HENLEY-PUTNAM UNIVERSITY
DOCTORATE IN STRATEGIC SECURITY
Dissertation
APPLYING FORESIGHT: ON ANTICIPATING UNINTENDED CONSEQUENCES IN INTERNAL SECURITY
by
Ian Charles MacVicar
B.A. (Honours) Acadia University, 1981
M.A. (International Affairs), Carleton University, 1983
Master of Defence Studies, Royal Military College of Canada, 2003
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Abstract

Law expresses the foundational principles of a society and governs the rights and obligations of its individual citizens. Most bodies of law focus on enduring rights and obligations of known persons, whether as individuals or corporations. Conversely, internal security law is characterized by the need to pre-empt and respond to threats to state legitimacy of unknown size and duration, and tends to be oriented towards populations. Nation-states address internal security challenges at the strategic-political level through passing legislation designed to: 1) identify individuals or groups which pose a challenge to the state or safety of its citizens; 2) monitor their activities; and 3) nullify threats. Such legislation is characterized by its attempt to pre-empt crises, as opposed to legal consequence management. This comparative case study addresses three central questions: 1) What are the common pre-conditions in internal security crises? 2) Why do internal security laws tend to have unanticipated, and often unintended consequences? and 3) How might we analyze internal security dilemmas to better assess risk and to avoid or mitigate such consequences? This study compares and contrasts the factors of internal security law through three longitudinal case studies comparing outcomes in Canada, the United Kingdom, and the United States over a century. The study isolates successes and failures in blending of policy, intelligence, and law enforcement; contrasts the short-term goals of internal security legislation with their longer-term societal impact; and concludes that while the long-term societal impact has seldom been a factor in decision-making, it must become one.

Keywords: Act, anticipate, consequence, detention, fear, executive, extraordinary, intelligence, law, lists, measures, monitor, movements, policy, risk, search, security, seize, surveillance, threat, unintended.
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CHAPTER 1
INTRODUCTION

Law expresses the foundational principles of a society, and governs the rights and obligations of its individual citizens. Most bodies of law focus on enduring rights and obligations of known persons, whether as individuals or corporations. Transgressions of law by individuals are tried after a specific offence has been committed. Conversely, internal security law is characterized by the need to pre-empt threats to state legitimacy of unknown size and duration, and tend to be oriented towards populations. Nation-states address internal security challenges at the strategic-political level through passing legislation designed to: 1) identify individuals or groups who pose a challenge to the state or safety of its citizens; 2) monitor their activities, and 3) negate or mitigate threats. Such legislation is characterized by its attempt to pre-empt crises, as opposed to consequence management through criminal trials. This introductory chapter introduces foundational concepts in internal security law and psychology, describes the research problem parameters, sequence of the study, and poses initial questions.

Purpose

This study seeks to isolate the pre-conditions and recurring factors which lead to promulgating internal security law, with a view to developing a consequence management model which can be used to develop long-term risk projections in crises. The intent of this model is to prevent the inappropriate use of internal security law while maintaining appropriate security measures in protecting society.

Contemporary Relevance

The continuing relevance of the need to balance individual freedoms with collective internal security is observable in the rhetoric surrounding the response to the deadly attacks conducted by Islamic State of Iraq and Syria (ISIS) against Russian Metrojet 9268 on 31 October 2015 and against civilians in Paris 13 November 2015. The civil liberties protests surrounding the Counter-Terrorism and Security Act 2015 in the U.K.; the Anti-terrorism Act 2015 in Canada; expiration of certain sections of the USA PATRIOT Act and the enactment of the USA FREEDOM Act in early June 2015; and the debates on immigration in all three nations in the
autumn of 2015 indicate the importance of finding the right balance in protecting civil liberties, citizens’ lives, and human rights of non-citizens while simultaneously protecting the nation-state.

**Historical Relevance**

Attempts to pre-empt or mitigate internal security crises through legislation have often led to lasting social and political consequences. Twentieth-Century instances include the Defence of the Realm Regulations enacted in the United Kingdom from 1914-1919, which permitted a wide range of restrictions in daily life ranging from public house hours, the strength of alcohol in beer, to military courts martial of civilians. (Some of the restrictions concerning alcohol remained in place for over seven decades). Short-term but more intrusive executive measures included the internment of Ukrainian-Canadians from 1914-1920, internment of Japanese-Canadians from 1941-1946, some of whom were deported to Japan in 1946, and the brief internment of French-speaking Canadian citizens during the October Crisis of 1970. Mass surveillance and the suspension of habeas corpus followed the tragic events of 11 September 2001 in many Western democracies. Many of the executive measures cited above led to court cases, recognition of government malfeasance, and financial compensation for people (and their survivors) deemed wrongly deported, imprisoned without trial, killed, placed under surveillance, or arrested without probable cause.

**Scope of Study**

**Assumption.** The study starts from the assumption that internal security is a complex social and political problem which does not respond well to force and executive measures alone. This assumption predicates a broad-based study which explores the parameters of law, psychology, and speculative fiction within the context of a longitudinal comparative historical case study.

**Impact of internal security law on society.** The study explores the genesis, implementation, and lasting impact of internal security law in Canada, the United Kingdom (U.K.) and the United States of America (U.S.A.) over 100-plus years. There are six interrelated elements in this study. The first three elements are based on human cognitive limits and institutional biases. First, the *fundamental attribution error* (FAE) of assuming that another culture, an economic rival, or another nation is less valuable than the host nation and assumes
worst case motives in the rival (Kahneman & Renshon, 2009). Second, FAE is reinforced by two-valued (Hawakaya, 1990) propaganda which assumes threats based on hostile origins or association alone. Third, source analogs, i.e., negative incidents which appear to validate FAE leading to reinforced propaganda, confirmatory bias, and premature closure in decision-making concerning the non-host nation group. These biases or predictable errors (Kahneman & Renshon, 2007), may underlie the ethical dilemmas which arise when analysis time is limited and decisive action is required to respond to a threat.

**Worst-case planning.** As Kahneman & Renshon (2007) assert, hawks’ arguments will almost always win out over doves due to the tendency toward loss aversion.¹ When realized, this tendency leads to the fourth element – the ethical dilemmas which may arise in internal security when FAE leads to worst-case planning. Large groups of people, i.e. aliens, recent immigrants, or other people judged less loyal to the nation-state may be placed under surveillance without probable cause, detained without trial, have their property expropriated without just recompense, or may be otherwise punished due to their associations rather than actions against the state in which they live. In effect, the individual legal protections inherent in the *Universal Declaration of Human Rights* (1948), the *Canadian Charter of Rights and Freedoms*, the *U.S. Constitution*, the uncodified British constitution, and common law are suspended based on suspicion of a group. The fifth element of the study assesses the frequency of suspensions of common law, civil rights, and human rights during internal security crises and in non-crisis conditions. Last, given the negative examples of the suspensions of individual rights, research into mitigating FAE influence in crises would be beneficial.

**Gap analysis.** The fundamental challenge in internal security law is finding a balance which respects individual rights while protecting the populace and state institutions. This study explores the gaps within internal security response; from law and policy, through the operational and tactical execution of internal security plans, and their aftermath. The study considers the need for anticipating unintended consequences rather than pursuing a short-term crisis response approach to emerging threats. A revised approach could address one of the remaining aspects of

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¹ Loss aversion is a component of prospect theory (Kahneman & Tversky, 1992). The main evidence for loss aversion in prospect theory was the extreme reluctance of people to accept gambles with equal probabilities to win and lose. Loss aversion also contributes to the explanation of an important phenomenon of choice known as the status-quo bias. Focusing attention on considerations that become relevant only if war occurs leads decision-makers to plan for the worst-case scenario – often a recipe for self-fulfilling prophecies.
unfinished business in the strategic security communities of Western democracies, which is the failure to anticipate long-term socio-political consequences beyond the intended goal. This study explores how such an anticipatory framework might be developed within three nations which share a common law tradition – Canada, the United States of America, and the United Kingdom.

**Sequence.** Chapter 1 introduces foundational concepts in law and psychology and describes the parameters of internal security problems. Chapter 2 reviews the literature base, including common law, the history of internal security in the three nations, psychology, and the role speculative fiction in pre-World War I Great Britain. Chapter 3 describes the methodology employed, which is a longitudinal comparative case study. Chapter 4 discusses the case study findings and introduces a model to guide internal security analysis. Chapter 5 offers conclusions and provides recommendations for further study.

**At risk.** The loss of individual civil and human rights and the resort to collective executive measures is a common feature in internal security crises. The case studies described in Chapter 4 and Appendices B, C, and D illustrate the inherent difficulties in evaluating risks, and ordering an appropriate response under perceived crisis, but otherwise peacetime conditions.

**Employing Extraordinary Measures**

**Coordination**

Nations employ their intelligence, law enforcement, legal, and military capabilities to execute extraordinary measures. The success of such measures is dependent on the acquisition of accurate, dependable, and timely corroborated information which accurately describes the capabilities and intent of the perceived threat group; and sharing such information between the judiciary, law enforcement agencies, intelligence agencies, and military forces in a manner which facilitates coordinated tactical action. Unanticipated problems, and unintended consequences may arise when any element of these interdependent actions between the executive agencies, judiciary, and societal representatives is misinterpreted, delayed, disrupted, or extended beyond its intended purpose in crisis response. Extreme mistakes range from failing to identify known terrorists who then mount successful attacks to killing innocent citizens. Less extreme, but equally damaging to a society over time are the large-scale internment of groups of innocent people based solely on hostile origins or perceived hostile associations.
Consequences of failure

The strategic failure of tactical internal security measures may be observed in the loss of trust between the state and its citizens. The proximate cause might be protests with numerous casualties, the indefinite detention of innocent people without trial, and in the continual enhancement of the scope and severity of internal security measures in maintaining the status quo. The long-term consequences of the loss of trust are sometimes only apparent in hindsight, as may be observed following a rebellion (which replaces a leader, but maintains the system of governance), a revolution (which replaces a system of governance) (Arendt, 1970; Johnson, 1982), in a massive turn to alternative political parties, or in enacting laws which restrict the independence of intelligence and security agencies.

Re-evaluating traditional legal protections

Once the decision to execute internal security measures is reached, much of the responsibility for implementing security measures is delegated to lower, (often secret), courts and to intelligence agencies, law enforcement agencies, and military forces. Given the effectiveness of 21st Century surveillance technology, individuals and groups can be identified as a danger to society much earlier than in past years. Although an internal security crisis can extend decades, it may be time to re-evaluate whether the legal tests described above are still valid when a perceived low-probability threat can turn into a high-impact consequence management operation in minutes. Of particular concern are the status of the 800-year old common law doctrine of habeas corpus, and whether the 21st Century phenomena of extraordinary rendition and mass surveillance without a search warrant are appropriate for democratic nations.

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2 *Habeas corpus* (n.) is a writ requiring a person to be brought before a court, mid-15c., Latin, literally “(you should) have the body,” in phrase habeas corpus ad subciciendum “produce or have the person to be subjected to (examination),” opening words of writs in 14c. Anglo-French documents to require a person to be brought before a court or judge, especially to determine if that person is being legally detained. From habeas, second person singular present subjunctive of habere “to have, to hold” (see habit (n.)) + corpus “person,” literally “body” (see corporeal). ([http://www.etymonline.com/index.php?term=habeas%20corpus](http://www.etymonline.com/index.php?term=habeas%20corpus)). Duhaime (n.d.) defines habeas corpus Latin: a court petition which orders that a person being detained be produced before a judge for a hearing to decide whether the detention is lawful ([http://www.duhaime.org/LegalDictionary/H/HabeasCorpus.aspx](http://www.duhaime.org/LegalDictionary/H/HabeasCorpus.aspx))

3 *Extraordinary rendition* occurs when one state moves its suspects to another state for interrogation away from the scrutiny from the first state’s legal oversight bodies (Bonner, 2007, p. 332). The practice is controversial as the information gained may be obtained through torture or maltreatment of the detainee.
The challenge. As the case studies illustrate, internal security problems are challenging on three levels. First, the policy makers must describe the political end-state sought without knowledge of all the factors. Second, the judiciary or executive branch must design extraordinary measures with vague policy guidance. Third, the executive agencies must conduct operations to stabilize potentially dangerous situations while protecting human rights and civil liberties to the greatest degree possible. All levels are characterized by the difficulty in measuring whether or not they are ensuring security as absence of evidence of a threat does not necessarily signify evidence of that the threat no longer exists. The frequent reaction to this conundrum is to seek more information.

On the Difficulty of Measuring Security

The tendency to seek additional information assumes that more data leads to greater precision. This tendency can contribute to premature closure in decision making due to the cognitive trap known as confirmatory bias (Heuer, 1999; Johnston, 2005; Betts, 2007; Schneier, 2008; Clark, 2010; Lowenthal, 2012) - in which the mere accumulation of data appears to confirm a pre-formed hypothesis. This data need not arise solely from verified fact arrived at through the diagnostic method of ruling out possible hypotheses. Cognitive biases have a cultural component which predisposes a decision maker to place greater value on information which reinforces existing beliefs and to place less value on information which detracts from these prejudices (Hayakawa, 1990). This is the inherent danger of propaganda.

Limitations

The laws in this study are described only so far as necessary to illustrate the evolution of internal security law, its complex scope, and the potential impact it has had, and may yet have on contemporary and future society at national and international level. The study will concentrate on the federal implications of these laws. Closely related international implications, such as extraordinary rendition and the extraterritoriality of U.S. prisons in Guantanamo Bay will not be discussed in this study. Further, although the study is structured using case studies of historical events, the discussions are limited to describing the significance of an issue and the consequences which unfolded during and after the principal events. The study will conclude with a summary of findings as to recurring problems and best practices in internal security law;
emerging legal challenges to balancing individual liberties and collective security, promising research projects, and recommendations for future research.

**Summary of the Study’s Intent**

Profound, yet unanticipated societal consequences have flowed from the implementation of executive measures designed to mitigate the threat posed by alien, i.e. non-citizen, or immigrant groups in internal security crises. Such consequences, which may only become apparent long after the crisis is past, are often unintended by the originators of the internal security legislation and by the executive measures implementers. The study seeks to develop a model which will facilitate improved forecasting of such consequences.
CHAPTER 2

LITERATURE REVIEW

This literature review examines the political and social historical context for enacting internal security legislation, and the political and social consequences of their implementation through executive measures in the near, mid, and long term. This chapter examines the primary, secondary, and tertiary source documents related to the implementation of three landmark internal security laws: the Defence of the Realm Act, 1914 (DORA) in the United Kingdom, the War Measures Act, 1914 (WMA) in Canada, and the Uniting and Strengthening America through the Provision of Appropriate Tools Required to Interdict and Obstruct Terrorism Act 2001 (Patriot Act), but primarily in the context of describing their consequences, and relative effectiveness in meeting the law’s intent. In effect, the literature review uses the diagnostic method to rule out areas of study that are well-explored to focus on research gaps meriting new study, and asks those questions at the end of the chapter. Given the lengthy time period under review, more than 150 related laws and executive measures were incorporated in the study and another 350 were reviewed to establish their relevance to the study, which facilitates the creation of new linkages within the existing literature body. The purpose of this literature review is to identify the aspects of internal security law which may lead to unintended social and political consequences beyond the intent of the lawmakers. The immediate objective of the review is to discover gaps in the literature which lead to developing the research questions at the end of the chapter.

Search Strategies Employed

The three-stage search strategy seeks to: 1) ascertain the depth of the body of literature for each of the primary acts; 2) identify major themes, and ultimately, 3) to isolate areas of study that require new research. The search strategy employs the Henley-Putnam University Library

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1 For the purposes of this study, tertiary sources include non-peer reviewed secondary sources, such as speculative fiction, popular film, and opinion-editorial articles, including polemical pieces, which would not otherwise be included in a literature review. The value of such sources is to illustrate the social climate in which many of the political decisions on internal security were taken. The term tertiary is used in a non-traditional sense to differentiate such sources from peer-reviewed secondary sources in the context of this study. The term has other uses, which are explained at: 1) http://www.lib.odu.edu/genedinfolit/1infobasics/tertiary_information_sources.html; 2) http://www.lib.umd.edu/tl/guides/primary-sources#tertiary; 3) https://en.wikipedia.org/wiki/Tertiary_source; and 4) http://libguides.newhaven.edu/content.php?pid=465151&sid=3809011.
linked academic search engines such as Academia.edu, Columbia International Affairs Organization (CIAO), EBSCOhost, Gale Military & Intelligence Database, Homeland Security Digital Library, JSTOR, Proquest, Research Gate, the Social Science Research Network (SSRN), and Social Studies of Science. Additional searches were conducted using the GSTF Digital Library (GSTF-DL), Questia, Quora, and Sweet Search: A Search Engine for Students. Commercial search engines such as Ask.com, Bing, Dogpile, Google, Google Scholar, WebCrawler, and Yahoo were used in supporting searches to identify entry points into specialized search engines and databases. The Open Rights Group Wiki (https://wiki.openrightsgroup.org/wiki/Main_Page) provided awareness of issues such as internet freedoms, data protection, privacy and copyright reform, and led to other national advocacy sites.

**American Advocacy Groups.** American groups include the American Civil Liberties Union (ACLU), the Center for Immigration Studies, Electronic Frontier Foundation, Electronic Privacy Information Center (EPIC), The Heritage Foundation, and People Against the National Defense Authorization Act (PANDA). Although the phenomenon of *echo* or the repeating of a single source in numerous citations is always possible, the number of citations noted was used as a weighting criterion in selecting and assessing the value of sources. This weighting strategy acknowledges that sources with fewer citations but strong argumentation may also lend credence to the research objectives. A search of an author’s references also leads to identifying additional sources. This additional search strategy serves to isolate the most cited sources, and to finding older sources beyond the holdings in many contemporary databases.

The ACLU Internet Archive is highly categorized by subject matter, allowing filtered searches by ever smaller sub-titles and by year. These civil rights searches also led to articles addressing the international aspects of internal security law when immigration provisions were included in the search parameters. Due to the sense of shame, disenfranchisement, and loss of empowerment which often accompanies internment of an identifiable group, advocacy sites were consulted as they proved to be good document repositories.

Closely related to the advocacy sites in purpose are the independently managed web sites which reflect alternative points of view to U.S. government policy statements. Amongst the most useful sites were: the Condé Nast Digital website, [http://arstechnica.com/](http://arstechnica.com/), which highlights emerging technologies; lawyer turned journalist Glen Greenwald’s web log *Unclaimed Territory*
British Advocacy Groups. The numerous civil rights advocacy groups in the U.K. reflect the long history of civil liberties and rights grounded in common law. One of the primary civil rights advocacy groups, Liberty, then known as the National Council for Civil Liberties (NCCL), was founded in 1934 (https://www.liberty-human-rights.org.uk/). The Civil Rights Movement website (http://www.civilrightsmovement.co.uk/), created in 2000, maintains a repository of articles and advice on various related issues, although not on the scale of Liberty nor the American and Canadian advocacy groups. The Guardian newspaper also maintains an active web blog and links site (http://www.theguardian.com/law/uk-civil-liberties). Other advocacy group websites consulted included: http://www.theyworkforyou.com/, which is similar to openparliament.ca and govtrack.us; http://www.statewatch.org/, which monitors state and civil liberties in Europe; http://www.schedule7.org.uk/, specifically tracks use of Section 7 of the Anti-Terrorism Act 2000, and provides its history, legal challenges, visibility, reviews, and external resources. The defunct, but still available website http://forum.no2id.net/, was formed to “stop the database state” when it appeared that a national identity card was being introduced between 2006 and 2010. The privately operated parliamentary oversight group http://www.publicwhip.org.uk/ tracks how Members of Parliament vote.

Canadian Advocacy Groups. The “Canadian First World War Internment Recognition Fund” website (http://internmentcanada.ca/resources-bibliography.cfm) was very useful in this regard. It also illustrates the negative emotions described above, as most writing on this issue has only occurred since 1990. The federal department Citizenship and Immigration Canada sponsored the Community Historical Recognition Project (CHRP) from 2008 to 2013. The CHRP endeavors to safeguard the troubled history of many immigrant communities. “Its purpose was to acknowledge and to educate Canadians about the historical experiences of ethno-cultural
communities affected by wartime discriminatory measures and immigration restrictions applied in Canada” (http://www.cic.gc.ca/english/multiculturalism/programs/community.asp). The CHRP “Righting Canada’s Wrongs” book series is also helpful in this regard. The Ukrainian Canadian Civil Liberties Association is very active in ensuring the continued remembrance of Ukrainian-Canadian suffering in these camps, and maintains voluminous searchable records. The records of Japanese-Canadian and Italian-Canadian internment in World War II are also held in cultural centers dedicated to keeping the memory of these events alive for future generations. Some of these centers include the Villa Charities Columbus Centre for Italian-Canadians (http://www.italiancanadianww2.ca/static_pages/freeformpage/footer_about_us). The Nikkei National Museum & Cultural Centre and the JapaneseCanadianHistory.net website, developed with a Networks Grant from the British Columbia Ministry of Education, is also a good starting point for researchers of this troubled period in British Columbian and Canadian history. SEDAI: the Japanese Canadian Legacy Project (http://www.sedai.ca/) archive is home to many documents, photograph, and video resources.

Multi-disciplinary Research Scope

The search strategy began by using the following key word combinations in English: anticipatory governance; bias, cognition, complex, complicated, wicked, problems; consequence, crisis; civil rights; Defence of the Realm Act, DORA; detention; executive, extraordinary measures; fear; financial, monitoring and security; human rights; immigration; intelligence community; internal security; internment; legislation; lessons learned; money laundering; Patriot Act, USA PATRIOT Act; risk; surveillance; unintended consequences; and War Measures Act. The study expanded to include dozens of other acts related to internal security. With those

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3 According to Prime Minister Stephen Harper, “The wartime measures and immigration restrictions experienced by those communities mark an unfortunate period in our nation’s history. The policies were race-based and inconsistent with values that Canadians hold today.” Retrieved from (http://www.cic.gc.ca/english/multiculturalism/programs/community.asp)

4 There were 170,000 Canadians of Ukrainian origin in 1914, most of whom had immigrated to Canada since 1891. In 2011, there were an estimated 1,209,085 persons of full or partial Ukrainian origin residing in Canada (mainly Canadian-born citizens) making them Canada’s ninth largest ethnic group, and giving Canada the world’s third-largest Ukrainian population behind Ukraine itself and Russia. Self-identified Ukrainians are the majority in several rural areas of Western Canada. Of the 1,209,085 who identify as Ukrainian, only 144,260 (or 11.5%) speak the Ukrainian language. (http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?TABID=2&LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=1118296&GR=0&PID=105396&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0)
Although only three internal security acts anchor this study, they cover a cross-cutting scope of activity: civil rights, defense production, executive authority, immigration, intelligence review, and the roles of the judiciary and executive agencies in times of crisis. The social impact of these acts necessitates a review of the psychology of fear and risk as well as the role of the media and popular culture in creating the socio-political pre-conditions which underlie internal security law. This very broad scope of activity necessitates a parallel review of other legislation affected by the three principal acts, and an examination of how the strategic and political provisions of the acts were executed at operational and tactical level. This secondary study was based on the laws, the executive measures employed, and the varied sources of opposition and support which accompanied these laws during their debate, enactment, and aftermath.

The literature review analyzes the legislative content of the acts, the private and public debates related to their passage, and the short-, mid-, and long-term consequences of various legislation in the U.K., Canada, and the U.S.A. as described in the secondary and tertiary sources. The review seeks to identify what combination of internal security legislation and executive measures have worked in most circumstances, what has not worked, what measures should work but may not because of the impact of individuals or groups, and the why in each case. The review will examine each national case in its historical, political, and social context prior to summarizing common issues, challenges, and responses near the end of the chapter. Given the importance of the legal principle of precedents law explained in the Introduction, the legal literature review and subsequent discussion must address more than the three principal acts described above. However, the precedent and subsequent acts will be examined primarily in relation to the three principal acts to keep the study within manageable bounds.

The primary source review will examine: 1) the laws themselves; 2) antecedent and subsequent laws and executive measures; 3) debates in Parliament and Congress; and 4) contemporary published critiques. The secondary source review includes peer-reviewed articles and official security agency histories. The tertiary review (see fn 1) examines journalistic comment, popular reaction to the implementation of these acts, and most importantly, descriptions of the social and political climate which facilitated rapid passage of the internal
security acts. This later review includes opinion-editorial pieces and political cartoons – which help to identify some of the social impacts of internal security law.

The tertiary source review includes selected works of fiction in the U.K. in the years leading up to World War I. This is a departure from formal academic practice, this aspect of the tertiary review illustrates how non-factual information, (i.e. invasion scare and spy-fiction literature in this case) helped to shape the political climate that led to passage of internal security legislation which shaped social evolution. The literature review begins with an examination of the tertiary sources as it facilitates an understanding of the sequence of events. This preliminary step provides political, social, and military context prior to reviewing the secondary sources examining the pre- and post-enactment debates, and the primary sources, i.e., the acts which followed from the debates.

The overall literature review seeks to isolate common themes as to: 1) the political and social conditions which give rise to internal security legislation, 2) what types of measures have worked in internal security, 3) which measure have not worked so well, and 4) where global trends observed in the 20th and early 21st Century may be leading internal security legislation and extraordinary measures. The research questions will be based on the historical cases and on these emerging trends.

**Contextual References**

The general history of the three principal internal security acts and the controversies related to each law are described elsewhere in sufficient detail. The sections (i.e., U.K., Canada, and U.S.A.) which follow the next section on the “Psychology of Security” summarize the major themes in the secondary literature related to each act. One of the most common factors that emerged in the general history literature review of the three internal security case studies was the perception of an external threat leading to labelling of members of non-citizen groups as *aliens*. The Psychology of Security section which follows this paragraph describes the human need for security at the lowest levels of abstraction, which is a precursor to the need to formulate laws to obtain security.
The Psychology of Security

The multi-faceted concept of security links the perception of a threat to the health, safety, and continued well-being of a person, a facility, an organization, or a nation-state through the employment of protective measures designed to prevent or to mitigate the effective execution of the perceived threat. The initial assessment of the threat, and of the stimulus for designing protective measures to mitigate it, lies in the perception that an unrealized potential event will transpire with negative effects, or more simply, this assessment is based on fear.

Fear

Fear, although frequently described as an emotion is also a chemical reaction (Seligman, 1993, pp. 124-125; Goleman, 1995, pp. 207-208; 2007, p. 225; Kahneman, 2011) which arises from the perception of a threat. Fear over an extended period of time leads to fear conditioning (Goleman, 1995, p. 207; Kahneman, 2011, p. 238), which may not be based on an actual threat, but rather on association with a continued stimulus. Fear, can be a stimulant to preventive action against a perceived or real danger - which leads to demands for more security (June, 2007, p. 17). Fear can lead to timely action or to paralysis and defeat (Dixon, 1976; June, 2007) and it may also lead to institutional rigidity (Hayakawa, 1990, p. 174). In the context of strategic security, this continued stimulus might include the portrayal of a minority ethnic group as a potential internal enemy, or possibly as less civilized than the security experts in the concerned nation-state.

Fear can be a stimulant to preventive action against a perceived or real danger - which leads to demands for more security (June, 2007, p. 17), and it may also lead to institutional rigidity (Hayakawa, 1990, p. 174). Although the language which describes security measures is bellicose and confident in nature, the response itself is rooted in fear of the presumed aggressor and of the unknown; and from fear comes hate and from hate comes violence (Eisenstein, 2013). Fear of the unknown leads to an urge to control events (Eisenstein, 2013) through the implementation of active and passive measures to forecast and to forestall random (Clark, 2010; Taleb, 2010; Taleb & Blyth, 2011) and planned negative events, such as espionage, subversion, and kinetic attacks against critical infrastructure, key leaders, and police and military personnel.
Over reaction to fear. Fear can cause an inflation of the threat, an irrational assessment of the courses of action available, and selection of a less than optimal reaction to the situation (Gardner, 2008). Sometimes the nature of the threat is not fully evident and the executive action ordered is later deemed to be too harsh given the actual danger. This judgment appears to have been the case in Canada (Appendix C), given the mass internments of Ukrainian Canadians during World War I, Japanese-Canadians during World War II, and in the mass arrests during the October Crisis of 1970.

Under reaction to fear. Over confidence can cause an under estimation of the threat and a delayed or insufficient reaction to a threat. Optimism bias can lead to not understanding the degree of danger in a situation until it is too late. Wohlstetter (1981) describes this phenomenon in her article “Slow Pearl Harbors,” which illustrates how wishing for the best led to negative effects for British trust in Nazi Germany’s rearmament in the 1930s (pp. 24-26), the U.S.A. in 1941 (p. 23), in the U.S. underestimation of the Soviet strategic nuclear weapon forces (pp. 27-28) in the 1960s, and the Indian nuclear program (pp. 28-31). Two additional metaphors come to mind for this author. The first metaphor concerns a frog that gradually boils to death as water temperature is raised very gradually. While the scientific truth of this story is disputed, it makes an excellent metaphor for cautioning people to be aware of the effects of gradual change lest they suffer unanticipated and often undesirable consequences. The second metaphor is related by Taleb (2010, pp. 40-44) who describes the comfortable life of an American turkey who has come to believe that life is grand based on the 1000 days of its life until the day of its death on the 1001th. Taleb (2010) uses the metaphor to explain the problem posed by inductive thinking, in which the thinker draws a general conclusion from data based on past patterns.

Need to react. An acute threat can lead to the physical reaction of fight or flight. Prolonged fear can lead a sense of powerlessness and learned helplessness (Seligman, 1975; 1993). The presence of a threat can contribute a societal need to band together to feel safe. The isolation and powerlessness felt by individuals can contribute to a need for collective action by a powerful agency that acts on their behalf, such as a government. The desire to give over control to a friendly powerful protector and benefactor can facilitate the handing over of individual

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5 William Thompson Sedgwick (1882) writes in “On the Variation of Reflex Excitability in the Frog induced by changes of Temperature”: "in one experiment by (Edward) Scripture the temperature was raised at a rate of 0.002°C per second, and the frog was found dead at the end of 2½ hours without having moved.”
rights which would not have been given up in less than crisis conditions. According to Kahneman & Renshon (2007, paras. 2-5) the tendency toward believing the advisors pushing a hawkish view of a potential adversary may be ingrained in human biology. This finding starts from the fact that they are likely to be more persuasive as they have a bias toward action and human beings tend to be loss adverse.

**Loss aversion.** Loss aversion refers to the tendency to avoid a certain loss by continuing an unproductive behavior. Kahneman & Tversky (1992) were pioneers in explaining loss aversion through their prospect theory. In economics and decision theory, loss aversion refers to the tendency for people to prefer avoiding losses to acquiring gains. According to Kahneman & Tversky, most studies suggest that losses are twice as powerful, in a psychological sense, as gains. This theory explains the tendency of security decision makers to avoid losses through worst case planning.

**Security and Privacy**

**Security.** The term *security* can be used to describe the subjective perception of safe environment, which is difficult to quantify, and a series of concrete objective measures designed to ensure that the perception becomes reality. Ultimately, “the reality of security is mathematical, based on the probability of different risks and the effectiveness of different countermeasures (Schneier, 2008, p.50). Although this assertion is demonstrably true, this assertion only partially explains the convergence of perception and measurable reality as probability can also be subjective depending on the variables chosen or emphasized (Taleb, 2010, p. 343). Although the language which describes security measures is bellicose and confident in nature, the response is rooted in fear of the presumed aggressor and of the unknown, and from fear comes hate, and from hate comes violence (Eisenstein, 2013). Fear of the unknown leads to an urge to control events (Eisenstein, 2013) through the implementation of active and passive measures to forecast and to forestall negative random (Clark, 2010; Taleb, 2010; Taleb & Blyth, 2011) and planned events.

**Privacy.** The subject of privacy has been of renewed interest in the 21st Century due to the prevalence of surveillance in Internet use by businesses seeking commercial advantage and by governments seeking to monitor terrorist financing and conspiracies. Social media facilitates connections between friends and families while simultaneously permitting tailored advertising
This trade-off appears to be acceptable to many 21\textsuperscript{st} Century people due to the pervasive nature of surveillance.

\textbf{U.K}. The old adage (trad.) that “an Englishman’s home is his castle” sums up the British common law approach to the protection of privacy. The assumption of non-interference from the nation-state is one of the most fundamental civil liberties, as it facilitates the free exchange of ideas leading to political advocacy and societal change. However, fear of the unknown also leads to populations placing their trust in the decisions of the government. As British legal author Sidney W. Clarke (1919, p. 36) asserts that, “Of all the phenomenon exhibited during four years of warfare, none is more remarkable than the docility with which the people of this country submitted to the abrogation of many of their most cherished rights.”

\textbf{U.S.A}. The tort of invasion of privacy is rooted in the common law right to privacy, which was first described in a \textit{Harvard Law Review} article by Samuel Warren and Louis Brandeis (1890). The protection of privacy was codified in the U.S.A. in the \textit{Privacy Act of 1974}, which prohibited the sharing of U.S. citizens’ records between federal departments for other than their primary collection purpose. The \textit{Foreign Intelligence Surveillance Act of 1978} (FISA) limited intelligence collection to agents of foreign powers until American citizens were seen to be involved. FISA also proscribed targeted, (as opposed to mass), surveillance which followed the Fourth Amendment guidelines of having probable cause to search a specific place within a specific timeframe. There is an extremely diverse, rich, broad, and deep literature on privacy which has emerged in the U.S.A., led by advocacy groups such as the ACLU, EFF, and EPIC. Given that four of the top ten ISP (Malik, 2010, para. 3) are located in the U.S.A., much of the ISP backbone\textsuperscript{6} resides in the U.S., much of the literature is global in scope.

\textsuperscript{6} The Internet grew out of the Advanced Research Projects Agency network (ARPANET) in the U.S.A. in the 1960s. The \textit{Internet backbone} may be defined by the principal data routes between large, strategically interconnected computer networks and core routers on the Internet. The Internet backbone is a conglomerate of multiple, redundant networks owned by numerous commercial companies. It is typically a fiber optic trunk line which consists of many fiber optic cables bundled together to increase the capacity. Because of the overlap between long-distance telephone networks and backbone networks, the largest long-distance voice carriers such as AT&T Inc., MCI, Sprint, and CenturyLink also own some of the largest Internet backbone networks. These backbone providers sell their services to Internet service providers (ISP). The largest providers, known as Tier 1 providers, have such comprehensive networks that they never purchase transit agreements from other providers. As of 2013 there are only seven tier 1 providers in the telecommunications industry. Current Tier 1 carriers include Level 3 Communications, TeliaSonera International Carrier, CenturyLink, Vodafone, Verizon, Sprint, and AT&T Corporation.
Technological developments such as the Internet and surveillance conducted by ISPs have made the assumption of privacy difficult to guarantee in an era in which website usage is monitored to obtain metadata and individual consumer preferences which lead to targeted advertising. Angwin (2014), Keenan (2014), and Schneier (2015) describe the potential future of worldwide surveillance in the wake of the Snowden revelations in June 2013. Turk & Manson (Eds.) (2007) and Webb (2007) describe the negative impact of global surveillance on democracy worldwide in first five years after the implementation of the Patriot Act. Boghosian (2013) describes the perverse effects of government and corporate surveillance on democratic societies. Lewis Lapham’s comments in his forward to Boghosian’s (2013, p. 13) Spying on Democracy, that part of the reason for mass surveillance is that the “American government is so frightened by its own citizens that it classifies them as probable enemies.”

Canada. Historically the debate on privacy in Canada has been muted in comparison to the U.K. and the U.S., perhaps in keeping with the traditional British Commonwealth nation focus on “peace, order, and good government.” One of the major milestones in Canadian internal security law was the McDonald Commission of 1981 which recommended the creation of a civilian security intelligence agency to replace the discredited RCMP Security Service, which had used lists of FLQ sympathizers to disrupt union activities and to arrest approximately 500 alleged accomplices during the October Crisis of 1970. The Air India Flight 182 Inquiry of 2010 and the Mahar Arar Inquiry of 2006, although well-covered by media, did little to engage Canadian citizens in debate over the privacy of personal information and of security matters in general. The Air India Flight 182 Inquiry Final Report Volume 5 (pp.194-195, 200-202, 205-206, 215-216, and 220-223) addresses terrorist financing and the importance of internal security intelligence in disrupting the links between charitable organizations, not-for-profit organizations (NPO), and terrorist groups through anti-money laundering legislation and monitoring executive agencies – which must have access to personal bank accounts under certain conditions.

Risk and Vulnerability

Threat Risk Analysis (TRA) and Threat Risk Vulnerability Analysis (TRVA) structured analytic tools respectively describe security risks from the perspective of measurable enemy capability and from the perspective of comparing the known enemy threat to friendly vulnerabilities. Such tools do not examine the level of friendly fear and the degree to which it
influences decision making on security issues, amongst both the security community planners who promulgate executive measures – and by the general populace who passively accept these extraordinary measures.

Risk analyst Bruce Schneier (2008) asserts that security risk measurement must consider human biases (emotional, social, and cognitive), bounded rationality, risk perception, and neuroscience – as far as understanding the limits of human rational thinking. Schneier (2008) concludes that security is never absolute and that planners should seek a trade-off that balances threat, friendly and adversarial capabilities, time, money, and convenience. He offers that planners may miscalculate the following risk elements:

1. The severity of the risk.
2. The probability of the risk.
3. The magnitude of the costs.
4. How effective the countermeasure is at mitigating the risk.
5. How well disparate risks and costs can be compared. (Schneier, 2008, p. 52)

On Cognition and Decision Making

Cognitive Limits

Heuer (1999), Johnston (2005), Schneier (2008), and Clark (2010) describe the limiting effects of heuristics in thinking about security and intelligence matters. These limiting effects include framing effect (how a situation is described), the endowment effect (maintaining the security status quo), and the affect heuristic (emotional response guiding the rational response). Heuer (1999), Schneier (2008) use the control, optimism, recency, vividness biases to explain how each bias tends to reinforce existing beliefs leading to confirmatory (or confirmation) bias and premature closure (Heuer, 1999; Johnston, 2005; Schneier, 2008; Clark, 2010) in decision making. Schwarz & Bless (2007) describe the closely related assimilation effect (or bias), which describes how people selectively incorporate new information within their existing belief structure so as to not disturb their underlying prejudices and attitudes. Schneier (2008, p. 64) emphasizes the pernicious effect of the availability heuristic, which means that people tend to “assess the frequency of a class or probability of an event by the ease with which instances or occurrences can be brought to mind.” Zegart (1999; 2007; 2011) describes how individual and collective cognitive limits, institutional cultures, and the inertia which characterizes large organizations may lead to groupthink and to collective failure to understand a phenomenon.

Kahneman’s System 1 and System 2. Nobel laureate Daniel Kahneman\(^7\) (2011; Gardner, 2008) describes how the common tendency to use instinctive System 1 thinking to solve routine problems is extended to solve complex System 2 problems which require deep reflection and structured analytic thinking in his best-selling Thinking, Fast and Slow. Kahneman (2011, p. 119) describes the tendency for people to consider a particular value for an unknown quantity before estimating the quantity as the anchoring effect, which he describes as “one of the most reliable and robust results of experimental psychology. Kahneman and his colleague Amos Tversky refine this concept further through the anchoring and adjustment heuristic, which describes how people will tend to adjust their views from an initial anchor when confronted with a related problem set rather than start afresh recognizing the uniqueness of a new problem (Kahneman, 2011, p. 120).

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\(^7\) Nobel Prize co-laureate in Economic Sciences (2002).
On imperfect knowledge. Clark (2010, p. 8) describes the purpose of intelligence as reducing uncertainty in conflict. However, Kahneman (2003) observes that,

Uncertainty is poorly represented in intuition, as well as in perception. Indeed, the concept of judgment heuristics was invented to accommodate the observation that intuitive judgments of probability are mediated by attributes such as similarity and associative fluency, which are not intrinsically related to uncertainty. Kahneman (2003, p. 701)

It appears that experienced decision makers working under pressure rarely have to make a choice between alternatives because their minds are made up. According to Kahneman, “Doubt is a phenomenon of System 2, a metacognitive appreciation of one’s ability to think incompatible thoughts about the same thing” (2003, p. 702). In other words, System 1 wins out in most decisions taken by presumably confident fully-aware leaders. Kahneman (2011, pp. 23-24) observes that Chabris & Simons (2011) describe how trusting our intuitions can often lead to failure in The Invisible Gorilla: How Our Intuitions Deceive Us. Heuer (1999) would possibly describe this default to intuition as confirmatory bias leading to premature closure in decision making.

Kahneman (2011, p. 14) admits to having been influenced by commodities trader-philosopher-statistician Nassim Talib, author of The Black Swan (2007), who asserts that we underestimate the role of chance in events, and seek coherent causality from fragments of knowledge (p.75). According to Taleb (2010, p. 347), knowledge is fragile, i.e. subject to estimation error and requires frequent re-assessment. Taleb (2007, p. 50) introduces the concept of narrative fallacy to describe how human beings “cater to our Platonic thirst for distinct patterns,” and how flawed stories of the past are used to shape our world view and expectations for the future. These flawed stories include the speculative fiction discussed in this chapter, and the early parochial political histories of an internal security event. Such over-confidence, (sometimes false confidence), is reinforced by the illusion of hindsight when the narratives appear to work well, and confirmatory bias leading to premature closure in decision making is reinforced. Given that intelligence analysis is based on pattern analysis (Clark 2010, pp. 60-64), it appears that errors based on the comfort of repeated stories, or metaphors can arise.
Korzybski, Hayakawa and Two-Valued vs. Multi-Valued Orientation

This development of empathy may start with how considering people are described in intelligence assessments, policy documents, media reports, and speculative fiction. Linguist and U.S. Senator S.I. Hayakawa⁸ (1990 [1940]) describes the limiting role played by language in framing perceptions as first elucidated by Alfred Korzybski⁹ (1950 [1921]; 1994 [1933]). Hayakawa (1990 [1940]) is particularly persuasive in explaining the formation of racial prejudices as a Japanese-Canadian-American through the tendency to abstract values at the lowest possible level. He also provides sage advice on replacing a two-valued (right/wrong) Manichean approach (p.112) to analyzing complex problems with a multi-valued orientation (p.125).

On the centrality of metaphor in cognition. The pioneering work of philosopher Mark Johnson (1980; 2007) and cognitive linguist George Lakoff (1980; 2009) reinforces Hayakawa’s (1990 [1940]) earlier work. Johnson (1980; 2007) and Lakoff (1980; 2009) make the case that metaphor is absolutely central to human understanding and communication (Ritchie, 2007). This assertion, which is called cognitive or conceptual metaphor theory, has had profound influence in many fields of human intellectual endeavor over the past 30 plus years. As law (in any context) is a human discourse communal activity, their claim can be applied in the context of legal analysis and communication. According to pioneering philosopher Mark Johnson, everything that we think and communicate is formed, at some level, by metaphorical constructs that give us context and intellectual reference points upon which to attach our understanding. Johnson (2007) describes a relationship between a superficial understanding of metaphor as a mere literary device, and a deeper cognitive understanding that impacts the very nature of human reasoning. This understanding of metaphor reinforces Korzybski’s (1950; 1994), Hayakawa’s (1990), and Lonergan’s (1957) understanding of how we perceive and value other people.

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⁸ Samuel Ichiye “S. I.” Hayakawa (b.1906 - d.1992) was a Canadian-born American academic and politician of Japanese ancestry. Educated at the University of Manitoba and McGill University in Canada, he moved to the United States to complete his doctoral work at the University of Wisconsin-Madison, He became an English professor specializing in the study of semantics. Hayakawa lectured at the University of Chicago and later served as President of San Francisco State University. He was the United States Senator (Rep.) from California from 1977 to 1983. His seminal book, Language in Thought and Action, was published in five editions between 1940 and 1990.

⁹ Alfred Korzybski (1994 [1933], p. 750) is known for his dictum, “the map is not the territory.” Korzybski (1994 [1933]) also introduced the concept of time binding (pp. xxxii, 8, 39, 108, 183, passim) which describes how human beings pass information from one generation to the next - including prejudices.
The practical application of this thinking to internal security lies in how we describe aliens and potential adversaries in legislation and in executive measures, as political and legal debates are usually pre-situated to lead to preconceived action. Such debates are very dependent on the metaphors embedded in the discourse as metaphors can reinforce biases. Changing the metaphors could change the tone of the debates. Developing new metaphors to replace old metaphoric descriptions of adversaries could have an impact on how analysts, policy makers, legislators, and the general public see the world and engage in communal discourse. Indeed, it can mean the difference between arrest on suspicion, arbitrary detention, length and conditions in detention, and possibly life and death when the old metaphors are repeated and accepted without question.

**On propaganda.** The reductionist two-valued approach to describing groups of people and their motives is evident in the promulgation of propaganda. Snow (2007, p. 17) quotes pioneering journalist and presidential advisor Walter Lippmann on the capacity of the average person to understand the world, “The world that we have to deal with politically is out of reach, out of sight, out of mind.” Lippmann was a propagandist and prisoner-of-war interrogator during World War I. Lippmann’s war experience underlies his bleak outlook on the average person’s ability to make sense of the external world, which can be summarized as a “bewildered herd” (Snow, 2007, p. 18). Lippmann (1922) asserts that people in stressful situations are apt to be overwhelmed by external stimuli, including messages delivered through mass communications, which more often than not were driven by cultural stereotypes. According to Lippmann (1922, Ch. VI, Sect. 1, para.6), “We do not first see, and then define, we define first and then see,” which captures the tendency for people to default to labelling, using images and stereotypes designed to make the consumer of such labels feel more secure in an unpredictable and thus insecure world. The study first addressed how thinly veiled propaganda was disseminated in the U.K. prior to World War I.

**Metaphors are central to propaganda.** The “cunning Hun,” “the dirty Jap,” “the inscrutable Asian,” and the “barbaric Islamist” are all examples (trad.) of such discourse. The preceding paragraphs describe how metaphor contributes to and reinforces bias. This negative assertion recognizes the valuable role that propaganda can play in uniting people against a common threat. Winston Churchill’s soaring rhetoric was invaluable in uniting Great Britain and
her Commonwealth in the darkest days of World War II. The problem, however, is that it clouds clear analysis and leads to premature closure in decision making. President George W. Bush’s creation of a false dilemma post-9/11 with the assertion “you’re either with us or agin [sic] us” (VOA, 21 September 2001) did not lead to clear debate nor rational assessment of the threat of Al Qaeda nor of the danger posed by Iraq (http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html). The issue which confronts the policy maker is not whether propaganda should occur in wartime, but rather the degree to which it should influence the pre-conflict analysis process. In effect, repetitious propaganda may contribute to confirmatory bias and premature closure in analysis when time is limited.

**Lonergan’s General Empirical Model**

Kahneman’s (2011) thinking echoes that of Canadian Jesuit theologian Bernard Lonergan (1904 - 1980), who developed the *General Empirical Model* (GEM). GEM posits that people process information and take decisions in two different manners – common sense and theoretical. Human beings experience insights in both modes, which are acts of *understanding*. In the common sense mode, we understand how things relate to ourselves because we are concerned with practical actions, routine interpersonal relations, and our performing our social roles. In the theoretical mode, people grasp how things are related to each other because we wish to comprehend how nature works. Theoretical insights may not be of practical use in a social crisis because they operate *always* and *everywhere* with all conditions being equal (i.e. ceteris paribus). In seeking a practical application of this theory to strategic security, it should be noted that GEM defines authority as power legitimated by authenticity (http://www.iep.utm.edu/lonergan/#H2), which echoes Arendt’s (1970) and Johnson’s (1982) assertion that regimes assert authority over dissidents when they start to worry about losing authenticity – and control of the populace.

In many respects, Kahneman’s later System 1 and System 2 are equivalent to Lonergan’s earlier *common sense* and *theoretical* manners respectively. GEM goes somewhat deeper by incorporating a moral dimension absent in Kahneman’s (and Tversky’s) thinking by addressing how we know values lead to moral decisions. The General Empirical Model of the *thinking and choosing person* has four levels – the experience of receiving data, understanding the data, judging that one’s understanding of the data is correct, and *deciding* to act on the resulting new knowledge. The use of GEM in ethical comparisons of courses of action in internal security
could offer additional clarity for making tough choices regarding societal values. The ethical effort relies on *self-appropriation* or personal insight into what occurs when making value judgments, on a discovery of innate moral norms, and on grasping the meaning of moral objectivity in crisis situations when heuristics and biases are most prone to appear. In effect, GEM assists structured analytic techniques by bringing value laden assumptions out into the open and mitigates the extreme urgency that often attends crisis situations.

**Lonergan’s Insight Theory.** Lonergan’s *Insight Theory* approach to conflict analysis and resolution seeks to isolate and to illuminate the moment of understanding in the cognitive-analytic process described in the preceding two paragraphs. Insight Theory offers an opportunity to isolate the cognitive operations that lead to knowing that the right choice is being made (Orsulak, 2013). Each of these conscious operations of experiencing, understanding, judging, and deciding to act is transitive; i.e. they act on an object and it is through each of the operations that the thinker or analyst becomes aware of the object, and consequently consciously aware of their own relation to the object being considered. In other words, the analyst becomes aware of himself or herself analyzing the problem during the process of analysis (Lonergan, 1957, p. 8).

Lonergan’s cognitive insight theory enables an individual to isolate, record, and externalize feelings by differentiating between levels of consciousness; empirical, intellectual, rational, and responsible. Cognitive operations (i.e. analysis) can occur on any one of the four levels, and at each level, people operate and feel with varying degrees of conscious intention. Lonergan’s cognitive framework interprets information to determine the relevancy of data to the *first circle of concern*, i.e. how to feel empathy for those people that you would not otherwise consider as worthy of attention. According to Lonergan (1957, p. 209), “Memory ferrets out instances that would run counter to the prospective judgment…memories and anticipations rise above the threshold of consciousness only if they possess at least a plausible relevance to the decision to be made.”

A narrow and close-minded analytical framework which is grounded on empirical fact alone will prevent the analyst from recognizing a range of relevant data. These self-imposed boundaries will limit the questions they ask, if they ask any at all. This is not to say that an objective analyst should allow free-reign to their feelings, but only that they recognize that there is an emotive and often unacknowledged limits (i.e. predictable errors or biases) to their
cognitive processing. Lonergan’s (1957) Insight Theory and GEM bring an ethical dimension to the analysis of complex social problems by extending analysis beyond metaphors.

**John Paul Lederach and Multi-dimensionality**

Some means of regaining time for value-free analysis could lead to a more holistic assessment of internal security crises as the analyst or policy maker may see only the confirming evidence of the source analogs if they are under time pressure. John Paul Lederach (b. 1955), is known for his multi-generational approach to peace-building and the need for cultural intelligence. Lederach’s (2005) book *The Moral Imagination: The Art and Soul of Building Peace*, explains how the concept of the *moral imagination* opens the possibility of envisioning an *alternative future*, in a manner similar to the structured analytic technique (Heuer & Pherson, 2011, pp. 126-127). Lederach (2005) states that the moral imagination requires the practitioner to develop the art of living in multiple time and space spheres. Lederach (2005) asserts that *multi-dimensionality* is present even in the moments of greatest crisis, when the urgency of the situation seems to hinge on quick short-term decisions. This description of the *tyranny of the urgent* is characteristic of many of the internal security dilemmas reviewed in this study. Lederach (2005, Ch. 12) believes that “we need the imagination of the past that lies before us,” and that “this imagination involves the capacity to restory” or to find a new narrative to explain a circumstance.

In essence, Lederach (2005) is saying that crisis decision making must also assess the impact of decisions taken on a community generations into the future, based on extrapolations from their collective past. To do so, the analyst and policy maker must accept that enemies may become future friends, and avoid the *fundamental attribution error* (FAE) of solely framing the adversary in pejorative terms, i.e. allowing their own propaganda. As such, they must avoid the use of metaphors which influence their cognitive processes in analyzing the adversary and adopt a very long-term view of the crisis situation as it unfolds. Lederach’s (2005) multi-dimensional approach offers the possibility of applying a longer timescale to analyzing what appear to be short-term crises. It also offers a means of disrupting the multi-generational time-binding process described by Korzybski (1994 [1933]).
Crisis Decision Making

There is an enormous body of multi-disciplinary research related to decision making in routine and crisis situations that goes back to the mid-20th Century. This literature review can only be reflective of the literature base rather than all-inclusive. Roger Fisher (1969) explains negotiating and bargaining at strategic level. Graham Allison’s (1971) seminal *Essence of Decision* used the rational actor paradigm and the organizational process models to explain the Cuban Missile Crisis. Robert North and Nazli Choucri’s *Nations in Conflict* (1975) examines the economic determinants of World War I. For the most part, the first three books treated crisis as a series of transactions between rational actors using objective evidence. Roberta Wohlstetter (1981) describes the tendency to self-deception in “Slow Pearl Harbors” through misreading the evidence in accordance with pre-conceived beliefs, which fits Richards Heuer’s (1999) concept of confirmatory bias leading to premature closure in decision making.

On the Centrality of Law

Law governs individual, group, and state behavior in social, professional, financial, and international interactions. Laws arise in response to the need for consistency and justice, and evolve based upon collective human experience through the trial of individual cases. The centrality of law in regulating society is evident when it is absent, or temporarily suspended, as often occurs in internal security crises.

Internal Security Law vs. the Civil, Common and Criminal Law Processes

Most bodies of law focus on the enduring rights and obligations of known persons, whether as individuals or as corporations. People are accused of crimes after the fact. The presumption of innocence of the accused is maintained through a common law criminal trial, and the state must prove its case beyond a reasonable doubt. Civil, common, and criminal laws’ impact on daily life can be measured directly through the number of persons arrested, court cases heard, financial mergers affected, and through the numbers of people executed, sentenced to prison terms, fines, or acquitted. Publicizing the results of a trial also serves the purpose of

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10 The presumption of innocence is specific to criminal proceedings. The test in a civil trial is “balance of probabilities”.
general deterrence, as does the principle that for justice to be done it must be seen to be done. This is often not the case in studying the executive measures in internal security law, when the researcher must wait years before such statistics enter the public domain.

**Security approach.** In contrast to common law, internal security law is characterized by the *security approach* (Bonner, 2007, p. 33), in which the need to rapidly respond to threats of unknown size and duration replaces the presumption of innocence and the threshold for admissibility of evidence is lower. It does not require proof, even in the civil law *balance of probabilities* sense of any criminal act, but simply proof of preparations to commit a criminal act (Blum, 2012). Internal security law differs from common law, in that its purpose is to pre-empt action by members of a threat group, rather than to try individuals accused of committing a crime.

**Pre-emption.** Internal security law and associated executive measures are designed to pre-empt espionage or terrorism and to contain threats to national security or public order. The security approach removes the right of the accused individual to know the full details of the case against him or her as the state must often protect the *sources and methods* used to obtain the evidence (Blum, 2012, p. 108; Bonner, 2007, p. 33). Internal security law and executive measures permit action against persons who are deemed likely to commit a crime, as well as those who have actually committed illegal acts. Thus, such laws and measures tend to be oriented towards suspect populations – as opposed to individual persons.

**Crisis action planning.** Internal security laws are enacted in anticipation of a crisis or in the aftermath of a crisis when emotions are running high, and the perceived need to protect society is paramount in the minds of political decision-makers, members of the judiciary and security agencies, and of the public. Historically, the haste to enact such laws has frequently led to amendments of the principal acts, a cascading effect on subsidiary enabling laws, runaway costs, and to unintended long-term consequences well beyond the strategic purpose of the acts. Temporary extraordinary powers and executive measures may become institutionalized through the extension of sunset clauses and through the creation of specialized institutions - both of which can be measured and compared across nations and across time. The challenges inherent in drafting effective internal security law include finding a balance between intrusive security measures, interference with commerce, and individual freedom; anticipating the duration of such
temporary measures; and devising appropriate safeguards to ensure that adverse effects of prolonged extraordinary measures are minimized.

**Balance of powers.** The traditional superior common law court criteria for testing this balance uses words such as the “reasonable person” (Holmes, 1909, p. 108), a “clear and present danger” (Schenck v. US, 1919, 249 US 47), and “reasonable and justifiable” (Canada, 1982, Part I, para.1)\(^1\) to describe the decision point at which the threat should supersede individual rights, and limit freedoms such as association, speech and assembly. However, it is difficult to place reason above emotion when citizens have been killed and the perceived need to act decisively supersedes a measured response.

**Extraordinary (and Executive) Measures**

The term *extraordinary measures* includes measures beyond the realm of peacetime civil, common, and criminal law, but in accordance with a lower evidence threshold than would be required to obtain a conviction in court. Such measures are also described as *executive measures* when they are executed by the executive branch of government as part of a strategy to respond to threats to national security. Thus, conferring the power of arrest without warrant on a police officer or a soldier without recourse to a court for each specific case is an executive measure (Bonner, 2007, p. 21), as is the power to refuse entry at a border, or to detain a person indefinitely. In effect, the decision to make an arrest, detain, or refuse entry to a person may be made on suspicion rather than on evidence as described above (Blum, 2012). Executive measures may significantly limit individual freedoms enjoyed under any legal system.

Executive measures in the context of internal security are designed to mitigate the threat posed by *aliens*, i.e. non-citizen, or recent immigrant groups. Such executive measures begin with the promulgation of internal security law, which delegates authority to executive agencies. The sufficiency of evidence and the burden of proof required to gain a criminal conviction in common law is much higher than the suspicion based on hostile association used to justify the

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\(^1\) Canada (1982). *Constitution Act, 1982*. Part I, The Charter of Rights and Freedoms. The primary test to determine if the purpose is demonstrably justifiable in a free and democratic society is known as the *Oakes test*, which takes its name from the essential case *R. v. Oakes* [1986] 1 S.C.R. 103 which was written by Chief Justice Brian Dickson. The test is applied once the claimant has proven that one of the provisions of the *Charter* has been violated. The onus is on the Crown to pass the Oakes test. Section 8 of the Charter also states “Everyone has the right to be secure against unreasonable search or seizure.”
arrest, detain, and to conduct surveillance of individuals and groups deemed to pose a threat to
the state and to the safety of its citizens. Inevitably, innocent people within minority groups have
been wrongly imprisoned, deprived of property, deported, and killed. More to the point, such
measures often fail to protect the populace, and some have had perverse and unanticipated
consequences.

Summary of Common Law Constitutional Themes

Now that the cognitive limits which constrain individual and collective decision making
have been discussed, and the importance of law has been explained, it is necessary to describe
the legal parameters which guide the behaviour of the three nations in the case study. The
constitutional descriptions below guide the analysis in Chapter 4, which identifies the factors that
contribute to the promulgation of internal security law. The analysis in Chapter 4 addresses how
these factors interact and influence the implementation of internal security laws and the
execution of the executive measures.

United Kingdom

The inhabitants of the island of Great Britain, who belong to the historically distinct
nations of England, Scotland, Wales, and Northern Ireland, have been citizens of the United
Kingdom (U.K.) since 1707. Unlike many other constitutional democracies, the U.K. has no
single constitutional document. The constitution of the United Kingdom is the sum of the laws
and historic principles that govern daily life in the United Kingdom. This is sometimes
expressed by stating that it has an uncodified or unwritten constitution.\(^\text{12}\) Essentially, the
uncodified constitution of the U.K. has evolved incrementally over hundreds of years through the
passage of numerous laws which describe the relationship between the individual citizen and the
state, and the functioning of the legislature, the executive and judiciary.\(^\text{13}\) Thus, it would be
more appropriate to describe the British constitution as “uncodified”, rather than “unwritten.”

One implication of the absence of a single codified constitutional document is that there

\(^ {12} \) “A written constitution is one contained within a single document or a [finite] series of documents, with or
without amendments” (Barnett, 2005, p.9).

\(^ {13} \) In 2004, the Joint Committee on Draft Civil Contingencies, First Report, Chapter 5 – “Constitutional Matters,”
listed 21 laws which make up the “statutory patchwork of the British constitution,” retrieved from
http://www.publications.parliament.uk/pa/jt200203/jtselect/jtdcc/184/18407.htm#a44. Of note, 15 of the 21 laws
listed were enacted after 1911, so rapid evolution in the 20\(^{\text{th}}\) and 21\(^{\text{st}}\) Centuries is evident.
are no unambiguously constitutional “higher” laws. With a written constitution it is generally easier to distinguish constitutional laws within the body of the law, whereas in the U.K. there is no such differentiation. There are certain laws which are generally regarded as being core constitutional laws that deserve special consideration. The Magna Carta, 1215 and the Bill of Rights, 1689 are examples of such laws, as they form the bedrock foundation of the freedom of the individual against executive authority. British courts would generally be unwilling to accept that the provisions of such legislation have been overridden by later statutes except in very clear language (UK, HCL, 2009, p. 4).

Citizens of the U.K. display a noticeable dichotomy in their near-simultaneous, or perhaps near-sequential tendency, to centralize - and to resist the centralization of political power. These conflicting tendencies arise from their isolated geographic position as an island whose political evolution began in feudal times with resistance to the highly-centralized political and economic power exercised by kings and the aristocracy. Four laws enforce the distinct separation of prerogative powers in this oldest constitutional monarchy and Parliamentary democracy: the Magna Carta, 1297, which established the right to due process of law; the Bill of Rights, 1688, which established Parliamentary supremacy over the monarch; the Crown and Parliament Recognition Act, 1689, which confirms the succession to the throne and the validity of the laws passed by the Parliament; and the Parliament Acts, 1911 and 1949, which assert the supremacy of the House of Commons by limiting the legislation-blocking powers of the House of Lords.

Common law foundations. The common law tradition began in England 800 years ago; thus civil liberties in the United Kingdom have a long and influential history. This history is considered to have begun with the signing of the Magna Carta (Great Charter), the central legal document in British constitutional history, by King John at Runnymede in June 1215. This English Charter, which was written in the court language of the day, i.e. Latin, contained 63 clauses related to religious freedoms, debtors’ responsibilities, forest and watercourse management, and the extension of trade to the City of London and to other boroughs. Many of these clauses been modified over the centuries, and are no longer valid. However, the 39th clause became the bedrock of the common law system:
No free man¹⁴ shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled; nor will we proceed with force against him except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice. (http://www.bl.uk/magna-carta/articles/magna-carta-english-translation)

Although this clause certainly did not apply to the great majority of the people in 1215, over time it has been used to justify the *writ of habeas corpus*, which allows people to appeal imprisonment without trial. Despite its central role, the earliest ancestor of contemporary human rights protection may be the *Assize of Clarendon*, passed by Henry II in 1166. A precursor to trial by jury, the Assize paved the way for the abolition of *trial by combat* and *trial by ordeal* (Liberty, 2015).

**The historic Royal Prerogative and its evolution.** The Magna Carta is also significant as it represents the first successful attempt to limit the *Royal Prerogative*, or special powers of the reigning monarch to direct action to defend his or her realm. The Royal Prerogative is that body of customary authority, privilege, and immunity, recognized in common law and, sometimes, in civil law jurisdictions possessing a monarchy, as belonging to the sovereign alone.¹⁵ Employment of the Royal Prerogative is the means by which some of the executive powers of government vested in a monarch with regard to the process of governance of the nation-state are conducted. Historically in Britain prerogative powers were exercised by the monarch acting alone, without an observed requirement for parliamentary consent.

Since the accession of the German Protestant House of Hanover to the Throne of the United Kingdom in 1714, replacing the Scots¹⁶ Catholic House of Stuart, these prerogative powers have been generally exercised on the advice of the Prime Minister or the Cabinet, who in turn is accountable to Parliament, exclusively so, except in matters of the Royal Family. Given the separation of powers in a constitutional monarchy and parliamentary democracy, modern (18⁰ Century onward) ministerial powers all flow from the ancient prerogatives of the Crown.

¹⁴ It should be remembered that in 1215 most men were peasants and tied to their landlords land, rather than freemen.
¹⁵ See http://findlaw.co.uk/law/government/constitutional_law/citizens_guide_to_government/500456.html
¹⁶ The adjective *Scots* is preferred by the inhabitants of Scotland, who traditionally do not use “Scotch,” which is the name of the alcoholic spirit distilled in Scotland, and “Scottish” which is not used in Scotland.
The royal prerogative is a difficult concept to define adequately. The classic definition was given by constitutional law specialist A.V. Dicey, who described the royal prerogative as,

… the remaining portion of the Crown’s original authority, and it is therefore … the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers.17 (Parliament, H.C., 2004, Select Committee on Public Administration, Fourth Report, para. 3)

The evolution of civil liberties continued in common law and in statute law in the 17th and 18th centuries, most notably with the passage of the Bill of Rights, 1689, which limited the arbitrary power of kings.18 The Bill of Rights included the freedom to petition the Monarch (a precursor to political protest rights; the freedom from cruel and unusual punishments (the forerunner to the ban on torture contained in the Human Rights Act, 1998); and the freedom from being fined without trial.19 Although the Bill of Rights 1689 attacked the abuse of prerogative power by a monarch rather than prerogative power itself, the Bill had the virtue of enshrining in statute what many regarded as ancient rights and liberties.

Three other seminal historical documents regulate relations between the Crown and the people of the United Kingdom; the others being: the Magna Carta (as confirmed by Edward I, 1297), the Petition of Right, 1627 and the Act of Settlement, 1700.20 The Petition of Right, 1627

17 The Select Committee on Public Administration, Fourth Report, para. 3 describes three areas of royal prerogative: Queen’s constitutional prerogatives; the legal prerogatives of the Crown; and Prerogative executive powers, which formed the main subject of the Select Committee’s inquiry. Certain prerogative executive powers, as expressed at para. 9 are of particular import in this study. “The principal royal prerogative, or Ministerial executive, powers exercised by Ministers include the following: a) The making and ratification of treaties…. b) The conduct of diplomacy, ….the relations (if any) between the United Kingdom and particular Governments….d) The deployment and use of the armed forces overseas, including involvement in armed conflict, or the declaration of war. (The Royal Navy is still maintained by virtue of the prerogative; the Army and the RAF are maintained under statute.) e) The use of the armed forces within the United Kingdom to maintain the peace in support of the police.”
18 The Bill of Rights was an historic statute that emerged from the “Glorious Revolution” of 1688-89, which culminated in the exile of King James II and the accession to the throne of William of Orange and Mary. Its intentions were: to depose James II for misgovernment; to permit Parliament to determine the succession to the Throne; to curb future arbitrary behaviour of the monarch; and to guarantee Parliament’s powers vis-a-vis the Crown, thereby establishing a constitutional monarchy (UK, HCL, 2009, p. 2).
19 These same freedoms are reflected in the First (freedom of assembly, association, speech), Sixth (right to trial by jury), and Eighth (prohibition against cruel and unusual punishments) Amendments to the U.S. Constitution and which form part of the Bill of Rights, which is comprised of the first ten Amendments to the Constitution.
20 The Human Rights Act 1998 should be added to this list of fundamental constitutional documents (UK, HCL, 2009, p.2). The British Library considers it to be a modern day Magna Carta (http://www.bl.uk/magna-carta/articles/magna-carta-and-human-rights)
sets out specific liberties of the subject that the king is prohibited from infringing, such as *imprisonment without cause* and the use of *martial law*, which had been in effect for much of 1627-1628. The *Petition of Right, 1627* influenced the *Massachusetts Body of Liberties* (1641-1691) (Bachmann, 2000, p. 276), and is seen as a predecessor to the Third, Fifth, Sixth and Seventh Amendments to the *U.S. Constitution* (Bachmann, 2000, pp. 281-286).\(^{21}\)

**The act of settlement.** The *Act of Settlement, 1701* decided the conditions for succession and placed limits on both the role of foreigners in the British government, and on the arbitrary power of the monarch with respect to the Parliament of England (though some provisions have been altered by subsequent legislation).\(^{22}\) The *Act of Settlement, 1701* led to Scotland accepting relinquishing the right of the Roman Catholic House of Stuart to the Scottish throne and paved the way to establishing the United Kingdom of England and Scotland in 1707. According to Naamani Tarkow (1943, p. 561), “If one is to make sweeping statements, one may say that, save Magna Carta (more truly, its implications), the *Act of Settlement* is probably the most significant statute in English history.” In terms of its impact on internal security, the *Act of Settlement, 1701* solidified the separation between the arbitrary power previously exercised by monarchs, and the collective authority of the monarch’s subjects as legislated in Parliament. Although there were other acts which dealt with internal security during various other crises in the 18\(^{th}\) and 19\(^{th}\) Centuries, the above mentioned laws laid the constitutional foundations for the U.K.’s enactment of internal security measures in the 20\(^{th}\) Century.

At this point in its history, the U.K. is a quasi-federal state which has devolved decentralized powers to its constituent nations of England, Scotland, Wales, and Northern Ireland, as well as to the European Union - in certain aspects guided by the *European Convention on Human Rights*. According to Masterman (2010, pp. 245-253), the U.K. is in the process of becoming a constitutional state, marked by checks and balances between the different branches of government, and becoming a state in which the judiciary has a crucial role to play in the determination of individual rights and in determining the scope of government action. This comment is supported by the creation of the Supreme Court of the United Kingdom in 2009.

\(^{21}\) These Amendments are respectively concerned with the arbitrary quartering of soldiers; double jeopardy and self-incrimination; right to trial by jury; and the establishment of common law as the governing standard in U.S. trials.  
\(^{22}\) Under the *Act of Settlement, 1700* anyone who becomes a Roman Catholic, or who marries one, becomes disqualified to inherit the Throne.
whereas this function had previously been conducted by the Law Lords, who had simultaneously sat in the upper parliamentary chamber known as the House of Lords.

Now that the constitutional foundations of the United Kingdom have been described, the literature review can concentrate on those laws most relevant to internal security in the 20th and 21st Centuries. As in many cases, such laws begin with the description of who merits protection of the nation-state.

**The Aliens Act, 1905**

The *Aliens Act, 1905*, 5 Edw. 7 c. 13 is at the intersection of domestic and international law – i.e. crossroads of several historical traditions within domestic and international law: 1) the history of political asylum and extradition, 2) of excluding the enemy alien who might threaten a state’s political security, of immigration law in which undesirable aliens were denied and excluded, and of international refugee law. Protection from surrender for political offenses (the “political offense exception”) was already an established part of extradition law. Protection from removal to persecution grew out of the political offense exception, but developed within refugee law, and over time came to be housed domestically within immigration statutes as a humanitarian measure (Bashford & McAdam, 2014, pp. 334-336). This theme is repeated in the *Aliens Restriction Act, 1914*, 4 & 5 Geo. V, c.12 and in the *Aliens Restriction (Amendment) Act, 1919*, 9 & 10 Geo 5 c. 92.

A recurring sub-theme in British common law since the enactment of the *Aliens Act, 1905* is the need to continually re-assess the definitions of refugee and asylum.23 The concept of

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23 Bashford & McAdam (2014) note a degree of hypocrisy in the British position as the defense of an individual’s right to asylum, almost chauvinistically argued into British domestic law at the beginning of the 20th Century, was rejected by British delegates during the *Universal Declaration of Human Rights* (UDHR) drafting in 1947-1948. It was a British amendment that reduced the UDHR’s asylum provision to nothing more than a restatement of the existing position under international law; i.e. it was the prerogative of the receiving nation state to grant asylum should it so choose. Bashford & McAdam (2014) note that their findings contradict the commonly held perception that refugee law only emerged in 1938 prior to World War II, which has been popularized by leading legal scholar James C. Hathaway, (2014; 1990). Bashford & McAdam (2014) make a strong case that the “received narrative” that international instruments developed in the 1920s, that the concept of persecution appeared in the 1930s and 1940s, and that this all progressed to the 1951 Convention relating to the Status of Refugees is valid on a narrow view of just where and how international “refugee” law emerged. Another view is that these lost decades (i.e. between 1914 and 1939) were characterized by retreat. Thus, the (re)emergence of the term “persecution” in the 1940s was not revolutionary, but evolutionary. Legislation to promote emigration to the Dominions (i.e. Australia, Canada, New Zealand, etc.) was the basis of British migration policy for over a century, being renewed as late as 1952 (Coleman, 1994) so legislation focused on permitting entry was a departure from routine discourse. Bashford & McAdam (2014, p.337) observe that the American *Immigration Act of 1917*, Pub. L. 64-301, 39 Stat. 874 (1917),
asylum in domestic law started to transform from an exception to extradition for a political offence, which was its 19th Century connotation, into a basis for admission for humanitarian reasons.

The control of aliens became much more rigorous after the start of World War I as German males of military age were obviously of concern to British authorities. Because of the many difficulties aliens created for the government, they became less welcome in Britain. Britain’s Ukrainians illustrated the way in which, during World War I, even a small immigrant community could pose large problems. More than 32,000 alien men were interned during World War I, and of the 28,744 aliens were repatriated at the outbreak of war, 23,571 were Germans (http://www.bbc.co.uk/history/familyhistory/bloodlines/migration.shtml?entry=alien_registration_act&theme=migration). German and German-Jewish public figures felt compelled to declare their support for Britain in Loyalty Letters published in The Times.

The Official Secrets Act, 1909

The fear that suspect immigrant populations might gain access to sensitive military installations is reflected in paragraph 3 of the Official Secrets Act, 1911, c.28 which defines a prohibited place in a four-paragraph description that includes military installations such as “any work of defence, arsenal, factory, dockyard, camp, ship, telegraph or signal station, or office belonging to His Majesty, and any other place belonging to His Majesty used for the purpose of building, repairing, making, or storing any ship, arms, or other materials or instruments of use in time of war,…” (para.3 (a)).

It can be stated with some certainty that the Official Secrets Act, 1911 was enacted due to the fear of the alien population that had recently immigrated to the U.K. The fear of potentially disloyal alien populations is reflected in the passage of the Aliens Act, 1905, the Aliens Restriction Act 1914, and the Aliens Restriction Act (Amendment), 1919. The Official Secrets Act, 1899, (which was replaced by the Official Secrets Act, 1911), had created only the offences of disclosure of information (section 1) and breach of official trust (section 2). Both of these

c.29, sec. 3 defines “undesirable” in a very similar manner to that in the Aliens Act, 1905, and adds the exclusion criterion of illiteracy. This theme of national prerogative in selecting immigrants continues to be of particular import in the refugee crisis of 2015. This theme has had, and continues to have evident value in screening immigrants with the intent of identifying and preventing entry into the U.K. of known terrorists and of potential spies. If assessed from the humanitarian perspective implicit in the UDHR or the 1951 Convention on Refugees.
1889 offenses were to play a future role in the late 20th and early 21st Century offenses committed by native-born British citizens working in intelligence and security roles.

**The Defence of the Realm Act, 1914**

The *Defence of the Realm Act, 1914*, 4 & 5 Geo. 5 c. 29, commonly known as DORA, was passed into law on 8 August 1914 in the first days of World War I by Prime Minister Herbert Asquith’s Liberal Party government. DORA 1914 was amended 28 August as *DORA No. 2, 1914*, 4 & 5 Geo. V, c. 63, and again on 27 November 1914 as the *DORA Consolidation Act, 1914*, 5 & 6 Geo. V, c. 8. DORA underwent three additional amendments throughout World War I in 1915, 1916, and 1918. DORA was supported by *Defence of the Realm Regulations* (DORR) and by expansive *Defence of the Realm Manuals* which were published annually, and sometimes more often. DORA (as amended) and the Defence of the Realm Regulations further controlled the movements of non-native British citizens throughout the war.

The political and social historical literature related to the *Defence of the Realm Act, 1914* (DORA) is quite rich. Andrew (1986); Bird (1986); Knightley (1986); Hutcheson (2005); Mason (2014); Panayi (2014); and Taylor (1954) describe the historic context of DORA in the U.K. with an emphasis on the controversial aspects related to the wartime employment of the Security Service, initially Military Operations (MO) 5; later Military Intelligence (MI) 5. The legal history of DORA is addressed by Bonner (2007); Clarke (1919); Ewing & Gearty (2000); Donahue (1999); and Vorpsan (2008). Of note in describing the political and social context, is the tertiary review (which soon follows) of the voluminous fictional and non-fictional invasion scare literature in the 44 years prior to World War I. Of equal importance is describing the contextual history of civil liberties which existed in the United Kingdom prior to the enactment of DORA.

**Significance of DORA.** DORA is of historic significance for the legal precedence it set for the extension of military law to civilians in the U.K.; for the appropriation of lands, goods, and real property by the state; for surveillance, arrest without warrant and detention, censorship; and for the rationing of food and alcohol. Key supporting internal security laws from the United Kingdom and Canada were also reviewed to ascertain the influence on counter-espionage Techniques, Tactics, and Procedures (TTPs). Counter-espionage and internal security operations for the remainder of the War and for the decades that followed were underpinned by several Acts
of Parliament which permitted much wider powers of arrest than had existed pre-World War I. These new powers, which were based on suspicion rather than evidence, were supported by detention without warrant, and by widespread surveillance of the general population.

DORA provided the basis for the Canadian War Measures Act, 1914, 5 Geo. V, Ch.2, 1914; numerous acts related to internal security in Ireland and Northern Ireland, and it continues to influence British internal security laws in the 21st Century. It also influenced the development of the Espionage Act of 1917, Pub. L. 65-24, 40 Stat 217 (1917) and the Sedition Act of 1918, Pub. L. 65-150, 40 Stat. 553 (1918) in the U.S.A. DORA is a seminal internal security landmark, as it permitted the suspension of common and criminal law courts in the U.K. under certain circumstances permitting the use of Court Martials for civilians, and firmly established legal precedence for internal security law in English-speaking nations. It is worth investigating the circumstances that led to legislation so comprehensive that it affected practically all aspects of life in Britain during World War I, and which continues to influence British life in the 21st Century.

The Historic Context for the Enactment of DORA

British internal security forces achieved what appeared to be a tremendous coup de main with the arrest of 21 German agents on the eve of World War I, 3-4 August 1914, which was followed by the arrest of another 14 spies later that month. These arrests were reputed by most leading English language historians to have crippled German intelligence gathering efforts in the United Kingdom of Great Britain and Northern Ireland (U.K.) for the remainder of the War. The arrests, which were executed by Scotland Yard Special Branch and numerous County Constables on behalf of Military Operations (MO) 5g (renamed Military Intelligence (MI) 5 in January 1916; Andrew, 1986, p. 174), appeared to set the expected standard for counter-espionage operations for the remainder of World War I. They also cemented the foundation myth of the fledgling MI5 in public perception which has lasted into the 21st Century. The reality is much more complex, as the MO5g and MI5 successes were presaged by decades-old threat perceptions across British society, public and parliamentary debate on the scope of the threat, policy goals, legislation, and the definition of executive measures beyond the Criminal Code – i.e., extraordinary or executive measures in accordance with the Royal Prerogative.
**The counter narrative.** The MI5 foundation myth is being re-assessed by intelligence historians following the release of 74 records and files following declassification between 1997 and 2005. This section of the study draws heavily on the work of Christopher Andrew (1986), Nicholas Hiley (1983; 1985; 1986; 1990; 1991; 1996; 2006; 2010), and Phillip Knightley (1986), the first being an official historian of the British Secret Service, the second an independent historian, and the latter being an investigative journalist. A contrary perspective is offered by British intelligence specialist Nicholas Hiley (2006; 2010), who not only discounts the successful execution of the August 1914 arrests, but also asks whether this apparent success was worth the cost in reduced civil liberties over the longer term.

Nicholas Hiley produced a plethora of articles between 1983 and 2010, in which he examines the veracity of the accepted historiography and debates the enduring influence of these early successes in counter-intelligence and internal security. Hiley (2010) responded to the MI5 official history (Andrew, 2009, pp. 873-875) which reputed Hiley’s (2006) article with a 1931 internal memorandum which references a 1914 arrest list. Hiley (2010, Abstract, p. 416, p. 449) asserts that “by claiming authority from the only arrest list known to have been challenged within MI5 itself, the Authorized History (Andrew, 2009) merely reinforces the conclusion that (MI5 Chief Vernon) Kell fabricated his most famous victory” after the fact. Meacham (2012) also recounts the blending of fact and fiction within MO5g and MI5 based on new research.

This section of the study seeks to add to the debate through a re-examination of the events, the historiography base, and offers comment on the long-term and strategic unintended consequences of tactical and operational successes in counter-intelligence achieved through internal security legislation. This next section of the U.K. literature review highlights the security challenges faced by the British Secret Service during World War I, with a view to identifying recurring dilemmas faced by internal security services in the contemporary security environment.

**Tertiary Sources - British speculative fiction 1871-1914**

**Invasion Mentality**

Inhabitants of Great Britain have long considered that their independence is due in no small part to the existence of a natural moat surrounding their island. The preceding sections
describe a fear of invasion that dates back to the Norman Conquest of 1066. The 19th Century British sense of pride in the extension of British commerce and values around the World through the Empire was matched by the fear that a major European land power could invade their “green and pleasant isle” and impose their values. The 44 years between the creation of the modern nation-state of Germany and the outbreak of World War I were punctuated by a continuous stream of invasion scares which permeated the popular press, novels, and most importantly - government discourse.

Speculative Fiction

Purpose of this review. Speculative fiction is not a genre which would normally be represented in an academic review of political and military decisions. However, the influence of invasion scare literature on political debate in the 44 years before World War I is possibly unparalleled in history. This section of the literature review examines the scope of this manifold genre written in English, which can be described as rich, very deep, still producing revisionist assessments a century after its heyday. The literature is manifold in nature as it encompasses invasion scare literature, early spy fiction, and adventure stories. The fictional aspect of the genre was supported by speculative comment on actual events by political and military leaders to such an extent that it became difficult for readers, both lay and specialist, to separate fact from fiction. This is why this review is necessary for a comprehensive picture of Edwardian life prior to the introduction of the Aliens Restriction Act, 1914, the Defence of the Realm Act, 1914, the associated Defence of the Realm Regulations, and all subsequent legislation and executive measures.

Scope of genre. Full treatment of the speculative fiction genre is found elsewhere, as this area of study has developed its own literature and corps of specialist scholars. I.F. Clarke (1965; 1966; 1967, 1992, 1995; 1997a; 1997b; 1997c; 1998), Patrick Kirkwood (2012), Harry Wood (2014; current web log) concentrate their research efforts in this area. Other scholars and journalists, such as Christopher Andrew (1986), Phillip Knightley (1986), David Stafford (1981; 1982; 1988), Nicholas Hiley (1986; 1990), Wesley K. Wark (1991), Thomas Boghardt (2004), and Christopher Moran & Robert Johnson (2010) have contributed books and articles to the analysis of speculative fiction while pursuing factual research on intelligence and internal security as well. The spy fiction genre is present is many world cultures, and the English
language genre, pre-World War I alone, is so massive that a representative survey of the major
titles must suffice to illustrate its influence on internal security and intelligence policy making in
the four decades leading to war. According to Reiss (2005) the invasion scare and early spy
fiction genre hosts in excess of 400 major titles and countless short stories and novels which did
not achieve mass circulation between 1871 and 1914. Thus, the literature review in Chapter 2
could never attempt to be conclusive, but merely representative of the genre.

**Landmarks in British Speculative Fiction Survey – Pre-World War I**

A representative survey of the invasion scare literature includes, but is not limited to the dozen or
so titles which are described below. These titles were selected as they illustrate the ability of
fiction writers to tap into, and spread widely-held anxieties which did not necessarily have a
strong factual basis. The selected titles also show the power of the media to sway public opinion
in calling for government action, and ultimately – to influence government policy, legislation,
and executive action.

**The Battle of Dorking**

George Chesney’s (1871) short story *The Battle of Dorking: Reminiscences of a
Volunteer* was the first of hundreds of novels with similar themes. The book, narrated by an
anonymous volunteer, describes the German invasion of the UK following their victory in the
Franco-Prussian War. Chesney had submitted his novella anonymously to *Blackwoods’
Edinburgh Magazine*, a highly influential contemporary periodical, in May 1871. Kirkwood
(2012) describes the work as “a seminal work of British “speculative fiction” - on print and
political debates throughout the 1870s and beyond” and “finds him (i.e., Chesney) to be a more
substantial figure than most previous scholarship suggests.” Kirkwood (2012) asserts that the
British Army maneuvers held in October of that year included a corps of 33, 000 men using
Prussian infantry tactics due to the influence of this seminal work. *The Battle of Dorking* (1871)
was equally part of the invasion scare genre and a proto-policy-document. Kirkwood (2012,
p.16) notes that its frequent citation by Members of both Houses of Parliament, and its citation
by senior military officers engaged in public and private debate backs this assertion, as does
Chesney’s integration into the pro-military reform wing of the Conservative Parliamentary Party
of the 1890s.
The Riddle of the Sands

**Polemic with a purpose.** Boer War veteran R. Erskine Childers (1903) sold several hundred thousand copies of *The Riddle of the Sands: A Record of Secret Service*, in which the heroes uncover German invasion plans during a Baltic sailing vacation (Stafford, 1988, p. 34). Childers (1903) purported to be the editor of reports from the two heroes of the novel – Carruthers of the Foreign Office, and his sailing companion Davies. This literary device, used by William Le Queux and later used by John Buchan, blurs the line between fact and fiction. Childers’ intent in writing the book was clearly to arouse public opinion to demand government action - it was a polemic with a purpose. He added a postscript, “Is it not becoming patent that the time has come for training all Englishmen systematically either for the sea or for the rifle?” (Andrew, 1986, p. 37).

**Impact.** Despite its early dismissal as “rubbish” by Lord Louis Battenberg, Director of Naval Intelligence (Stafford, 1988, p. 30), Childers’ fictional invasion plan impressed Lord Selford, the First Lord of the Admiralty, and Admiral Sir John Fisher, the First Sea Lord as plausible. Lord Selbourne called for a feasibility study by the Naval Intelligence Division (NID) which concluded that the fictional plan was not feasible (Andrew, 1986, p. 37). Stafford (1988, p. 34) quotes Childers’ biographer Andrew Boyle (1977, p. 111), who notes that “For the next ten years, Childers’ book remained the most powerful contribution of any English writer to the debate on Britain’s alleged military unpreparedness.” Knightley (1986, p. 17) notes that Winston Churchill had stated that the threat posed by the fictional Baltic Sea invasion plan led to the establishment of Royal Navy bases at Invergordon, Firth of Forth, and Scapa Flow. The doyen of contemporary British military historians, John Keegan (2002, p.4), describes *The Riddle of the Sands* as “the first serious novel of intelligence to appear and still one of the best.”

**Context.** The reader of invasion scare and spy fiction novels should be aware of the social and political context in which they were written. Childer’s (1903) novel was published within a year of Britain’s Pyrrhic victory in the Boer War (1899-1902). Britain’s troops experienced numerous bloody setbacks in the first counter-insurgency campaign of the 20th Century, in which they had to resort to concentration camps and a scorched earth policy (Pakenham, 1979) to contain the Boer farmers. These drastic tactics did not fit the image that
most Britons believed that they presented to the world in their mission of spreading civilization across the Empire.

**The Impact of the Boer War (1899-1902).** The public and many military officers were shocked by the difficulties suffered by the British Army during the counter-insurgency campaign against the Boers between 1899 and 1902. It took 450,000 British Empire troops 33 months to subdue a guerilla force one-tenth their size (Andrew, 1986, p. 34), in a campaign which Stafford (1988, p. 32) and Pakenham (1979, p. xxii) describes as being akin to Britain’s “Vietnam.” Post-war, the British sense of security was never assured (Stafford, 1988, p. 216), nor was their sense of moral certainty (Pakenham, 1979, p. xxii). The professional British Army initially suffered catastrophic defeats against presumably poorly trained Boer guerillas, particularly during the *Black Week* of 10-17 December 1899, in which British casualties far outnumbered those of their enemies (Pakenham, 1979, pp. 257-259).

**Introspection.** These unanticipated reversals led to introspective debate at all levels of British society with concern expressed as to the degeneration of British youth within the emerging context of Social Darwinism. A representative article entitled, “Is England Decadent?” appeared in Saturday Review in 1900 (https://invasionscares.wordpress.com/). These debates eventually led to the tabling of the *Inter-Departmental Report on Physical Deterioration* in the House of Lords in July 1905, wherein negative findings were made as to the health of Regular Army applicants on enrollment. The *Report*, Sect. 1318 stated that “moat [sic] disturbing fact that from 40 to 60 per cent of the men who present themselves for enlistment are found to be physically unfit for military service.”

**An unanticipated success – the Boy Scout movement.** One of the unanticipated, (and still enduring) consequences of this debate was the emergence of the Boy Scout movement led by Boer War veteran Lieutenant-General (Retired) Robert Baden-Powell in 1907-1909, which emphasized the non-military practice of scouting in a healthy outdoor environment. Baden-Powell’s *Scouting for Boys* (1908) became one of the best-selling books in the English language in the 20th Century, being outsold only by the Bible until the end of World War II (Baden-Powell, 2004, Elleke Boehmer (Ed.), p. xi, fn1). Baden-Powell (2004 [1908], pp. 185-186) echoed these same worries as to “the deterioration of our race” in his preliminary “Hints to Instructors: How to Help in a Great National Work” in his introduction to Chapter VII,
“Endurance for Scouts.” Although the Boy Scout movement was not militaristic in the then maligned sense of the word, boys who enrolled “were exposed to a constant diet of patriotic nationalism and pro-war propaganda” (Paris, 2000, 108). Baden-Powell supported Field Marshall Lord F.S. Roberts and novelist William Le Queux’s worries of German invasion, even going so far as to predict a German invasion during the August 1908 Bank holiday (Stafford, 1988, p. 11). As with many cultural aspects of the Edwardian Era, the Boy Scout movement remains open to contrasting and even contradictory interpretations as its role is reassessed.

Spy fever

Non-German threats. The British concern with finding foreign agents was not limited to the German threat. It also addressed a non-specific fear of Asian influence, which was described without irony or without a sense of racial prejudice as the Yellow Peril, which was captured in a book entitled *The Yellow Peril: or Orient vs. Occident*, by G.G. Rupert (1911). Rudyard Kipling’s (1901) *Kim*,24 based on the espionage adventures of the orphan son of an Irish soldier of the Indian Army became one the most beloved novels of the Edwardian era. Kim, born Kimball O’Hara, grows up able to assume the guises of a Christian, Hindu, and Muslim as he travels across the roof of the India Himalayas as a surveyor, ready to thwart Russian, or any other foreign influence in protecting British interests in “the Great Game” (Kipling, 1901; Baden-Powell, 2004 [1908]; Andrew, 1986; Keegan, 2002).

The wave of anarchist assassination attempts of European royal family members during the 1890s fed a fear of societal upheaval. Thirty years of nationalist unrest in Ireland also influenced the perception of being under siege. Irish nationalism had led to the formation of the Special Branch, initially the Special Irish Branch, of the Metropolitan Police Force (Scotland Yard) (Stafford, 1988, p. 12), and the employment of agents, informers, and proactive agents-provocateurs. Parliament failed to pass a Home Rule bill in 1912, and Ireland was close to being in a state of civil war as events such as the Balkans War unfolded in continental Europe.

German threat. The level of public anxiety can be gauged through the brisk sales of one of the first modern spy novels, *Spies of the Kaiser: Plotting the Downfall of England*, by William Le Queux, which went into its third print run in 1909 alongside a contest in the *Weekly News*

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24 The novel *Kim* became the subject of films by MGM (1950), NBC (1960), and London Films (1964). It was also adapted to the animated Walt Disney film *The Jungle Book* in 1968.
which offered a £10 Sterling reward for information leading to the arrest of German spies (Hiley, 1985, p.844; Meacham, 2012, p. 286). The year 2013 marked the centenary of one of the most popular examples of the invasion scare genre - Saki’s (1913) *When William Came: A Story of London Under the Hohenzollerns*. Saki’s speculative fictional account is similar to Childers’ (1903) *The Riddle of the Sands*, which describes the potential German invasion, and LeQueux’s (1909) *Spies of the Kaiser*, which describes the potential subjugation of Britain.

Le Queux was in one respect simply following the well-worn path created by Chesney (1871), Maude (1900), and Childers (1903). Despite the early influence of military officers such as Chesney (1871) and Maude (1900), Le Queux dominates the invasion scare genre (James, 1954; Andrew, 1986; Knightley, 1986; Stafford, 1988; Clarke, 1992; Kirkwood, 2012; Meacham, 2012; Wolstenholme, 2013; Wood, 2014; http://us.wow.com/wiki/Invasion_literature, n.d.). However, his prodigious output, public following, a rich patron, and above all – his timing – ensured his influence on the development of British pre-war perception of the German threat of an amphibious invasion.

**William Le Queux - a man of many talents.** William Tufnell Le Queux (b. 2 July 1864 – d. 13 October 1927) was an Anglo-French journalist and prolific author of fiction and non-fiction in fields as varied as medieval history, Russian history, Arab novels, murder mysteries, science fiction, travelogues, and anticipatory texts on scientific progress. Le Queux’s massive oeuvre includes approximately 200 works which concerned the perceived German threat against the United Kingdom and the British Empire. His output was unmatched by any of his contemporaries. Le Queux published an average of five novels a year between 1890 and his death in 1927 (Moran & Johnson, 2010, p.12; Stafford, 1988, p. 21). Most of his novels were presented in serialized form in daily newspapers (Stafford, 1988, p. 15; Meacham, 2012), which ensured widespread readership and advertising.

**Public influence.** Le Queux is frequently described as the most influential author of invasion scare and spy fiction literature (James, 1954; Andrew, 1986; Knightley, 1986; Stafford, 1988; Clarke, 1992; Meacham, 2012; Wolstenholme, 2013; Wood, 2014) writing in English before World War I. Amongst his other achievements, Le Queux was a diplomat (Honorary Consul for San Marino); an accomplished linguist in English, French, Italian, and Spanish; a traveller (in Europe, the Balkans, and North Africa); foreign editor for the *Globe* and a war
correspondent for the *Daily Mail* (Knightley, 1986, p.13); a flying buff who officiated at the first British air meeting at Doncaster in 1909; and a wireless pioneer who broadcast music from his own station at Guildford long before radio was generally available. His autobiography, *Things I Know About Kings, Celebrities, and Crooks* (1923) alludes to subsidization by the British Government (Wolstenholme, 2013, para. 9). Le Queux’s best-known works are the anti-French and anti-Russian invasion fantasy *The Great War in England in 1897* (1894) and the anti-German invasion fantasy *The Invasion of 1910* (1906), the latter of which was a phenomenal bestseller, selling over a million copies (Reiss, 2005). Le Queux had spent several weeks touring southern England to plan his fictional invasion route for the book. His jingoistic patriotism appealed to Lord F.S. Roberts, former Commander-in-Chief of the Forces, and head of the drive to bring in peacetime conscription.

**Political influence.** Lord Roberts aided Le Queux’s critical reception through supplying military expertise in planning the fictional invasion routes (Stafford, 1988, p. 24) as it aided his campaign for universal conscription. Le Queux was also assisted by H.W. Wilson, the *Daily Mail*’s naval affairs specialist (Andrew, 1986, p. 39) as well as Colonel Cyril Field and Major Matson (Knightley, 1986, p.16). Le Queux’s widespread commercial success is attributed to his ability to capture the worries and the dreams of the masses (Stafford, 1988, p. 33), as opposed to the more limited sales of Childers (1903), whose sole novel appealed more to the upper classes. Le Queux’s commercial success is also attributable, in part, to having a wealthy, influential, and equally patriotic patron.

**Lord Northcliffe and fomenting public opinion.** Le Queux was both encouraged and funded by Lord Alfred Charles William Harmsworth, 1st Viscount Northcliffe, publisher of both *The Times* and the *Daily Mail*, and an early pioneer of tabloid journalism (Clarke, 1966; Stafford, 1988; Reiss, 2005). Lord Northcliffe had long sought to warn his countrymen and women of the threat posed by Germany through his newspapers, which had wide circulation over both “the classes and the masses,” and were to exert great influence over public opinion during the War. Northcliffe’s Germanophobe tendencies and cynicism were paramount in his editorial influence on Le Queux’s (1906) *Invasion of 1910*. On reading that the fictional German invasion route avoided cities and large towns, he directed Le Queux to re-route the invasion forces to come through the urban areas in which he found the mass of his *Daily Mail* readership (Stafford, 1988,
Northcliffe used his widespread publishing empire to ensure widespread Daily Mail readership by publishing the German invasion routes in The Times, the Daily Telegraph, the Morning Post, the Daily Chronicle, and the Daily Mail itself (Knightley, 1986, p. 16). Northcliffe’s virulent anti-German stance prior to the outbreak of the War led his competitor The Star, to state “Next to the Kaiser, Lord Northcliffe has done more than any living man to bring about the war” (Bingham, 2005, para. 11). The popular success of the novel led to the fusion of patriotism, profit, and paranoia. Lord Roberts, Colonel Edmunds (p. 18), and other influential members of British society became ardent, and publically vocal supporters of the German threat (Knightley, 1986, p. 9-13, 16).

I.F. Clarke – After the fact analysis. I.F. Clarke (b. 1918 - d. 2009) was one of the most prolific contributors to the speculative fiction genre – after the fact. Clarke’s post hoc oeuvre spanned approximately 35 years in both the science fiction and alternative history genres. Clarke’s analytical contribution to the pre-World War I speculative fiction genre includes studies of Chesney’s (1871) The Battle of Dorking written in 1965, 1997, and 1999. Clarke is best-known for his seminal book, Voices Prophesying War: 1763-1984 (1966), in which he summarized the English language genre over two centuries. Although Clarke’s contribution to the genre of imaginary war (1965; 1966; 1967; 1992; 1997a; 1997b; 1997c; 1998; 1999) was written post World War I, he helped to establish the continuing prominence of George Chesney, William Le Queux, and H.G. Wells in the invasion scare genre. Chesney and Le Queux focused on the German threat, whereas Wells looked to extraterrestrials in his best-selling War of the Worlds (1898), which has never gone out of print. No author, according to Clarke (1966), was as remarkably prescient as H.G. Wells, who foresaw atomic bombs as early as 1913.

H.G. Wells. H.G. (Herbert George) Wells’ work is of significance for two reasons. First of all, there are numerous plot similarities between Wells’s (1898) War of the Worlds and Chesney’s (1871) The Battle of Dorking (Batchelor, 1985, p.7; Kirkwood, 2012, p.3, fn15), which illustrates a degree of echo in the invasion scare genre. A seemingly invincible enemy launches a devastating surprise attack in both books, with the British armed forces helpless to stop its relentless advance. Both books include widespread destruction of the Home Counties of southern England. The Martian invasion force’s primary landing site is near Wells’ (1898) residence in Woking, a Surrey market town. Woking is located at the center of a geographical
triangle, the three points being: 1) Chesney’s 1870s workplace at the Royal Indian Civil Engineering College at Cooper’s Hill, Staines; 2) his choice of the field of battle, the crucial rail junction at Dorking; and 3) the Hog’s Back ridge between Guildford and Farnham, where the Duke of Cambridge oversaw military maneuvers in September 1871 (Kirkwood, 2012).

Second, *The War of the Worlds* (1898) transcends the typical invasion scare genre concerned with European Realpolitik, the readiness of contemporary British military technology to deal with the armed forces of other nations with its introduction of an alien adversary. This departure from the continental European enemies illustrates the impact of *Social Darwinism*, which applies Charles Darwin’s evolutionary concept of survival of the fittest to international politics. It allows Wells to question the prevailing notions of race, class and religious notions in British society, at a time when the British Empire was the world’s greatest power.

**Impact of the Invasion Scare Literature**

Approximately 400 books and uncounted short stories and newspaper articles were published in the 44 years between the birth of Germany and the outbreak of World War I (Reiss, 2005). Most of these titles were thinly veiled propaganda which sought to influence the public perception of the German threat.

**Counter-narratives.** Not all British observers were as convinced of the German threat. P.G. Wodehouse’s (1909) humorous short story, *The Swoop! or, How Clarence Saved England: A Tale of the Great Invasion*, tells of the simultaneous invasion of England by several armies – “England was not merely beneath the heel of the invader. It was beneath the heels of nine invaders. There was barely standing-room” (p. 11). Wodehouse’s (1909) satiric *The Swoop!* was influenced by James Blyth’s (1909) *The Swoop of the Vulture*, another German invasion scare novel. Blyth’s (1912) *The Perils of Pines Place* imagines German secret agents stirring up social unrest. The authors of these works were evenly divided between civilian and military occupations, which provided a synergistic effect between anxious civilians fearing invasion and military officers seeking further justification for military capability improvements and expansion.

The forty plus years of cultural malaise and political anxiety was contained within the spy novels’ tale of a battle for global hegemony, Germanophobia, militarism, national security,
physical degeneration, moral decadence and imperial decline. The novels reflect the convergence of popular culture as expressed by the public and the press, which coalesced around a repertoire of anxieties to influence Realpolitik. The invasion scare genre gave voice to these unproven, but ever conscious worries embodied in the tales of the ‘German Menace’ and other foreign intrigues seeking the destruction of the British Empire. The invasion scare genre amplified the fears of social conservatives who saw physical degeneration and the beginnings of socialist tendencies amongst the working poor (Stafford, 1988, pp. 45-46). As I.F. Clarke (1992) asserts, speculative fiction writers offer a window into the fears of the present, rather than predict the future. A problem arose when the interests of authors of spy fiction and the advocates of military rearmament and conscription joined forces.

The convergence between invasion scare fiction and advocacy. Stafford (1988, p.8) states that Field Marshal Lord F.S. Roberts (Head of the National Service League and Retired Commander-in-Chief of the Forces) told the House of Lords that there were 80,000 German reservists living in Britain waiting orders to mobilize. Clarke (1966; 1992) and Andrew (1986, pp. 38-39) observe that Lord Roberts used the invasion fiction genre to make his case for universal conscription to keep pace with French, German, and Russian military expansion. James (1954, p. 424); Andrew (1986, pp. 38-40), Knightley (1986, pp. 16-17), and Stafford (1988, p. 24) note that Lord Roberts read and contributed military expertise to the proofs of Le Queux’s (1906) The Invasion of 1910. Stafford (1988, p. 46) reports two speeches by British peers in the House of Lords that indicate acceptance of the prevailing worries of social degeneration and alien invasion. Lord Malmesbury warned the House in 1908 that “socialism, narcotic-like, has drugged the spirit of patriotism into forced slumber. Lord Curzon addressed the same audience in 1909, predicting that a successful German invasion would unchain forces of disorder throughout the land leading to a total subversion of the existing order. It appears that suspicions of foreign invasion and internal collapse were widely accepted across British society by 1908.

Impact of fear. Ultimately, the invasion scare literature genre was instrumental in creating - and sustaining - a four-decade long climate of fear in which American sociologist Robert K. Merton’s self-fulfilling prophecy or self-confirming beliefs (Wohlstetter, 1981, pp. 32-33) came to pass. Contemporary British scholar Harry Wood (2014) opines that the invasion
scare genre “is best understood not simply as objective assessments of Britain’s liability to invasion, but as a literary response to the change (social, economic, political, military...) in Britain’s circumstances from the late-Victorian period to the outbreak of war in 1914.” These speculative narratives articulated a diffuse sense of popular anxiety about the fragility of the status quo and its vulnerability to challenges emanating both at home and from abroad (Hughes & Wood, 2014, Abstract). Unfortunately, spy fever had the perverse effect of focusing British counter-espionage efforts in the wrong direction in its infancy.

**Threat vs. reality.** American intelligence scholars Moran & Johnson (2010, p.2) firmly assert that “early 20th century spy fiction was designed, above all else, to alert both the government and the people of England to the vulnerabilities of the British Empire.” The speculative fiction was supported by presumed factual observations such as those made by American specialist in German history Ernest F. Henderson (1914), which assessed German military capabilities against those of the Allies. Hiley (2006; 2010) delivers a scathing riposte (Meacham, 2012, p. 287) against the elected politicians “who failed to halt the spread of hysteria, misinformation, and public anxiety, in large part generated by their civil servants,” i.e. intelligence officers in War Office sections MO5g and MO6 who were influenced by popular fiction and propaganda. Boghardt (2004, p. 80) concludes after meticulous research in the German archives, that the very limited German espionage effort was targeted to obtain insight into British naval technology, and not on invasion planning.

**Origins of MI5 and MI6.** Whether grounded in factual observation of German actions, heightened emotions regarding German intent, or some combination of the two, these widespread fears precipitated the need for a formal intelligence agency to address both internal counter-espionage concerns and the need to gather foreign intelligence. It is sometimes forgotten that despite the frequent (fictional) reporting of Childers, Le Queux and their many imitators of British espionage successes, the United Kingdom did not actually possess an internal security nor a foreign intelligence service until 1909 (Andrew, 1986, Knightley, 1986; Stafford, 1988). The revisionist historians make a strong case that MO5g/later MI5 evolved from a small office tracking less than two dozen presumed German spies in 1909 into a vast network of counter-intelligence agents which conducted surveillance and collected evidence against anyone remotely opposed to government policy, “costing hundreds of thousands of pounds a year” leading to the
harassment of pacifists, trade unionists, homosexuals, and left-leaning groups by MI5 under the guise of counter-espionage (Meacham, 2012, p. 287). As the case studies in Chapter 4 and Appendix B (U.K.) of this study reveal, it can be confidently asserted that this surveillance and harassment of groups perceived to be less than fully loyal to the Crown continued for decades post World War I, truly an unanticipated consequence of the creation of MI5 and MI6.

Canada

Constitutional History and Participation in World War I

Canada’s constitutional history is tied to that of the United Kingdom and the common law system, with some influence from the French Napoleonic Civil Code in the Province of Quebec. Although the independent nation-state Canada was created on 1 July 1867 by the British North America Act, 1867, 30 Victiae, cap.3, as the Dominion of Canada, the nation was strongly influenced by its British heritage for over 100 years. Canada was assumed to have to respond the British Empire defence and security requirements during the colonial wars in Africa and in Europe.25

Canada’s participation in the World War I was assumed in the British declaration of war on 4 August 1914. The Canadian War Measures Act, 1914 (WMA), passed 22 August 1914 was based on the Defence of the Realm Act, 1914 of 8 August 1914; and many of the Canada’s wartime regulations were copied from the Defence of the Realm Regulations. Canada’s support of the British Empire in World War I was massive in the context of its total population. Canada raised 619,636 men for the overseas Canadian Expeditionary Force (C.E.F.) from a population of only eight million people (CWM, n.d., 06 – After the War: Legacy, para.1), of which 424,000 deployed to Flanders (CWM, n.d., 03- Military Structure, preamble; (CWM, n.d., 06 – After the War: Legacy).26 27 The human cost was high as 61,000 were killed and 172,000 were wounded (CWM, n.d., 06 – After the War: Legacy). These high numbers, relative to the total population

25 Of these 7368 Canadian troops who served in the Boer War, 89 were killed in action or died of wounds and 252 were wounded. Another 135 died of disease or in accidents (Martinson, 1992, p. 80). Canada also contributed to Imperial Defence through provision of sailors to the Royal Navy (Morton, 1985, pp. 125-126) until the formation of the Naval Service of Canada in May 1910, renamed the Royal Canadian Navy in January 1911.
26 http://www.warmuseum.ca/firstworldwar/history/after-the-war/legacy/the-cost-of-canadas-war/
27 It should not be surprising as 70 percent of the 30,000 man first Canadian contingent of the C.E.F. which fought in Flanders was British-born, and even at war’s end the native-born Canadians was only 51 percent (CWM, n.d., 05-People in Uniform, para. 1), retrieved from http://www.warmuseum.ca/firstworldwar/history/people/in-uniform/tommy-canuck-the-infantry-soldier/
size, indicate that most Canadians held strong allegiance to the Mother Country – the United Kingdom. The high human cost led to demands for recognition of Canada’s independence by the United Kingdom and by other leading powers.

Canada signed independently the *Treaty of Versailles, 1919* that formally ended the war, and assumed a non-committal role in the newly established League of Nations. London’s wartime agreement to re-evaluate the constitutional arrangements between Great Britain and its former colonies culminated in the *Statute of Westminster, 1931*, which recognized the Dominions of Australia and Canada’s independent control over their foreign policy.

**Primary Sources**

The primary source literature base is relatively sparse in comparison to those of the U.K. and the U.S.A. The *War Measures Act, 1914* (5 George V, Chap. 2) (WMA) was a statute of the Parliament of Canada that provided for the declaration of war, resisting invasion, or quelling an insurrection. The statute, Section 6 stated that,

> The Governor-in-Council shall have power to do and authorize such acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or advisable for the security, defence, peace, order and welfare of Canada. (WMA, 1914, Sect.6)

In effect, in the event of “war, invasion, or insurrection real or apprehended,” the Governor in Council (i.e. the Prime Minister and Cabinet) could rule through publishing regulations. The WMA empowered the Governor-in-Council to deploy military forces, impose censorship, arrest, and detain suspected subversives and aliens, ban subversive organization, expropriate property, and exert central government control over virtually all aspects of transportation and trade (WMA, 1914, Sect.6). The WMA dictated the types of emergency (i.e. executive) measures that could be taken to defend the state and the populace. The WMA is one of the most controversial pieces of legislation in Canadian history. It has been questioned for its suspension of civil liberties and personal freedoms, not only for Ukrainians and other Eastern Europeans during Canada’s first national internment operations from August 1914 to January 1920, but for its use in the internment of Japanese-Canadians during World War II, and for the

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28 *Long title - An Act to confer certain powers upon the Governor in Council and to amend the Immigration Act.*
mass arrests and arbitrary detention of suspected Front de Libération du Québec (FLQ) sympathizers during the October Crisis of 1970. Of note, emergency regulations under the War Measures Act, 1914 were replaced in November 1970 by similar regulations under the Public Order Temporary Measures Act, which lapsed on 30 April 1971.

One of the early legal challenges to the WMA was Re George Edwin Gray, [1918] 57 S.C.R. 150, which was decided 19 July 1918 in the Supreme Court of Canada. Mr. Gray had petitioned for a writ of habeas corpus as he had been held without trial for protesting the legality of the Military Service Act, 1917. Noting that the British House of Lords, in R v Halliday, ([1917] UKHL 1, [1917] AC 260) had held in 1917 that the Defence of the Realm Act, 1914 possessed similar wide powers with respect to the United Kingdom, Sir Charles Fitzpatrick, Chief Justice of the Supreme Court of Canada held that,

> It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and they must be understood to have employed words in their natural sense, and to have intended what they have said. There is no doubt, in my opinion, that the regulation in question was passed to provide for the security and welfare of Canada and it is therefore intra vires\(^29\) of the statute under which it purports to be made. (Re George Edwin Gray, [1918] 57 S.C.R. 150, pp. 158-159)

This 1918 Supreme Court judgement asserted the validity of the suspension of common law protections of individual Canadian citizens for the duration of the declared emergency. This ruling was to remain valid on subsequent enactments of the WMA. The Privy Council of Canada proclaimed the War Measures Act on 1 September 1939, with effect from 25 August

\(^{29}\) *Intra vires* means within the legal power of the court making the judgment.
1939, due to a state of “apprehended…war” and enacted the Defence of Canada Regulations (DCR) on 3 September 1939. Canada declared war on Nazi Germany on 10 September 1939.

The legal significance of these developments was that authority to rule through the promulgation of regulations was passed from the Parliament, i.e. the House of Commons and the Senate, to the Privy Council, which issued thousands of directives throughout the war, some of which are recounted in Appendix C, sers. 9, 11, 12, and 13 to illustrate their scope and coercive power. Of particular note is the confiscation of property, forced detention, and relocation of over 25,000 Japanese-Canadians to Prisoner of War camps east of the Rocky Mountains.

Other primary source documents related to the WMA included the 57-page *Defence of Canada Regulations*, which were a set of emergency measures implemented under the *War Measures Act, 1914* on 3 September 1939, a week before Canada’s entry into World War II. The extreme executive measures permitted by the *Defence of Canada Regulations* included the suspension of habeas corpus and the right to a speedy trial, internment based on suspicion, bans on political and religious groups, restrictions of free speech including the banning of certain publications, and the confiscation of property. “Restrictions on the Movements and Activities of Persons,” Section 21 of the *Regulations* allowed the Minister of Justice to detain without charge anyone who might act “in any manner prejudicial to the public safety or the safety of the state.” This regulation was used to intern German-, Italian-, and Japanese-Canadians. One of the salient points of the use of the WMA in World War I and World War II was the ability of the Governor-in-Council to issue executive measures by proclamation. The third use of the WMA in October 1970 was unique in that a debate actually occurred in the House of Commons.

**Secondary Sources**

The history of the *War Measures Act, 1914* (WMA) is explained by Byers (1996); Clément (2008); Lindsay (2014); Macgillivray (1974); Malroney (2000); Munroe (2009); Stevenson (2000; 2001); and Stewart (1947). Dreisziger (2013) and Marx (1970) discuss the legal implications of the three uses of the WMA in Canada: 1914-1920, 1939-1945, and October – November 1970. The secondary source literature base is relatively limited in comparison to

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the U.K. and U.S. literature. The literature is best discussed using the three uses of the WMA during World War I, World War II, and during the October Crisis of 1970.

**World War I.** The majority of the general political and social histories of the WMA in World War I concern the 24 internment camps established to detain suspicious aliens of Eastern European origin. This vein of inquiry, although relatively new, is quite rich. There are approximately five dozen books and articles concerning the internment camps, most of which describe the experience of 171,000 Ukrainian-Canadian immigrants, 80,000 of which had to register as aliens, and 5000 of whom were interned for years (Luciuk, 2006). A representative sample of the titles includes Avery (1979; 1995), Carter (1998), Kordan (2002), Luciuk (1980; 1994; 2001a; 2001b; 2006), and Luciuk & Kordan (1989). Kordan & Mahovsky (2004) describe attempts to achieve legal redress for Ukrainian-Canadian suffering in the internment camps. Melnycky (1994) typifies the experience of Ukrainian-Canadians interned in French-speaking Quebec during World War I as “Treated Badly in Every Way.” Luhovy (1994) describes the struggle of recent Eastern European immigrants to be recognized as full Canadian citizens in his documentary film, “Freedom Had a Price: Canada’s First National Internment Operations 1914–1920.” Of note is the fact that the modern nation of Ukraine did not exist in 1914 and many of the internees came from Ukrainian ethnic areas in Russia (Allied Power), modern Poland (then split between Russia and Austro-Hungarian Empire), and the Austro-Hungarian Empire (Central Powers enemy) Crownlands of Galicia and Bukovyna. Thus, it was citizenship, rather than nationality, that led to many of the 5000 internments.

There are relatively few peer-reviewed articles which use a non-historical studies approach. Farney & Kordan (2005) describe the indeterminate legal status of enemy aliens, whereas Peppin (1993) explains the negative impact of the WMA on civil liberties. Minenko

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32 Professor Lubomyr Luciuk’s *Without Just Cause* (2006) offers a superb overview of the nation-wide internment camp system. Profusely illustrated and well-documented, it is a good place to start reading on the human impact of the War Measures Act of 1914’s consequences. The book makes it clear that the internment included not only men of military age, but also older men, women, and children. Page 46 of the book illustrates the use of Army Form I.B./2 POW lists to track detainees. Page 48 depicts a Treasury Board memorandum 463341, dated 5 March 1954, which ordered the destruction of World War I records related to internment operations and damages suffered by the internees.

33 There were three internment camps in Quebec, located at Beauport Armoury, Spirit Lake, and (Canadian Army) Camp Valcartier.

34 *Freedom Had a Price* (1994) documents the internment of 5000 Ukrainian-Canadian immigrants, labelled enemy aliens by the Canadian government between 1914 and 1920. The documentary film interweaves eye-witness accounts, narration, historical overviews, and original photographs to describe life in the internment camps.
(1991) describes the absence of the common law principle of probable cause in “Without Just Cause: Canada’s First National Internment Operations.” Waiser (1995) and Luciuk (2006) describes the use of detainees in building the roads and structures of the beautiful Banff and Jasper National Parks, which is perhaps one of the pleasant unanticipated consequences for future generations of visitors of a negative experience for the detainees. The suffering of the Ukrainian-Canadian immigrants was recognized in the *Internment of Persons of Ukrainian Origin Recognition Act 2005*, c.52 which also offered financial restitution to their descendants.


Roy (2002) describes the delayed return of the Japanese-Canadians to the Pacific Coast from the Canadian interior and the efforts made to encourage their internal migration to other parts of Canada. On a happier note, Dowe (2007) describes the substantive and successful efforts made by Protestant Churches in helping Japanese-Canadians who moved from the fishing villages and farms of British Columbia to integrate in the urban centers of Ontario in the 1950s. Roy (2007) describes the final acceptance of Chinese and Japanese as full citizens of Canada by
the nation’s Centennial in 1967 - after many had immigrated in the early 1900s. The articles and books written following Prime Minister Brian Mulroney’s apology to the Japanese-Canadian community in 1988 on behalf of the Canadian government tend to illustrate the lack of evidence of a bona fide threat to Canada or the Allied war effort. The legacy of bitterness such measures have left among succeeding generations of Italian- and Japanese-Canadians is still present - although diminishing with time.

October Crisis 1970. The October Crisis literature is best considered from two perspectives: 1) those articles written close to the events in the 1970s when the principal actors were still living, and frequently actively engaged in politics; and 2) articles written in the past decade which reflect a more nuanced view of events as influenced by the socio-political and cultural changes of the past four decades.

The peer reviewed articles and books written in English in the immediate aftermath of the October Crisis stay close to the official view of pre-empting a counterinsurgency. Saywell (1971) provides a documentary narrative that relies on government documents and FLQ communiqués. Gellner\(^35\) (1974) examines the October Crisis from the perspective of questioning the utility of the military as an aid to civil power and considers the comparability of the roles of soldier and policeman. Loomis (1984) explores the same issues from the unique perspective of having been the Chief of Staff in Western Quebec during internal security operations Essay in the Province of Quebec, and Ginger in the National Capital Region (Ottawa, ON - Hull, QC).

Maloney (2000) notes that the October Crisis literature tends to focus on the political aspects of separatism and the legal ramifications of the WMA. His article (Maloney, 2000), entitled “A Mere Rustle of Leaves,” explores the intersection of the political aims of the executive in containing separatism and the Canadian Army’s preparations for Aid of the Civil Power operations in accordance with the National Defence Act. Maloney (2000) observes that the two most controversial contentions of Loomis’ (1984) Not Much Glory are, first, that Mobile

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\(^{35}\) John Gellner (b. 1907- d. 2001) was an author, journalist, and lawyer. He was also a retired Royal Canadian Air Force (RCAF) Wing Commander and World War II veteran. Gellner served as Editor-in-Chief of Canadian Defence Quarterly from 1971 to 1987. He was a Professor of Political Science at York University (1972-82), and a board member of the Canadian Institute of International Affairs, the Canadian Institute of Strategic Studies, and the International Institute of Strategic Studies (UK). He was made a member of the Order of Canada in 1983. He had significant influence on Canadian defence policy in the 1960s and 1970s (http://www.thecanadianencyclopedia.ca/en/article/john-gellner/).
Command (i.e., the name of the Canadian Army in the unified Canadian Armed Forces) was specifically structured by Lieutenant-General Jean Victor Allard in 1965-66 to fight a counter-revolutionary war in Quebec and; secondly, that a Canadian government grand strategy to counter separatist revolutionary warfare in Quebec existed during the tenure of the governments of both Prime Minister Lester B. Pearson and Prime Minister Pierre E. Trudeau. Maloney (2000) states that Loomis (1984) asserts that the same strategy was articulated from 1963 to 1970, and that “this strategy was said to include a coherently articulated military component.” Such an assertion places the planned executive measures beyond the realm of the *Criminal Code of Canada*, presumes partial or full enactment of the WMA, and places the Government of Canada Privy Council (i.e., Cabinet) in a position in which it could be accused of planning civil war. From the strategic and operational level perspective of Mobile Command, this could be seen as prudent contingency planning. A similar observation from Vallières (1977), is provided from an adversarial perspective.

Cohen-Almagor (2000) describes instances in which media coverage of terrorist events was problematic, evoked public criticism, and actually worsened relations with security authorities. His essay on the October Crisis of 1970 shows that some French-speaking media cooperated with the FLQ terrorists because they sympathized with the FLQ’s basic premise of creating a sovereign nation, and did not perceive them as terrorists. Cohen-Algamor (2000) asserts that the Crisis escalated to a state of national emergency leading to invoking the WMA due to dramatic provocation from some segments of the French language media. Clément (2008) describes human rights abuses under the WMA during the October Crisis, particularly the arbitrary detention of close to 500 Québécois based on association alone.

**The Québécois counter-narrative.** Most of the contrary opinions originate with sympathizers with the cause of Quebec independence. Some of the books and articles originate with former members of the FLQ movement, such as left-wing journalist and propagandist Pierre

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Some of the works in French tend to assume that the creation of an independent state of Quebec through violence is a valid political objective and a justified response to oppression. They also point to planning weakness in the internal security measures promulgated by the state, in that the FLQ was assumed to be a monolithic entity with well-established connections to international liberation movements. While such connections did exist, the FLQ was “as much a state of mind as an organization” (Ross, 1995, p. 294). Anyone could set off a bomb and claim

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\(^{37}\) Journalist Pierre Vallières (b. 22 February 1938 – d. 23 December 1998) was considered to be a key intellectual leader within the FLQ. He became a left-wing political activist at a young age and conducted a hunger strike at the United Nations Headquarters in New York to protest Quebec’s political subordination to Canada. While in New York, he was held in the Manhattan House of Detention for Men before being extradited to Canada, where he was arrested and convicted of manslaughter, but later acquitted in a second trial in 1970. During his four years’ imprisonment in New York, he wrote numerous books and articles, the most famous of which was *Nègres blancs d’Amérique* (1968), translated into English as *White Niggers of America*. The book compared the plight of French-Canadians in Quebec to that of African-Americans at the height of the civil rights movement. He initially called for armed struggle, but later recanted this view in 1971 after the murder of Pierre Laporte. Vallières renounced violence as a means to achieve Quebec independence, and on 4 October 1972, received a one-year suspended sentence in a plea bargain agreement on three charges of counselling kidnapping for political purposes - and resumed his career.\(^{38}\) Simard served 11 years of a life sentence for the murder of Pierre Laporte before being released on parole.\(^{39}\) Louis Fournier, journaliste et syndicaliste à la retraite, l’auteur a été reporté à la station de radio CKAC, où il fut le premier à lire *le Manifeste du FLQ* lors de la Crise d’octobre 1970. Il est aussi l’auteur de *FLQ. Histoire d’un mouvement clandestin* (éditions Québec-Amérique, 1982, réédité en 1998 chez Lancôt).\(^{40}\) The title refers to the security agency response to the question “why I am being arrested/detained?” The routine response, “We have orders” led to selecting the title. At the time of the film’s release, Director Michel Brault stated that he did not set out to make a film about the October Crisis per se, but rather “a film about humiliation.” *Les ordres* won numerous awards: Critics Award, Quebec Association of Film Critics (1974), Best Director (Michel Brault, tied with Costa-Gavras), Cannes Film Festival (1975), Direction – Feature (Michel Brault), Canadian Film Awards (1975), Original Screenplay – Feature (Michel Brault), Canadian Film Awards (1975), Film of the Year, Canadian Film Awards (1975), and Feature Film, Canadian Film Awards (1975). *Les ordres* was named one of the Top 10 Canadian films of all time in polls conducted by the Toronto International Film Festival in 1984, 1993 and 2004, and is considered one of the major works of Québec cinema. In 1996, it was one of 10 films honoured with postage stamps by Canada Post to commemorate 100 years of cinema in Canada. See [http://www.thecanadianencyclopedia.ca/en/article/les-ordresorders/](http://www.thecanadianencyclopedia.ca/en/article/les-ordresorders/)
to represent the FLQ, in a manner similar to that of the contemporary (c. 2015) Al-Qaeda and the Islamic State in Iraq and the Levant (ISIL).

Other former members of the FLQ influenced the popular perception of the October Crisis for decades after their release from prison. Paul Rose (b. 1943 - d. 2013), of the Chenier Cell, whose 5 October kidnapping of British Trade Commissioner James Cross led to the October Crisis, gave many interviews, in which he expressed no remorse and that he would take the same actions again. Rose ran for elected office with the left of center New Democratic Party (NDP). Fellow Chenier Cell member Jacques Lanctôt (b. 1943) continues to work as a journalist with the Quebec-based news service Canoe.ca.

How Differing Perspectives Emerge

Of particular note in the Canadian literature is the presence of numerous contrary perspectives which deviate from the official Government of Canada view. The World War I internment of 8700 recent immigrants, and the control of movement of another 80,000 was based on suspicion alone rather than probable cause. The enactment of these executive measures led to much bitterness amongst Canadian citizens of the Austro-Hungarian, German, Slavic, and Ukrainian ethnic groups. The Government of Canada resorted to the same executive measure in World War II, primarily with internment of the Japanese immigrant population living in British Columbia. This measure led to lawsuits well into the 1990s. The arbitrary detention of approximately 500 Québécois in 1970 led to politicization and further legitimization of the desire to create an independent country.

The passage of time has allowed for more nuanced scholarly reviews of the WMA’s executive measures. Rosenthal (1991) describes how few opposed the enactment of the WMA at the time, despite that few would defend it at the time of his writing. Maloney (1997, p. 150) observes that while Canada has a well-established means of supporting civil authorities in crisis, “deploying troops domestically is a politically provocative act” under any circumstances. Clément (2008) describes human rights abuses committed in accordance with the WMA.
Bouthillier & Cloutier (2010) have gathered speeches and writings of eminent Canadian thinkers, journalists, and political leaders in an anthology which explains how the Trudeau government deceived Canadians and denied justice in October 1970. Arguing that Prime Minister Trudeau violated the human rights of hundreds of individuals by imposing the WMA in response to the kidnappings of British Trade Consul James Cross and Labour Minister Pierre Laporte, this anthology reveals the motives behind the strained relationship between Quebec and Canada. This book includes material by well-known Canadian politicians and authors such as Margaret Atwood, Tommy Douglas, Don Jamieson, Eric Kierans, Peter C. Newman, Brian Moore, and Desmond Morton.

While the vast majority of authors writing on the October Crisis of 1970 are Canadian, there are several other pieces by non-Canadians which enrich the canon. Briton Paul Wilkinson (1977) and American Jan Schreiber (1978) address the actions of the FLQ within the context of the urban guerilla movement which was in vogue during the tumultuous 1960s and 1970s. American Todd DeGhetto (1994) describes how a government actor can use systems theory to hasten the decline of a terrorist group in his three-part case study examining the FLQ, Red Brigades and Abu Nidal Organization at the Naval Postgraduate School (NPS). A second NPS thesis comparing the FLQ to the IRA was completed in 2007 by Timothy Thurston. Thurston (2007) argues that civilian law enforcement is more effective than military law enforcement against domestic terrorism.

41 Guy Bouthillier holds a law degree from McGill University and a PhD from the Sorbonne (Paris). He is honorary Professor of Political Science at the Université de Montréal where he taught for thirty years. Édouard Cloutier holds a PhD from Rochester University, New York. He taught Political Science at the Université du Québec à Montréal, McGill University, and the Université de Montréal where he chaired the Political Science Department for many years. Cloutier also chaired the Société Québécoise de science politique and co-directed the Canadian Political Science Review.

42 Abu Nidal Organization (ANO), a.k.a. Fatah Revolutionary Council, the Arab Revolutionary Brigades, or the Revolutionary Organization of Socialist Muslims is a terrorist organization widely known for deadly attacks in the 1980s on Western, Palestinian, and Israeli targets. The ANO was attempting to derail diplomatic relations between the Palestinian Liberation Organization (PLO) and the Western Democracies, while advocating for the destruction of Israel. The organization was named for a former member of the PLO who split off in a dispute over establishing diplomatic ties with Israel. Abu Nidal has been on the U.S. list of terrorist organizations for more than twenty years but is largely considered to be inactive, according to the 2008 State Department Country Reports on Terrorism (http://www.cfr.org/israel/abu-nidal-organization-ano-aka-fatah-revolutionary-council-arab-revolutionary-brigades-revolutionary-organization-socialist-muslims/p9153).
Quebec Cabinet minister and eyewitness to events William Tetley\textsuperscript{43} (2006) uses declassified documents and passages from his 1970 diary to describe details of the government’s decision-making process. As Tetley (2006) states in his foreword, the book contains numerous citations and quotes from source material to the point where October Crisis researchers might find the bibliography the most useful part of the book, as it makes up approximately 20 per cent of the 310 page book. Tetley (2006, p. xv), a law professor, recognizes his responsibility to remain objective, stating, “This is neither novel nor narrative. I have tried to keep to the facts, while my opinion usually appears at the end of each...chapter.” Tetley (2006) points out facts that most historical interpretations do not mention: e.g. all but sixty of the approximately 500 people arrested were soon released, not a window was broken, and the FLQ soon disappeared as a violent extremist organization.

\textbf{United States of America}

\textbf{Primary Sources}

The primary source review which follows is anchored by the Patriot Act of 2001 as the main point of reference, but is not limited to the years since its relatively recent enactment. The constitutional foundations of American law and earlier internal security laws which influenced the development of the Patriot Act and the American approach to internal security will be described where appropriate, as well as subsequent laws.

\textbf{The USA PATRIOT Act of 2001}

The \textit{USA PATRIOT Act of 2001} (Public Law 107-56, 115 Stat. 272 (2001)) was signed into law by President George W. Bush on 26 October 2001. Its short title is the \textit{Uniting and Strengthening America through the Provision of Appropriate Tools Required to Interdict and Obstruct Terrorism Act of 2001}.\textsuperscript{44} The Act may be referred to by its ten-letter backronym USA PATRIOT, but it is most commonly called the Patriot Act. The Patriot Act is the US Government’s primary legislative response to the terrorist attacks of 11 September 2001. It is comprised of 10 titles which enhance or reinforce the powers held by the Central Intelligence

\begin{footnotesize}
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\item \textsuperscript{43}William Tetley (b. 1927 – d. 2014), was a Professor of International Law at McGill University. He served as a minister in Premier Robert Bourassa’s cabinet when the October Crisis occurred.
\item \textsuperscript{44}The \textit{USA PATRIOT Act}’s long title is \textit{An Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.}
\end{itemize}
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Agency (CIA), the Federal Bureau of Investigation (FBI), and other federal Law Enforcement Agencies to identify and to disrupt terrorist networks operating inside the United States and abroad. The ten titles comprising the *Patriot Act* are:

- **Title I** – Enhancing Domestic Security Against Terrorism;
- **Title II** – Enhanced Surveillance Procedures;
- **Title III** – Anti-Money Laundering to Prevent Terrorism;
- **Title IV** – Protecting the Border;
- **Title V** – Removing Obstacles to Investigating Terrorism;
- **Title VI** – Victims and Families of Victims of Terrorism;
- **Title VII** – Increased Information Sharing for Critical Infrastructure Protection
- **Title VIII** – Terrorism Criminal Law;
- **Title IX** – Improved Intelligence; and,
- **Title X** – Miscellaneous.

**Title I - Enhancing domestic security against terrorism.** Title I authorizes general measures to enhance the capabilities of domestic security agencies in preventing terrorist attacks against the United States. Title I established a fund for counter-terrorist activities and increased funding for the Terrorist Screening Center administered by the FBI. The Department of Defense (DoD) is authorized to provide assistance to other federal agencies in situations which involve weapons of mass destruction (WMD) when so requested by the Attorney General (AG). The National Electronic Crime Task Force (NECTF) was expanded, along with the President’s authorities in terrorism cases. Title I also condemned the discrimination against Arab- and Muslim-Americans that happened soon after the 9/11 terrorist attacks. This condemnation is repeated in Title X.

**Title II - Enhanced surveillance procedures.** Title II grants wider surveillance powers to U.S. government Intelligence Community (IC) and security agencies responsible for the physical and electronic surveillance of foreign agents. Title II amends the *Foreign Intelligence Surveillance Act of 1978* and its related provisions in 18 U.S.C., “Crimes and Criminal
Procedure,” as well as the *Electronic Communications Privacy Act of 1986*. Title II extends the U.S. IC agencies’ powers in facilitating intercepting, sharing, and using private telecommunications. It also updates the regulations governing computer crime investigations. The main impact of Title II was to remove the so-called “wall” between foreign intelligence and domestic crime protection and to permit sharing of information between the FBI and the U.S. IC agencies.

Title II contains some of the most contentious provisions in the Patriot Act. Proponents of the act argue that these provisions are necessary in fighting the *Global War on Terrorism*, while its detractors believe that many of the Title II sections violate individual civil rights protected by the U.S. Constitution and the Bill of Rights. Title II has 25 sections, one of which (Section 224) contains a *sunset clause* which set an expiration date of 31 December 2005 for many of the Title’s provisions. This expiration date was extended twice; on 22 December 2005 the sunset clause was extended to 3 February 2006. The clause was extended again on 2 February to 10 March 2006. The clause also sets out procedures and limitations for individuals who feel their rights have been violated to seek redress, including against the United States government. However, it also includes a section that deals with trade sanctions against countries whose government supports terrorism, which is not directly related to surveillance issues.

Detailed discussion of the immediate and longer-term implications of Section 206 (Roving Wiretaps), Section 213 (Delayed Notice Warrant, also known as sneak-and-peak warrants), and Section 215 (Business Record Searches for “any tangible thing” and the accompanying non-disclosure or gag order) will occur in the Chapter 4.

**Title III - Anti-money laundering to prevent terrorism.** Title III of the Patriot Act, the *International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001*, is intended to facilitate the prevention, detection and prosecution of international money laundering and the terrorist financing. Title III amends portions of the *Money Laundering Control Act of 1986* (MLCA) and the *Bank Secrecy Act of 1970* (BSA). Title III contains three subtitles, with the first dealing with strengthening U.S. banking rules against money laundering with an emphasis on international transactions. The second sub-title seeks to improve information sharing between law enforcement agencies and financial institutions, as well as expanding the obligation to keep records and to report anomalies. This sub-title transferred the Financial Crime
Enforcement Network (FinCEN, established 1990) to the Department of the Treasury.\(^{45}\) (Statistics from FinCEN will be used to underpin arguments in later chapters). The third subtitle addresses currency crimes, such as smuggling and counterfeiting, including quadrupling the maximum penalty for counterfeiting foreign currency. The reporting and non-disclosure obligations on the part of financial institutions will be discussed in Chapter 4.

**Title IV - Protecting the border.** Title IV is seldom discussed by civil liberty organizations such as the ACLU, EFF, or EPIC to the same degree as the controversial Title II. However, Title IV is a significant, as it also removes administrative and legal barriers between U.S. federal agencies. Of note, it also provides detailed definitions of terrorism and who can be designated as a terrorist. Title IV amended the *Immigration and Nationality Act of 1952* (INA) to give more law enforcement and investigative power to the AG and to the Immigration and Naturalization Service (INS). The AG was authorized to waive any cap on the number of full-time employees (FTEs) assigned to the INS on the northern border of the United States with Canada, and to exceed overtime payments to INS employees. Previous prohibitions on information sharing were amended as access was given to the Department of State and the INS to criminal background information contained in the FBI’s National Crime Information Center’s Interstate Identification Index (NCIC-III), Wanted Persons File and any other files maintained by the National Crime Information Center to determine whether visa applicants and applicants could be admitted to the U.S.\(^{46}\) Of note, the National Institute of Standards and Technology (NIST) was ordered to develop technological standards to verify the identity of all persons applying for a visa to enter the U.S.A..\(^{47}\)

The intent of Title IV was to standardize the technologies used in a cross-agency, cross-platform electronic system for conducting background checks, confirming identities and ensuring

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\(^{45}\) FinCEN was established by order of the Secretary of the Treasury (Treasury Order Numbered 105-08) on 25 April 1990. FinCEN’s mission was broadened to include regulatory responsibilities in May 1994. In October 1994 the Treasury Department’s precursor of FinCEN, the Office of Financial Enforcement was merged with FinCEN. On 26 September 2002, Treasury Order 180-01[3] made it an official bureau in the Department of the Treasury following passage of Title III of the USA PATRIOT Act on 26 October 2001.


\(^{47}\) *USA PATRIOT Act* (U.S. H.R. 3162, Pub. L. 107-56), Title IV, Sec. 403. Final regulations are specified in 22 C.F.R. 40.5.
that individuals had not received visas under different identities. The standards sought to produce tamper-resistant, machine-readable documents to reduce fraudulent entry to the U.S.A.

Definitions relating to terrorism were amended and expanded under subtitle C of Title IV. The INA was retroactively amended to forbid aliens who are assessed to represent a foreign organization or group which endorses acts of terrorism from entering the U.S.A. This restriction included entire families (Section 411). The definition of terrorist activity was amended to include actions involving the use of any dangerous device (not just explosives and firearms) (Section 411). To “engage in terrorist activity” is expanded to committing, inciting to commit or planning and preparing to undertake an act of terrorism. Included in this revised and expanded definition is the gathering of intelligence information on potential terrorist targets, the solicitation of funds on behalf of a designated terrorist organization, or the solicitation of others to undertake acts of terrorism. Those who provide knowing assistance to a person who is planning to perform such activities are defined as undertaking terrorist activities. Such assistance includes affording material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training to perform a terrorist act. Although the amendments to the terrorism related definitions are retroactive, it does not mean that they can be applied to members who joined an organization, but since left, before it was designated to be a terrorist organization under 8 U.S.C. § 1189 by the Secretary of State.

Title IV also contains provisions related to the executive order of detention, which is commonly used by many nations as a collective preventative measure. The Patriot Act added additional provisions to the INA enforcing mandatory detention laws, which apply to any alien engaged in terrorism, or who is engaged in an activity that endangers U.S. national security.49

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48 The INA criteria for making a decision to designate an organization as a terrorist organization was amended to include the definition of a terrorist act.
50 Title IV also applies to those persons who are inadmissible, or who must be deported because it is assessed that they are attempting to enter the U.S.A. to conduct illegal espionage; export goods, technology, or sensitive
Title V - Removing obstacles to investigating terrorism. Title V, which encompasses eight sub-titles related to the capture and prosecution of terrorists, facilitated information sharing between U.S. federal government departments and federal law enforcement agencies. Sections 501 and 502 of the Patriot Act deal with the use of rewards to gain information leading to the defeat of terrorist networks. Section 503 amended the DNA Analysis Backlog Elimination Act of 2000 to include terrorism\textsuperscript{51} or crimes of violence\textsuperscript{52} in the list of qualifying Federal offenses. Section 504 amended FISA to permit non-law enforcement officers federal officers who acquire information through electronic surveillance or physical searches to consult with federal law enforcement officers to coordinate efforts to investigate or protect against potential or actual attacks, sabotage or international terrorism, or clandestine intelligence activities by an intelligence service or network of a foreign power.

Section 505 of the Patriot Act has proven to be one of the more controversial provisions as it delegates the authority for very intrusive personal records search from the Director or Deputy Director of the FBI to the Special Agent in Charge (SAC) of any of the 56 FBI Field Offices. Counter-Intelligence provisions of FISA permitted U.S. IC members to demand telephone and ISP subscriber records through National Security Letters (NSL).\textsuperscript{53} These powers of search and seizure were extended to include FBI members. This executive measure was reinforced by a non-disclosure (or gag) order which prevented the agency providing records telling the subject of the search of the intrusion. Given that the FBI had been designated as the lead federal agency for counter-terrorism within the U.S. in December 2004,\textsuperscript{54} this extension made sense.

\textsuperscript{51} Terrorism as defined at 18 U.S. Code § 2332b – “Acts of terrorism transcending national boundaries,” retrieved from https://www.law.cornell.edu/uscode/text/18/2332b

\textsuperscript{52} Crimes of violence as defined at 18 U.S. Code § 16 – “Crime of violence defined,” retrieved from https://www.law.cornell.edu/uscode/text/18/16

\textsuperscript{53} NSLs are defined in 18 U.S. Code § 2709 - Counterintelligence access to telephone toll and transactional records, retrieved from https://www.law.cornell.edu/uscode/text/18/2709.

Title VI - Victims and families of victims of terrorism. Title VI amended the Victims of Crime Act of 1984 (VOCA) to change how the U.S. Victims of Crime Fund was managed and funded. Changes were made to VOCA to facilitate the provision of aid to families of public safety officers by expedited payments to officers or to the families of officers. Under the amendments, payments to the families must be made no later than 30 days after the officer is injured or killed in the line of duty.

Title VII - Increased information sharing for critical infrastructure protection. Title VII has one small but significant section. Title VII increased the ability of U.S. law enforcement agencies to counter terrorist activity that crosses jurisdictional (i.e. state) boundaries through amending the Omnibus Crime Control and Safe Streets Act of 1968 to include terrorism as a criminal activity.

Title VIII - Terrorism criminal law. Title VIII amends the definitions of terrorism, and redefines the rules which address its prosecution. Title VIII defined the term domestic terrorism to include use of WMD as well as assassination or kidnapping of state officials as a terrorist activity. The new definition also includes activities which are deemed “dangerous to human life that are a violation of the criminal laws of the United States or of any State,” and are intended to “intimidate or coerce a civilian population,” “influence the policy of a government by intimidation or coercion,” or are undertaken “to affect the conduct of a government by mass destruction, assassination, or kidnapping” while in the jurisdiction of the United States.\(^55\) Terrorism was also added in the re-definition of racketeering,\(^56\) which greatly expands the scope of executive measures and penalties which could be used in criminal prosecutions. Cyber-terrorism definitions are also redefined, including the term protected computer, damage, conviction, person, and loss.\(^57\)

Title IX - Improved intelligence. Title IX removes intelligence sharing barriers in a manner similar to Titles II, V, and VII. Title IX amends the National Security Act of 1947 to require DCI to establish requirements and priorities for foreign intelligence collected in

\(^55\) *USA PATRIOT Act* (U.S. H.R. 3162, Public Law 107-56), Title VIII, Sec. 802.
accordance with FISA, and to provide assistance to the AG to ensure that information derived from electronic surveillance or physical searches is disseminated for effective foreign intelligence purposes.\(^{58}\)

Title IX also addresses domestic crime intelligence needs within the foreign intelligence context. With the exception of information that might jeopardize an ongoing law enforcement investigation, it was made obligatory that the AG, (or the head of any other department or agency of the Federal Government with law enforcement responsibilities), disclose to the Director any foreign intelligence acquired by the U.S. Department of Justice. The AG and Director of Central Intelligence were directed to develop procedures for the AG to follow in informing DCI of any AG intent to investigate criminal activity of a foreign intelligence source, or of a potential foreign intelligence source based on the intelligence tip-off of a member of the U.S. IC. The AG was also directed to develop procedures on how to best administer such sensitive matters.\(^{59}\)

**Title X – Miscellaneous.** Title X created or amended numerous miscellaneous laws that did not fit any other section of the *USA PATRIOT Act*. The Inspector General of the Department of Justice was directed to appoint an official to monitor, review and report all allegations of civil rights abuses against the DoJ to Congress.\(^{60}\) Title X amended the definition of *electronic surveillance* to exclude the interception of communications done through or from a *protected computer* (defined in Title VIII), where the owner allows the interception, or is lawfully involved in an investigation.\(^{61}\) Many of these laws fit the category of executive measures as there was a degree of delegation of authority held at higher levels. Money laundering cases could now be brought in the district court where the money laundering was committed, or near where a money laundering transfer was initiated.\(^{62}\) Aliens who committed money laundering were also prohibited from entering the U.S.A.

**Summary.** The 131-page Patriot Act is often described as an *omnibus act*, as it amends, extends, or repeals 11 other Acts of Congress. The *USA PATRIOT Act* amended the: 1) *Electronic Communications Privacy Act of 1986* (ECPA); 2) *Computer Fraud and Abuse Act of 1986*.

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\(^{58}\) *USA PATRIOT Act* (U.S. H.R. 3162, Public Law 107-56), Title IX, Sec. 901. See also Cornell University Law School LII.

\(^{59}\) *USA PATRIOT Act* (U.S. H.R. 3162, Public Law 107-56), Title IX, Sec. 905.

\(^{60}\) *USA PATRIOT Act* (U.S. H.R. 3162, Public Law 107-56), Title X, Sec. 1001.

\(^{61}\) *USA PATRIOT Act* (U.S. H.R. 3162, Public Law 107-56), Title X, Sec. 1003.

\(^{62}\) *USA PATRIOT Act* (U.S. H.R. 3162, Public Law 107-56), Title X, Sec. 1004.

**Major updates.** On 26 May 2011, President Barack Obama signed the *PATRIOT Sunsets Extension Act of 2011*, a four-year extension of three key provisions in the USA PATRIOT Act: roving wiretaps, searches of business records (the “library records provision”), and conducting surveillance of “lone wolves,” i.e., individuals suspected of terrorist-related activities who are not members of terrorist groups. Such people may be *self-radicalized* through reading and watching jihadist Internet sites and interacting online or in person with similar convictions. (This potential gap in surveillance had been covered in Section 6001 of the IRTPA, which addressed “Individual Terrorists as Agents of Foreign Powers.” The amendment read, “Section 101(b) (1) of the *Foreign Intelligence Surveillance Act of 1978* (50 U.S.C. 1801(b) (1)) is amended by adding at the end the following new subparagraph: ‘‘(C) engages in international terrorism or activities in preparation therefore; or’’”.

**Secondary Sources**

The Patriot Act has generated a substantial body of literature, ranging from legal analysis of its provisions, peer-reviewed articles in history, political studies and strategic security; to advocacy from special interest groups, and opinion-editorial polemics for and against strengthening or extending the Act. Given the plethora of articles and studies available, which number in the millions,63 this section of the literature review provides a representative sample of the peer-reviewed articles.64 Given the broad scope of the literature, the review can serve only to identify the major themes rather than seek to conduct a comprehensive review. As discussed in

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63 A Bing search conducted 14 2030 ADT April 2015 revealed 3,480,000 results (http://www.bing.com/search?q=patriot+act&src=IE-SearchBox&FORM=IENTTR&conversationid=).
64 A Google Scholar search for peer reviewed articles conducted 15 0900 ADT April 2015 retrieved “approximately 69, 000 results” (http://scholar.google.ca/scholar?hl=en&q=USA+Patriot+Act&btnG=&as_sdt=1%2C5&as_sdtp=).
the introductory chapter, the principal themes of internal security law are executive measures which seek to control movement of people, information, and money. These themes can be further divided as follows: movement of people can describe detention, exclusion from entering the country, i.e. immigration controls; movement of information describes the restriction or sharing of information across boundaries; and movement of money describes the physical movement of currency, the virtual electronic transmission of financial information, and the regulations which govern each of these modes of commerce.

**The Panetta Anthology – A good starting point for Patriot Act research**

**Overview.** Toni Panetta’s (2004) anthology, entitled *The USA PATRIOT Act*, is very helpful in orienting the researcher to the broad scope of the literature in the three years following enactment of the Patriot Act. Panetta’s (2004) anthology is divided into the following major headings: 1) Background and context, 2) Issues Relating to Information-Sharing and expanded surveillance capabilities; 3) Issues relating to immigration policy, detention, and deportation; 4) Additional constitutional challenges to the Act; 5) Political responses; and 6) Issues relating to the *International Money Laundering Abatement and Antiterrorist Financing Act of 2001*. These last two sections make up approximately 60 percent of her selected articles, and thus give an impression of her weighting of issues, and perhaps the focus of effort in the peer-reviewed field. Much of the literature included in the anthology examines the negative consequences of the Patriot Act from an American civil liberties perspective, as opposed to an international human rights perspective.


Banks (2004) provides clear and concise context for the passage of the Bill through case law analysis. Banks (2004) explains the challenges to the Act on First (freedom of association and speech); Fourth (search and seizure); Fifth (right to due process and grand jury); Sixth (right to counsel); Eighth (prohibition against cruel and unusual punishment); and Fourteenth (due process, privacy, and equal protection) Amendment grounds. In a similar vein, Whitehead &
Aden (2002) interpret the Fourth, Fifth, and Sixth Amendment concerns with the Act, and how its provisions changed U.S. law.\textsuperscript{65} This article provides an excellent introduction to understanding the Constitutional challenges to the Act.

**Civil liberties.** Panetta’s (2004) slim section on the historical context of the debate contains one book and one article. Leone & Anrig’s (2003) collection of 13 essays examine the lack of political discussion in the U.S.A. regarding the protection of civil liberties when intrusive policies, such as the Patriot Act, are enacted under the guise of national security. The essays include historical instances of the tension between security and civil rights, the lack of checks on government authority in time of crisis, Guantanamo Bay detention policy, immigration policy and racial profiling post 9/11, decreased availability of information in contradiction of the *Freedom of Information Act*, and the decline in media scrutiny of government actions.

The one article, written by legal scholar Paul Rosenzweig\textsuperscript{66} (2004) is entitled “Civil Liberty and the Response to Terrorism.” Rosenzweig (2004) provides a good summation of the historic tension between civil liberties and security. His article is of particular value due to his discussion of two of the most controversial provisions of the Act – sections 213 (sneak and peek searches) and section 215 (expansion of records available under the *Foreign Intelligence Surveillance Act of 1978* (FISA).

**Surveillance.** The bulk of the articles related to information sharing Constitutional challenges focus on the Fourth Amendment’s protections against unreasonable searches and seizures. This flows from the Act’s Title II expansion of surveillance and intelligence gathering powers. Of note is the Act’s amendment of the *Foreign Intelligence Surveillance Act of 1978* (FISA), and the extension of electronic surveillance techniques to the Internet.

**Immigration.** Some of Panetta’s (2004) selected articles relating to immigration policy posit that the Act treats immigrants unfairly through barring entry to the USA on suspicion of

\textsuperscript{65} This article is particularly useful for legal researchers. It had been cited in 103 articles by 15 April 2015. [http://heinonline.org/HOL/Page?handle=hein.journals/aulr51&div=41&g_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/aulr51&div=41&g_sent=1&collection=journals)

\textsuperscript{66} Paul Rosenzweig had briefed the House Permanent Select Committee on Intelligence 9 April 2003 on means to find the appropriate balance between security and civil rights. See “We Can Fight Terrorism And Protect Civil Liberties, Analyst Tells Congress,” published by The Heritage Foundation at [http://www.heritage.org/research/reports/2003/04/we-can-fight-terrorism-and-protect-civil-liberties-analyst-tells-congress](http://www.heritage.org/research/reports/2003/04/we-can-fight-terrorism-and-protect-civil-liberties-analyst-tells-congress)
being a terrorist alone. Her articles also address the detention and deportation of non-citizens and the implications of the Act for refugees and asylum seekers. As Panetta (2004, pp. 163-164) admits, there are gaps in the literature (c. 2004) as the Patriot Act is just one legal aspect among many which affect human rights in the U.S.A. Her selected articles do not address the issues of executive authority and judicial review, both of which test the limits for legal government behavior, (i.e. employment of executive measures), and the protection of civil liberties. Panetta (2004) does not include a large selection of articles on immigration policy nor technical discussions of electronic surveillance. These will be the next subject areas investigated in this literature review.

Other Secondary Sources

Despite being the most recent of the three major acts studied, there is a plethora of historical, legal, and socio-cultural analyses that have been written concerning the USA PATRIOT Act of 2001. These analyses range from opinion-editorial polemics to peer-reviewed articles, general histories, anthologies, and single-issue books. Doyle (2002b) and Panetta (Ed., 2001) provide general background. Howell (2002) and Wong (2006b; 2006c) describe the drafting of the Act. The Patriot Act can also be situated within a historical context in the evolution of internal security law in the U.S.A. as well. Of note, Sutherland (1951, p. 383) describes the tension that can occur when the U.S. Congress overrules a Presidential veto, as happened with the passage of the Internal Security Act of 1950 (McCarran-Walter Act), Pub. L. 81-831, 64 Stat. 987 (1950). The following thematic paragraphs describe the depth and multidisciplinary richness of the secondary literature base.

Civil rights. Legal scholars Murray & Wunsch (2002, para.1) chronicle various suspensions of civil rights in times of crisis through case law, including Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944), and the Red Scare and McCarthy-era internal subversion cases, Schenck v. United States, 249 U.S. 47 (1919); and Dennis v. United States, 341 U.S. 494 (1951). Murray & Wunsch (2002) make a compelling argument through their description of the 18th Century Alien and Sedition Acts, the suspension of the writ of habeas corpus during the Civil War, the crucial role of Ex parte Milligan 71 U.S. (4 Wall.) 2 (1866) in reinforcing the role of civilian courts in wartime, World War I convictions for speech critical of the war, the First Red Scare 1917-1920, the attacks on immigrants culminating
in the Palmer Raids in 1919-1920, the World War II internment camps, the post-World War II Second Red Scare 1947-1957, and the spying on and harassment of lawful protestors like Dr. Martin Luther King during the civil rights marches and anti-Vietnam War protests of the 1960s and 1970s.

**Immigration and border control.** Biddle (2008, p. 12) describes the scope of the challenge facing INS authorities through her mention that 11 million people, fully one-third of immigrants in 2005, were in the U.S.A. illegally. The controversial immigration provisions of the Act are addressed by Biddle (2008); Dority, 2004; Jenks (2001); Panetta (Ed.), 2001; Jaeger & Burnett (2004); and Wong (2006a). The gradual criminalization of immigration since the Patriot Act is described by sociologists Furman, Akerman, Loya, & Jones (2014). Bosworth & Turnbull (2014) contribute a chapter examining the issues of migration detention in Australia, Canada, the U.K., and the U.S.A. post 9/11. Smith (2013) describes how immigrants are disproportionately targeted by counter-terrorism policies in a comparative study of the U.S.A. and the U.K., and how such policies ultimately hinder intelligence collection and can lead to radicalization through exclusion. ACLU (2004); Chaffin (2005); Dority (2004); Johnson (2004); Weich (2001) describe the related issue of using racial profiles to identify threats; which, according to these authors, has metamorphosed from African-Americans in criminal cases to include Arab and Muslim Americans in border security and immigration cases.


**Money laundering.** The secondary literature concerning money laundering is broad, rich, and deep as corruption has a long history in the U.S.A. and around the world. Much of the literature is related to organized crime. The following books and articles provide a good introduction to the subject as related to terrorism post 9/11 - as opposed to racketeering. Stessens (2000) and Wechsler (2001, July/August) describe the status of anti-money laundering regimes in the U.S.A. and worldwide just prior to 9/11. Shelley & Picarelli (2002) discuss the
implications of the convergence of international organized crime and terrorism in the immediacy of 9/11, noting that organized crime starts from an economic motive, whereas terrorism is rooted in politics.

**Hawala.** Gouvin (2003) discusses the Patriot Act’s provisions to combat money laundering. Wheatley (2005) describes how the ancient alternative remittance transfer system of hawala enables criminals and terrorists to thwart existing laws in secret money transfers throughout the Islamic world. McCulloch & Pickering (2005) take an adversarial stance, by positing that many of the laws passed in the aftermath of 9/11 reinforce a vision of U.S. neo-colonialism which is better empowered to crush alternative banking systems.67

For the purposes of this study of executive measures, McCulloch & Pickering (2005) also note the granting of wide discretionary police powers. Berti (2008, para. 20) describes the inherent flexibility of hawala in money laundering as draws from five funding sources for terrorist groups such as: (1) donations from charities, (2) individual contributions -whether coerced or spontaneous, (3) state sponsorship, (4) profits from legitimate businesses, and (5) profits from criminal enterprises. The hawala system has bolstered these fundraising efforts by providing a secure channel for transfers between legitimate companies and criminal enterprises. Berti (2008, paras. 31-38) describes a theoretical means of combatting the use of hawala for money laundering which encompasses operator registration, compliance with public investigative efforts, and sanctions and suspensions for illicit activity.

**Hawala in Western democracies.** Redin, Calderon, and Ferrero (2013) assert that the 1000-year old hawala system is unlikely to disappear and explore means to harmonize its use in a Western ethical context. The authors posit a change in the regulatory approach to hawala toward a more ethically, culturally, and economically sensitive strategy. They recommend that future AML research should focus on how “hyper-norms” or fundamental principles inherent to humanity, which are common to both “formal” and “informal,” “Western” and “non-Western”

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67 In the context of the time (c. 2005), alternative banking systems encompasses the use of Western Union wire transfers by migrant workers to send remittances from the Developed World to families living in the Developing World. It also includes the South-Asian paperless system of hawala (or hundi in India) remittance system, in which no tax is paid by the borrower to the lender for the state, is interest-free, and extensive emphasis is placed on the trust inherent in family and tribal connections. Unlike traditional banking or even the Chinese chop system, hawala makes minimal (often no) use of any sort of negotiable instrument. Transfers of money take place based on communications between members of a network of hawaladars, or hawala dealers (Jost & Sandhu, 2005, p.2).
financial practices, could govern an emerging AML/CTF regulation agenda. (The 34-member Organisation for Economic Co-operation and Development (OECD) Financial Action Task Force 2010 and FATF 2013 reports address these challenges from a multinational perspective).

Control of Money. The U.S. Department of the Treasury provides educational guidance to its staff and the public through websites such as http://www.fincen.gov/statutes_regs/patriot. These websites help to educate the reader through defining financial terminology related to the Act, e.g., such as the difference between a correspondent and concentration accounts.68

Summary of money laundering. The best summary of the anti-money laundering efforts of the U.S. government is found on the website of the Financial Crimes Enforcement Network (FinCEN), the administrator of the Bank Secrecy Act of 1970 (BSA). The FinCEN page, “History of Anti-Money Laundering Laws,” defines money laundering, and describes the three-stage process of placing dirty money in a service company, layering it with clean money, and re-integrating it in the financial system.

ACLU Internet Archives

One of the staunchest opponents of the Patriot Act since its enactment has been the American Civil Liberties Union (ACLU).69 The long history of the ACLU is well-documented and its Internet Archives are a valuable research tool. A 23 April 2015 search of the ACLU website/Internet Archive using the search terms “Patriot Act” found 2202 entries, which are categorized as assets, blog posts, cases, and news/press releases. A filtered meta-data search to identify subject groupings revealed that the 2202 entries are classified under the headings: National Security (1766), Privacy and Technology (149), Free Speech (121), Mass Incarceration (80), and Immigrants’ Rights (44) (https://www.aclu.org/search/patriot%20act). A subsequent

68 A correspondent account (often called a nostro or vostro account) is established by a banking institution to receive deposits from, make payments on behalf of, or handle other financial transactions for another financial institution. Correspondent accounts are established through bilateral agreements between two banks. A concentration account is a single account used within financial institutions to facilitate the processing and settlement of multiple or individual customer transactions within the institution, usually on the same day. Such accounts could be used to conceal transactions made by customers by financial institutions. The USA PATRIOT Act, Title III, Section 325 prohibits their use for such purposes.

69 The ACLU has affiliate offices in 50 States and is headquartered in New York, NY. Founded in 1920 following the Palmer Raids (ordered by Attorney-General Mitchell Palmer) to detain so-called radicals in November 1919 and January 1920 during the First Red Scare, the ACLU states that it has over 500,000 members. Approximately 100 ACLU staff attorneys collaborate with about 2,000 volunteer attorneys in handling close to 6,000 cases annually. See https://www.aclu.org/about-aclu.
search of the largest heading National Security revealed the following sub-headings: Privacy and Surveillance (341), Secrecy (83), Detention (33), and Discriminatory Profiling (28). Each of the sub-headings can be further filtered by content. The largest sub-heading, *Privacy and Surveillance* can be broken into Ideological Exclusion (28), NSA Surveillance (3), and Secrecy (76). Secrecy is further divided into Detention (2), Torture (2), Discriminatory Profiling (1), Privacy & Technology (20), Free Speech (5), Mass Incarceration (2), and Criminal Law Reform (2). Privacy & Technology was broken into 18 additional sub-headings: Consumer Privacy (8), Internet Privacy (7), Free Speech (1), Criminal Law Reform (1), and Mass Incarceration (1).

The fifth and last filter, *Consumer Privacy*, revealed eight blog posts which focused on concerns regarding NSA mass surveillance capabilities.70

A second meta-data search strategy by archive year was conducted 23 April 2015. This meta-data search sought to identify the relative weighting of ACLU concerns regarding the Patriot Act and possible shifts in emphasis over time. Using the broad terms “Patriot Act” again revealed the following annual break down of related entries: 2015 (37), 2014 (119), 2013 (176), 2012 (54), 2011 (115), 2010 (65), 2009 (137), 2008 (93), 2007 (102), 2006 (143), 2005 (285), 2004 (297), 2003 (433), 2002 (82), 2001 (40), and 2000 (4). A second search was conducted amongst the most prolific years in four-year intervals in five-year blocks (2000-2005; 2005-2010, and 2010-2015) seeking to identify recurrent themes and shifts in emphasis. The years selected were 2003 (433), 2007 (102), 2009 (137), and 2013 (176).

**ACLU Internet archive – 2003.** The ACLU Issue Areas in 2003 include National Security (408), Privacy & Technology (15), Free Speech (11), Immigrants’ Rights (3), Human Rights (2), Religious Liberty (1), and Mass Incarceration (1).71 The total of 441 exceeds the previous filter total of 433, leading the researcher to surmise that some Issue Areas were reported in more than one category. Using the same strategy of reducing the largest 2003 Issue Area of National Security into its smallest component issues through use ACLU archive filters the following sub-issues were identified as priorities: Torture (2), Privacy and Surveillance (1), Detention (1), Privacy & Technology (15), Human Rights (2), and Mass Incarceration (1).
search results review using the *Content Type* filter revealed that most articles were described as *assets* (309), which are texts of government legislation, critical comment from an advocacy perspective, legal documents (15), ACLU reports (4), or ACLU correspondence to the U.S. government (11), including letters to individual members of Congress. The ACLU news/press releases (99) for 2003 have somewhat less analytical comment and serve to provide media response lines or ACLU policy positions on the issues. The Content Filter does not provide full classification of the archive content but it does serve to indicate the ACLU weight of effort in 2003. The number of Issue Areas is sub-divided by month as follows: January 2003 (8), February 2003 (28), March 2003 (44), April 2003 (33), May 2003 (36), June 2003 (17), July 2003 (18), August 2003 (18), September 2003 (25), October 2003 (38), November 2003 (27), and December 2003 (17).\(^72\) In selecting the largest month, March 2003 (44), the following filtered sub-themes are revealed: Torture (1) and Privacy and Technology (3). An examination of the 44 Issue Areas reveals that the entries described the *USA PATRIOT Act 2001*, examined the case against the introduction of the draft *Domestic Security Enhancement Act* (PATRIOT II), and included 29 resolutions\(^73\) against the draft bill by local (city, town, county) ACLU affiliates across the U.S.A.

**ACLU Internet archive – 2007.** The ACLU Issue Areas in 2007 include: National Security (87), Mass Incarceration (7), Privacy & Technology (4), Immigrants’ Rights (3), Free Speech (2), Capital Punishment (2), Voting Rights (1), Racial Justice (1), and Women’s Rights (1).\(^74\) After applying the National Security filter the sub-themes revealed are: Privacy and Surveillance (13), Torture (2), Detention (2), Secrecy (1), Privacy & Technology (4), and Mass Incarceration (2).\(^75\) The next level filter for the largest sub-category, Privacy and Surveillance

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(13), displays Ideological Exclusion (3) and Privacy & Technology (1).\textsuperscript{76} The remaining 10 entries include four on SIGINT related topics including wiretapping, the links between NSA and AT&T, FISA, and the FIS Court.

**ACLU Internet archive – 2009.** The ACLU Issue Areas for 2009 include: National Security (64), Mass Incarceration (15), Free Speech (13), Privacy & Technology (7), Religious Liberty (5), Human Rights (3), Capital Punishment (2), Immigrants’ Rights (2), Voting Rights (1), Criminal Law Reform (1), and Prisoners’ Rights (1).\textsuperscript{77} Application of the National Security filter leads to Privacy and Surveillance (30), Detention (7), Secrecy (5), Torture (3), Discriminatory Profiling (2), Mass Incarceration (9), Free Speech (7), Privacy & Technology (7), and Human Rights (3).\textsuperscript{78} A further break down of Privacy and Surveillance reveals Ideological Exclusion (8), Secrecy (4), Free Speech (7), and Privacy & Technology (5).\textsuperscript{79}

**ACLU Internet archive – 2013.** The ACLU Issue Areas for 2013 are more focused than in 2007, 2009, and 2003. These Issue Areas include Privacy and Surveillance (103), Secrecy (42), Torture (4), Targeted Killing (3), Discriminatory Profiling (2), Detention (1), Privacy & Technology (30), Free Speech (7), Human Rights (3), Criminal Law Reform (3), Mass Incarceration (2), Racial Justice (1), Religious Liberty (1), Immigrants’ Rights (1), HIV/AIDS (1), Voting Rights (1), Prisoners’ Rights (1), Capital Punishment (1), Reproductive Freedom (1), Women’s Rights (1), and LGBT Rights (1).\textsuperscript{80} Applying the Privacy and Surveillance filter reveals Ideological Exclusion (1), Secrecy (42), Discriminatory Profiling (2), Torture (1), Detention (1), Privacy & Technology (26), Free Speech (5), Mass Incarceration (2), and


\textsuperscript{77} https://www.aclu.org/search/patriot%20act?f[0]=field_date%3A2009.


\textsuperscript{79} https://www.aclu.org/search/patriot%20act?f[0]=field_date%3A2013.

Criminal Law Reform (2). Application of the Privacy & Technology filter displayed Internet Privacy (12), and Consumer Privacy (10).

**Current ACLU efforts.** Romero (2015, 22 April) alludes to sunset clauses in his web log post “the sun must go down on the Patriot Act.” Romero (2015, 22 April) emphasizes that Section 215 on NSA use of call-records program should be permitted to expire 1 June 2015. Romero (2015, 22 April) uses the Fourth Amendment’s prohibitions on search and seizure to argue against the use of National Security Letters (NSL) and the broad, (rather than specifically targeted), nature of the surveillance and search and seizure powers permitted. Aside from the possible abrogation of civil liberties, Romero (2015, 22 April) states that the sweeping surveillance measures are ineffective. He notes that a review group appointed by President Obama and the Privacy and Civil Liberties Oversight Board concluded after analysis of classified files that there was no evidence that the NSA surveillance program played a key role in any investigation.

**ACLU Internet archive – cumulative analyses.** The discrepancies between the subject headings, sub-headings, sub-sub-headings and below are assumed to be due to difficulties in either maintaining all subject categories in the archive or in classification of issues by ACLU analysts and archivists. The value of the search is seen in the relative value that the ACLU assigns to each subject category and the shift in subject emphasis in their annual archives. The theoretical research approach used in analyzing the ACLU Internet Archive is closest to *grounded theory*, in that any hypotheses arise from the data collected. *Privacy and Surveillance* is the most consistent of the prominent themes that emerges from the Issue Area comparison over the 13.5-year review (TBC).

Emergence of this theme leads to assessing that further investigation regarding privacy and technology would be helpful in narrowing research gaps. Two of the better known research

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centers dealing with the impact of emerging technologies on privacy are the Electronic Frontier Foundation and the Electronic Privacy Information Center.

**Electronic Frontier Foundation**

The Electronic Frontier Foundation (EFF) claims to be the leading non-profit civil liberties organization in cyberspace. Founded in July 1990, the San Francisco-based EFF acts to champion user privacy, free expression, and innovation through impact litigation through amicus curiae briefs, policy analysis, grassroots activism, and technology development. The EFF’s stated purpose is to “ensure that rights and freedoms are enhanced and protected as our use of technology grows” (https://www.eff.org/about) through fighting what it describes as “illegal surveillance.” Although the EFF states that is international in scope, the staff and issue areas are primarily American. EFF does participate in international efforts to influence foreign governments which it assesses are acting in a manner which limits the free use of the Internet.

The EFF database facilitates metadata searches filtered by content type, related issues, legal case, and date. Using content type as a guide the following issue areas are revealed in order of priority: Document (8009), which contains copies of legal briefs (response and reply), complaints, judgments, motions (to dismiss, to file interlocutory appeal, to quash, to stay, for summary judgment, to file surreply), opinions, petitions, rulings in the courts; EFF in the News (5044), Deeplinks Blog (4844), Press Release (926), Event (825), EFFector (674), Page (406), Legal Case (270), Staff Profile (167), Whitepaper and (48).

**Electronic Privacy Information Center**

Formed in 1994, the Electronic Privacy Information Center (EPIC) is an independent non-profit public interest research center based in Washington, DC. The EPIC website states that the organization “works to protect privacy, freedom of expression, democratic values, and to promote the Public Voice coalition in decisions concerning the future of the Internet”

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83 *Amicus curiae* (Lat., literally, friend of the court). Amicus curiae briefs are delivered by a person, not a party to a case who offers information that bears on the case, but who has not been solicited by any of the parties to assist a court. This may take the form of legal opinion, testimony or learned treatise (the amicus brief). It is a method of ensuring that the possibly broad legal effects of a court decision will not depend solely on the parties directly involved in the case. The decision on whether to accept the information lies at the discretion of the court.

84 [https://www.eff.org/search/site/](https://www.eff.org/search/site/)

85 The Public Voice coalition works in cooperation with the Organization for Economic Co-operation and Development (OECD), UNESCO and other international non-governmental organizations.
EPIC pursues these goals with like-minded organizations through a wide range of program activities including public education, litigation, and advocacy. Similar to EFF, EPIC frequently files amicus curiae briefs in federal courts, including the Supreme Court, pursues open government cases, defends consumer privacy, organizes conferences for NGOs, and speaks before Congress and judicial organizations about emerging privacy and civil liberties issues.\footnote{EPIC is a 501(c) (3) non-profit group with no clients, no customers, or shareholders. EPIC works with an advisory board with expertise in law, technology and public policy. EPIC maintains two of the most popular privacy web sites in the world - epic.org and privacy.org (https://www.epic.org/epic/about.html).}

EPIC does not organize its data base in the same manner as the ACLU or the EFF. However, a search of its policy archive reveals annual reports and twice monthly reports (The EPIC Alert) on numerous civil rights issues with an emphasis on electronic privacy. Its policy archive headings are divided into two sections – Hot Topics and New Resources\footnote{Hot Topics and New Resources includes: Algorithmic Transparency, Big Data, Cloud Computing, Consumer Privacy Bill of Rights, Cybersecurity, Drones and UAVs, EU Data Protection Directive, Facebook, FBI Watchlist, Government Surveillance, Internet of Things, Location Privacy, National ID, NSTIC, Right to be Forgotten, Search Engine Privacy, Smart Grid, Social Media Monitoring, Student Privacy, and Voter ID Laws.} and Privacy by Topic: The A to Z’s of Privacy.\footnote{Privacy by Topic: The A-Z’s of Privacy is too extensive for a footnote. Access to this list and to the Hot Topics in the previous footnote (25) can be gained at https://www.epic.org/privacy/.} The archive, which does not use filtered headings and subheadings, is useful as it reveals a wide range of civil rights issues on which the EPIC focuses its legal education and ex parte efforts. Aside from issues related to electronic privacy, EPIC also brings attention to bear on the following issue areas: air travel, children’s, consumers’, citizens’, financial, identity, medical, protestors’, students’, veterans’, women’s, and workplace privacy; as well as new or emerging technologies,\footnote{e.g. backscatter X-ray machines, biometrics, body scanners, cloud computing, Registered Traveller passes, Customer Proprietary Network Information (CPNI), Deep Packet Inspection (DPI), digital cash, digital rights management, Domain Name System Security Extensions, drones and Unmanned Aerial Vehicles (UAV), genetic and disease privacy, Internet and iPhone privacy, Radio Frequency Identification (RFID), Verichip (RFID) under the skin, Closed Circuit Television (CCTV) and video surveillance, and digital and wiretapping surveillance.} the right to anonymity, related legislation, and prominent legal cases. Similar to EFF, EPIC also facilitates and participates in privacy and human rights seminars across the U.S.A. and around the world (https://www.epic.org/events/).

EPIC provides extensive information concerning the history of, and the current influence of the Patriot Act on related surveillance acts, such as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Foreign Intelligence Surveillance Act of 1978, the Electronic Communications Privacy Act of 1986, and the Communications Assistance for Law Enforcement
Act of 1994 (CALEA, also known as the Digital Telephony Act). EPIC also reviews the impact of some of the more controversial provisions of the Patriot Act, such as the impact on privacy of the FBI Carnivore device which monitors Internet traffic through ISP facilities, the use of pen registers, and trap and trace devices in accordance with Section 216 of the Patriot Act; the use of multi-point roving wiretaps in Section 206, and the “sneak and peek” searches authorized by Section 213 (https://www.epic.org/privacy/terrorism/usapatriot/).

**EFF and EPIC Impact**

Review of the electronic privacy aspects of civil rights and the impact of the Patriot Act on their enjoyment is well-covered in both advocacy group databases. It is evident that much of the concerns expressed deal with the widespread loss of the common law probable cause in obtaining private information. The websites, and thus public understanding of the issues, could be improved by more detailed explanations of the daunting challenges faced by public safety authorities in keeping up with rapid changes in electronic technology.

**Privacy as an Inherent Value**

Cockfield (2007, p. 43) quotes Westin (1967) who defines privacy as “the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, whether in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve.” Cockfield (2007, p. 43) notes that Westin (1967) and other researchers have seen privacy interests as being shaped by complex social, economic and political processes which give rise to privacy rights being recognized by law or social conventions.

Xhelili & Crowne (2012), writing in the *Journal of International Commercial Law and Technology* use a comparative case study approach describe the impact of counter-terrorism legislation in the United States, the United Kingdom, and Canada on privacy since the enactment of the USA PATRIOT Act of 2001. Their 15-page comparative study examines money laundering, terrorist and anti-terrorist finance, government investigative surveillance, and data mining. The authors use case law to illustrate how once enacted, courts have been reluctant to modify security laws. The authors conclude that security has trumped privacy, which has become a commodity to be traded in enhancing security. This study differs from Xheli &
Crowne (2012) as traces the evolution of current internal security legislation to World War I in seeking to isolate best practices, unintended consequences, and the long-term impact of presumed emergency legislation.

I’ve got nothing to hide argument. Daniel J. Solove, J.D., (2007) of George Washington University Law School examines the “I’ve got nothing to hide” argument often put forward by proponents of government surveillance and data mining. The presumed security value of such activities is facilitating a security agency’s ability to gain background data on societies, social groups, and individuals, establish patterns of life, and to then note deviations from the pattern. The presumed trade-off in minor personal embarrassment or inconvenience is assumed to be subsumed in the greater collective good of pre-empting a terrorist attack.

According to Solove (2007); Schneier, (2006); Stone, (2006), many people sincerely believe that there is no danger to their privacy unless the government uncovers unlawful activity, in which case they get what they deserve. As Bruce Schneier (2006, supra note 10) notes, the argument stems from the flawed “premise that privacy is about hiding a wrong.” Solove (2007, pp. 766-767) states that the key misunderstanding in this premise is that that the right to hide information assumes that individual harm is just one of the types of harm that can occur. In fact, the concept of privacy as a structural problem must also be examined to understand the scope of the issues arising from unrestricted surveillance.

Solove (2007) describes the argument of “I’ve got nothing to hide” as a narrow understanding of the concept of privacy which takes quantifiable individual physical, financial, emotional harm as its standard, whereas the individual making such a statement should consider that he or she is speaking for millions of their countrymen and women who may be endangered by free access to their personal information. Solove (2007, p. 751) summarizes their argument as “I don’t care what happens, so long as it doesn’t happen to me.” However, the unintended consequences of unrestricted data collection may include a massive shift in the existing power imbalance between the government and individual members of society in favor of the government; the use of third party data for secondary purposes other than the initial reason for gathering it; and the aggregation of small amounts of data leading to greater losses of privacy, and possibly persecution of targeted social groups. Solove (2007) argues persuasively that society should move from an individual, intimate concept of privacy which seeks to shield
individuals from harm or embarrassment to a pluralistic understanding which prevents the aggregation of data which might be to the detriment of social groups. This concept is already accepted in some respects, in that law enforcement and census data is not aggregated by race to avoid building racial profiles. Another premise in support of this argument is that the principle of informed consent has been breached if meta-data is gathered which may be one day used to the disadvantage of a social group.

Solove (2007) describes the *chilling effect*, in which people who know they are being watched reduce or stop their participation in activities which underpin a healthy democracy, such as advocating for social change, better wages, or safety at work – which is an unintended consequence of the legislation which permits massive collection of meta-data. Given the widespread possible effects of privacy violations Solove (2007) prefers to describe privacy as a web-like, as opposed to a single unitary social value. Cockfield (2007) and Solove (2007) both support Post’s (1989) observation that protecting individual autonomy also leads a more cohesive society through promoting rules of individual behavior, decorum, and civility. In other words, privacy itself ultimately contributes to social control.

Ultimately, the privacy debate should not lead to a yes or no decision as to whether government security agencies should be allowed to continue to gather individual meta-data or targeted surveillance. Given that such intelligence contributes to collective safety, the debate should examine the types of oversight and accountability measures required to ensure that law abiding citizens and social groups are not unduly disadvantaged in the quest to prevent terrorist attacks. Such measures should not be seen as an operational impediment, but rather as a safeguard to protecting the long-term values of an open society once the threat has passed, or at least diminished to the point where the society itself is not threatened. The common law principle of probable cause underpinning *minimization measures* may force the executive branches to specify the content, retention, and dissemination controls of the information they gather and reinforce the time limited emergency nature of the executive powers.

**Immigration and Habeas Corpus**

Jenks (2001) summarizes the immigration-related provisions of the Patriot Act. Jenks (2001) recognizes the enhanced powers allocated to the CIA and the FBI for arrest, information sharing, investigation, surveillance, but notes that the Act fails to provide sufficient recognition
of the importance of immigration controls, which is the function of the Immigration and Naturalization Service (INS). Akram & Johnson (2001, p. 295) describe the targeting of Arabs and Muslims by INS authorities. Germain (2002, p.505) explains the concern that non-citizens could be detained indefinitely as suspected terrorists “by merely asserting a ‘reason to believe’ they would engage in terrorist acts or otherwise be a threat to national security….”

**Controversies related to suspension of habeas corpus**

The scope of internal security law is so broad that the literature review is reflective of controversial laws, as opposed to being all inclusive. The following laws illustrate one of the recurring controversies in internal security law in the United States of America; that of the transformation of the writ of habeas corpus from a common law right into a privilege based on behavior.

**The AUMF and the NDAA.** The sheer size of the U.S. government, the complicated nature of its financial approvals process, and the world-wide scope of the U.S. Department of Defense necessitates the packaging of many disparate Defense activities requiring financial authorization in huge omnibus Bills to gain approval within one fiscal year. Legislators may miss contentious provisions as they are buried within a mass of other proposed authorizations. The identification of such contentious elements often falls to advocacy groups which specialize in such reviews in the interests of transparency, such as the ACLU, the Bill of Rights Defense Committee, OpenCongress.org, People Against the National Defense Authorizations Act (PANDAA), and journalists specializing in human rights and U.S. Constitution issues. One such provision, which provides for the *indefinite detention* of U.S. citizens and foreign nationals is found in the *National Defense Authorizations Act for Fiscal Year 2012* (NDAA 2012), Division A-Department of Defense Authorizations, Title X-General Provisions, Section 1021. This small section, buried amongst 565 pages of text, became a flashpoint for the security vs. civil liberties debate for almost three years, and ultimately, a benchmark in the gradual erosion in the authority of the U.S. Constitution, and will be discussed in Chapter 4 in Theme 8.

**Literature Review Summary**

The literature review fills several functions simultaneously. First of all, it serves to narrow the scope of research as it identifies areas of study which are well-served. Second, it
facilitates the identification of recurrent themes which arise from the review in a manner similar to grounded theory. The use of widely-separated case studies facilitates the comparison of these recurrent themes in a manner which assists identification of recurring problems and solutions.

**U.K. literature.** The internal security aspects observed in the literature describing the enactment of DORA and in the accompanying DRRs included the need to identify aliens living in the U.K., to monitor their activities through surveillance of their correspondence and movements, and to detain individuals and groups under emergency regulations facilitated through legislation passed in crisis. While the majority of the Central Powers aliens subject to such regulations were of German or Austro-Hungarian origin, these same laws and regulations were used in internal security operations against Irish nationalists. The review of the World War I British cases leads to asking which aspects differed in the application of DORA and DRR between the external threat of Central Powers aliens and that of Irish nationalists – ostensibly an internal threat. Unique in the U.K. case was the influence of tertiary fictional literature in creating and sustaining a climate of suspicion and fear of aliens over almost five decades prior to World War I. The U.K. case also illustrates the persistence of the foundational terminology of the *Aliens Act, 1905* and *DORA, 1914* in British internal security law over the next century.

**Canadian literature.** As it was derived from DORA, the WMA was similar in purpose and scope in the World War I context as it directed the identification, surveillance, and internment of enemy aliens suspected of being an internal security threat. For the most part, the people interned between 1914 and 1920 were recent Eastern European immigrants to the Prairie Provinces of Manitoba, Saskatchewan, and Alberta. In World War II, those interned were primarily immigrants of Japanese origin in British Columbia. The large-scale internment of Japanese-Canadians leads to asking what factors influence the executive decision to detain groups classified solely by ethnic origin as opposed to probable cause. The implementation of the WMA during the Quebec Crisis of 1970 gives rise to questions concerning the limits to legitimacy in using internal security legislation to criminalize political dissent. The apologies and financial compensation paid to the descendants of the Ukrainian and Japanese detainees 70 and 50 years post-crisis internment give rise to asking whether internal security planning must anticipate possible injustices that compound the long-term societal cohesion of a nation. Much of the secondary literature in the Canadian case describes the foundational racism which,
according to many authors, appears to guide Canadian government law and executive measures taken against designated enemy aliens during World Wars I and II, and against presumed FLQ sympathizers during the October Crisis.

**U.S. literature.** The U.S. literature reflects the tension between proponents of stringent security measures and of civil liberties. Although the U.S. legislation is much newer, the legal and socio-political literature base is much richer than the Canadian literature base, and substantially broader and richer than the British literature base. This proto-finding is indicative of two factors: 1) the technological advances which led to electronic surveillance on a scale unimaginable during World War I, and not yet not possible during World War II and the Quebec Crisis of 1970; and the associated issues concerned with privacy, information sharing, and the electronic transfer of funds. As six of the eleven Acts amended by the Patriot Act concern financial issues, this is perhaps inevitable.

**Common themes**

**Between a rock and a hard place.** A literature review of the history of political violence indicates that the expected reaction of a political entity, (i.e., a state), to a threat to its survival is to limit routine peacetime freedoms until the crisis is past (Arendt, 1970; Isaacharoff & Pildes, 2003; Whitaker, 1999; 2003; 2008; Cole, 2004; Bonner, 2007; Gross & Ni Aolain, 2007; Waxman, 2009; Lalonde, 2012; Ni Aolain, 2000; 2012; McCormack, 2014). Cole (2004, pp. 2565-2566) states that, “As a result the conventional wisdom is that courts function poorly as guardians of liberty in times of crisis….The traditional view….holds that judicial review has largely failed to protect individual rights when their protection is most needed.” Uni-jurisdictional governance models have proven prone to failure due to their reliance on complicated problem solutions which deal with known variables and tested solutions.

However true this assertion might be, the axiom of first things first must be considered if the state is to survive to protect individual rights. State institutions must consider the need for immediate action to protect the physical attributes of governance, such as legislative assemblies, incumbent representatives, leaders in the government bureaucracy, and the communications means of issuing direction to their subordinate organizations. State authorities should also seek to prepare alternate means of governance in case the primary physical safety measures are breached. Once the continuity of governance is reasonably assured, the emphasis shifts to
identifying future threats to the long term surety of the governing body - and the safety of the populace.

The social climate in each of the three national cases is characterized by a generalized fear of an alien enemy across a broad spectrum of society, a reduced tolerance for risk, and an acceptance of emergency measures which affect the normal exercise of civil rights under common law. These civil rights include freedom of association, assembly, and speech; as well as freedom from arbitrary detention, and search and seizure of property or information without probable cause. The socio-political climate of crisis influenced the rapid passage of internal security bills with little debate in the Parliaments of the U.K. and Canada and within the U.S. Congress. The apparent lack of debate leads to a general research question with a psychological component – why was there so little debate in each case? Another aspect worth further exploration is the tendency for temporary internal security acts to gain permanent status through the extension of states of emergency and the institutionalization of security agencies monitoring threats in crisis conditions.

Common in all three cases studies are the legal, political, and social challenges of monitoring non-citizen aliens and recent immigrants in crisis conditions in societies which perceive them as a threat. Given the reported abuses of human rights and civil liberties in crisis in all three nations, it might be reasonable to ask whether a better means of assessing threats in internal security crisis exists, or could be developed within the common law system of governance.

**Complexity Theory and Anticipatory Governance**

Leon Fuerth (2009) observes that legacy systems across the U.S. government for the formation of policy are based on the expectation of linearity - which can distort understanding of cause and effect. Fuerth (2009, Section 5) contends that linear problem solving leads people to expect that “for every problem there is a unique solution; and that proportionate changes of circumstances will produce proportionate changes of outputs.” According to Fuerth (2009),

We believe that it is possible to disassemble (“unpack”) compound, conglomerate issues, without destroying their coherence. We divide government into “vertical” hierarchies which neatly align legal mandates, bureaucratic boundaries, and the selection and training
of personnel – all in the expectation that in the end, the result will be actions that are fully integrated and part of a properly functioning whole. (Fuerth, 2009, Section 5)

The application of the principles of anticipatory governance to complex problem solving through legal regulation is emerging in science and social policy. Two other prominent American leaders offer similar perspectives to refining this approach.

David M. Walker, former Comptroller General of the United States describes the need for collaborative governance due to the need for holistic financial planning due to the “daunting long-term fiscal outlook” (USG GAO, 2005, p.5). Walker’s GAO report (2005), which was led by Paul Posner (p. 3), forecasts that the governance structures and management processes that emerge will be shaped by forces such as increasing interdependency, scientific and technological changes, and security threats, and will depend on having sufficient foresight, a continuous reexamination and updating of priorities, ongoing oversight, and reliable and results-oriented national performance indicators (p.11). The GAO report’s (2005) conclusions (pp. 87-90) emphasize the need for a much broader engagement with stakeholders, broader range of sources in decision making, and a “clear and transparent process for engaging the broader public in the debate over the recommended changes” (p.90).

Keon Chi (2008, p.6), the former Director of The Council of State Governments, states that state governance can be transformed through four transformation strategies: anticipatory governance, results-focused governance, collaborative governance, and transparent governance. Chi’s (2008, p.6) report seeks to change short-term oriented decision-making practices into long-term policies with vision, foresight; and making decisions based on informed trends, evidence-based decisions, with a future co-designed by professionals and citizens. While Dr. Chi wrote his report from the perspective of inter-state relations within the U.S.A., the issues he examined bear close resemblance to some of the problems which influence internal security policy decisions: globalization, increased use of information technology, immigration, and “ambiguous government authorities with overlapping jurisdictions” (Chi, 2008, p. 8).

Fuerth contends that complexity theory provides a more realistic description of the interaction of the diverse interdependent elements in complex problems. He offers that it brings the sense that everything is indeed related to everything else to the study of human affairs – “however inconvenient that may be for established disciplines, or for organizations based on
bureaucratic insularity.” According to Fuerth (2009, Section 5), complexity theory aids understanding why the Law of Unintended Consequences stands intact over the ruins of policies based on single concepts and rigid plans.”

**Research questions** for Chapter 4 (Analysis):

**Primary research questions in the case study protocol**

1. *What* are the common pre-conditions in internal security crises?

2. *Why* do internal security laws tend to have unanticipated, and often unintended consequences?

3. *How* might internal security dilemmas be better analyzed to better assess risk and to avoid or mitigate such consequences?

**Supporting research questions**

4. What are the emotional, political, social, and temporal pre-conditions that guide risk assessment and the promulgation of internal security law?

5. How effective are internal security access control (i.e., to places, information, and to money) measures in ensuring security?

6. Are there unintended consequences or perverse effects related to effective internal security measures?

7. What are the divisions between temporary security measures in crisis and permanent changes in the balance between security and civil liberties? (i.e., when does an inalienable right become a privilege?)

8. What are the benchmarks in measuring societal change in security analysis?

9. What factors influence the duration of the response to an internal security crisis?

10. Given the long-term consequences of extraordinary measures, is the crisis management approach to internal security sufficient?

11. Laws might determine which methods of surveillance are legal, but technologies determine which are possible. Does law lead security legislation or does technology lead law?
12. Is the Developed World moving toward a post-democratic political structure dominated by the internal security agencies?
CHAPTER 3

METHODOLOGY

This study isolates the cultural, political, and social pre-conditions which lead to the central phenomenon of enacting internal security laws which may have unanticipated consequences, with a view to proposing a model for identifying such pre-conditions at an earlier stage in their evolution. Fulfilling this aim necessitates a broad-based review of human cognitive limits, the historical circumstances in the years prior to internal security crises, the events during the crises themselves, and the long-term political and social consequences.

This chapter describes: 1) the rationale for using a comparative case study method; 2) how data is gathered 3) how data is analyzed, 4) strengths and limitations of the methods used to evaluate the data; 5) strategies used to reduce bias throughout the process, and 6) the parameters of the case studies. The primary reasoning tool used in this comparative case study of internal security is analogy, comparing past decisions and social and political circumstances in three nations over 100-plus years. The three-stage (i.e. primary, secondary, tertiary source) data-gathering process is described in the literature review in Chapter 2. Key words will be used to isolate common terminology and to identify variations in understanding and practice across the security communities along the 100-year timescale. The intent in examining a long timescale is to track the evolution of internal security law through foundation documents, amendments, repeals, and the influence on subsequent national laws and in other countries sharing a common law legal heritage.

Rationale for the Methodology

The qualitative approach is most relevant to examining the complex emotive, social and political problem set posed by internal security, as a quantitative study could offer statistics on the numbers of people arrested, detained, or tried, or the numbers placed under surveillance, but not why these executive actions were necessary, or whether such actions were justified in hindsight. A quantitative study cannot adequately address the why and the how questions that are the central purpose of a qualitative study. The case study method is best-suited to comparing large sets of data from sources separated by geography and time. This study examines three countries linked by common law and the English language over 100-plus years.

The case study method is also highly relevant in examining a large-scale complex problem set as “better powered evidence, e.g. large studies or low-bias meta analyses” is best
used when the pre-study probability is already high so that a post-test probability could be considered quite definitive (Ioannidis, 2005, p. 0700). Large-scale evidence is also best used when it tests major concepts rather than narrow, specific questions. A negative finding in analyzing a narrow question can then refute a hypothesis and call an entire field of inquiry into doubt. This study examines the broad problem of managing the unintended consequences of internal security law and offers possible ways forward in better managing internal security crises.

Yin (2014, Abstract) notes that although traditionally regarded as a “soft” research method, the case study method is “hard” when the overall challenge of managing and evaluating the multiple sources of data is considered. If properly designed, the case study method is very adaptable, as it can be used to examine widely varied evidence and multiple levels of discourse in the same research design (Piantanida & Garman, 1999, p. 43). A researcher can strengthen the construct, internal, and external validity, reliability, and potentially – generalizability - of his or her case study through including qualitative and quantitative data, keeping evidence separate from interpretation for external review, and by presenting the evidence and findings in photographs, text, tables, charts, and graphs in the narrative or in appendices. This study uses appendices to isolate the data for external review and employs multiple levels of discourse.

**On case studies and this case study.** A case study protocol is a set of questions to be addressed which serve as a mental framework for the researcher to avoid drifting away from an analytical framework and seeking anecdotal evidence to reinforce existing predispositions, i.e. confirmatory bias leading to premature closure. The three central questions which guide this case study are: 1) what are the common pre-conditions in internal security crises?; 2) why do internal security laws tend to have unanticipated, and often unintended consequences?: and, 3) how might internal security dilemmas be better analyzed to better assess risk and to avoid or mitigate such consequences?

This qualitative study employs a longitudinal case study method to identify the pre-crisis conditions, isolate successes, failures, and best practices in internal security law by comparing internal security structures, legislation, policies, the execution of extraordinary measures and their social impact. Given the wide variety of sources, the differing availability of sources, and lengthy periods reviewed, this instrumental, longitudinal, multiple-case study combines numerous research strategies in its design. This case study design incorporates coding,
contextual analysis, cross-case analysis, embedded analysis, empirical data comparisons, and in-case analysis at various stages.

The steps in executing this research design include defining the boundaries of the cases (in the following sub-section), selecting the case study design, and developing and testing theoretical research questions. The specific method employed is the embedded multiple-case study, in which the boundary between the facts of the case and the political and social context can be blurred. Further precision is made possible by allowing the major themes to emerge from the data, in a manner akin to grounded theory through recurring key word discovery and pattern-matching in each case study. These steps will contribute to explanation-building (Eisenhardt, 1989; Yin, 2014). Further precision, which may lead to identifying patterns and recurring casual factors, is possible through assembling key events into a chronology which mimics quantitative time-series analysis.

**On analogies.** One of the primary reasoning skills is the comparison of similarities and differences, which is known as an analogy (Spellman in Fischoff & Chauvin (Eds.), 2011a, p. 136; Heuer, 1999; 2012). This reasoning skill underpins the historical method, as well as the physical and social sciences. Historians as well as intelligence analysts, security planners, and policy makers use analogies to compare past events to present problems with the general premise that what has worked in the past may work again in the present or the future.

Past problems are described as source analogs (Spellman in Fischoff & Chauvin (Eds.), 2011a, p. 136) in social science. *Pattern analysis* (Lonergan, 1957, p.235; Johnston, 2005, p. 62; Clark, 2010, pp. 60-64), based on past observations of phenomena is used to forecast the future behavior of similar phenomena under similar conditions. According to Spellman (2011, pp. 136-137), “The key is finding relevant similarities – typically similarities that matter to casual relationships, between the two situations.”

**Defining the problem set.** A prudent comparative analyst starts by specifying the key elements of the problem set. This comparative study incorporates these key elements in the evidence tables in appendices B, C, and D. These tables include: 1) the legal citation of the law being studied, 2) its purpose, 3) the degree of legislative debate and 4) support measured by votes prior to its passage into law, 5) the immediate consequences of its enactment, 6) its duration, and 7) the unanticipated and often unintended consequences of its enactment over its
duration. Cross-references to structurally similar laws at other times, and in the other two nations are also made within the evidence tables, which are explained further in Chapter 4.

**Using similarities effectively.** “The most productive uses of comparative analysis are to suggest hypotheses and to highlight differences, not to draw conclusions” (Heuer, 2012, p. 17). Distinctions must be drawn when making analogies between superficial and structural similarities, as reasoning by comparison is a convenient heuristic, one often chosen when neither data nor theory are available for other analytical strategies. However, unquestioned analogies are no substitute for multi-method analysis, which can shed new light on long-held perspectives which tend to survive simply due to not being challenged.

**Data Gathering**

Primary source documents are examined in their immediate historical context seeking to identify which precipitating events led to the amending or extending of internal security legislation. These sources include: 1) legislation; 2) debates and 3) votes in legislatures; 4) contemporary analysis by legal, military, political academic specialists; 5) military or police orders; 6) arrest warrants and detention records. As the majority of the primary source documents were found in the legal domain and that it was not possible to find an equal balance of all types of records (i.e. legislation, regulations, executive measures, and criminal records) across all three nations. Therefore, logical inferences were made based on the data available with comment as to perceived gaps in the evidence. The primary source study serves to identify recurring language, influencing factors, decisions, and outcomes with the intent of isolating factual information in the public domain. This level of review should facilitate a factual comparison of the internal security acts, executive decisions, and extraordinary measures leading to an understanding of what was the intent of the originators of these purposive social actions. Thus, the primary source review focuses on the pre-crisis and crisis management phase of internal security challenges.

Secondary sources include: 1) pre-crisis books, articles; contemporary post hoc analysis by journalists, 2) official histories of intelligence and security services, and 3) past, current or recent (last 10 years) analysis by academic specialists in the fields of history, law, politics, and psychology including revisionist views of the official histories, which draw from declassified documents. It is anticipated that analysis of the secondary sources will reveal background information regarding how certain threat/risk factors were weighted by individuals and
institutions – and continue to be weighted - in decisions to enact internal security laws, and extraordinary measures. Analysis of this weighting process should contribute to an enhanced understanding of why certain decisions were taken. As such, the secondary source review focuses on post hoc analysis of consequences – both anticipated and unanticipated.

Tertiary sources include: 1) opinion-editorial articles, 2) contemporary political cartoons, and 3) speculative fiction. The inclusion of the third category of speculative fiction is a departure from traditional academic practice in strategic security studies as it addresses the emotive component of political decisions. However, its inclusion facilitates a broader and more nuanced understanding of the social climate within which political decisions were taken. The tertiary source review adds to a deeper understanding as to why certain decisions occurred. The speculative fiction component of the review examines the pre-decisional phase, prior to the promulgation of acts, laws, regulations, and executive measures. The review of tertiary literature provides contemporary insight into how the measures were viewed during their implementation.

**Primary document review strategy.** Extensive review of government debates was used to gain an understanding of both the legislative process, and the thought processes of the members of the legislative assemblies of the Canada, the United Kingdom (U.K.), and the United States of America (U.S.A.). These debates are described in the Hansards in Canada and the U.K. and in the House of Representatives and Senate Debates in the U.S.A. Research was conducted primarily in English, with some research being conducted in French regarding the history of the Front de Libération du Québec (FLQ) and the October Crisis of 1970, as well as general Parliamentary debates in Canada. The results of the research is assembled in tables in appendices B (U.K.), C (Canada), and D (U.S.A.). These tables present evidence describing the laws using the legal citation method in use at the time of the bill’s passage into law, the length of the debates, degree of consultation amongst legislators prior to enactment, the stated purpose of the law, and the duration of the law. The tables also guides the analysis of the social and political consequences of the laws. Comparisons were made between time periods and between nations using key words searches to identify common features and to isolate differences between

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1 Mid to late 20th Century English language speculative fiction has concentrated on the science fiction genre, with a lesser concentration on spy fiction such as the James Bond series. Science fiction pioneer Robert Heinlein is believed to have first used the term speculative fiction in a 1947 editorial in The Saturday Evening Post (http://www.jessesword.com/sf/view/438). This concentration on science fiction reflects the popular interest in advances being made in space travel. The speculative fiction of the late 19th and early 20th Century was more concerned with the position of the United Kingdom relative to her European rivals for global hegemony.
the three nations. The primary source government document review strategy for each nation is described in detail in Appendices G (U.K.), H (Canada), and I (U.S.A.).

Saturation. Data collection ended when no new themes were identifiable in new data.

Data Analysis

Organization. The central organizing principle of the study was the structural similarity between the bicameral legislatures and common law legal system in the English speaking nations of Canada, the United Kingdom, and the United States of America. A synopsis of the common law system is found at Appendix F. The initial analysis through comparative analogies is guided by the seven headings described in the paragraph “defining the problem set.” The three appendices B, C, and D were used as both researcher field notes and as a means of organizing this very broad-based study. The three appendices facilitated the grouping of analogous situations, laws, and executive measures by key words, then by general themes, and finally by focused themes, which can be described as open and axial coding. The seminal works of invasion scare and spy fiction discussed in Chapters 2 and 4 are listed in Appendix A. These works were selected based on their influence on the political and social climate as reported in peer-reviewed journals, and perhaps as importantly on the reported influence on decision-makers in the United Kingdom in the decade prior to World War I.

Discussion. Given the reported influence of speculative fiction in pre-World War I Britain, discussion of the degree of influence is placed in the literature review in Chapter 2. The discussion in Chapter 4 begins by placing each law in its historical context; using secondary and tertiary sources to describe the successes and failures related to each Act, essentially, asking “how did we do?” in achieving the intent of each law. The unanticipated consequences of each law and executive measures are assessed in the immediate crisis and in the aftermath to examine the mid-term and long-term political and social consequences.

Anticipated results. The three levels of document review facilitate in-depth, comparative case studies which should yield richer, more holistic data concerning both the anticipated and unanticipated consequences of internal security legislation. In effect, the study seeks to isolate internal security laws that appear to work within the context of their long-term social consequences and the evolution of law. The findings are presented in Chapter 4 and in appendices through text descriptions and comparative tables and graphs. Generalizable conclusions which arise from the data across the three case studies are presented in Chapter 5.
Comparing similarities. Superficial similarities are usually time-limited observable variables such as the relative wealth of a nation or the size of its armed forces (Spellman, 2011; Blanchette & Dunbar, 2000). Structural similarities concern the underlying, and more long-term relationships that nations (in this example) may have in common (Spellman, 2011; Blanchette & Dunbar, 2000). Structural similarities, such shared legal systems, are considered more important when using analogies for deeper understanding of a phenomenon and for prediction (Spellman, 2011, p. 137). Superficial similarities are easier to recall under time pressure and may form the basis of similarity/analogy comparisons (Spellman, 2011, p. 137). Comparison of past and present events through analogies can assist in generating hypotheses and guiding the search for additional information to confirm or refute these hypotheses. Triangulation of data in the study is achieved through the use of multiple sources of data such as the primary source laws and executive measures, the legislative debates, and statistics regarding the people affected by these measures. Secondary sources such as contemporary journalism and post hoc peer-reviewed articles assist in gaining a deeper appreciation of the legal, political, and social context of the laws. The use of tertiary works of fiction in the British case study opens another perspective on the emotional, social, and political climate of the United Kingdom before and during World War I. Generalization of the findings is also facilitated through comparing the experiences of three nations over a 100-plus year timescale. The rationale for the selection of this approach is based on the nature of complex problems.

The variables, or perhaps more appropriately the factors, in complex social problems are not easily quantified as they are not always fully visible, nor are their behavioral properties always evident. Thus, an indirect approach must be used to isolate independent factors with an emotional component or premise (i.e., the why). The indirect approach used in this study is to seek the prevalence of confirmatory bias through what is described as tertiary literature in the study, in this case speculative fiction in pre-World War I Great Britain. Internal security legislation will be analyzed through longitudinal content analysis seeking common themes (i.e., dependent variables) arising in legislative amendments and in follow-on legislation. This chapter describes how analogies will be used in this effort, as well as how individual and institutional biases will be identified and mitigated.

Coding. Pattern analysis starts with gathering similar categories of information in a process known as coding. At its most basic, coding begins with keyword searches conducted
using a computer search engine on the Internet, or simply through counting the occurrences of words or phrases in a book or an article. The repetition of certain words or phrases permits the aggregation of such words into categories which can then be displayed by themes in comparative tables. Coding in this study began with the organization of the data into the evidence tables found in appendices B, C, and D, which then facilitated the initial identification of similar patterns. This basic process can be used in developing an index by subject matter or by names.

Social and physical science coding is somewhat more refined. Coding begins with open coding (Creswell, 1998, p. 57), in which the researcher forms initial categories of information about the phenomenon being studied by segmenting information. A category represents a unit of information composed of events, happenings, and instances. Then the researcher looks within each category to find several sub-categories, and looks for data to dimensionalize or to show the extreme limits of a phenomenon. This step is known as axial coding, (Creswell, 1998, p. 57), in which the researcher assembles the data in new ways after open coding. The researcher:

- Identifies a central phenomenon (or category) about the phenomenon;²
- Explores causal conditions that influence the phenomenon;³
- Specifies strategies (i.e. actions or interactions that result from the central phenomenon);⁴
- Identifies the context and intervening conditions that influence the strategies; and
- Delineates the consequences (i.e. outcomes) of the strategies.⁵

Once themes emerge through the coding process pattern-matching may start with proposing an initial pattern of expected findings which must be continually tested against new evidence. Rejection of a rival hypothesis strengthens the original claim. This diagnostic process is similar to that of Analysis of Competing Hypotheses (ACH) conceived by Richards J. Heuer, Jr. (1999, Ch. 8, pp. 95-110). Time Series Analysis, which may take the form of a simple chronology, provides descriptive context and may hint at casual relationships, i.e., causal

² Passage of internal security legislation which leads to unanticipated consequences with unintended long-term impact.
³ These causal conditions include: 1) Long-standing fear of the threat group, possibly as an economic or military rival; 2) proximate cause of crisis; 3) Sense of urgency due to threat of unknown size or duration; 4) lack of time to consider consequences of draft legislation in depth; 5) fear of failure leading to taking a worst case approach
⁴ 1) Rapid passage of internal security legislation; 2) omnibus legislation; 3) nation-wide security measures, i.e. surveillance, pre-emptive detention; 4) military preparedness through recruiting, training, ship-building
⁵ 1) Centralization of executive privilege to facilitate crisis action planning and executing executive measures; 2) extension of crisis; 3) leading to long-term entrenchment of internal security laws and institutions; and 4) societal adaptation to laws.
conditions must precede outcomes. As mentioned in the previous section on “Data Gathering,” data collection ends when no new themes emerge from the data over arbitrarily selected limits. In this study, these arbitrary limits were reached at 150 primary laws, 350 analogous laws, and approximately 100 works of speculative fiction.

**Strengths of the Case Study Method**

**Explanation building.** The case study’s method’s value is best demonstrated in the search for deep understanding of phenomena through seeking the motivation (why?) and the context (how?) in which specific interrelated phenomena occur. This search for meaning beyond superficial observable relationships builds *internal validity*\(^6\) in most studies. A comparison of similar and conflicting literature also builds internal validity, and improves *construct definition* in a hypothesis or theory.\(^7\) Contemporary and historical literature supporting and opposing internal security law was reviewed in this study. This literature review included peer-reviewed articles, newspaper and current events discussions, and advocacy articles before passage of the laws, as well as during the internal security crisis period, and years to decades afterwards.

**Theory building.** *Qualitative researchers* may develop *inductive* theories through direct observations, interviews, comparisons of superficial and structural similarities, and conjectures as to how and why (Yin, 2014) certain similarities or phenomena are interrelated. The qualitative research study design is crucial to assuring that the individual researcher or research team does not rush to early interpretation of evidence based on superficial similarities. The research design must force a disciplined approach that leads to *saturation* of the evidence, in which adding new evidence does not yield new insights. The social science research design which is most adaptable to comparing superficial and structural similarities across complex phenomena in different locations and times is the *case study* method (Yin, 2014). This study integrates individual cognitive and institutional psychological limitations with the pre-conditions of internal security crises, how such conditions influence internal security law, and how such laws often have unanticipated consequences due to the time-limited approach taken by the internal security policy makers and operational planners.

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\(^6\) The extent to which causal conclusions can be drawn from any study.

\(^7\) The degree to which a test measures what it claims to measure.
**Replication logic.** The study also employed a cross-case synthesis seeking *replication logic*\(^8\) as three nations sharing a common law heritage were reviewed in this study. The researcher sought to achieve *saturation*, i.e., to find new information or data until no new insights can be derived (Creswell, 1998, p. 56). Over 150 internal security laws and executive measures were compared in this study, and over additional 350 laws were assessed for suitability and appear in the supporting discussion. Approximately 100 works of speculative spy and invasion fiction were reviewed in assessing the influence of non-factual literature in contributing to the social and political climate. In any case, as the researcher must be careful to select only situations which are sufficiently similar to be relevant for the purposes of the study, many other laws were reviewed during the research phase but were not included in the evidence tables at Appendices B, C, and D. Again, the researcher had to guard against accepting superficial similarities or mistakenly dismissing them when they are relevant.

Although the multiple-case study method is more difficult to employ than a single holistic case study, triangulation of data from multiple sources is possible leading to improved construct validity, internal validity, and external validity. In a sense, the case studies are a series of experiments in which replication logic is sought by the researcher. It is anticipated that the multiple-case study design in this study will lead to enhanced reliability of the data, greater confidence in the findings, and thus better generalizability. As competing explanations for a phenomenon are possible this research design method helps to avoid the bias that may emerge in single focus case studies.

**Limitations of the Case Study Method**

**Pitfalls of using analogies.** Comparison of past source analogs with present problems can stimulate an analyst’s imagination to reveal the presence or the influence of factors which are not readily apparent in the current situation. This realization may then lead the analyst to conceive causal explanations that might not otherwise have occurred. In other words, the study of source analogs aids the imagination. The challenge is to rein in the imagination before the analyst comes to a premature conclusion regarding the present problem. Analogies should not

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\(^8\) Replication logic includes: 1) direct replication, i.e., there is the same or a similar event in each case; and 2) theoretical replication, i.e., each case’s ultimate disposition could be predicted beforehand but the each case may produce a varying or even contrasting result based on the preconceived propositions.
form the basis for conclusions unless thorough analysis of both situations confirms that they are comparable across almost all factors and conditions.

After specifying the central elements of the present problem, the analyst then seeks one or more historical precedents that may shed light on the present. This step must be approached with caution, as a historical precedent may be so vivid that it imposes itself upon the analyst’s thought process from the outset, conditioning them to perceive the present problem in terms of its similarity to past events. This anchoring effect, as described by Kahneman (2011) is the principal pitfall in reasoning by analogy, as it can lead to confirmatory (or confirmation) bias (Heuer, 1999; Johnston, 2005) in which corroborating, rather than contradictory evidence is sought. Strict adherence to research protocols must be maintained to avoid bias and premature conclusions or decisions.

On the paradox of expert knowledge. Experts perceive meaningful patterns in their knowledge domains better than non-experts (Johnston, 2005). The subject matter expertise developed over decades on armed forces, countries, cultures, geographic regions, industrial processes, languages, political organizations, religions, terrorist organizations, and weapons capabilities will continue to be the primary resource in social science, and in intelligence analysis in particular (Fischoff & Chauvin, 2011b). However, the more complex the task, the more specialized and exclusive is the knowledge required to perform a task and expertise does not necessarily transfer easily from one domain to another (Johnston, 2005).

Source anecdotes. Intelligence analysts are often good historians, and are able to recall a large number of historical precedents. The greater the number of potential source analogues an analyst has at his or her disposal, the greater the likelihood of selecting an appropriate one. Experts use these source analogs to create models to solve problems. The greater the depth of an analyst’s knowledge, the greater the chances are that the analyst will discern the differences as well as the similarities between two situations. However, one of the weaknesses in employing expert researchers is that their deep and readily available knowledge base of source analogs can lead them to particularize through deductive reasoning mixing evidence with early interpretation.

Heuristics. This weakness becomes particularly acute when incomplete information and time pressure lead to an expert’s reliance on heuristics (i.e., mental shortcuts) and a tendency to disregard data that falls outside their own individual mental framework (Orsulak, 2013; Heuer, 1999; 2008; Johnston, 2005). Inferences based on comparison with a single analogous historical
case are probably more prone to error than any other form of inference as only one data point is being compared. The misuse of historical analogies has led to frequent misinterpretations of foreign policy problems. May (1973) quoted in Heuer (2012, p. 17) notes,

When resorting to an analogy, they tend to seize upon the first that comes to mind. They do not research more widely. Nor do they pause to analyze the case, test its fitness, or even ask in what ways it might be misleading. (Heuer, 2012, p. 17)

**Premature closure.** One of the contributing factors to such expert overconfidence, and the rush to premature conclusions is the lack of task structure. Experts outperform novice analysts when tasks are well-structured and hold appropriate source analog cues for the experienced analyst. Problems in defining structure arise when the cues are ambiguous, as often happens in intelligence analysis. A second contributing factor is *hindsight bias*, which can lead an intelligence analyst or social scientist to exaggerate the depth and quality of their subject knowledge and methodological approach in defining the boundaries of the problem and analyzing it. The key to holistic analysis is being able to apply the hard-won subject matter knowledge to new problems through combining it to other forms of expertise, and assessing the validity of the result. This can best be resolved through structuring the task, reducing the ambiguity of the cues and clues, and defining the evaluative criteria.

According to Heuer (1999) this tendency toward *confirmation bias* often leads to *premature closure* in decision making. Kahneman (2011) describes the anchoring effect, in which people make adjustments to previously held assumptions rather than start problem solving from a fresh, unbiased perspective. *Structured analytic techniques* (Heuer, 1999; 2008; Heuer & Pherson, 2011) help to mitigate the effects of cognitive biases and to externalize the analyst’s thought processes for later review and possible refinement or replication. In effect, social scientists endeavor to achieve similar neutrality in their analysis through quantitative (empirical and statistical) and qualitative research methods. Expert researchers seeking deeper understanding of a phenomenon should concentrate on structural, as opposed to superficial similarities.

**Limitations of case study analysis.** If selecting the cases and their boundaries is the most critical step in case study research, then analyzing the case study data is the most

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9 Kimberly Orsulak (2013) describes the deeply rooted problem of confirmation bias and posits that Bernard Lonergan’s *insight methodology* can help to mitigate its negative effects on intelligence analysis.
challenging as the researcher may have false expectations that the data will speak for itself in a manner similar to grounded theory, or that simply counting the number of occurrences of a phenomenon will lead to being able to formulate a theory. Data collection and theory development in grounded theory may occur simultaneously and continually until the phenomena converge or diverge. Given that all the decision makers in the World War I and II cases are dead, it was necessary to rely on documents rather than conduct interviews. This same approach guided the contemporary sections of the study as the challenges of obtaining sufficient interview data from senior decision makers was assessed as being too difficult to achieve in a comparative fashion.

The phenomena in this broad-based study, i.e. fear of an internal security threat, legislation, executive measures, and unanticipated consequences, combine to pose a very fluid complex problem. This degree of complexity requires a more diagnostic approach which demands that structural and superficial similarities be clearly identified rather than simply reinforced by more evidence. This study uses a combination of open and axial coding to identify themes within and across the three nations.

Avoiding bias

A study of this breadth runs the risk of falling into the cognitive traps of confirmatory bias based on the researcher’s nationality, language, and life history leading to early acceptance of the accepted official histories and official views of past and contemporary internal security law. Social psychologists have long observed that people tend to attribute lofty values to support their own view of a conflict situation while failing to recognize similar attributes in an adversary’s position, and ascribing negative intent to a person’s nature, character, or persistent motives. This robust and common bias, which can apply to groups of people as well, is known as the fundamental attribution error (Kahneman & Renshon, 2007, section 2, para.2). Hayakawa (1990, pp. 99-102) describes how using low-level abstraction to categorize groups of people can lead to racial and ethnic prejudice. The portions of this study which address the influence of fear and propaganda are included to illustrate how this phenomenon influences behavior in developing internal security legislation and in its post hoc rationalization.

On researcher bias. The case study method has been long thought to be the weakest of social science methods due to the occurrence of researcher bias, as described in the section on analogies above. Researcher bias may be eliminated, reduced, or mitigated by compiling more
data over a longer timeframe (Ioannidis, 2005), varying the sources of evidence, direct observations (not possible for historical events), interviews (open-ended non-structured conversations with key participants near the time of the case events), interviews (structured survey questions), and researcher-participant observation. The researcher may also consult archival records (primary sources), documents (e.g. peer-reviewed journals, newspapers, reports), and examine physical artifacts. Researcher bias was mitigated in this study by the use of multiple data sources over a century. This approach led the researcher to revise his opinions of various historical figures and of the processes used to draft, pass, and promulgate internal security law.

**On archival bias.** The researcher sough to eliminate, reduce, or mitigate the shortcomings of archival record bias by being attentive to the social and political context of the time in which the case occurred, by noting existing prejudices and by accepting alternative explanations of phenomena. This was the underlying rationale for the inclusion of tertiary sources in this study. The researcher may select authors or media accounts from varied perspectives (e.g. official government versions and revisionist accounts of alleged victims of systemic abuse). As editorial choices by the archivist or an individual researcher can create systematic bias, the researcher should be prepared to submit his or her evidence and findings to an external review body. The researcher may also use longitudinal *cross-sectional analysis* of the same variables or factors to separate the case from its context of its time and place, thus lending to its potential generalizability.

**On using protocols to reduce bias.** The *case study protocol* seeks to first describe the historical, political, and social context in which the events described occurred. Second, the research questions seek to explain *why* and *how* (Yin 2014) decisions on internal security legislation and executive measures were taken. Rival explanations of these decisions were evaluated in a search for discrepant evidence and to dispel researcher bias. Alternative perspectives were evaluated for validity and reliability as described in the preceding paragraph. This dialectic and iterative approach necessitates relatively lengthy discussion. Third, the results of these internal security decisions are discussed in the immediate aftermath of a crisis, in the

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10 Researchers working in teams, such as intelligence analysts can benefit from the fusion of multi-disciplinary research approaches (Heuer, 2008). They must also be aware of the phenomenon of *groupthink* (Janis, 1982; 1972; Fischoff & Chauvin, 2011b) and avoid accepting leader generated analysis. The research team should also accept rival explanations, and adopt a skeptical approach to evaluating all evidence.
subsequent decades, and after several generations in the two earlier cases. The third major case study (U.S.A.) is discussed primarily in a near contemporary context, with reliance on changes in legislation, government and public debates, and secondary source discussions. The case study evidence and findings are presented in the text of a separate chapter (Ch. 4) supported by separate tables in appendices which allow the reader to independently judge the author’s selection of the variables and interpretation of the case study data.

**The Parameters of the Case Studies**

Given the plethora of security related laws, three landmark internal security acts which characterize historic and emerging problem areas in internal security law anchor this study and will be examined in depth. These three landmark acts provided the legal justification for internal security operations in Canada, the U.K., and the U.S.A. for much of the 20th Century and the early 21st Century. These omnibus acts are the *Defence of the Realm Act, 1914 4 & 5 Geo. V, c.12* (DORA) in the U.K.; the *War Measures Act, 1914* (Statutes of Canada 1914, c. 2) in Canada; and the *Uniting and Strengthening America by Providing Appropriate Tools to Interdict and Obstruct Terrorism* (USA PATRIOT) *Act 2001*, Public Law 107-56, 115 Stat. 272 (2001).

Each of these landmark internal security Acts was preceded by other enabling legislation, and each Act has affected subsequent bodies of law which govern freedom of association, thought, and speech; as well as surveillance, detention, financial transactions, and information sharing. Although the entries into force (EIF) of these acts are widely separated in time (i.e., 1914-2001), the enduring impact of their internal security provisions is illustrated by their amendments and subsequent incorporation into subsidiary Acts throughout the intervening years (c. 2015). The impact of other internal security acts will be incorporated into the analysis to illustrate linkages between the acts. The crisis phase of phase of each event is relatively easy to determine as World Wars I and II are time limited, although it could be argued that the 9/11 crisis phase is still ongoing due to continued operations against Islamist extremist organizations and that the Cold War has recurred.

Each case study includes a *content analysis* of primary and contemporary secondary sources, as well as secondary sources written well after the implementation of the foundational legislative Acts, in which the occurrence of unintended consequences/dependent variables will be isolated. Tertiary (i.e. fictional) sources will be examined for their value in understanding the social and political climate in which the legislation was enacted in the four decades prior to
World War I in the case of the U.K. and Canada. The three-phase review serves to integrate sources at the crisis, consequence, and pre-crisis phases.

**Previous Uses of this Research Strategy**

A similar research strategy was used by David Bonner (2007), whose book *Executive Measures, Terrorism and National Security*, examines the *Defense of the Realm Act, 1914*, the *Aliens Restriction Act, 1914*, and British counter-terrorism strategy in Northern Ireland over 90 years. Bonner (2007) examined internal security operations during both World Wars, in Ireland during the post-World War I era, and during the Troubles. Furthermore, he studied the application of executive measures in fighting terrorism in Malaya, Kenya, and Cyprus; and the evolving security climate in the U.K. after 9/11 and 7/7. Bonner (2007, p. 40) divided his study into two parts: historical and modern to demonstrate the link between past and current executive measures, which he describes as a “case of old wine in new bottles.” This study differs from Bonner’s factual legal approach through a wider use of secondary sources to gauge the relative success of executive measures, and the inclusion of tertiary sources in political reporting and fiction genres to illustrate the social conditions before and after the implementation of the internal security legislation.

Herbert Marx (1970), writing in the *McGill Law Journal*, also used a comparative case study structure to compare the resort to martial law in the Britain, the United States, and Canada in Section I of “The Emergency Power and Civil Liberties in Canada.” Marx (1970) addressed the development of emergency doctrine in Canada in Section II, and how long emergencies should be considered to last. He examined the impact of emergencies on civil liberties, focusing on freedom of speech, the press, and of association in Section III. Marx (1970) also investigated the impact of declarations of emergencies on property rights, and the suspension of habeas corpus, particularly among Japanese Canadians during World War II. This study (c. 2015) updates Marx’s (1970) pioneering work on the Japanese Canadian case, investigates the detention of enemy aliens during World War I, and compares the legislative impact across three nations over 100 years of legal evolution.

Besar Xhelili and Emir Crowne (2012), writing in the *Journal of International Commercial Law and Technology* use a comparative case study approach describe the impact of counter-terrorism legislation in the United States, the United Kingdom, and Canada on privacy since the enactment of the *USA PATRIOT Act of 2001*. Their brief 15-page comparative study
examines money laundering, terrorist/anti-terrorist finance, government investigative surveillance, and data mining. The authors use case law to illustrate how once enacted, courts have been reluctant to modify security laws. The authors conclude that security has trumped privacy, which has become a commodity to be traded in enhancing security. This study differs from Xheli & Crowne (2012) as it traces the evolution of current internal security legislation to World War I in seeking to isolate best practices, unintended consequences, and the long-term impact of presumed short-term emergency legislation.

David M. Smith (2013) examines the American government’s handling of the First Red Scare (1919-1920), the American response to 9/11, and the British response to 9/11 through a comparative case study approach. Smith (2013) found that immigration policy across the three cases were remarkably similar, and that the rights of non-citizens were curtailed to a much greater extent than were the rights of citizens. Smith (2013, p. 3) attributes these similarities to the ways in which notions of national identity influence problem definition and policy legitimation. This study differs from Smith’s in that it seeks to ascertain the unintended long-term consequences of internal security legislation across the three societies, and how all policy makers, (including those in immigration) must consider a different approach.

Assumptions

The triangulation strategy described in this chapter will reinforce the construct validity\textsuperscript{11} of the study, and thus protect its external validity.\textsuperscript{12} The study’s end-to-end or strategies-to-task approach will identify common themes in threat perception, legislative response, the scope of executive measures, and successes and failures in tactical execution. This study will be conducted in accordance with the following assumptions: the primary source historical data (i.e., legislation, regulations, executive measures, and criminal records) pertaining to each act is stable, although not equally balanced; the secondary source literature is relatively stable, particularly for the Defence of the Realm Act and War Measures Act; and the end point for data collection is November 2015. This end date was selected to facilitate a comparison of the social and political impact of the Canadian Anti-terrorism Act 2015 and the USA FREEDOM Act 2015, both of which became law in June 2015, with the three primary acts.

\textsuperscript{11} The validity of a study refers to whether or not meaningful and useful inferences from be drawn from the data. Construct validity refers to the use of strong definitions and proper measurement of factors.

\textsuperscript{12} External validity refers to the researcher drawing incorrect inferences from the data collected to other settings, places, people, or times.
**Anticipated Results**

This study could produce what Merton (1949, p. 39) describes as “middle range theory,” i.e., “theories that lie between the minor but necessary working hypotheses that evolve in abundance during day-to-day research and the all-inclusive systematic efforts to develop a unified theory that will explain all the observed uniformities of social behavior, social organization, and social change.” In other words, it is anticipated that this study will illustrate the long-term and proximate causes of internal security legislation and extraordinary measures; as well as reveal common trends in the evolution of internal security law which lead to extended declared emergencies. Further, given that the study examines three nations sharing a common linguistic heritage, and to a degree – legal heritage - it is anticipated that the results of the study will be generalizable to other English speaking nations using the common law legal system, and possibly to those using the Napoleonic or Civil Code.
CHAPTER 4

DATA ANALYSIS AND DISCUSSION

On Deducing Findings from Data

Well-elaborated hypotheses in the physical sciences often include the statement ceteris paribus (i.e., all things being equal) to describe the conditions under which the hypothesis is valid. The long-standing challenge in the social sciences is that all things are never equal, and it is not possible to compare directly the cultural, political and social circumstances of societies a century apart (Creswell, 2009). Inductive reasoning is always risky as the leap to grand conclusions from strands of evidence is intellectually dangerous (Taleb, 2010). Despite this caution, the observation of similar practices in three allied nations with similar legal systems in response to shared threats over a century should offer sufficient data from which trends can be deduced, grouped into major subject areas, and from which premises leading to theory may be developed. The data gathered in this extended comparative case-study of internal security law indicates that certain patterns in cultural, political and social stimuli and legal responses tend to recur, which leads to identifying patterns, and best (and worst) practices in internal security law.¹

This chapter isolates the recurring factors which contribute to formulating internal security law, with a view to identifying the best and worst practices in developing internal security policies and in promulgating executive measures. The chapter also introduces a model, which with elaboration, could enhance internal security decision-making in crises by placing such decisions in a long-term perspective.

Scope

This extended case-study compares and contrasts the common law legal system responses to perceived internal security crises in three structurally similar nations over a 100-plus year time span, from 1914 to 2015. Given the evolutionary nature of law, laws and executive measures before and after this timespan were included in the study when they assist in explaining the

¹ For the purposes of this study, internal security is defined as being comprised of the laws, policies, plans, procedures, executive orders, and executive measures which are enacted to protect a government and its populace from kinetic (i.e. violent) and non-kinetic (non-violent) threats, during crises and daily life. Executive measures include physical and electronic surveillance, pre-emptive arrest on suspicion as opposed to probable cause, detention based on association rather than committing a criminal offense, the loss of the presumption of innocence before a court, and the suspension of the common law principle of habeas corpus. The term executive, in the context of orders and measures, denotes the authorization of national leaders, police, security, and military agencies to execute emergency measures without the checks and balances in effect during routine non-crisis conditions.
evolution of a law or an executive measure. As laws are passed in response to a perceived requirement for societal regulation, it is necessary to understand the underlying cultural, emotional, political, and social reasons for considering such legal remedies.

First of all, the study examined the laws (as amended), the executive orders and measures, and the debates surrounding their enactment, execution, repeal, and in some cases - repudiation. Second, speculative fiction in the years prior to World War I is also examined in the case study of the United Kingdom.\(^2\) Finally, as purposive social action may lead to unanticipated, and even unintended consequences, the isolation of such consequences assisted the researcher in identifying those internal security laws and executive measures which functioned within the intended limits, and those which proved subject to human biases, led to wide-scale abuses of human rights, and which should be avoided by liberal democratic nations.

**Purpose**

The purpose of the discussion is to identify, compare and contrast: 1) the evidential factors (i.e. (A) mental, (B) cultural, political, and social) through the exposition of themes which influence the conceptual development of internal security law, and which govern the execution of executive measures, 2) the unanticipated consequences of purposive legal action; and to 3) introduce emerging concepts of governance which might improve the implementation of security measures in an increasingly connected world community.

I (A) Mental Factors - On Bounded Rationality, Fear, and Decision-making

The following section examines the confluence of human cognitive limits (as described through the concept of *bounded rationality*), the effects of fear, and their effect on decision-making in crises. For the purposes of this section, the initial discussion parameters are bounded by the limits of human cognition at the intersection of crisis decision-making and civil liberties, i.e. how our cognitive limits and biases (i.e., our predictable errors) affect decision-making during internal security crises.

**Bounded rationality.** As described in Chapter 2, human cognitive limits set the parameters for complex problem analysis. These limiting effects include framing effect (how a situation is described), the endowment effect (maintaining the security status quo), and the affect

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\(^2\) This study of the influence of speculative fiction in this narrower U.K. context is used solely to trial and validate this portion of the holistic methodology. An in-depth study of speculative fiction across all three nations over this timespan would require a dedicated study in its own right.
heuristic (emotional response guiding the rational response). Heuer (1999), Schneier (2008) use the control, optimism, recency, vividness biases to explain how each bias tends to reinforce existing beliefs leading to confirmatory (or confirmation) bias and premature closure (Heuer, 1999; Johnston, 2005; Schneier, 2008; Clark, 2010) in decision making. Schneier (2008, p. 64) emphasizes the pernicious effect of the availability heuristic, which means that people tend to “assess the frequency of a class or probability of an event by the ease with which instances or occurrences can be brought to mind.” The collective impact of these biases is to reinforce long-held beliefs as to the nature of a problem and to restrain the introduction of new perspectives. For example, the pre-World War I review of British fiction and non-fiction in Chapter 2 did not reveal very many voices stating that Germany was not an immediate threat, or at least an aggressive military rival. Appendix A lists approximately a dozen of the better known works among the hundreds of works of speculative fiction which urged military preparedness based on presumed German espionage. Appendix B (sers. 1 through 8) describes laws and executive measures which reinforce the pre-crisis beliefs regarding Germany’s long-held intent to invade and the U.K. Revisionist historians such as Niall Ferguson (1999) have described Britain’s entry in World War I as “the biggest error in modern history” (Kennedy, 2014, 30 January).

Fear. Chapter 2 provides an overview of the science and social science literature related to the chemically-based emotion of fear. This overview discusses the need to react to threats, the consequences of an overreaction and under reaction to fear, the phenomenon of loss-aversion which leads to worst case planning, and the tendency for hawks to dominate doves in discussions of security. The perception of security and the use of the structured analytic technique known as the Threat Risk Vulnerability Assessment are also explained in detail. The case studies revealed the political and social implications of prolonged fear.

On the permanence of fear. Prolonged fear may lead to a conditioned response, i.e. an instinctive response as opposed to a rational evidence-based response. The continued persistence of certain internal security laws over decades reflects both a continuing threat from a designated adversary (e.g. the U.S.S.R.), and the fear-driven perception that the adversary is capable of causing immediate military (e.g. ICBMs), or political (e.g. Communist subversion) harm. Inevitably, the safest course of action under uncertain conditions is to plan for a worst case event in which the “hawks win” (Kahneman & Renshon, 2007). Frequently, as the evidence tables at appendices B, C, and D attest, more pressure than necessary is applied to resolve a security
problem through sweeping executive measures – leading to unanticipated, and often unintended, consequences which detract from achieving real security.

On the permanence of security measures. As mentioned in Chapter 2, the term security may be used to describe the subjective perception of safe environment, which is difficult to quantify, and a series of concrete objective measures designed to ensure that the perception becomes reality. Measuring security is difficult as the absence of evidence of a threat is not necessarily evidence of the absence of a threat. As a result, loss aversion is manifested through worst case planning and many internal security laws tend to endure years to decades beyond the immediate threat, as indicated in appendices B, C, and D. It could be hoped that structured analytic tools such as Threat Risk Vulnerability Analysis (TVRA) which compares potential harm to impact might mitigate loss aversion and worst case planning. This remains a challenge for security planners as long as the potential for mission failure continues to exist and worst case planning predominates. The gap identified in this study is the failure to integrate the cognitive, emotive, and ethical aspects of security in the analysis. Security risk measurement must consider human biases (emotional, social, and cognitive), bounded rationality, risk perception, and neuroscience – as far as understanding the limits of human rational thinking. Schneier (2008) concludes that security is never absolute and that planners should seek a trade-off that balances threat, friendly and adversarial capabilities, time, money, and convenience.

Decision-making. Chapter 2 described decision-making literature’s richness, breadth, depth, and maturity. The rationale for this new examination of internal security law is that decision-making is not solely rational, but is influenced by external factors such as the information available and time; as well as internal factors such as cultural, political, and social biases which condition assessing the factors and formulating the response (Kahneman, 2011; Heuer, 1999). The intersection of cultural, political, and social factors is discussed below in the context of speculative fiction.

I (B) - Cultural, Political and Social Aspects

This section illustrates the influence that speculative invasion and spy fiction novels held in the United Kingdom between 1871, with the creation of modern Germany, and the outbreak of World War I in 1914. The measurements can be taken from the number of titles produced by each author, the sales figures, and the recorded statements of statesmen regarding their views on fictional representations of their purported adversary or adversaries. In many cases, the
statements are not based on much more than thinly-veiled propaganda assimilated through speculative fictional representations of the adversary and of their intent.

**Theme 1 - On preparatory propaganda.** Similar to preparatory artillery fire before an infantry attack, preparatory propaganda helps to reduce resistance to intrusive laws and executive measures. Chapter 2 describes the intersection of social and political trends in the 44 years prior to the outbreak of World War I. The British popular press, together with a steady stream of invasion scare and spy fiction novelists ensured that the perceived threat to the U.K. from the newly created nation of Germany never faded from the public eye. While a complete treatment of all three nations would require a study in its own right, it will suffice to say that a degree of demonizing an enemy and denigrating their culture is almost always present prior to an armed conflict as it dehumanizes the enemy, which makes it mentally easier to kill them.

When executive actions, such as detention without trial, internment-based association, and mass surveillance proceed rapidly and efficiently in crises, a degree of moral certainty often arises. The government and the populace tend to unite under threat to support executive measures without appreciable discussion, particularly when time for discussion is limited. This trend is evident in the rapid passage implementation of the *Defence of the Realm Act, 1914* in the U.K. (Appendix B); the *War Measures Act, 1914* in both World War I and II in Canada (Appendix C); and in the early years (2001-2004) of the *USA PATRIOT Act 2001* (Appendix D), in what are assumed to be wartime conditions.

**Appendix A - Instances of spy fiction influencing policy.** Appendix A describes instances of speculative invasion scare and spy fiction literature which influenced public perception of the threat of invasion of the U.K., and how fiction lent weight to the deliberations and actions of national decision-makers. This purpose of this section is to illustrate how traditional social science research into rational decision-making can miss important elements which can influence policy makers responsible for strategic security decisions. This aspect of the study has potential to fill gaps in the holistic assessment of internal security law and to balance revisionist historical views as these fictional sources appeared either prior to the promulgation of the internal security laws or concurrent with them.

**Keystone books.** Chapter 2 provides an extended synopsis of the impact of major novels. The reader should note three keystone books in evaluating the findings of this study: 1) Chesney’s (1871) *The Battle of Dorking*, which introduced the invasion scare genre post-German
unification; 2) Childer’s (1903) *The Riddle of the Sands*, described by John Keegan (2002, p. 4) as “the first serious novel of intelligence to appear and still one of the best;” and 3) Le Queux’s (1906) *The Invasion of 1910*, which cemented the author’s reputation as the most prolific author of the era in a genre with hundreds of imitators, and as one of the foremost opinion leaders in Edwardian Britain.

**Importance of the Spy Fiction Genre – Past, Present, and Future**

The purpose of including fictional literature in a factual legal study is to widen the aperture in assessing the foundational premises in internal security, and to point to a model in which unanticipated consequences are more readily apparent to the analyst and in which unintended consequences are avoided to the greatest degree possible. Noted Edwardian era novelists such as Childers, Le Queux, Oppenheim, and Buchan spoke to the German threat; Cold War writers such as Fleming, LeCarré, Deighton, and Clancy to the Soviet threat; and it could be argued that Baldacci, Clancy and his inheritors in his Op-Center series continue to publicize the Islamist threat. While the degree of influence of these authors on specific decision makers is likely impossible to determine, there are numerous instances identified in the case studies. The most evident examples are found in the case of pre-World War I Great Britain (Appendix B).

The invasion-scare and spy fiction genre fueled existing xenophobic fears through a fusion of racial prejudice, patriotism, profit, and paranoia. The German community in Britain during World War I, which numbered approximately 60,000 had developed during the course of several hundred years, found itself under attack both officially and unofficially during the course of the War. The most potent of the official responses involved the introduction of a policy of wholesale internment and repatriation, which reduced the size of the German community in Britain to 22,254 by 1919 (Panayi, 1992, Abstract). In order to fully understand this development we need to put it within the context of the ethnic prejudice and intolerance which gripped Britain in the decades prior to, and during World War I.

Wood (2014) opines that the invasion scare genre “is best understood not simply as objective assessments of Britain’s liability to invasion, but as a literary response to the change (social, economic, political, military...) in Britain’s circumstances from the late-Victorian period to the outbreak of war in 1914.” The invasion scare literature genre was instrumental in creating - and sustaining a five-decade long climate of fear in which American sociologist Robert K. Merton’s (1936) self-fulfilling prophecy or self-confirming beliefs (Wohlstetter, 1981, pp. 32-
33) came to pass. While the leading authors in the invasion scare and spy fiction genre wrote from an activist perspective seeking to facilitate conscription and German spy hunts, the long-term unanticipated and unintended social and political consequences described in Appendices B, C, and D are likely beyond their wildest imaginations. The careful reader of spy fiction should be alert to its influence on public opinion and on political leaders.

II - Unintended Consequences

Thomas K. Merton (1936) developed the notable concepts of unintended consequences and self-fulfilling prophecy. Unintended consequences, sometimes called unanticipated consequences, unforeseen consequences, or accidents) are outcomes that are not the ones foreseen and intended by a purposeful action. Merton (1936) describes five contributing causes of unintended consequences: 1) ignorance (p. 900), 2) errors in analysis from using inappropriate methods (p. 901), 3) immediate interests overriding long term interests (pp. 901-903), 4) the interaction of variables over time leads to changes in the basic (often initial) values (p. 903), and 5) self-defeating prophecies, or, the fear of some consequence which drives people to find solutions before the problem occurs, thus the non-occurrence of the problem is not anticipated (pp. 903-904). Each of the five variables may contribute to unintended or unanticipated consequences in the implementation of executive measures in internal security operations, and each of the five contributing causes is evident in each of the case studies illustrated in Appendices A, B, C, and D. Of the five variables, numbers 1) and 2) are integral to the human condition and are probably impossible to change due to cognitive and epistemic limits; variable number 4) approximates one of the characteristics of a complex or wicked problem. However, variables 3) and 5) are characteristic of bias, or predictable errors, and may be subject to isolation and elimination, or at least some degree of control through employing structured analytic techniques. The proposed model at the end of this chapter is an early step toward developing a new structured analytic technique which aims to reduce the occurrences of unanticipated events with unintended consequences. 

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3 In a manner similar to complex problems.

4 Certain elements of this discussion reflect Taleb’s (2010, p. xxii) Black Swan model, which is characterized by three attributes: 1) rarity; 2) extreme impact, and 3) retrospective predictability. Other aspects reflect Fuhrth’s (2009; 2011; 2012) anticipatory governance model in which he says it is important to hear the “faint signals” to exercise foresight in forecasting.
In each case study, the majority of the populace tended to support the initial security measures in time of crisis and later came to regret their support of the executive measure implementation. The obvious question regarding post-event regret is why would measures that appear so necessary during crisis be regretted years later if the initial factors were deemed valid and the original narrative is correct?

**On the Evolving Role of Privacy**

Two converging trends are evident in observing past and contemporary (c. 2015) regulations in internal security law. First, is the traditional government approach to preparing for internal security challenges through extensive information gathering on groups and individuals deemed to pose a potential threat to the stability of the government and the safety of the populace. The rationale for intrusive surveillance is usually described as being necessary in the face of an immediate threat. The second trend is the gradual loss of personal privacy as corporate- targeted advertising profits from metadata and in collecting individual buying preferences has eroded the expectation of privacy in using any electronic device.

**Impact.** As noted in the literature review described in Chapter 2, privacy emerged as the top concern of American web log writers according to content analysis conducted across the ACLU, EIFF, and EFF websites. Given the close cultural ties and the interconnectivity of Canadian Internet communications to servers based in the United States, privacy has emerged as an issue for Canadians as well. While Canada does not have civil liberties advocacy groups on the same scale as those of the U.S.A., similar trends are visible. Numerous on-line petitions\(^5\) circulated during Spring 2015 prior to the passage of Bill C-51 (*The Anti-terrorism Act 2015*) in the Senate 10 June 2015.

**Canada’s Bill C-51.** Bill C-51, with the short title of *Anti-terrorism Act, 2015*, amended over a dozen Canadian laws, including the *Criminal Code of Canada* (CCC) to permit Canadian government agencies to share metadata and information about individuals (Bill C-51 Preamble, 2015). Passed into law on 18 June 2015, it also broadens the mandate of the Canadian Security Intelligence Service (CSIS). It is the first comprehensive reform of this kind since 2001.

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5 These petitions included: PETITION: Repeal Bill C-51, led by the federal New Democratic Party (NDP), retrieved from [http://www.ndp.ca/node/116187](http://www.ndp.ca/node/116187); Kill Bill C-51, which garnered 302,469 signatures, retrieved from [https://kille51.ca/](https://kille51.ca/); Reject fear. Stop Stephen Harper’s "secret police" bill, which gathered 110,366 signatures, retrieved from [http://you.leadnow.ca/petitions/reject-fear-stop-stephen-harper-s-secret-police-bill](http://you.leadnow.ca/petitions/reject-fear-stop-stephen-harper-s-secret-police-bill); and a petition from openmedia.ca received over 100,000 signatures, retrieved from [https://openmedia.ca/news/joint-petition-over-100000-signatures-against-secret-police-bill-c-51-be-delivered-key-parliamentary](https://openmedia.ca/news/joint-petition-over-100000-signatures-against-secret-police-bill-c-51-be-delivered-key-parliamentary)
This act is based on the concept of pre-empting “activities that undermine the security of Canada” (para. 3, “Purpose”). This extremely broad concept is more sweeping than any definition of security in Canadian national security law. In some respects the act’s scope parallels the “total information awareness” sought by the NSA in 2003, or at least a very unitary view of governmental information holding and sharing. On 6 March 2015, Daniel Therrien, Privacy Commissioner of Canada, stated that the powers of Bill C-51 “are excessive and the privacy safeguards proposed are seriously deficient.” Therrien noted the potentially limitless powers amongst 17 federal agencies that would exist if this Bill were passed without amendment (Therrien, 2015, 6 March, paras. 4-6). The ruling Conservatives amended the bill 26 March 2015 by: 1) removing the word “lawful” from the section listing exemptions to the new counterterror measures addressing protests; 2) clarifying that CSIS agents, while newly empowered to “disrupt” potential threats, would not be empowered to make arrests; 3) establishing limits on inter-agency information sharing; and 4) adjusting a provision that would have given the Minister of Public Safety the power to direct air carriers to do “anything” that, in his or her view, was “reasonably necessary” to prevent a terrorist act against an aircraft.

Roach (2015) made a strong argument that Canadians tend to downplay the importance of complex security issues, and that Canada needs a sustained non-partisan evidence-based debate on the implications of Bill C-51 prior to the October 2015 election. This opinion was supported by fellow law professors Penney (2015, 30 March) and Sossin (2015, 19 March); and investigative journalist O’Malley (2015, 20 May). Roach (2015) pointed out that Canada stands alone amongst the major Western democratic nations as it lacks robust Parliamentary oversight of its intelligence and security agencies. Roach notes the lower standards for peace bonds and the capacity for preventive arrests permitted in the proposed Anti-terrorism Act, 2015 (Bill C-51). His main concern is that without legislative expertise, the executive, i.e. security agencies will dominate whatever debate emerges and detention based on suspicion will become an accepted practice.

Bill C-51 was passed in the House of Commons on 6 May 2015, in the Senate 9 June, and was signed into law by the Governor-General David Johnson on 18 June 2015. C-51 permits mass surveillance, the exchange of single-purpose information across all government departments, detention on suspicion rather than probable cause, and the ability to pre-empt
terrorist plots through anticipatory peace bonds, arrests, freezing financial accounts, and cyber misinformation to disrupt conspiracies.

**Summary of the Mental Aspects of Internal Security Law**

Although confident and bellicose in nature and intent, internal security law and executive measures originate in fear of the unknown. The decision to use executive measures designed to control the behavior of large groups is not entirely rational in nature. The case studies indicate that there is an emotional component in any such decision based on time pressure, and a desire to prevent loss (of lives, of resources, of comparative advantage). The World War I and World War II era cases in Canada and the U.K. also indicate a strong elements of nationalism, ethnocentrism, and racial prejudice. The U.S. case illustrates the acceptance of the loss of electronic privacy to gain the perception of security from attack, which as Schneier (2015) points out does not increase the reality of security. Thus, internal security decisions which are applied to large groups based on suspected hostile origins and association are not necessarily based on rational thought, nor are they well-grounded in common and civil law.

**Best vs. Worst Practices**

The extended case study examined the history of British, Canadian, and American laws related to internal security, with emphasis on the 20\textsuperscript{th} Century and early 21\textsuperscript{st} Century. Internal security emergencies pose challenging problems for constitutional democracies with a common law heritage as they necessitate a fundamental re-examination of the enduring nature of individual rights to freedoms of association, of expression, of freedom of movement, and of the right to property. In many cases, such common law rights are reduced to *privileges* which must be gained and maintained through the demonstration of loyalty to the nation-state. For the purposes of this study, an arbitrary distinction will be drawn between emergency laws which facilitate a rapid return to the exercise of common law freedoms. These laws and accompanying oversight practices will be described as *best practices*, identified by the acronym *bp* in the appendices. Those laws and oversight practices which tend to obstruct or limit a return to the exercise of common law freedoms are described as *worst practices*, identified by the acronym *wp* in the appendices. The following section uses this arbitrary distinction to describe the best and worst practices identified in the evidence, and as described in Appendices B, C, and D - which respectively describe the implementation and impact of emergency laws in the United Kingdom, Canada, and the United States of America. Given the central role of England, and later of the
United Kingdom in the evolution of common law, an explanation of the constitutional history of Britain as well as the concept of Royal (and later executive) Prerogative is essential before describing the case study findings in greater detail. The constitutional histories of the United Kingdom, Canada and the United States of America will also be briefly described in the context of being inheritors of the common law system prior to discussing the best and worst practices in internal security law as they emerged from the case study.

Appendix B – the United Kingdom

The British portion of this three-part comparative case study of internal security law, is strongly influenced by the evolution described in Chapter 2. Given that the British political system evolved from the feudal system of hereditary landowners and rulers, there are continual attempts over hundreds of years to limit the arbitrary powers of ruling families over their agricultural workers, clansmen and women, indentured labourers, and miners and factory workers. The keystone document in British law, and the basis of common law, is the Magna Carta, or Great Charter, which was signed by King John of England in June 1215. The Magna Carta established the principle of habeas corpus, which demands that a person accused of a crime be brought to trial in a reasonable time – or released from custody. This presumed common law right is often suspended in internal security crises, or relegated to being described as a privilege which must be earned or maintained through demonstrated loyalty to the nation-state.

The significance of the concept of the Royal Prerogative in the U.K. is observable in how its vague and previously ill-defined nature (until 2004) has been adapted throughout the 20th Century to permit Ministers representing the Crown to wield considerable executive authority during national emergencies. Prime Ministers and Cabinets have been able to temporarily suspend parliamentary supremacy, and to alter the traditional balance in a parliamentary democracy. As the case study evidence depicted in Appendix B demonstrates, these temporary imbalances have endured for decades in some circumstances, leading to unanticipated, and at times, unintended consequences in everyday social and political life.

Appendix C - Canada

The significance of the concept of the royal prerogative beyond the U.K. is observed in its retention in the common law-based legal systems in other English-speaking nation-states, such as Canada and the United States. As Canada is also governed through a parliamentary
government system and a constitutional monarchy, many of the same phenomena regarding use of the royal prerogative observed in the U.K. are evident in the Canadian application of the royal (i.e. executive) prerogative until the repatriation of the Constitution Act 1982.\(^6\) (Examples of Canadian usage are described in Appendix C). Canada’s defence and security laws are closely aligned with those of the United Kingdom due to its constitutional history.

**Appendix D – The United States of America**

The employment of executive prerogative in the United States of America is problematic due to the formal separation of powers between legislature, executive, and judiciary in Articles 1, 2, and 3 of the U.S. Constitution. In theory, this formal division of authority should protect against the assumption of unchecked power by one of the three branches of government. In practice, an informal “prerogative emergency power of undefined content to which the executive has appealed with almost uniform success in times of emergency” has evolved (Cotter, 1953, p. 382). Although Cornelius Cotter was writing in the *Stanford Law Review* in 1953, his warnings as to the danger of this informal development are still valid in 2015. Cotter (1953) observes that,

The present status of emergency-powers doctrine and practice in the United States is dangerous in two respects:

1. Constitutional morality is undermined by a crude adaptation of the Lockean prerogative to act in accordance with the law, in the absence of law, or in conflict with law in times of emergency. This doctrine has been used to justify the more extreme exertions of prerogative emergency powers by American executives.\(^7\) theory of lawless reaction to emergency breeds lawlessness in times of war or peace and corrupts the essential process of constitutionalism.

2. Executive uncertainty as the nature and extent of emergency powers thwarts vigorous and systematic response to an emergency. In the absence of organic legislation establishing a reservoir of emergency powers, the executive must give preponderant attention not to selecting the most suitable means for meeting emergency conditions, but rather giving some veneer of legality to his actions.

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\(^7\) Cotter’s (1953) fn4 recounts 4 April 1864 correspondence from President Lincoln to A.G. Hodges: “Was it possible to lose the Constitution and yet preserve the nation? ... I felt the measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation.” Essentially, President Lincoln’s unprecedented executive actions during the Civil War would become seen as valid precedent law by future President facing similar conflicts.
This he might do by subterfuge, by invoking one of the complex of emergency statutes, by new legislation, or by resort to alleged executive or constitutional or “inherent” powers. (Cotter, 1953, pp. 382-383)

Essentially, President Lincoln’s unprecedented executive actions in suspending Constitutional rights during the Civil War would become seen as valid precedent law by future President facing similar conflicts. (Examples of these phenomena are described in Appendix D).

**Major Themes Emerging from the Legal Case Study Data**

The following themes are evident in the data assembled in Appendices B, C, and D. As mentioned earlier in this chapter, these laws and accompanying oversight practices which support common law usage or a rapid return to its use post-crisis will be described as *best practices*, identified by the acronym bp in the appendices. Those laws and oversight practices which tend to obstruct or limit a return to the exercise of common law freedoms are described as *worst practices*, identified by the acronym wp in the appendices. The themes described below are closely related, as uncertainty under conditions of stress tends to lead to large-scale measures designed to deal with worst-case scenarios as described by Kahneman & Renshon (2007). The practices of each nation will be compared and contrasted under each theme.

**Theme 2**

**– Omnibus Legislation**

When omnibus bills of 100 to 275 pages in length are passed in a matter of hours or days it is evident that the legislators spent little time, if any, in analysis of the consequences of the bill’s provisions. Conversely, when small bills of just a few paragraphs or pages are hotly debated and require several attempts to pass the bill, this indicates uncertain support of a contentious issue, or a series of issues. Some bills, such as the original version of DORA are short (e.g. six paragraphs), but of such sweeping consequence in the authorities granted and societal change ordered that they can also be described as omnibus in nature. The same could be said of the U.K. *Emergency Powers Act, 1920*, c.55, which was short in text (3 pages), but profound in the authority granted by the legislature to executive agencies for the next 84 years. One of the primary indicators of an omnibus act is the number of other statutes it amends. While it is inevitable that some amendments to other acts is required, an internal security act that

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8 Theme 1 on Preparatory Propaganda is located in Section II B – “Cultural, Political, and Social Aspects” of this chapter.
amends a dozen or more other statutes across differing domains of competence is clearly an omnibus act, which has the potential to affect large segments of society over many years.

Appendix B – the United Kingdom. The accumulated evidence in Appendix B reveals a tendency to draft omnibus legislation in crises to facilitate rapid change to numerous laws and to justify the implementation of large-scale executive measures. This trend is evident throughout the British portion of the case study in every major societal crisis – World War I, the Irish Civil War, World War II, the Cold War, including the Troubles in Northern Ireland, and in the post-9/11 period. The Regulation of Investigatory Powers Act 2000, c.23 (RIPA) sought to codify the extensive police and security agency powers. In fact, RIPA reaffirmed powers on the scale of the USA PATRIOT Act of 2001.

In terms of pure economy of effort, this legislative tactic is highly effective in passing large-scale executive measures such as designating prohibited places nation-wide, designating controlled or prohibited drugs, appropriating lands and facilities, justifying surveillance, suspending habeas corpus, and in causing mass registration of suspect ethnic groups as aliens, or of the entire citizenry. In this narrow sense, omnibus legislation may be regarded as a best practice, due to its efficiency in causing large-scale change in a timely manner. On the other hand, it is also a means of avoiding debate on contentious issues, and it facilitates the extension of temporary emergency measures. The long-standing fear of invasion in Great Britain described in Chapter 2 and in this chapter facilitates the acceptance of such omnibus measures in crises.

Appendix C – Canada. Although the War Measures Act, 1914, 5 Geo. V, Ch.2, 1914 was only 13 paragraphs in length, its scope and impact was to last for 84 years. Clause 6 of the Act stated, “The Governor in Council shall have such power to do and authorize such acts and things and to make such orders and regulations as he may by reason of a real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.” This blanket authority permitted the federal Cabinet to rule by decree, with absolute authority to issue legally binding direction on any issue. In practice, this Act gave the Cabinet the power to censor communications; to arrest, detain, and deport suspects; to control all aspects of transportation; and to appropriate private property. (The wartime use of the WMA, and its use in the labour disputes which followed are recounted in Appendix C, ser. 2 and sers. 4, 6, and 7). Of note is the registration of 80,000 aliens, or rather recent immigrants of Ukrainian and Eastern European origin, and the forced detention of approximately 8700 in detention camps
from 22 August 1914 through 20 January 1920 (Appendix C, ser.2, Remarks Column, footnotes 9-13). This law, and the accompanying regulations were used to justify the confiscation or property, forced detention, and relocation of over 25,000 Japanese-Canadians to Prisoner of War camps east of the Rocky Mountains during World War II and to detain (briefly) over 450 suspected FLQ sympathizers during the October Crisis of 1970 (Appendix C, ser.17, pp. C-6-7/12). The Anti-terrorism Act S.C. 2001, c. 41. (Appendix C, ser. 23, pp. C-8-9/12) and the Anti-terrorism Act S.C. 2015, c.20 (Appendix C, ser. 29, p. C-12/12) also follow this pattern, amending 27 and 15 acts respectively.

Appendix D – the United States of America. The central omnibus piece of legislation is the U.S. Constitution of 1787, from which the government is organized, and from which all other laws are drawn, including the Bill of Rights, which contains the first 10 amendments to the Constitution, and the subsequent 17 amendments to the Constitution. The U.S. Constitution underwent years of debate and amendment prior to ratification, and is still open to future amendment. It is mentioned here as many of the internal security laws are believed to abrogate numerous Articles or Amendments to the Constitution. The study revealed 11 U.S. internal security acts which can be characterized as omnibus:

1) the 20-chapter Organic Act of 1900, c. 339, 31 Stat. 153 (1900); as amended 48 U.S.C 532 (1940), which created the Territory of Hawaii and which was used to authorize martial law from 1941 to 1944 (Appendix D, ser. 11, p. D-6-7/55). The impact of the unauthorized seizure of Hawaii led to a joint House-Senate Apology Resolution in 1993.

2) Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987 (1950), also known as the Subversive Activities Control Act of 1950 or the McCarran Act. (Appendix D, ser. 19, pp. D-13-14/55). This act also included the Emergency Detention Act of 1950 at Title II. Although the act focuses on security issues, it is broad scope of surveillance authorized by Title I, “Subversive Activities Control” that leads to its characterization as omnibus.

Wiretap Statute,\textsuperscript{9} which establishes procedures for obtaining warrants to authorize wiretapping by government officials, and regulates the disclosure and use of authorized intercepted communications by investigative and law enforcement officers (Appendix D, ser. 22, pp. D-16-17/55).


5) \textit{The Intelligence Reform and Terrorism Prevention Act of 2004}, Pub. L. 108-458, 118 Stat. 3638 (2004) (IRTPA). The IRTPA is omnibus due to the wide scope of actions it directed. Aside from creating five new acts, the IRTPA established the Office of the Director of National Intelligence, the National Counterterrorism Center, the National Counter Proliferation Center, and the Joint Intelligence Community Council. Section 1016 of the IRTPA directed the U.S. Intelligence Community to establish the Information Sharing Environment (ISE) across agency boundaries, and Title VI also directed the “Pretrial Detention of Terrorists.” (Appendix D, ser. 52, pp. D-34-35/55).


7) Division A, Title X of DoD Appropriations Act 2006; being the Detainee Treatment Act of 2005. It is the sheer scope of the annual DoD Appropriations Acts which results in their inclusion in this theme, and the fact that it is easy to include significant provisions deep in the act which can be overlooked. (Appendix D, ser. 54, pp. D-36-37/55). See Appendix D, fn 84 regarding the “McCain Amendment” and the prohibition of the “cruel, inhumane, and degrading treatment of prisoners.”


9) National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat.3 (2008). It is the massive scope of the appropriations bills and the ability to include small but significant direction within them. This act is notable for President Bush’s signing statement which appears, according to some legal experts (i.e. ACLU, EFF) to conflict with the U.S. Constitution Articles 1 and 2 (Appendix D, ser. 60, p. D-42/55, fn 101).

10) 2012 National Defense Authorization Act (NDAA), Pub. L. 112-81, 125 Stat. 1298 (2012). Again, the use of large-scale acts to direct significant internal security executive measures is apparent. Sections 1021-1022 authorize the indefinite detention for U.S. citizens suspected of involvement with terrorism in accordance with the Authorization for the Use of Military Force Act of 2001. Similar to DORA provisions in World War I, s. 1021 negates habeas corpus and the principles of common law, as well as possibly abrogates the First and Fourth Amendments to the U.S. Constitution. It also permits a lower standard of “tainted” evidence “if persons who nonetheless pose a threat to the security of the United States.” This act garnered significant public opposition, including the

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10 Language in 2012 NDAA s. 1021 (b) (1) and AUMF 2001 is similar. See Appendix D, ser. 67, p. D-51/55, fn118.
creation of a nation-wide protest group\textsuperscript{11} and a major lawsuit\textsuperscript{12} against President Obama and key members of his Administration. (Appendix D, ser.67, pp. D-47-49/55). (Further discussion of 2012 NDAA is found under Theme 8).


Theme 3 - Extension of security regulations to the entire society

Appendix B – United Kingdom. This theme is most evident in the initial passage of the \textit{Defence of the Realm Act, 1914} (DORA), its five amendments, and in the accompanying Defence of the Realm Regulations (DORR) during World War I. DORA is truly a landmark internal security law, in that its echoes can be observed when key word searches are used to group major themes in almost all British internal security laws over the past century; and in Canadian and American internal security laws. (The extent of DORA’s reach is explained in Appendix B, sers. 6-9, pp. B-9/73 to B-15/73,.) The right to jury trial for civilians was removed in certain circumstances.\textsuperscript{13} Legal scholar Rachel Vorspan (2008) notes that, “To facilitate prosecution of the war, the government narrowed the jurisdiction of the traditional courts by eliminating jury trial, subjecting civilians to court-martial, and establishing new administrative tribunals to displace the traditional courts” (p.401).

\textit{Defence of the Realm (Acquisition of Land) Act, 1916} 6 & 7 Geo. 5, c. 63 gave his Majesty in Council the power to expropriate land and change its usage, the power to remove buildings & works; to continue land holdings, and to determine compensation. This Act led to a diminution of real property rights. The wide-ranging and enduring social impacts of DORRs 3A, 12A, 13, 14, 14B, 18, 21, 27, 40B, and 40D is explained in Appendix B, pp. B-20/73 to B-
DORA therefore became as significant in the development of twentieth-century national security law as the Statute of Treasons had been in an earlier era. Upon its enactment on 8 August 1914 onwards, national security law entered the “Age of the Emergency Code.” Thereafter, the ability of twentieth-century governments to call upon an emergency code transcended peace and war… (Murray, 2006, p.7)

This theme of the extension of military relations into civil society is repeated in the Restoration of Order in Ireland Act, 1920 10 & 11 Geo. 5 c. 31 (ROIA) which concerned the implementation of executive measures in Ireland, the Emergency Powers Act, 1939, 2 & 3 Geo. 6 c. 62 (EPA) and the Defence of the Realm Regulations (DRR) during WWII. Although the EPA’s practical duration was from 24 August 1939 to 8 May 1945, it was only repealed officially by the Emergency Laws (Repeal) Act 1959), essentially being in effect through the first decade of the Cold War. The Prevention of Terrorism Acts of 1974–1989 (as amended 1976, 1984, and 1989) conferred emergency powers upon police forces when terrorism suspected in the domains of proscribing organizations (e.g. PIRA), promulgating exclusion orders, surveillance of financial support for terrorism, and arrest, detention, and control of entry into the U.K. These powers were updated in the Terrorism Act 2000, c. 11, which is notable for its s.44 stop-and-search powers which were deemed in contravention of the ECHR, and which were used in non-terrorist related criminal operations (Appendix B, ser.32, fn 122). Post 9/11, the Anti-Terrorism, Crime and Security Act 2001, c. 24; the Coroners and Justice Act 2009, c. 25; and the Anti-social Behaviour, Crime and Policing Act 2014, c. 12 supported surveillance measures. In effect, the permanent monitoring of communications started with DORA 1914.

Appendix C – Canada. Similar to DORA, the WMA 1914 was Canada’s keystone act in regard to government intervention in daily life. WMA regulations in both World Wars as enacted by the Governor in Council Orders. The National Emergency Transitional Powers Act, 1945, c.25; the Continuation of Transitional Measures Act, 1947, S.C. 1947, c. 16, as amended by S.C. 1947–48, c. 5, S.C. 1949, c. 3, & S.C. 1950, c. 6; and the Emergency Powers Act, 1951, 15 Geo.6, c.5 (Can.) effectively extended the authority of the Privy Council to issue Orders on
many non-security matters for nine years after the end of World War II (Appendix C, sers. 10, 13, 15).

Appendix D – USA. The USA does not appear to have used executive measures similar in content to the DORA and the WMA regulations against alien populations during World War I, perhaps due to a more liberal view as to the value of European immigrants, and the relatively late entry of the U.S.A. in the war. The *Immigration Act of 1917*, Pub. L. 64-301, ch. 29, 39 Stat. 874 (1917), also known as the *Asiatic Barred Zone Act*, did bar immigration from Asia countries.

The Palmer Raids of 1920 are notable for the thousands of European aliens arrested, detained, and deported by the Department of Justice during the first Red Scare (Appendix C, fn 11, p. C-1/12). The *Organic Act of 1900* (as amended 1940) was used to place Hawaii under martial law for three years from 1941 to 1944. The *Internal Security Act of 1950*, Pub. L. 81-831, 64 Stat. 987 (1950) was the legal foundation for Senator Joe McCarthy’s hunt for communist subversives in the early years of the Cold War, and its provisions were used to monitor the political, sexual, and social associations of thousands of people.

**Theme 4 – Royal (or Executive) Prerogative**

Appendix B – U.K. This theme could also be described as executive branch dominance over the judiciary and legislature in crises. DORA 1914 was proclaimed with no debate by legislators was on the advice of Ministry of Defence (MoD)/Military Operations (MO5). DORA was followed by use of courts martial for many offences related to trespassing in prohibited places and in betraying military information. The authority to execute DORR and DRR measures was delegated by the legislature to military and security officials at the operational and tactical levels. This authority is also described as the right of *eminent domain* when applied to appropriation. (See Appendix B, p. B-14/73, fn40, re HC Deb 10 Mar 1915, vol. 70, cc1453-94, Mr. Cook at c1489). DORA was followed by use of courts martial for many offences related to trespassing in prohibited places and in betraying military information. The U.K. has continued to reserve the right to claim Royal Prerogative in crises throughout the 20th Century, although it is necessary for the courts to determine the scope of the royal prerogative due to the uncodified nature of the constitution. It is clear that the existence and extent of the power is a matter of the common law of England, making the courts the final arbiter of whether a particular type of prerogative exists or not.
Appendix C – Canada. Canada, based on the War Measures Act, R.S.C. 1927, c.206 (WMA) and subsequent emergency measures legislation described in Theme 2, has ruled in crises through Orders by the Governor-in-Council, and through the Privy Council during the Korean Conflict. (Author note: The Privy Council Office and the Prime Minister’s Office have both been criticized for usurping the power of the legislature, but these criticisms are beyond the scope of the study which focuses on internal security law and codified executive measures). Appendix C, sers. 4, 6, 7, 9, 11, 14, and 16 describes the flexible approach taken by Canada in applying WMA, R.S.C.1927, c. 206 when it appeared to assist the Government of Canada’s position in any legal or quasi-legal case. Most well-read Canadians are aware of the WMA’s proclamation during World War I, World War II, and the October Crisis of 1970. Far fewer are aware (c. 2015) of the WMA’s use to bolster the Royal Prerogative or the executive authority of the Privy Council in non-wartime circumstances.

Appendix D – U.S.A. The United States is unique, in that its Presidents can issue Executive Orders (EO), for they are not immediately accountable to either the judiciary or the legislature. This discretionary power facilitates unified and timely response in crises. It also permits potential abuse of the process based on an individual President’s beliefs and biases. Notable EOs included in the study include: 1) EO 9066 (Roosevelt) concerning Japanese-American detention during World War II (Appendix D, ser. 17, p.D-11/55); 2) EO 12333 (Reagan) “United States Intelligence Activities” was amended three times under President G.W. Bush to permit domestic surveillance (Appendix D, ser. 27, pp. D-21/55, see fn 44); 3) EO 13440 (G.W. Bush) concerning “interpretation of Common Article 3 of the Geneva Conventions” (Appendix D, ser. 57, p. D-39-40/55); and 4) EO 13493 (Obama) “Ensuring lawful interrogations” which rescinded EO 13440 (Appendix D, ser. 62, pp.D-4344/55).

Although not titled as EOs, President Lincoln’s suspension of habeas corpus during the Civil War through a series of “Proclamations” was also an exercise of executive prerogative (Appendix D, sers. 4-8, pp. D-3 to D-5/55). Section 2 of the Authorization for the Use of Military Force Act of 2001, Pub. L. 107-40, 115 Stat. 224 (2001) also gives the President complete freedom to determine the scope of any military action (Appendix D, ser.33, fn 64, p. D-28/55).

There is no specific Constitutional provision nor statute that explicitly permits executive orders. EOs are subject to judicial review and may be overturned if they are not supported by a
Congressional decision, statute law, or the Constitution. They can also be overturned by a future President with the stroke of a pen, and the signing statements made by President G.W. Bush on at least two occasions appear to offer a liberal interpretation of Article 2 of the U.S. Constitution which describes the powers of the President (Appendix D, sers. 54, 55, 60). The Heritage Foundation has accused Presidents of abusing Executive Orders, of using them to make laws without Congressional approval, and of moving existing laws away from their original mandates (Graziano, 2001).

Despite the apparent drift toward governance by the executive branch, Hudak (2014, 30 January) concludes that while executive orders are fairly common, their use has dropped over the 20th century, and that so far President Obama has used executive orders less than other contemporary presidents. Hudak (2014) provides a useful chart that illustrates the frequency of executive orders in U.S. history:

**Figure 4.1. A History of Executive Orders**

![A history of executive orders](image)

Theme 5 – Acceptance of Intrusive Security Measures

The passive acceptance of increasingly more stringent legal limits to civil liberties appears to be long established in the United Kingdom. Sidney W. Clarke (1919, p. 36) asserts that, “Of all the phenomenon exhibited during four years of warfare, none is more remarkable than the docility with which the people of this country submitted to the abrogation of many of their most cherished rights.” Civil rights in Britain are residual, in that they are what you are permitted to do commit a criminal offence or infringe on the rights of other citizens (Smith, 1986). Smith (1986, p. 641) observes that British judges tend to act negatively, i.e., they curb arbitrary and unlawful abuses of power rather than generate new rights, except where they have an antecedent foundation in common law. The danger inherent in this approach is that the legislation restricts liberties not only in time of crisis, but for ever after. Clarke (1919) lists the fundamentals of British civil rights as Government by Parliament, the responsibility of the Executive to the Legislature, the liberty of the subject, trial by jury, open law courts, freedom of speech, the freedom of the press, and “an Englishman’s house is his castle.” Clarke (1919, p. 436) quotes Dicey regarding the quintessential feature of the British Constitution, which is “the absence of arbitrary power on the part of the Crown.”

The trend toward the passive acceptance of executive measures is evident in the rapid and unopposed passage of the Defence of the Realm Act, 1914, 4 & 5 Geo. V, c. 29 (DORA) and the passive acceptance of the Defence Of the Realm Regulations (DORR) in the United Kingdom (Appendix B); the internment of Ukrainian-Canadians in World War I and of Japanese-Canadians in World War II; and in the mass arrest of presumed FLQ sympathizers during the October Crisis of 1970 (Appendix C). As explained above in the Theme 4, Royal (or Executive) Prerogative has a long-established history dating back to the divine rule of Kings. It appears that most people accept subordination to authority, at least until the authority causes significant disruption to their way of life, as they believe that their government will protect them from danger, which for the most part they do.

The primary reaction to the 9/11 terrorist attacks was to implement the USA PATRIOT Act of 2001, which led to mass, rather than the targeted surveillance within the United States and abroad (Appendix D, FISA 1978). It can be argued that this assertion is an oversimplification of events in the face of a complex threat of unknown size, location, and duration. However, the issue of whether the U.S. Bill of Rights was abrogated is not the central issue, but rather what
factors give rise to the passage of bills which abrogate civil liberties? As mentioned in the preamble, the external factors of time and the information available play a large role. The internal emotive factors such as prior cultural, political, and social biases which condition assessing the factors and in formulating the response (Kahneman, 2011; Heuer, 1999).

**Theme 6 – Legislative recognition of responsibility**

**Appendix B – U.K.** There is recognition in House of Commons (HC) and House of Lords (HL) Hansards of the loss of freedoms in legislative debates; which were accepted as necessary in times of crisis. (Some discussion of a return to common law protections was observed in the debates). The loss of fundamental common law protections, such as the security of the person vs. the suspension of habeas corpus, arbitrary detention, protection from arbitrary search and seizure – and to the assumption of guilt-based on association and on hostile origins. (See Appendix B, ser.9, p. B-14/73, fn 42 re HL Deb 15 March 1915 vol. 18 cc724-41, Lord Joicey at c737).

**Appendix C – Canada.** The WMA was initially proclaimed rather than voted on, although debates as to its scope and duration occurred after the proclamation in 1914, 1939 and 1970. Debates on the scope of WMA 1914 were limited in duration (Appendix C, ser. 2, fns 4-6) with the draft bill being passed within three days. It appears that Canadian Parliamentarians did acknowledge the impact of the WMA during the Korean Conflict (1950-1954) as significant debate occurred over the duration of the Conflict as to the need to avoid enacting the WMA.

The *Emergency Powers Act, 1951, 15 Geo.6, c.5 (Can.)* closely resembled the WMA in terms of the scope of executive powers granted to the Governor-in-Council or the Cabinet in many aspects. This time, however, there was a degree of reticence in the discussions in the House of Commons and the Senate, and a non-partisan desire to limit the scope. The second reading of the bill on 14 March 1951 led to a three-part decision to refrain from invoking the more expansive powers of WMA. The first reason was a legal one, i.e. the Governor-in-Council is empowered to proclaim the “existence of a real or apprehended war, invasion, or insurrection” (Canada Gazette, 1951, p. 246), and it appeared difficult to state that events in Korea posed an immediate threat to Canada. Secondly, such a declaration would have a psychological impact, in that it could influence people to believe that “a third world war is almost inevitable and likely to come at any time” (Canada Gazette, 1951, p. 246). The third premise recognized the danger of authorizing unnecessary executive power, i.e. “a democratic government of a democratic people
– does not seek greater and more extraordinary powers than it believes to be essential at the present time” (Canada Gazette, 1951, p. 246).

The Parliamentarians of the day were cognizant of the distinctions between the WMA and the *Emergency Powers Act, 1951*. The records of the debates note the exclusion of censorship in the more recent 1951 act. The second power omitted from the WMA was the “control and suppression of publications, writings, maps, plans, and photographs” (Canada Gazette, 1951, p. 247). There was also no power of arrest, detention, exclusion, and deportation in the 1951 bill, however three of the WMA powers are repeated directly. These executive powers are the control of harbours, ports, and territorial waters and vessel movement; transportation by land, air, or water and the control of the transport of persons and things; and trading, exportation, production, and manufacture. “With regard to these three items, there is no difference between the two bills” (Canada Gazette, 1951, p. 247). In the intervening years, the first executive measure has remained in force as a federal power, the second has become a shared federal-provincial responsibility, and the third has reverted to private industry with long-term exceptions in certain commodities such as grains and nuclear materials. The appropriation confiscation, forfeiture and disposal of property that was central to the wartime function of the WMA was also discontinued in the 1951 bill.

That the Parliamentarians could recognize the gradual drift toward government by executive measure was evident. They built three safeguards into the *Emergency Powers Act, 1951* that facilitated the rapid annulment of the legislation under certain proscribed conditions. First of all, they guaranteed that the regulations directed by the act would cease to have effect 40 days after the passage of a joint House of Commons and Senate resolution to that effect. Secondly, both houses of Parliament agreed that they would allow ample time for debate in the other house. The third safeguard was an expiration clause set for 31 May 1952 (Canada Gazette, 1951, p. 248). While the *Emergency Powers Act* was extended twice into 1954, the use of what came to be known as sunset clauses allows, and in fact forces further debate - which is useful as a crisis situation evolves.

Appendix C, sers. 10, 13, 14, and 15 (with the accompanying footnotes) display evidence of this reluctance to proclaim the WMA, although the acts passed gave many of the wartime powers to the Governor-in-Council and Privy Council in any event. Numerous debates also occurred after the proclamation of WMA 1970 (Appendix C, ser. 17, p. C-6/12) and the

Appendix D – U.S.A. Only one-in-four proposed bills make it through the committee consideration stage and are returned to the House or the Senate for a vote, which ensures that considerable debate occurs before a proposed bill even achieves first reading (Appendix D, ser. 25, p. D-20/55, fn 40). Keystone acts such as the Espionage Act of 1917, Pub.L.65-24, 40 Stat 217 (1917); the Espionage Act of 1917, Pub.L.65-24, 40 Stat 217 (1917); the Alien Registration Act of 1940 (Smith Act), Pub. L.76-670, 54 Stat. 670 (1940); the Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987 (1950) passed with substantial majorities, perhaps due to a perception of imminent threat from the Germans, the Japanese, and the Soviets respectively. The Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) encountered opposition (Appendix D, ser. 25, p. D-19-20/55); but later acts, such as the Electronic Communications Act of 1986, Pub. L. 99-508, 100 Stat. 1848 (1986). (Appendix D, ser. 29, p. D-23/55) and the Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4279 (1994). (Appendix D, ser. 31, pp. D-26-27/55) were passed by voice vote. This might be indicative of several things, such as a broad acceptance of the need for the legislation, or it might indicate a lack of understanding of complex legislation. However, the committee system would appear to assure that sufficient review has occurred before a bill is tabled for a vote.

Theme 7 - Permanence of Temporary Internal Security Legislation

Appendix B – United Kingdom. Elements of the Aliens Act, 1905 and DORA, 1914 can be noted in current (c. 2015) immigration and internal security legislation in the U.K. Specifically, the reader can trace alien restrictions and exclusion orders through all subsequent internal security acts to control orders and Terrorism Prevention and Investigation Measures (TPIM) used to isolate and limit potential terrorist freedom of action. As pointed out in Appendix B, ser.6, p. B-9/73; DORA 1914 was not repealed for 74 years. Temporary wartime executive measures become permanent, with the removal of the s.1 reference to “state of war” in the Aliens Restriction (Amendment) Act 1919, 9 & 10 Geo 5 c. 92 (Appendix B, ser. 22, p. B-24/73). The 1919 Act, with its series of Immigration Orders starting from 1920, has provided the

Ultimately, as Donahue (1999) notes, once temporary anti-terrorist legislation is passed it is hard to rescind as to do so appears to be giving in to the terrorists.

**Appendix C – Canada.** The most obvious law in the Canadian case study is the *War Measures Act*, 5 Geo. V, Ch.2, 1914, (WMA) which was repealed with the passage of the *Emergencies Act*, S.C. 1988, c.29. Although the *War Measures Act* was only officially proclaimed on three occasions, what is not as well-known is the piecemeal extension of the Act for nine years following the end of World War II. There was a gradual and partial retreat from governing by executive measures in the late 1940s and early 1950s. The *Wartime Power Control Act, 1941* was repealed in S.C. (1947), c. 50. Under the terms of the act, the act could have repealed by either a proclamation by the governor-in-council or a year after a declaration of the cessation of hostilities by the governor-in-council (Laskin, 1948, p. 487). The ever-present but ill-defined threat from the Soviet Union and its assumed satellites of the People’s Republic of China and the Democratic People’s Republic of North Korea led to the enactment of the *Emergency Powers Act, 1951* in March of that year, which was to remain in effect until May 1954.

The WMA had to be proclaimed each time as an emergency response to an apprehended war, invasion, or insurrection prior to entering into effect, which occurred in August 1914, September 1939, and October 1970. What is more disturbing are the times in which it was *not* proclaimed but assumed to be in effect, and was deemed so by Parliament and by the courts. Appendix C, sers. 4, 7, 9, 11, 12, and 14 describe the selective use of the WMA post-war to reinforce Orders in Council against Ukrainian immigrants, striking labourers, Japanese-Canadians, and suspected Communist sympathizers.
Despite its enactment in 1914 to control the movement of aliens and to place the wartime economy under central control, the WMA’s societal impact was well-recognized by the judiciary and by legislators. In the case Reference: As To the Validity of the Wartime Leasehold Regulations, [1950] S.C.R. 124, the Supreme Court of Canada identified the tendency of temporary legislation enacted after the invocation of the War Measures Act at the start of World War II to take on permanent form. The Supreme Court decision noted the extension of executive measures through The National Emergency Transitional Powers Act, 1945 (S.C. 1945, c.25) and The Continuation of Transitional Measures Act, 1947 (S.C. 1947, c.16 and amendments 1948, c.5 and 1949, c. 3). The Continuation of Transitional Measures Act, 1947, S.C. 1947, c. 16, (as amended by S.C. 1947–48, c. 5, S.C. 1949, c. 3, and S.C. 1950, c. 6) ensured that many of the wartime provisions remained in force in Canada nine years after the end of World War II.

Sedition remains a criminal offence under Sections 59-62 of the Criminal Code of Canada (1985, c. 46) (CCC), in Part II, “Offences against Public Order,” with the specific offence under Section 62 of “Offences in relation to military forces.” The WMA 1939, and the two subsequent acts passed in 1945 and 1947 continued the central control of certain aspects of food production in Canada, such as the designation of certain agricultural products and facilities as being under federal government control.

The Continuation of Transitional Measures Act, 1947 [S.C. (1947), c. 16] was to become effective on the expiry of The National Emergency Powers Act, 1945 [S.C. (1945), C. 25 and amendment (1946), c. 60, which was scheduled to occur 31 December 1947 if Parliament met in November or December of that year. Provisions for its extension to 31 March 1948 had been made if Parliament was deferred into the new-year with the possibility of another extension for a year if ordered by the governor-in-council (Laskin, 1948, p. 487). It is evident that once granted, the Canadian government executive was loath to relinquish its powers.

However, it should be noted that many of the executive measures used to govern Canada during World War II were extended from the end of the War in September 1945 to May of 1954 through the passage of three transitional emergency acts in 1945, 1947, and 1951, as well as acts to control the sale of strategic commodities such as agricultural grains and coal which lasted for decades. The Parliamentarians of 1951 also reserved the right to resort to invoking the WMA if the crisis deteriorated. However, the tendency to proceed cautiously informed the extensions in 1952 and in 1953.
Appendix D – U.S.A.  The major 20th Century extension of temporary internal security legislation in U.S. history is that of Presidential EO 9066, which lasted from 19 February 1942 to 19 February 1976 (Appendix D, ser. 17, p. D-13/55) when it was rescinded by Presidential Proclamation 4417.  Closely related to this theme is the extension of a permanent states of crisis or emergency through legislation, which is discussed below in reference to the current usage of the USA PATRIOT Act of 2001, the Homeland Security Act of 2002, and USA FREEDOM Act of 2015.

Theme 8 - Extension of a Permanent State of Crisis through Legislation

Appendix B – U.K.  DORA 1914 was used as the template for the Emergency Powers Act, 1939, and many provisions related to counter-terrorism appear in subsequent British legislation up to the present day (c. 2015).  DORA 1914 became the basis for the Restoration of Order in Ireland Act, 1920, 10 & 11 Geo. 5 c. 31 (ROIA), the Emergency Powers Act, 1920, c.55 (EPA), the Special Powers Act, 1922 (SPA, not in comparative table but can be added) and the extension of DORRs to SPA Regulations, etc.  DORR 14B (Internment) was extended to the ROI Regulations.  For example, the Emergency Powers Act, 1920, c.55 extended DORA for use in strike breaking in 1921, 1926, 1948, 1949, 1955, 1966, 1970 (twice), 1972 (twice), 1973, 1974.  EPA 1920 was finally repealed in 2004.  See Appendix B, p. 28/73, ser. 24.  The Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo. 4, ch. 50 (Eng.), which was enacted to deal with the IRA’s S-Plan was in effect until 1954 (Appendix B, ser.25, pp. 29/73-30/73).  This 1939 Act also formed the basis for the Prevention of Terrorism (Temporary Provisions) Act, 1974 which formed the basis for the now-repealed Section 44 of the Terrorism Act, 2000 (Walker, 1992, p. 31).  The Prevention of Terrorism Acts of 1974–1989 (as amended in 1976, 1984, 1989) were renewed annually as “Temporary Measures,” which causes an annual re-assessment of its continued validity, which is a best practice from the common law, humanitarian, and strictly utilitarian perspectives.

Appendix C – Canada.  Themes 6 and 7 describes how this type of situation was managed in Canada.  The only other instance was relatively brief in duration, i.e. after the passage of the WMA 1970, the Public Order Temporary Measures Act, 1970, 19 Eliz. II, c.2 lasted from 2 November 1970 through 30 April 1971 (Appendix C, ser. 19, p. C-7/12).  The third and last proclamation of the WMA occurred 16 October 1970 due to an “apprehended insurrection” led by le Front de Libération du Québec, (which after a decade long bombing
campaign), had kidnapped British Trade Counsel James Cross and Quebec Provincial Cabinet Minister Pierre Laporte. Although the proclamation of the WMA was supported almost universally by both English- and French-speaking Canadians, there was a recognition of an overreaction which led to social and political consequences. These unanticipated consequences, as well as subsequent developments in Canadian internal security law are explained in Appendix C, sers. 17 to 29.

Appendix D – U.S.A. Aside from the Reconstruction Era (1865-1877) following the Civil War, the major legislated crises are the occurrence of martial law in Hawaii following the enactment of the Organic Act (Appendix D, ser. 11, p. D-7/55) to declare martial law from 1941 to 1944, and in some respects the lower-level but still valid crisis state which attends the ongoing (c. 2015) struggle against Islamists which is guided by the Patriot Act, the Homeland Security Act of 2002, and the USA FREEDOM Act of 2015. One of the striking aspect of the U.S. approach to internal security legislation is the incorporation of significant societal changes within the context of omnibus bills.

2012 NDAA. The 2012 NDAA\textsuperscript{14} is typically a mundane bill that appropriates funding for the military for the current fiscal year. However, one unintended consequence of the 2001 enactment and five subsequent reauthorizations of the \textit{USA PATRIOT Act} may be contributing to the establishment and acceptance of a climate of permanent wartime crisis in the United States, and by extension, in other Western democratic nations. The Patriot Act provided ample precedent for indefinite detention of suspected terrorists through legitimizing the detention of unlawful enemy combatants in an off-shore prison at Guantánamo Bay, Cuba. In May 2006, the UN Committee against Torture condemned prisoners’ treatment at Guantánamo Bay, noting that indefinite detention constitutes per se a violation of the \textit{UN Convention Against Torture}.

\textit{Detention provisions.} Christopher Anders, ACLU senior legislative counsel stated that “The bill is an historic threat to American citizens and others because it expands and makes permanent the authority of the president to order the military to imprison without charge or trial American citizens” (ACLU, 2011, 1 December, para. 4).

\textsuperscript{14} The draft 2012 NDAA Senate Bill, which ran to 926 pages, was initially tabled as S. 1867 on 15 November 2011. S.1867 passed on 1 December 2011 by a vote of 93 to 7, and the Bill was passed to the House of Representatives. The indefinite detention provisions were hotly debated in the House until 15 December 2011, when an amended Bill, H.R. 1540 was passed by a vote of 283 to 136, with 14 not voting https://www.govtrack.us/congress/votes/112-2011/h932). Senator Lindsey Graham (SC, Rep.) supported the Bill stating that the battlefield had come to America and that we were fighting an endless war against terror.
On 2 May 2012, the House of Representatives Armed Services Committee (HASC) released a “Myth and Fact” report on the 2012 NDAA which sought to ease concerns as to the scope of the detention provisions of the Act. Grass roots opposition to the Act continued after its passage. In 2012 alone the following amendments and bills were introduced, primarily to prevent the application of 2012 NDAA Sections 1021 and 1022 (generally referred to as the “detention provisions”) to American citizens: The Ron Paul Bill (included Persons); The Gohmert Amendment; The Smith-Amash Amendment (included Persons); The Due Process Guarantee Act; and the Feinstein-Lee Amendment (PANDA, 2015, FAQ, Myth #1, para. 13). If American citizens were not covered by the detention provisions, there would be no need to introduce clarifying legislation. It appears that at least six attempts were made to fix or repeal those provisions after 2012 NDAA was signed into law on 31 December 2011. It is clear through these actions that Congress believes the provisions do apply to American citizens.

Indefinite detention. It is possible that the acceptance of indefinite detention as normal peacetime practice facilitated the introduction of Section 1021 (b) (2) of the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA) under “Subtitle D-Counterterrorism.” Section 1021 is an “Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force.” Sub-section (b) (2) defines covered persons as:

A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces. (USG-GPO 2011)

Sub-section (c) “Disposition under law of war” sub-sub-sub section (1) states that covered persons may be subject to “Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.

NDAA 2012 is an omnibus Act which covers all aspects of Department of Defense (DoD) activity in its 565 pages. The Act authorizes $662 billion in funding “for the defense of the United States and its interests abroad.” President Obama described the Act in a signing statement as addressing national security programs, DoD health care costs, counter-terrorism within the United States and abroad, and military modernization. The Act also imposes new economic sanctions against Iran (Sec. 1045), directs appraisals of the military capabilities of countries such as Iran, China, and Russia (Sec.1232, Sec. 1240), and refocuses the strategic goals of NATO towards “energy security” (Sec. 1233). NDAA 2012 also increases pay and healthcare costs for military service members and gives governors the ability to request the help of military reservists in the event of a hurricane, earthquake, flood, terrorist attack, or other disaster.
Protections. The 2012 NDAA does provide a degree of protection against abuse in subsection (f), “Requirements for Briefings to Congress:”

The Secretary of Defense shall regularly brief Congress regarding the application of the authority described in this section, including the organizations, entities, and individuals considered to be “covered persons” for purposes of subsection (b)(2).

The loss of the writ of habeas corpus in counterterrorism related cases possibly abrogates the following Amendments to the U.S. Constitution: First (Free Speech, assembly, and association), Fourth (Illegal search and seizure), and particularly the Sixth (Trial by peers).

While it can be argued that Section 1021 focuses on persons suspected of supporting terrorism, the definition of what constitutes support to terrorism is vague and open to considerable interpretation. The protection of individual liberty provided in sub-section (f) is also vague, i.e. “regularly brief Congress.” In effect, a suspect may be detained indefinitely without charges being brought against them in court of law.

Negative reaction to the passage of Section 1021 of 2012 NDAA was immediate. Anthony D. Romero, Executive Director of the ACLU stated:

President Obama’s action today is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law. The statute is particularly dangerous because it has no temporal or geographic limitations, and can be used by this and future presidents to militarily detain people captured far from any battlefield. The ACLU will fight worldwide detention authority wherever we can, be it in court, in Congress, or internationally.

The purpose of the wide parameters in Sections 1021 and 1022 are not stated directly in H.R. Bill 1540 nor in Public Law 112-81; however, it could be assumed that its provisions related to covered persons can be extended to include American citizens who hold dual citizenship, live abroad, and work actively to subvert U.S. interests. It would appear that this law addresses cases akin to that of Anwar al-Awlaki, a Yemeni-American citizen killed in a drone strike on 14 October 2011, as Section 1021 begins with the words, “Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note),” a joint House-Senate resolution passed in the immediate aftermath of the 9/11 attacks on 18 September 2001.
The AUMF includes the power to detain, via the Armed Forces, any person, including a U.S. citizen, “who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners,” and anyone who commits a “belligerent act” against the United States or its coalition allies in aid of such enemy forces (P. Law 107-56, Sec. 1021 (2) (b)) under the law of war, “without trial, until the end of the hostilities authorized by the [AUMF]” (P. Law 107-56, Sec. 1021 (c) (1)). The Sec. 1021 text authorizes trial by military tribunal, or “transfer to the custody or control of the person’s country of origin,” or transfer to “any other foreign country, or any other foreign entity” (P. Law 107-56, Sec. 1021 (c) (4)).

The AUMF was unsuccessfully cited by the George W. Bush administration in Hamdan v. Rumsfeld (2006), in which the U.S. Supreme Court ruled that the Administration’s military commissions at Guantanamo Bay were not competent tribunals as constituted, and thus illegal. The AUMF was also cited by the Department of Justice as authority for engaging in electronic surveillance in ACLU v. NSA without obtaining a warrant of the FISA Special Court as required by the U.S. Constitution.

Given the power of detention already inherent in the AUMF, it seems unnecessary to reinforce it through 2012 NDAA Sec.1021. The passage of 2012 NDAA Sec. 1021 may contribute to reinforcing a permanent suspension of individual rights long held under common law, the U.S. Constitution, and the Bill of Rights. Pulitzer Prize winning journalist Christopher Hedges brought a suit against President Barak Obama in the U.S. Southern District Court of New York.

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16 In habeas and mandamus petitions, Hamdan asserted that the military commission lacks the authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him. Hamdan v. Rumsfeld, 548 U.S. 557 (2006), (argued 28 March 2006, decided 29 June 2006), is a case in which the Supreme Court of the United States held in a 5-3 decision that military commissions set up by the George W. Bush Administration to try detainees at Guantanamo Bay lack “the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949” (U.S.C. 2005, p. 4, point 4). Specifically, the S.C.U.S. ruling says that Common Article 3 of the Geneva Conventions was violated.

17 American Civil Liberties Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007), is a case decided July 6, 2007, in which the United States Court of Appeals for the Sixth Circuit held that the plaintiffs in the case did not have standing to bring the suit against the NSA, because they could not present evidence that they were the targets of the so-called “Terrorist Surveillance Program” (TSP). Judge Taylor wrote a 44-page, 11-part opinion in which she examined the defendant’s (i.e. NSA) claim over state secrets, standing, and the President’s war time claim. Judge Taylor found that the NSA surveillance Program violated statutory law in regard to the FISA. Furthermore, she concluded that the NSA program violated the constitution in regard to the First Amendment, Fourth Amendment, and Separation of Powers Doctrine. Judge Taylor stayed her own opinion, preventing it from taking effect, pending a September 7 hearing.
York in January 2012 with the assistance of attorneys Carl Mayer and Bruce Afran claiming that indefinite detention was unconstitutional.\(^{18}\)

In May 2012 U.S. District Judge Katherine B. Forrest declared 2012 NDAA Section 1021(b) (2) to be unconstitutional. The Obama administration not only appealed, but demanded that the law be immediately put back into effect until the appeal was heard. Judge Forrest refused to do this. The U.S. government appealed to the U.S. Court of Appeals for the 2nd Circuit, and asked, in the name of national security, that the court stay the District Court’s injunction until the government’s appeal could be heard. The 2\(^{nd}\) Circuit Court agreed and Sec. 1021 was revalidated. Hedges and his lawyers surmise that the rapid appeal was due to the fact that the administration was using the law to detain U.S. citizens in black sites, most likely dual citizens from Pakistan, Afghanistan, Somalia and Yemen. The Obama Administration would have been in contempt of court if Forrest’s ruling was allowed to stand while the federal authorities detained U.S. citizens under the statute. U.S. government attorneys refused to say whether or not the government was using the law when asked by Judge Forrest - which led to Hedges’ lawyers suspicion that it was already in use.

Judge Forrest, in her 112-page ruling against 2012 NDAA Section 1021, noted that under this provision whole categories of Americans could be subject to arrest by military authorities. These might include Muslims, activists, Black Bloc members and any other Americans labeled as domestic terrorists by the state. Forrest wrote that Section 1021(b) (2) echoed the 1944 Supreme Court ruling in Korematsu v. United States, which supported the government’s use of the military to detain 120,000 Japanese-Americans in internment camps without due process during World War II. The 2\(^{nd}\) Circuit Court overturned Forrest’s ruling in July 2013 in a decision that did not force it to rule on the actual constitutionality of Section 1021(b) (2).

Borrowing from precedent law, the 2\(^{nd}\) Circuit Court cited the Supreme Court ruling in Clapper v. Amnesty International argued 29 October 2012, decided 26 February 2013.\(^{19}\) Hedges was one of the plaintiffs in this case as well, and the outcome was similar. Chief Justice John G.

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\(^{18}\) Hedges was later joined by co-plaintiffs author Noam Chomsky, journalist Daniel Ellsberg of Pentagon Papers fame, journalist Alexa O’Brien, RevolutionTruth founder Tangerine Bolen, Icelandic parliamentarian Birgitta Jonsdottir and Occupy London activist Kai Wargalla (Hedges, 2014, 4 May, para. 3).

\(^{19}\) Clapper v. Amnesty International, 568 U.S. ___ (2013), was a United States Supreme Court case in which the Court held that Amnesty International USA and others lacked standing to challenge 50 U.S.C. § 1881a (also known as Section 702)[1] of the Foreign Intelligence Surveillance Act as amended by the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008.
Roberts held in the AI case that the Respondents lack Article III standing to challenge *FISA Amendments Act of 2008*, 50 U. S. C. §1881a. In Hedges’ (2014, 4 May, para.5) opinion the 2nd Circuit Court “used the spurious Supreme Court ruling to make its own spurious ruling,” i.e., to say that the Respondents had no standing in bringing the 2012 NDAA case to court. Hedges (2014, 4 May) explained that,

> because we could not show that the indefinite-detention law was about to be used against us, just as we could not prove government monitoring of our communications, we could not challenge the law. It was a dirty game of judicial avoidance on two egregious violations of the Constitution” (Hedges, 2014, 4 May, para. 6).

According to Hedges’ attorney Carl Mayer,

> in refusing to hear our lawsuit the courts have overturned nearly 150 years of case law that repeatedly holds that the military has no jurisdiction over civilians. Now, a U.S. citizen charged by the government with “substantially supporting” al-Qaida, the Taliban or those in the nebulous category of “associated forces”—some of the language of Section 1021(b) (2) - is lawfully subject to extraordinary rendition on U.S. soil. And those seized and placed in military jails can be kept there until “the end of hostilities” (Hedges, 2014, 4 May, para. 2).

The lawyers in the January 2012 suit are scathing in their assessment of the SCUS decision. Co-lead counsel Bruce Afran stated, “The administration of President Obama within the last 48 hours has decided to engage in an all-out campaign to block and overturn an order of a federal judge” (Hedges, 2012, 17 September, para. 4). “This may be the most significant constitutional standoff since the Pentagon Papers case,” said Carl Mayer, co-lead counsel for the plaintiffs. Concerned U.S. citizens working through grass roots advocacy established the anti-NDAA Sec. 1021 group known as PANDA. Hedges (2014, 4 May, para. 1) now concludes

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20 *Clapper v. Amnesty International* (AI) challenged the secret wiretapping of U.S. citizens under the *FISA Amendments Act of 2008*. The Supreme Court had ruled in *Clapper* that AI concern about government surveillance was “speculation.” The S.C.U.S. ruled that the plaintiffs were required to prove to the Court that the FISA Amendment Act would be used to monitor those persons interviewed by the journalists. The court knew, of course, that the government does not disclose whom it is monitoring.

21 Born on Social media, from Twitter to Facebook, and through a YouTube video, People Against the NDAA (PANDA) was founded on January 29th, 2012 in Bowling Green, OH. It is supported by groups across the political spectrum, including Young Americans for Liberty, Occupy Bowling Green, the Northwest Ohio Conservative Coalition, and the Ohio Oathkeepers, a group of 7-10 college students who went on the offensive. After distributing flyers throughout Bowling Green University and getting involved in local politics, this group launched PANDA nationwide in late April 2012. Read more at [http://pandaunite.org/aboutus/#Zm4SSmDuiSDf61Tk.99](http://pandaunite.org/aboutus/#Zm4SSmDuiSDf61Tk.99)
that the continued validity of 2012 NDAA Sec. 1021 “means that the nation has entered a post-constitutional era.”

**Theme 9 – Limiting Immigration for Security Purposes**

**Appendix B – U.K.** This theme is one of the oldest in the study, and most current (c. 2015). It is evident in the *Aliens Act, 1905*, 5 Edw. 7 c. 13 and in its successor acts and orders (i.e. EMs) include the *Immigration Appeals Act 1969*, and the *Aliens Order 1953*, and as amended in 1957, 1960, 1964, 1967, 1968, and 1970. The concept of asylum in domestic law started to transform from an exception to extradition for a political offence, which was its 19th Century connotation, into a basis for admission for humanitarian reasons. In effect, it was a major evolutionary step in common law – although it was not recognized as such at the time. While important as a milestone in common law, the practical application of this clause was not apparent for decades due to the atmosphere of perpetual crisis in the U.K. due to World War I, the Troubles in Ireland, World War II, and the retreat from the British Empire in the two decades following WWII.

**Appendix C – Canada.** The *War Measures Act, 1914* (as amended 1927) was used during both World Wars to detain and deport Eastern European and later Japanese-Canadian citizens who were recent immigrants. The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (Appendix C, ser. 23, p. C-8/12) which superseded the 1976 act), established the Governor-in-Council (i.e. Cabinet) as the enabling authority empowered to make regulations in clauses 4-6, which led to the law becoming less accessible to citizens and foreign nationals, and thus harder to appeal an inadmissibility decision. The *Protecting Canada’s Immigration System Act*, S.C. 2012, c. 17 (Appendix C, ser. 26, p. C-10/12) gives the Minister the authority to designate irregular arrivals of groups and individuals, which has echoes with the British *Aliens Act, 1905* (Appendix B, ser. 1, p. B-1/73). The *Strengthening Canadian Citizenship Act*, S.C. 2014, c.22 (Appendix C, ser. 28, p. C-11/12) defines Canadian citizenship as a privilege, not a right, which makes revocation – and exile possible, and leads to two-tier citizenship. All in all, Canadian immigration regulations have been gradually tightened since 9/11 to better screen for human smuggling and for potential terrorists.

**Appendix D – U.S.A.** The U.S.A. traditionally prides itself on being a nation built by immigrants, as evidenced by the Statue of Liberty and her invitation to “Give me your tired, your
poor, your huddled masses, ye\nning to breathe free…”22 This sentiment appears to be situation dependent. Bashford & McAdam (2014, p.337) observe that the American Immigration Act of 1917, Pub. L. 64-301, 39 Stat. 874 (1917), c.29, sec. 3 defines “undesirable” in a very similar manner to that in Aliens Act, 1905, and adds the exclusion criterion of illiteracy. The treatment of Japanese-Americans paralleled that of Japanese-Canadians during World War II, albeit with a population 4 to 5 times larger. Post 9/11 many Americans of Arab origin have complained of being singled out for additional security screening and monitoring which reflects the earlier concerns of hostile origins or associations found in the British Aliens Restriction Act, 1914 (Appendix B, ser.5, p. B-8/73). Sahar Aziz23 (2012, 21 February) writing in The Guardian, describes the surveillance program undertaken by the New York Police Department under the guise of “community outreach” which is assessed as “poisoning Muslim Americans trust.”

Theme 10 – Monitoring Aliens as Potential Threats

Appendix B – U.K. Closely related to the screening of immigrants is the creation of lists which guide and facilitate surveillance of their movements, associations, and communications. The secret Aliens List (Appendix B, ser. 3) compiled by the Security Service in 1910 (Andrew, 1986, pp. 60-61, pp. 174-175; Bonner, 2007, p. 50; Hiley, 1986, p. 646) is repeated in the provisions of current immigration law.

The Official Secrets Act, 1911, c. 28 (OSA 1911) redefined the term enemy to include potential enemies, i.e. alien residents. The long-term unintended consequence of this amendment was to use ethnic profiling to classify people as criminals before crimes are committed, solely on the basis of association. This presumption of guilt by association alone assumes away the common law principles – and individual protections - of probable cause for arrest, the right to a speedy trial through a writ of habeas corpus, the presumption of innocence at trial, the burden of proof on the prosecution, and of punishment proportionate to the crime. Perversely, it facilitated arrest on suspicion, indefinite detention without trial, the presumption of guilt at trial, the burden of proof lying with the defence, and of punishments which are based on perceived “hostile

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22 “Give me your tired, your poor, your huddled masses, yearning to breathe free, The wretched refuge of your teeming shore. Send these, the homeless, tempest-tossed, to me: I lift my lamp besides the golden door.” (From the poem “The New Colossus” by Emma Lazarus (1849-1877).

23 Sahar F. Aziz is an Associate Professor at Texas Wesleyan University School of Law and a Fellow at the Institute for Social Policy and Understanding. She is the author of Caught in a Preventive Dragnet 10 Years Later: Selective Counterterrorism in a Post-9/11 America (2011), published in the Gonzaga Law Review. She previously served as a Senior Policy Adviser at the Office for Civil Rights at the US Department of Homeland Security.
origins or associations” rather than the seriousness of the offence. The *Aliens Restriction Act, 1914*, 4 & 5 Geo. V, c.12 required the registration of all aliens, not only those identified as “enemy.” It also directed quasi-police duties for ships’ captains, preparations for internment, exclusion of aliens from Prohibited Places, and deportation as well as numerous other Orders-in-Council (Appendix B, p. 8/73, ser. 5).

**Appendix C – Canada.** Appendix C, sers. 2 and 8 describe the surveillance of immigrants during World Wars I and II. This modern approach is reflected in *Protecting Canada’s Immigration System Act*, S.C. 2012, c. 17 (Appendix C, ser. 26, p. C-10/12), which gives the Minister the authority to designate irregular arrivals of groups and individuals, and theoretically the ability to detain them.

**Appendix D – U.S.A.** The Custodian Detention Program and the Custodial Detention A-B-C Lists described in Appendix D, ser. 11, p. D-7/55 and in Kashima (2013, 19 March) reflect the historic need to pre-identify potentially dangerous immigrants. This same pre-identification continues with the No-Fly Lists created and maintained by the Terrorist Screening Center (TSC). This list, which contains 47,000 names, (including 800 Americans) as of August 2013 (ACLU, 2014, 10 October, para. 10) is prone to misidentification of individuals (false positives) due to common Arabic language names and difficulties in transliteration from Arabic to English. U.S. District Court Judge Anna Brown the DHS system for people to challenge their inclusion on the No Fly List to be “unconstitutional,” calling the procedures “wholly ineffective” and a violation of the Fifth Amendment’s guarantee of due process (ACLU, 2014, 10 October). (Appendix D, ser. 51, p. D-36/55). The No Fly Lists harken back to the A-B-C Lists of World War II and the earlier Aliens List of 1910 in the U.K. (Appendix B, ser.3, p. B-7/73). Kahn (2013, p. 3) notes that the inherent logic of watchlists (DoJ, OIG, 2008, March a) makes their use probable as the purpose is described to pre-empt travel of people who “present a threat to civil aviation or national security.” The last three words provide an open-ended opportunity for use by any federal government department as all will err on the side of caution when confronted with multiple terrorist warnings as predicted by Kahneman & Renshon (2007).

**Summary of Theme 10 and Forecast**

Efficiency trumps the presumption of innocence under common law as guilt by association plays a role in screening large groups. If anything, the pressure to expand the watchlists to err on the side of caution will likely increase, as will the utility of the lists for non-
counterterrorism purposes. However, given that the presumption of inclusion on such lists will drive evasive behavior by terrorists and criminals, it is also likely that the lists must be reinforced by unique identifiers such as biometrics for the general public. The question of who owns unique personal identifying data will become a future question for the courts to decide. (It is likely that this will be the government agency that holds it).

**Theme 11 – Reuse of Terminology**

The *Official Secrets Act, 1911*, c. 28 (OSA 1911) also defined “prohibited place” (PP) for the first time in Section 3. This definition was repeated in the 1920 and 1939 amendments to OSA 1911 and in 12 related acts over the next century. (A complete list is available in Appendix B, p. 7/73, fn 24). Of note, this initial definition is extended over time to include nuclear facilities. The terminology used in the *Aliens Act, 1905* is reflected in the 1914 and 1919 revisions of this Act, as well as in the U.S. *Immigration Act of 1917*. The terminology is of much older origin. The researcher noted its use in the *Aliens Act, 1793*, 33 Geo. 3 c. 4); as well as an *Act for Establishing Regulations Respecting Aliens, 1798*; and the *Act for the Registration of Aliens, 1836*. Both Canada and the U.S.A., as well as most English-speaking nations use similar terminology to describe security related threats, places, and technologies. This development is inevitable given common etymology and the need to share information across borders.

**Theme 12 – Unanticipated and Unintended Consequences of Purposive Social Action**

Many of the laws passed under emergency conditions had social consequences years, and even decades into the future. These unanticipated, and usually unintended consequences are identified throughout the table at Appendix B, C, and D under the heading UC. Given the hundreds of entries, the following observations reflect major social change caused, at least in part, by internal security law.

**Appendix B – U.K.** One of the less well-known aspects of DORA 1914 is the influence on political life, as explained in Appendix B, p. B-16/73, fn 51, and the enhanced role of women in the workforce (Appendix B, p. B-18/73). A brief, but humorous summary of the consequences of DORA 1914 and its attendant regulations is also available at [http://www.parliament.uk/about/living-heritage/transformingsociety/](http://www.parliament.uk/about/living-heritage/transformingsociety/) parliament-and-the-first-world-war/video-resources/defence-of-the-realm-act-1914/ [Documentary film]. Appendix B, pp. B-26–27/73, ser. 23 describes the unanticipated consequences of the implementation of martial law in Northern Ireland, which intensified the conflict and increased the losses on both sides
while garnering more criminal convictions. The *Anti-Terrorism, Crime and Security Act 2001*, c. 24 was also used against Iceland in 2008, which was described as a “completely unfriendly act” by Prime Minister Geir Haarde (Appendix B, ser.34, p. B-46/73).

**Appendix C – Canada.** Appendix C, ser. 2, UC describes the use of Ukrainian detainees to build several Canadian national parks, and the eventual compensation paid almost 80 years later (Appendix C, ser.1, fn 14); as well as the implementation of a *temporary* income war tax which is still in effect, and the expansion of the franchise to the female relatives of soldiers, who were assumed to be loyal to the government. Voting patterns were skewed against the Conservative Party thereafter in the Prairie Provinces and in Quebec for decades (English, 2006, sect. 4, para.2). Ser. 2 and 3 UC describes how the use of federal troops to quell a riot with fatal results further worsened the Anglo-Franco divide on conscription in Canada, which lasted into a second conscription crisis in World War II, and hardened Francophone Quebec feelings regarding their perceived second-place status.

Although these events are not unique causes in and of themselves, they are frequently mentioned anecdotally whenever the origins of political leanings are debated. Sers. 4 and 6 UC describe how the use of troops to quell labour disputes in the 1920s fueled the growth of quasi-socialist political parties in eastern and western Canada for decades. Ser. 7 notes the retention of WMA powers five years after the war ended, thus cementing the preeminence of federal government in emergency management – despite the division of powers laid out in the BNA Act, 1867. Ser. 11 describes the short- and long-term impact of the “Gouzenko Affair,” which is perhaps the first recognized confrontation of the Cold War. Ser. 17 notes that while the proclamation of the WMA was originally lauded, it furthered the perception among many Quebeckers that they would never be fully equal in Canada and they threw their political support behind separatist political parties. Ser. 21 notes how the disbandment of the RCMP Security Service and creation of CSIS in 1984 posed problems in information sharing which impeded the Air India Flight 182 investigation which led to the worst terrorist attack in Canadian history in 1985. Ser. 30 describes the divisive impact of the *Antiterrorism Act 2015* on Muslim Canadians which may have influenced voting in the October 2015 federal election.

**Appendix D – U.S.A.** Appendix D, ser.13, *Espionage Act of 1917* used to justify quelling labor strikes under the guise of preeminent communist subversion. Ser. 11 recounts the

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24 Previous revenues had been raised from tariffs and customs dues.
use of the *Organic Act* to declare martial law in Hawaii from 1941 to 1944. Custodian Detention Lists are used to detain 736 Issei indefinitely, none of whom were charged with any crime. Approximately 125,000 Issei and Nisei were detained on mainland U.S.A. The Clinton Administration paid $1.6B in reparations to survivors beginning in 1993. (Canada engaged in a similar process with survivors and descendants of the Ukrainian- (Appendix C, ser. 1, fn 14) and Japanese-Canadian populations which were interned during World Wars I and II respectively).

**Theme 13 – Right of Appeal of Deportation and Detention**

**Appendix B – U.K.** Given the frequent suspension of the writ of habeas corpus, one of the more humane best practice aspects provided in British internal security law is the right to appeal detention. Persons detained under the *Emergency Powers (Defence) Act 1939*, 2 & 3 Geo. 6 c. 62 could appeal their circumstances to an Advisory Committee (Appendix B, ser. 26, p. 33/73). Conversely, this same Act forbade the right to plead their case in a public court, presaging the future Public Interest Immunity (PII) and Closed Material Proceedings (CMP) of the post-9/11 era.

**Appendix C – Canada.** Approximately four thousand Japanese-Canadian citizens were deported to Japan in 1946 without the right of appeal (Appendix C, sers. 9 and 12, pp. C-4-5/12). Appendix C, ser. 23, p. C-8/12 describes how the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 has narrowed the right of appeal. Ser. 24, fn 98 recounts a Parliamentary debate which describes the difficulties which could occur in presenting an appeal to the Solicitor-General to be taken off a no-fly list under the *Anti-terrorism Act* S.C. 2001, c. 41. Significant authority is vested in the Minister of Citizenship and Immigration, and several cases have been decided against dual-citizens who have committed crimes in Canada, leading to their deportation to their countries of origin, or of their parents’ origin. Canada has deported only 12 people since the mass deportation of Japanese-Canadians in 1946; however, Canada has not provided sufficient avenues of appeal to satisfy the concerns of human rights groups, which has led to periodic calls for reform.

**Appendix D – U.S.A.** Appendix D, sers. 54-57, pp. D-39-43/55 describe the decade-long plus tug-of-war between the Bush Administration, human rights groups, and the U.S. Supreme Court in regard to the application of the writ of habeas corpus. The Bush Administration stated that none of the detainees held in Guantanamo Bay captured during the Global War on Terror were protected by the Geneva Conventions; that Guantanamo Bay was not
United States territory, and therefore it was not subject to U.S. law. The U.S. Supreme Court of the United States ruled, in *Rasul v. Bush* 542 U.S. 466 (2004), that the Guantanamo base was covered by US law. In a 6-to-3 opinion written by Justice John Paul Stevens, the U.S. Supreme Court found that the degree of control exercised by the United States over the Guantanamo Bay naval base was sufficient to justify the writ of habeas corpus.

Alleged illegal enemy combatants detained without charge at Guantanamo Bay have been permitted allowed to make appeals in Washington D.C. Federal Courts of Appeal since the passage of the *Detainee Treatment Act of 2005* (DTA, ser. 54) closed the right of Guantanamo detainees to submit new petitions of habeas corpus, and the *Military Commissions Act of 2006* (MCA, ser. 56) closed pending cases. On 29 June 2006, the U.S. Supreme Court held in a 5-3 decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the military commissions set up by the Bush administration to try detainees at Guantanamo Bay lacked “the power to proceed because its structures and procedures violate both the *Uniform Code of Military Justice* and the four Geneva Conventions signed in 1949.” The ruling says that Common Article 3 of the Geneva Conventions was violated. On 12 June 2008, in *Boumediene v. Bush*, 553 U.S. 723 (2008), Justice Kennedy of the U.S. Supreme Court delivered the opinion for the 5-4 majority which ruled the Combatant Status Review Tribunals provided detainees with insufficient protection. The U.S. Supreme Court re-opened the detainees’ access to submit petitions of habeas corpus, holding that the prisoners had a right to the habeas corpus under the U.S. Constitution and that the *Military Commissions Act of 2006* was an unconstitutional suspension of that right. On 21 July 2008 United States Attorney General Michael Mukasey called on Congress to legislate how judges would review the detainees’ petitions of habeas corpus petitions.

Mukasey was seeking to have the legislation control what evidence should be made public, and to proscribe releasing any of the detainees within the U.S.A. In this respect, Mukasey was probably seeking to define the limits of what the British courts describe as Public Interest Immunity (PII) within a Closed Material Proceeding (CMP). A series of U.S. Court of Appeal rulings since July 2010 have made it increasingly difficult for Guantanamo Bay detainees to win their habeas corpus cases following the *Boumediene v. Bush* (2008) decision. It appears that the executive has overruled the independent judiciary in the prevailing atmosphere of perceived crisis.
Theme 14 – Oversight of Executive Action

The historical case studies demonstrate that abuse of mandate, mission creep, and ad hoc response to rapidly evolving tactical situations can lead to operations difficulties and unanticipated and unintended strategic problems. These potential strategic problems are best mitigated by external review to ensure that security agencies remain within the boundaries of the law and conduct their duties in an ethical, unbiased manner.

Appendix B – U.K. Oversight came relatively late to British security law. The Prevention of Terrorism Acts of 1974–1989 (as amended in 1976, 1984, 1989) were renewed annually as “Temporary Measures,” which causes an annual re-assessment of its continued validity, which is a best practice from the common law, humanitarian, and strictly utilitarian perspectives as it ensures Parliamentary oversight. The U.K. government had received the 1957 Birkett Report, the 1980 White Paper, and the 1981 Diplock Report, all of which provided a review of the procedures, safeguards and monitoring arrangements relating to interception of communications, but none of them recommended a single legal framework to cover all interception matters (Wong, 2005, p.10). The Interception of Communications Act, 1985, c. 56 created the post of Interception of Communications Commissioner, which was the first window of debate on the U.K. Intelligence Community. This 1985 Act forced executive accountability to Parliament, and created the role of the Privy Councilors sworn to secrecy, both of which are judged as best practices as they promote shared, as opposed to single-point executive accountability. (See Appendix B, ser. 28, pp. 34/73-38/73 and the accompanying footnotes regarding the Parliamentary debates). The Security Service Act 1989, c. 5 officially acknowledged the existence of the Security Service for the first time in its 80-year history.

The existence of the Security Service was not a deeply hidden secret as the histories by Andrew (1985) and Knightley (1986) can attest. As the long title of the Security Service Act 1989, c.5 states, it is “An Act to place the Security Service on a statutory basis; to enable certain actions to be taken on the authority of warrants issued by the Secretary of State, with provision for the issue of such warrants to be kept under review by a Commissioner; to establish a procedure for the investigation by a Tribunal or, in some cases, by the Commissioner of complaints about the Service; and for connected purposes.”

Similarly, the Intelligence Services Act 1994, c. 13 placed the Secret Intelligence Service and the Government Communications Headquarters on a statutory footing for the first time, and
provided for a tribunal to investigate complaints, and for an oversight committee (the Intelligence and Security Committee) composed of nine MPs reporting to the PM. The Anti-Terrorism, Crime and Security Act 2001, c. 24 also requires annual renewal, and thus provides an opportunity for Parliamentary debate to some degree.

Appendix C – Canada. Canada has the weakest oversight mechanisms of the three nations in the study. The Security Intelligence Review Committee (SIRC) receives its mandate from the CSIS Act, 1984, S.C. 1984, c.9; R.S.C. 1985, c.C-23) Part III, s.34 (Appendix C, ser. 21, p. C-7/12). SIRC is limited to post-hoc addressing of selected topics, in responding to complaints, and producing an annual report to Parliament (http://www.sirc-csars.gc.ca/abtpr/index-eng.html). The position of Inspector General in CSIS was abolished (Roach, 2015, March). Former Supreme Court Justice John Major’s (2010, p.35) report on the investigation into the bombing of Air India Flight 182 had harsh words for the minimal oversight provided by SIRC.

Conversely, the Communications Security Establishment (CSE, analogous to GCHQ and NSA), is a component part of the Department of National Defence, and does not have an external review body. CSE has a system of annual review undertaken by the Office of the CSE Commissioner reporting to the Minister of National Defence, who delivers a redacted report to Parliament (Deibert, 2015, 27 March). Roach (2015), Forcse & Roach (2015, 13 February), and Deibert (2015, 27 March) all note that many commentators in Canada miss the purpose of external review, i.e. oversight of the mandate’s execution rather than just retroactive reaction to abuse. As Deibert (27 March, p. 8) notes in describing CSE, that Canada is “entrenching 1950s-era oversight of a 21st century security service.”

Appendix D – U.S.A. The United States has strong theoretical oversight of intelligence, with accountability to the U.S. citizens through Congressional oversight committees. Congressional oversight of the U.S. Intelligence Security Community is achieved through the House Permanent Select Intelligence Committee (HPSCI) and the Senate Select Intelligence Committee (SSCI). Both committees have representation from the House Appropriations, Armed Services, Judiciary, and Foreign Affairs Committees, and oversight of the IC budget. SSCI Vice-Chair (Chair 2009-2015) Senator Dianne Feinstein has complained that the Intelligence Community has been selective in presenting evidence to her committee, and that the
CIA had gained access to the SSCI copy of the *Panetta Review* and removed over 900 pages (Feinstein, 2014, 11 March), thus violating the separation of powers between Congress and the executive branch provided by the U.S. Constitution. She claimed that the report released by CIA Accountability Board on 14 January 2015 disputing parts of her complaint was factually erroneous in 15 cases, including the CIA claim of “deliberative privilege” (her Fact 12) in deciding what the SSCI could see (Feinstein, 2015, 27 January).


These issues illustrate the difficulties the legislative branch has in asserting oversight authority over the executive branch. This seemingly worthy goal may be flawed due to the premise that the members of the oversight body, however constituted, will have superior knowledge and dedication to the nation’s business than the members of the executive body.

**Theme 15 – Mission Creep**

Although this term has its roots in military vernacular, it also applies to the intelligence and security communities. Mission creep amongst security and intelligence agencies is almost inevitable as the urge to gather more information to gain a more precise picture is always present, as is the urge at all levels to avoid mission failure. As Kahneman & Renshon (2007), point out this creates an environment in which the “hawks win.” As they conclude, the hawks are not necessarily wrong, only that they are likely to be more persuasive than they deserve to be due to predictable errors (i.e. biases) in thinking.

**Appendix B – U.K.** DORA 1914 and the *Munitions Act, 1915* 5 & 6 Geo. 5 c. 54 & 99 provided for the vast expansion of security intelligence organizations such as the Ministry of Munitions Labour Intelligence division, later renamed the Parliamentary Military Security Department, No.2. Aside from their mandate of preventing sabotage by German spies and sympathizers, MMLI and P.M.S. 2 were used to pre-empt labour unrest, to protect the moral integrity of female employees, and thus indirectly preserve the class structure (Woolcott, 1994).

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25 Internal CIA review of the CIA Detention and Interrogation Program during the Bush Administration. Feinstein (2014, 11 March) notes that the CIA provided approximately 6.2M documents to the SSCI.
In the modern era, the stop-and-search powers in accordance with s. 44 of Terrorism Act 2000, c. 11, (later ruled illegal by the European Court of Human Rights), is another example. The use of s.44 grew over 10 years to include non-terrorism arrests. As security forces could stop and search any vehicle, aircraft, vessel, hovercraft, or person without probable cause it detracted from the common law protections of security of the person.

Appendix C – Canada. Appendix C, sers. 2, 4, 6, 7, 8, 10, 11, 13, 15, and 17 depict historical instances of the executive assuming powers beyond the original WMA mandate. Sers. 23, 26, 28 invest federal ministers with powers that approximate those of the wartime Governor in Council.

Appendix D – U.S.A. The tragic events of 9/11 led to enhancing many of the powers of the U.S. strategic security community (Appendix D, sers. 34 to 70, less ser. 59) with a view to preventing further terrorist attacks on U.S. territory or against U.S. interests overseas. As the years progress, less emphasis has been placed on the core mission of counter-terrorism as existing assets are used for other purposes. The U.S. Department of the Treasury Financial Crimes Enforcement Network (FinCEN) reflects this trend. Title III of the USA PATRIOT Act of 2001 provides significant powers to track the movement of money worldwide (Appendix D, sers. 44-47, pp. D-33/35). However, DoJ, FinCEN, 2015, s.2, BSA SAR Form 111, 5 - Exhibit 5 depicts the number of filings by type of Suspicious Activity by Depository Institutions, from March 1, 2012 through 31 March 2015. Line 100 depicts 600 investigations of known terrorist organization finances, whereas line 65 indicates that there were 51, 199 investigations for mortgage fraud in 2013 alone. In reviewing the FinCEN SAR statistics over three years, there were 600 terrorist financing investigations out of a total 586, 534 investigations, or 0.001023 percent.

The Office of the Inspector General (OIG) of the FBI publishes reports on the implementation of Section 702 of the FISA Amendments Act of 2008, as well as the use of Sections 1001, 215 (Business and Library Records), 505 (National Security Letters (NSL)) of the USA PATRIOT Act of 2001. All reports indicate use in routine law enforcement, particularly in drug related investigations (Appendix D, ser.38, p. D-32/55, fn 77; Timm (2011, 26 October)). Essentially the lower evidence of wrongdoing-threshold required to gain warrants in counter-espionage and counter-terrorism investigations is frequently used in law enforcement, effectively sidestepping the common law protections of the Fourth Amendment to the U.S. Constitution.
While the reports indicate numbers in the hundreds vice thousands of cases, the fact that it occurs should cause some concern and should lead to continued oversight lest it become routine.

Strict adherence by the FBI to the minimization standards related to the preservation of information collected in accordance with a with a PA 215 search. Such standards should specify the time parameters of an executive agency’s legal authority to collect, retain, and disseminate such information. While the Attorney General adopted the FBI Standard Minimization Procedures for Tangible Things Obtained Pursuant to Title V of the Foreign Intelligence Surveillance Act on March 7, 2013 (Final Procedures), the OIG assessed that such measures only came seven years after the expressed requirement in the USA PATRIOT Reauthorization Act of 2006 (DoJ-OIG, 2015, p. 63). The three DoJ OIG Reviews of the use of Section 215 published in March 2007, March 2008, and May 2015 were heavily redacted, particularly to prevent comparison of the use of Section 215 against U.S. citizens and non-U.S. citizens.

**Theme 16 – Adaptability**

Closely related to mission creep is the theme of adaptability, in the context of considered and debated change to existing legislation. This theme is most evident in the five revisions of DORA 1914, but it is also evident in modern acts such as the Criminal Justice Act 2003, c. 44, which extended the duration of questioning terrorism suspects from 7 to 14 days; and the Terrorism Act 2006, c. 11 which extends detention from 14 to 28 days due to the difficulties encountered in building criminal cases in which detailed scientific analysis is required. The use of U.S. counter-terrorism assets for crime fighting reflects this trend as well. The Canadian data in Appendix C does not indicate discernable trends since 9/11. The historical trends in the use of Governor in Council and Privy Council Orders post-World War I and World War II depict significant executive flexibility in interpretation of the scope and duration of the War Measures Act (as amended).

**Theme 17 – Law chasing technological developments**

Many internal security laws are drafted in response to new technologies which aid an adversary in avoiding government detection, identification, and monitoring or the government in accomplishing the same mission. In military terms, it is a classic example of the dialectic dance between the sword and the shield. Almost all the surveillance related acts have some element of response to emerging technologies such as the advent of the Internet. Private conversations between the researcher and senior Canadian intelligence and security personnel (7 July and 24
September 2015) acknowledge this conundrum. These private discussions can be summarized by stating that 21\textsuperscript{st} Century information technologies and air travel require such rapid reaction that laws crafted in the early 20\textsuperscript{th} Century are inadequate. In the interim, a degree of trust in the integrity of executive agencies, backed up by internal and external oversight must be dedicated by the legislative branches, and ultimately by the citizens of each democratic nation.

**Theme 18 – Foresight**

Theme 17 notes that the executive measures enabled by security laws must constantly adapt to changing technologies. Given the need to keep pace with emerging technologies in communications, identification, transportation, and medicine, there is a requirement to better anticipate the potential impacts on a broader scale. Currently, the best place to observe legal adaptation to emerging technologies lies in nanotechnology, bio-pharmaceuticals, and the Internet. The proposed model will incorporate ideas from these domains, as well as filters to identify cultural aspects of emerging complex social challenges.

**Summary of Findings and Discussion – U.K.**

DORA gave the Government intrusive powers, including the acquisition of land, buildings, and the re-tasking of existing industries for the war effort. It also permitted wide-scale media censorship. DORA’s wide-ranging powers directly affected the personal and professional lives of every man, woman, and child in the United Kingdom as it introduced British Summer Time (BST), and strict licensing laws for pubs that controlled their hours of operation. More pertinent for this review, DORA facilitated, guided, and influenced the conduct of counter-espionage operations throughout the War – and long after in the U.K., Canada, and in the U.S.A. due to the adoption of *judicial passivity* (Murray, 2006, p.5, fn 19, p.6) in confronting the executive in each nation.

Smith (1986, p. 644) opines that no other Western democratic nation has amassed so many tools that protect the integrity of government. This opinion (c. 1986) should be revisited given the numerous pieces of American security passed since 9/11. However, it suffices to say that the U.K. certainly has had a long history of passing legislation which alternately grants freedoms and later restricts them. Common law was (c. 1986) limited by statutes such the **Official Secrets Acts**\textsuperscript{26} (two enacted in 1889, 1911, and one in 1989), the **Public Records Act**,

What can be observed with a degree of accuracy is the gradual trend toward greater state control over daily activities in British society - as demonstrated through sheer force of statistics and the weight of laws enabling ever greater intrusiveness by government between 1914 and 1918. From this sure point of departure certain observations can be raised as to the recurrence of certain phenomena during times of heightened tension. If nothing else, the history of internal security in Great Britain during World War I and after makes for a good cautionary tale of what can happen.

A linear progression demonstrating a gradual loss of civil liberties in the United Kingdom and Canada can be traced over the course of World War I and beyond. This progression waxed and waned over the next two decades as the perception of internal subversion changed from German imperialism to early Soviet Soviet-led communism, to German fascism, to Communism during the Cold War. Irish nationalism has been a concern throughout most of the 20th Century. It appears that the United Kingdom never really relaxed its (internal security) guard. Aside from the symbiotic cause and effect relationships previously described concerning security policy and intelligence tactics, techniques, and procedures, there are three major themes worth revisiting in concluding this study. They are the gradual erosion of civil rights, the “law of unanticipated consequences,” and the influence of public opinion in a democracy.

Summary of Findings and Discussion - Canada

In summary, the use and alleged abuse of executive power in Canada has occurred more often than is believed to be the case amongst the general public. Between 1970 and 2015 there had been a gradual movement in Parliament to use legislation to develop checks on executive

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28 Emergency Powers Act, 1964, 1964 c.38; Section 1 of the Act, which describes declaring pre-emptory states of emergency did not extend to Northern Ireland. In 2004, the Joint Committee of the House of Commons and the House of Lords named this Act (and 20 other acts dating back to the Magna Carta 1297) a “fundamental part of the constitutional law” of the UK (http://www.publications.parliament.uk/pa/jt200203/jtselect/jtdcc/184/18407.htm#a44). It was amended, but not replaced by the Civil Contingencies Act 2004.
29 Defence or D-notices. Defence Advisory (DA) Notices since 1993 are official requests to the press to not publish information which might be detrimental to the nation’s defence.
power through the passage of the Constitution Act 1982, which included the Canadian Charter of Rights and Freedoms; the annulment of the War Measures Act through the passage of the Emergencies Act, 1988. The Emergencies Act differs from the War Measures Act in two important ways: 1) A declaration of an emergency by the Cabinet must be reviewed by Parliament; and 2) Any temporary laws made under the Act are subject to the Charter of Rights and Freedoms. This second legal protection is vital as the temptation to excess and abuse are greatly increased among public servants and politicians officials who are pressed by an anxious public to deal with the crisis.

The Charter. Of note are the passage of the Canadian Charter of Rights and Freedoms 1982 which guarantees the right to life, liberty, and security of the person in Section 7. Section 7 has not been interpreted to convey positive rights, nor has it been interpreted to impose any positive obligations upon the government. According to Section 8, “Everyone has the right to be secure against unreasonable search or seizure,” in a manner similar to the Fourth Amendment to the U.S. Constitution. Section 9 states that “Everyone has the right not to be arbitrarily detained or imprisoned.” Section 10 reinforces the long-standing common law principle of habeas corpus - “Everyone has the right on arrest or detention: (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

The Supreme Court of Canada has not had to rule on a case of mass detention similar those executed in accordance with the WMA in 1914-1920 and in 1942-1946. The tyranny of time pressure and the need to be seen to act decisively affects all leaders who do not wish to be seen as irresolute in crisis. In theory, any attempt by the Canadian government to suspend the civil rights of Canadians, even in an emergency, is subject to the “reasonable and justified” test under section 1 of the Canadian Charter of Rights and Freedoms.

To the Canadian government, internment during both World Wars was a practical solution to a perceived security problem. However the terms of the Orders in Council, and the executive measures used to implement them, demonstrate that the government was influenced as much by the prevailing racial discrimination and anti-immigrant sentiments than by any real threat to national security. The stories of the Eastern European, German, Italian, and Japanese internees are a reminder of how basic human rights are vulnerable in crisis. However, the Anti-
terrorism Act 2015, known before its passage on June 18th as Bill C-51, reinstates many of the previously curtailed executive measures. Canada now stands at a crossroads….

Summary of Findings and Discussion – U.S.A.

As described in Chapter 1, complex problems are characterized by uncertainty in identifying independent, dependent, and confounding variables, in measuring their interactions, and in forecasting outcomes. Addressing such problems is made infinitesimally more difficult when one complex problem is buried in a mass of numerous other complex problems which tend to exacerbate each other. The following factors must be considered in any critical review of the USA PARIOT Act of 2001, the Intelligence Reform Terrorism Prevention Act of 2004 (IRTPA), FISA Amendment Act of 2008, the annual National Defense Authorization Acts, or any other related Act which appears to be unduly intrusive or which appears to abuse or limit the free exercise of civil rights, civil liberties, or human rights.

The IC organizations tasked with protecting the U.S.A from attack by “all enemies foreign and domestic” face a formidable challenge in keeping pace with the speed of communications between individual conspirators and violent extremist organizations spread around the world. The speed of communications is largely responsible for the need to implement wide-ranging wiretaps which are not tied to a specific time and place, as they were prior to passage of the Patriot Act, and thus possibly abrogate the Fourth Amendment limitations on unreasonable search and seizure. However, the Amendments to the U.S. Constitution were written in 1791, long before there was a need for security authorities to consider that enemies might communicate plans, instructions, or financial instruments in near real-time across continents and oceans. The need to gather conclusive evidence that a crime has been, or is about to be committed is too high a standard in circumstances where a failure to share information in a timely manner could lead to the successful execution of a terrorist conspiracy. The Final Report of the 9/11 Commission clearly stated that the conspiracy succeeded due to a failure of the imagination and to share information across U.S. government agencies.

Another aspect of the employment of surveillance capabilities is whether their consistent monitoring to catch a very low probability event, such as capturing the passage of terrorist conspiracy related direction actually detracts from the overall intelligence effort. Forgang (2009, p. 222) recounts the story of NSA Highlander program analysts Adrienne Kinne and David Faulk, who described spending significant time monitoring the telephone communications of
U.S. aid groups, deployed U.S. service men and women, and American business people and journalists across the Middle East in 2005. There are practical issues aside from the possible abrogation of the First Amendment protection of free speech, and Fourth Amendment protection from unreasonable search and seizure. Should analysts and expensive surveillance capabilities be dedicated to continual monitoring lower priority intelligence targets at the expense of focusing more effort on those which are likely to yield actionable intelligence at operational level or contribute to the refinement of estimative intelligence of a lesser known region, group, or emerging capability? While anyone of these erstwhile intelligence targets might possibly be engaging in activities which undermine the security of U.S. troops and which might damage U.S. interests, should not the intelligence collection effort be more concentrated on the conflict zones of Iraq and Afghanistan pending multi-source confirmation that should effort is worth it?

These questions presume that the surveillance will be conducted without being detected. Detection of surveillance measures can lead to the fabrication of information, the possible destruction of physical recording devices, public revealing of the surveillance program, and potentially negative diplomatic consequences, and increased danger to other U.S. and allied persons in the region being monitored. It is also leads to unintended consequences for both the intelligence target and for the intelligence community. The aid organizations that have been targeted by the NSA Highlander program state that once detected, the presumed surveillance requires them to “take burdensome and costly measures” to protect confidentiality amongst their clients (Forgang, 2009, p. 221). The credibility of Developed World aid agencies as politically neutral interlopers in conflict zones is always tenuous at best. Human Rights Watch is challenging the FISA Amendments Act of 2008 because it believes that the ease with which intelligence agencies may get approval to conduct surveillance upon human rights groups in the Middle East will discourage many potential clients from contacting them.

Observers assess that laws related to internal security law have taken a significant turn away from protecting the rights of the individual to protecting the state. It appears that it may be at the price of judicial independence from the executive. According to McCormack (2014),

One of the principal victims in the U.S. so-called “war on terror” has been the independence of the U.S. Judiciary. Time and again, challenges to assertedly illegal

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30 Adrienne Kinne alleges that the calls intercepted in the NSA Highlander program came from throughout the Middle East, and not just the Iraq and Afghanistan war zones (Forgang, 2009, p. 220, fn 9).
conduct on the part of government officials have been turned aside, either because of overt deference to the Government or because of special doctrines such as state secrets and standing requirements. (McCormack, 2014, p. 306)

McCormack (2014, p. 306) even goes as far as to describe the behavior of the United States since 9/11 as a “war on the rule of law.”

Summary of Common Themes

The literature review revealed the following common executive measures in the three cases: the identification, monitoring, and indefinite internment of aliens during World Wars I and II in the U.K., Canada, and the U.S.A.; the indefinite internment of illegal enemy combatants in the post-9/11 era; the monitoring of correspondence (whether written or electronic) in all cases; the possession of alien assets in World War I and II and the repossession of assets of persons suspected of abetting terrorism in the post 9/11 era. Despite massive changes in technology over the course of a century, these common themes remain: identification of suspect persons on lists; indefinite internment; and the confiscation of personal assets. These executive measures are based on the assumption that the member of an identifiable alien group is a potential threat to either the political integrity of the state or to the safety of the general populace. It is assumed that these measures mitigate the threat through the isolation of suspect individuals.

Rethinking Security

Old Wine in New Bottles

Surveillance of individual members of a suspect group was conducted through alien registration and police monitoring in 1914-1920 and in 1941-1946. The presence of police lists such as Defence of the Realm Regulation 18B facilitated the mass arrest and internment of suspected Nazi sympathizers in in the U.K. in 1939. The Custodial Detention A-B-C Lists were used to intern Japanese-Americans on Hawaii. FLQ separatist sympathizers were rounded up in 1970 through the use of union and political party membership lists. Suspect persons do not need to be rounded up and interned in police dragnets in the post 9/11 world as they can be tracked through their computer and mobile cellular telephone use. Every mobile phone reports its location to the nearest cell phone towers, or the Wireless (Wi-Fi) networks that the phones log into, and through the internal Global Positioning System (GPS) (Schneier, 2015, p. 3). Hostile networks can resort to single-use throw away phones or couriers, as was the case with Osama
Bin Laden, but eventually sufficient data will be produced to track people down unless they are constantly moving, which further degrades their capabilities and judgment.

Perhaps the premises underlying the traditional concept of security should be reconsidered. Perhaps the fundamental tasks should not be identification of aliens and limitation of access, but rather risk management based on fluctuating vulnerabilities and adversarial capabilities. Detection of a threat and formulating appropriate responses remain just as important as prevention through preemption, but perhaps reducing the window of exposure for an enterprise is a security’s plans primary purpose.

Current Security Planning

The point must be made at the outset that the contemporary internal security planning does not envisage the wide-scale detention of suspect minority groups, as happened in World War I and II in Canada, the U.K., and the U.S.A., and during the October Crisis of 1970 in Canada. However, the preliminary measures which support detention are present in the suspension of the foundations of common law, i.e. probable cause, the writ of habeas corpus, procedural fairness, the presumption of innocence, trials by jury, and limits to open-ended detention. The ability to seize assets, freeze financial instruments, limit immigration, share personal identifiable information, and deport terrorism suspects is present in all three nations. There is also a tendency to extend the provisions of anti-terrorist legislation beyond the original intent to include law enforcement.

Where are we headed?

The U.S. strategic security community, together with those of other Western democracies, is confronted with complex problem sets with many unknown evolving variables and no tested solutions across multiple jurisdictions. These complex problem sets are no longer solvable solely with resort to uni-jurisdictional internal security law designed to screen for alien residents as the scale of the problem is worldwide. Massive population movements due to desertification in the Sahel region of Africa, combined with political instability in the Developing World are fueling unprecedented immigration to the politically stable and wealthier nations of the Developed World.
Immigration

To paraphrase U.S. Secretary of Defense Donald Rumsfeld,\textsuperscript{31} there are known knowns (proven facts), known unknowns (phenomena which can be inferred to exist but have yet to be proven), and unknown unknowns (yet to be discovered phenomena). There are also unknown knowns (phenomena of unknown dimension).

\textbf{Known knowns.} The United Nations High Commission on Refugees (UNHCR) annual \textit{Global Trends Report} observed in June 2014 that the number of refugees, asylum seekers, and internally displaced people (IDP) has exceeded 50 million people worldwide, which is the highest number since World War II. The UNHCR Report includes an analysis of trends from 1993 to 2013. The Report (UNHCR, 20 June 2014) notes a still building upward trend as the total of displaced people in 2012 was 45.2M, whereas it increased to 51.2M by end 2013.

\textbf{Figure 4.2. Global Forced Displacement}

\includegraphics[width=\textwidth]{figure4.2.png}

\textit{Figure 4.2.} Global forced displacement; UNHCR, 2014, p.6.

\textsuperscript{31} Then Defense Secretary Donald Rumsfeld, in response to a question “…is there any evidence to indicate that Iraq has attempted to or is willing to supply terrorists with weapons of mass destruction?,” at a press conference held 12 Feb 2002. Retrieved from \url{http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636}
Initial analysis of the UNHCR graph depicts that IDPs consistently outnumber refugees and asylum seekers by a factor of two to almost three to one. This fact speaks to the long-term political instability of much of the world.

**Figure 4.3. Major Source Countries of Refugees, end 2013**

![Major Source Countries of Refugees, end 2013](image)

*Figure 4.3. Major sources of refugees, end 2013; UNHCR, 2014, p.7.*

The distribution of Internally Displaced Persons in the Developing World is staggering as over half of Africa and most of the Middle East is deemed to be in need of UNHCR assistance.

**Figure 4.4. IDP Map**

![IDP Map](image)

*Figure 4.4. IDP Map, UNHCR, 2014, pp. 8-9.*
This wave, (and still pending wave) of immigration brings in its wake conflicting loyalties; and substantial challenges in managing religious accommodation, education, and language in a manner that promotes peaceful societal integration as opposed to reinforcing cultural barriers in succeeding generations. The challenges faced by secular, and historically Roman Catholic, France in integrating the Muslim members of its former colonies over succeeding generations exemplify these challenges. Germany, Italy, and the United Kingdom have faced similar challenges since World War II, but France is possibly the European bellwether given its decades-longer experience with building an inclusive, secular society.

Known unknowns. There are certain phenomena which are known to exist but are of unknown dimension due to the deliberate obfuscation of data and others which are hard to measure due to their dynamic nature, and the inherent difficulty in identifying independent, dependent, and confounding variables. This emerging issue is especially prevalent in the People’s Republic of China (P.R.C.), where population controls have been in place for 45 years and the One Child Policy has been in place since 1980. This massive experiment in social engineering has resulted in two generations of undeclared children who officially do not exist. Such children, who are known as ghost or shadow children have no official status in China, and are thus unable to enroll in school, obtain medical care, open a bank account, get a state sponsored job, obtain a passport, or move internally using long-distance buses or trains as they lack recognition in the family hukou, or household registration document (VanderKlippe, 2015, 14 March, p. F5). China’s 2010 census estimated that there are approximately 13 million people living in these conditions (VanderKlippe, 2015, 14 March, p. F1).

The intended purpose of the Two Child Policy, and later the One Child Policy, was to contain the burgeoning population and permit women to remain in the work force to boost

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32 The roots of these policies are reputed to lie in the “new population theory” espoused by Professor Ma Yinchu, the President of Peking University in 1957. P.R.C.’s first census in 1953 counted 600 million people, a large gain from the officially reported 450 million in 1947 at the nation’s birth (VanderKlippe, 2015, 14 March, p. F5). The prospect of having to feed 1 billion people based on an agrarian lifestyle was daunting. China enforced a Two Child Policy throughout the 1970s. Since 1971, China is reported to have aborted 336 million fetuses/babies, sterilized 196 million people, and inserted 403 million inter-uterine devices in their efforts to control the growing population (VanderKlippe, 2015, 14 March, p. F1). These measures were directed rather than just optional.

33 Although well-connected families can resolve this problem by paying hukou fines to local state officials or befriending sympathetic school administrators, less well-connected or wealthy families face bleak prospects. According to journalist Nathan VanderKlippe, such people are restricted to the areas around the family home and to non-regulated, and thus non-professional employment as they are unable to write state entrance examinations for middle school. In effect, they live in a self-imposed gulag, not unlike Siberia in the former USSR.
national productivity. The unintended consequence of these policies was to create social angst in a society which traditionally measures wealth through family size, goes against the goals of Chairman Mao Zedong,\(^{34}\) and which facilitates the creation - and the continuation of an unregistered sub-culture which rivals the population of many world nation-states. The policies, and the accompanying system of hukou fines, lead to buying your family size for the wealthy, and lives of economic desperation for those with modest incomes. Such vulnerable people are open to potential manipulation by human smugglers and by violent extremist organizations who promise a brighter future elsewhere.

**Unknown unknowns.** There is a potential danger that the rising tide of immigrants trying to escape conflict zones by fleeing to Europe and continuing threat of Islamist terrorism in Europe could lead to a near perpetual state of extended crisis, and the extension of executive measures permitting arrest, detention, and deportation of undocumented, or poorly documented immigrants. Such executive measures would possibly lead to a near permanent suspension of the foundations of common law, i.e. arrest on probable cause, the writ of habeas corpus, procedural fairness, and limits to detention without trial.

**Unknown Knowns - the contemporary internal security challenge.** The contemporary challenge is exacerbated by the advent of foreign fighters participating in Islamist jihad, primarily in the Middle East and the Levant. The Western democracies are increasingly concerned with the future legal status of more than 20,000 foreign fighters who have traveled to Syria from over 90 different countries. The U.S. IC assesses that at least 3,400 of these fighters are from Western countries including over 150 U.S. persons who have either traveled to the conflict zone, or attempted to do so (Rasmussen, 2015, p. 2). According to Nicholas Rasmussen, Director of the National Counterterrorism Center, the rate of foreign fighter travel to Syria exceeds the rate of travelers who went to Afghanistan and Pakistan, Iraq, Yemen, or Somalia at any point in the last 20 years (Rasmussen, 2015, p. 2).

**Lone-wolf threats.** Given the thousands of disaffected self-radicalized Western youth who have immigrated to join the Islamic State, the possibility of self-directed attacks on their return is rising. The evolving security situation brings to mind the letter from an anonymous member of the Provisional Irish Republican Army (PIRA) following the unsuccessful attempt to

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\(^{34}\) Chairman Mao is reported to have said, “The more people there are, the stronger we are” (VanderKlippe, 2015, 14 March, p. F5).
assassinate Prime Minister Margaret Thatcher in Brighton bombing on 12 October 1984, “Today we were unlucky. But remember we have only to be lucky once, you will have to be lucky always. Give Ireland peace and there will be no war” (Glasgow Herald, 13 October 1984, p. 1; McKittrick & McVea, 2002, p. 162; http://izquotes.com/quote/302949).

Tipping point. Western nations may be approaching the tipping point of the functional utility of internal security legislation oriented toward the control of suspect populations through physical or electronic surveillance – whether of migrants or citizens. The tens of millions of illegal immigrants residing in the United States and in the European Community, coupled with the sheer mass of world-wide information sharing on the Internet will eclipse the ability of security organizations to gather – and analyze - security related information in a timely manner. Although American and Western intelligence communities are highly effective in surveillance of movement, information, and financial transactions, the sheer numbers are daunting. As the intelligence process is based on pattern analysis, the threat of the unannounced lone-wolf attacker is difficult to foresee and to forestall.

Reorientation. Internal security legislation aims to disrupt conspiracies before they occur through arrests, detention, or targeted non-kinetic actions. This type of pre-crisis collaborative planning and intervention will continue to be necessary to prevent high-costs incidents such as assassination attempts, bombing civilian targets, use of a weapon of mass destruction (i.e., biological or nuclear), or a weapon of mass effect (i.e., chemical or radiological). However, perhaps the probability of failure to identify and interrupt all attacks should be accepted and prepared for through accepting that some attacks will succeed and that governance should focus on building societal resilience rather than a foolproof shield.

Surveillance Capability, Capacity, Culture, and Trade-offs

Civil libertarians continue to be concerned with the social and political ramifications of the extension of major Patriot Act executive measures such as surveillance powers. However, many critics miss the dilemma that the security agencies face. On one hand the security agencies are expected to be able to predict, pre-empt, or prevent organized conspiracies or lone-wolf terrorist attacks with a 100 percent success rate. On the other hand, the technical tools they have to predict such events are relatively limited.

Capability. Despite the huge advances in electronic surveillance capability resident in the Western democratic nations, and the USA in particular, intelligence agencies face the same
challenge as that faced by Vernon Kell and MI5 a century ago. The security agency must identify persons who might pose a threat to the integrity of the nation state and to the physical safety of its citizens. Lists of names, addresses, and known or suspected connections to known terrorists or agents must be created. The U.S. government’s Terrorist Identities Datamart Environment (TIDE) and the U.S. Transportation Safety Authority’s No Fly List are ultimately modern versions of MI5’s alien lists maintained by Miss Lomax in 1915. There are now hundreds of thousands of Miss Lomax around the world.

**Capacity.** Despite the worry about the Big Brother capabilities resident in the Utah Data Center and other data bases, it should be remembered that both the civil libertarians and the state security agency members start their quest from a common emotional starting place – fear. The civil libertarians fear the loss of the foundational democratic freedoms of association, assembly, free speech, and the consequent ability to foment political change at grassroots level. Members of legislative assemblies and of state security agencies fear failure in their dual protection mission, the legislators in protecting the populace and the state security agencies in protecting the nation state.

As the case studies reflect, a degree of confirmatory bias is observable in the laws and in the executive measures enacted in each nation state. These biases have been traditionally based on ethnic origin, such as German, Ukrainian, Japanese, French-Canadian, or Arab natives. Such bias does not necessarily originate in a desire to control fellow citizens, but rather the desire to not fail in protecting them from the perceived threat groups.

**Culture.** These foreign fighters are comprised of second- and third-generation Muslims in Europe and other democratic states who believe that they are marginalized by their societies and that the western democratic nations are attacking their co-religionists around the world without justifiable cause. These identifiable ethnic groups are now joined by converts to Islam who have become disillusioned with western democracy and have become self-radicalized Islamists through the Internet – by accepting the claims made by Islamist imams, or by simply reading the news and forming opinions as to the justice of the contemporary political balance of power between the Developed and the Developing World. The Internet and social media now facilitate connections between what would have been discontented, but otherwise isolated individuals whose associations would have required a physical rather than a cyber-presence to share their thoughts on the state of world affairs.
The use of cyber forums to replace physical contact lessens the possibility of establishing probable cause in a criminal investigation as the conspirators are exchanging political, religious, and social opinions as opposed to plotting operations to physically attack a western entity. The common law doctrine of probable cause is difficult to use effectively when assembly and association is occurring in cyberspace as opposed to a physical location. Previously, a warrant to search a specific location with specific time limits was required to record conversations. Given that the conversations occur in a non-physical location and at indeterminate times necessitates electronic surveillance rather than a search warrant.

**Necessary trade-offs.** The central means to protect both the populace and the state is electronic surveillance, and the speed of communications, travel, and movement of financial instruments has led to the need for near real-time surveillance of all electronic communications means.\(^3\) The global nature of communications necessitates spreading an electronic dragnet well beyond national boundaries. The speed of air travel requires stopping suspect travelers before they board a commercial aircraft thousands of miles away. The mass immigration of thousands undocumented refugees strains the ability of receiving European nations to feed, and detain them during an administrative processes that could take years to complete. There is insufficient time to apply the traditional individual protections afforded by common law at tactical, i.e. individual or small group level. The legislative authority to implement executive measures at the operational and tactical levels must be given well in advance. This demands a new means of preparing for rapidly emerging and evolving threats.

### III – Emerging Governance Concepts

**On the Use of Anticipatory Governance**

The overlapping legal, political, social, and technical challenges of internal security exemplify the *complex* or *wicked problems* described in the introductory chapter of this study. Much of the anticipatory governance research focuses on developing anticipatory legal frameworks for emerging technologies such as Nanotechnology, natural resource conservation, and dual-use bio-agents. However, the principles of anticipatory governance show promise in being adapted to any complex financial, political social, technical problem – such as internal security. The foresight-policy integration and feedback for applied learning aspects are self-

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\(^3\) Private conversation between the author and a high ranking CSIS official, 26 May 2015. The official agreed that the need for intrusive electronic surveillance is driven by the lack of other reliable means of detecting threats.
evident. The value of networked governance is that it extends warning time through near-real time information sharing, and thus aids an adaptive, holistic, collaborative whole-of-government or international approach to shared complex problems. This study has reviewed the determinants of internal security law in crisis conditions. The starting point for such anticipatory discussions must be with each nation’s past practice in the common law tradition. As the country of origin of common law, much of what has transpired in British law is reflected in the other English speaking nations which share a common law heritage.

Principles which govern the development of a *Model for Anticipatory Internal Security Review*, or anticipatory meta-governance (AMG), which could assist in anticipating and pre-empting unanticipated and unintended consequences:

a. periodic examination of the strategic threat assessment, or the threat risk vulnerability assessment which led to the enactment of the initial internal security legislation by the executive agencies which equate to national security council, the foreign intelligence service, the internal security agency, national police forces, and military forces;

b. periodic examination of the function of the executive measures which are conducted in accordance with the legal parameters of the enabling legislation;

c. internal executive agency oversight of the conduct of internal security measures by an auditor-general which reports to the head of the executive agency;

d. legislative oversight of the function of internal security activities through a congressional or parliamentary review committee (e.g. HPSCI, SSCI, ISC) which is enabled to hear classified testimony through the granting of security clearances and obligations to senators and representatives;

e. external to parliament or congressional review of executive agencies’ activities;

f. encouragement of the creation of non-governmental subject matter expert (SME) forums for the discussion of internal security matters which draw on academia, industry, and professionals trained in the law, medicine, culture and religious studies, and emerging technologies;
g. given that internal security legislation has frequently led to unanticipated and unintended consequences, and given that intelligence seeks to avoid uncertainty in conflict (Clark, 2010, p. 8), encouragement for the creation of alternative intelligence process models is encouraged. Such alternative intelligence process models should incorporate: 1) TRVA models of the immediate internal security threat through descriptions of adversarial capability, adversarial intent to cause harm, times, and places of attack; 2) frequent periodic review of the validity of adversarial factors by multiple executive agencies; 3) frequent periodic review of the effectiveness and legality of executive actions by legislative and juridical committees; and 4) an extension of intelligence modelling from the parameters of basic, current, and estimative intelligence to incorporate *anticipatory governance* which includes a multi-generational impact analysis, which draws on external to executive agency experts from multi-disciplinary perspective; and,

h. a new multi-disciplinary intelligence process model which incorporates input from the executive, legislative, and judiciary branches of government; industry specialists in emerging technologies, legal specialists, and cultural specialists would be timely – given the need to better anticipate vague emerging threats and the long-term unintended consequences of a short-term response.

i. the current mass movement of millions of refugees from the Developing World without complete identity documents will drive technologies required to vet their acceptance or rejection as visitors, landed immigrants, and candidates for citizenship in all common law nations;

j. this same refugee crisis will potentially drive the evolution of human rights law, common law, and criminal law as the common law rules of evidence are stretched to accept a fusion of information gathered in intelligence operations but used in domestic criminal and citizenship courts; leading to a need for anticipatory governance, defined by Fuerth (2012) as:

k. foresight fused to policy analysis; networked governance for mission-based management and budgeting; and feedback to monitor and adjust policy relative to
initial expectations – and hopefully to avoid unanticipated and unintended consequences of purposive social action; which will require –

l. a broader understanding of the intelligence process which extends beyond the traditional executive branch agencies; and,

m. evaluating potential security events on a longer time-scale in a broader global policy perspective, as opposed to a nation-state internal security perspective.

Possible Ways Forward

Historically, internal security in crisis has been characterized by the rapid devolution of executive authority from strategic political to the lower tactical levels, wherein relatively junior leaders in security agencies are empowered to detain suspects or to seize assets and communications. Attempts at security agency reform have thus far meant restructuring or reorganizing executive branch agencies to share information in a common effort, or the creation of single specialized agencies. However, these approaches appear to be inadequate to effectively manage the diverse, interdependent, and unpredictable nature of complex problems. Internal security agencies must become more flexible and responsive to the rapidly changing environment in which they operate.

Anticipatory Governance should seek to reinforce robustness and resilience in a society rather than build barriers to the flow of commerce, information, and people. Anticipatory meta-governance (AMG) includes wide variety of stakeholders and the use of metadata across lifetimes. The work of two non-strategic security thinkers informs this discussion. The two theologians express the need to move beyond the Western scientific method in deconstructing a problem. Bernard Lonergan described the General Empirical Method (GEM) in *Insight: A Study of Human Understanding* (1957). GEM begins with an analysis of human knowing as

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36 Examples include the creation of the Canadian Security Intelligence Service (CSIS) to replace the RCMP Security Service in 1984, the creation of the Information Sharing Environment (ISE) in accordance with Section 1016 of the *Intelligence Reform and Terrorism Prevention Act of 2004*, and the creation of the Office of the Director of National Intelligence (ODNI) in 2005.

37 Bernard Joseph Francis Lonergan, SJ, CC (17 December 1904 - 26 November 1984) was a Canadian Jesuit priest, philosopher, and theologian, regarded by many as one of the most important thinkers of the 20th century (*Time*, April 27, 1970, p. 10).

38 The word empirical comes from the Greek word for experience, ἐμπειρία (empeiría). After Immanuel Kant, it is common in philosophy to call the knowledge gained through experience *a posteriori* knowledge, which is contrasted with *a priori* knowledge, accessible from reason alone.
divided into three levels - experience, understanding, and judgment – and stresses the objectivity of judgment more than Immanuel Kant. The second theologian is John Paul Lederach\(^{39}\) (b. 1955), known for his multi-generational approach to peace-building and the need for cultural intelligence. Their unknowing contribution to the development of a model is to assist the researcher to step outside the time-scale that drives scientific method-based thinking to assess the optimal means to assess complex issues that may persist for generations.

**IV - The Proposed Anticipatory Meta-Governance Model**

The case studies demonstrate the limited ability of traditional intelligence and security agencies to identify unanticipated consequences sufficiently early in the problem-solving process, which has led to frequent unintended social and political consequences, even when the current intelligence process and tactical decisions appear to have succeeded.

**Capabilities & Limitations of the Traditional Intelligence Cycle and Agencies**

The intelligence process is based on known information driven by factual analysis conducted by subject matter experts. This paradigm works best when the factors are known and relatively stable, i.e. as a traditional complicated problem. This traditional paradigm tends to function less well when all the variables are not known, or their properties are less evident or unstable on their own or when combined. These unintended consequences are often not evident from years to decades into the future as the variable properties interact and evolve. Additional problems arise when the problem is framed from a unique national or cultural perspective and the analysis process devalues competing explanations of a phenomenon.

**Anticipatory Meta-Governance Model**

The *anticipatory meta-governance* (AMG) model includes the principles listed a-m at the start of Section III. The proposed model will facilitate long-term anticipatory estimative analysis that the traditional intelligence and security agencies are less able to provide due to conflicting tasks with current intelligence problems. The value-added in this proposed model lies in its ability to engage multiple external stakeholders in a non-bounded environment which is less likely to experience *groupthink*, politicization of intelligence, or perhaps most importantly – to

\(^{39}\) John Paul Lederach is the founding director of Eastern Mennonite University’s Conflict Transformation Program (CTP) and its associated Practice and Training Institute. He serves on the faculty of the Kroc Institute at Notre Dame. He teaches or mentors CTP students in an annual retreat or a classroom setting. He has extensive experience as a peacebuilding practitioner, trainer and consultant throughout Latin America, Africa and the U.S. He has been a pioneer in developing elective methods of conflict resolution training and practice, and is a widely published theorist in both English and Spanish. He holds a PhD in sociology from the University of Colorado.
focus only on the immediately known properties. The anticipatory meta-governance model looks forward at emerging political, social, and technological trends, and back at the long-term cultural history of the problem set, using all available resources, including less-valued cultural, and contemporary literary sources that are not easily subject to factual verification.

The AMG model derives the need to learn from experience from Lonergan, with rapid adaptation that assists Fuerth’s need to amplify faint signals of impending change. The model borrows from Lederach’s emphasis on all-source cultural intelligence as a means to truly understand the needs of a target population in a multi-generational context, and not just to achieve temporary tactical advantage, or dominance. The decision on how to apply findings from such a model lie with senior national policy makers rather than security and intelligence staffs. The potential gain offered by the model is a long-term, culturally neutral evaluation of complex situations which avoid some of the problems encountered by 20th Century and early 21st Century legislators who failed to anticipate the long-term consequences of their short-term emergency laws. The anticipated output is improved advice to policy makers and their legal advisors crafting long-term security structures with reduced time-binding influence.

**Figure 4.5. Anticipatory Meta-Governance Model**

![Diagram of Anticipatory Meta-Governance Model](image)

*Figure 4.5. Anticipatory Meta-Governance Model, Basic 3-Tier Concept, Author, 2015.*
Information sharing within the *anticipatory meta-governance model* is both centrifugal & centripetal with continuous feedback loops, guided by security clearance compartments held by the external agency and the need to know certain information to participate in the analysis process. However, the fact that the model incorporates non-government methods, sources, and analysis is a departure from traditional intelligence process.
CHAPTER 5

CONCLUSIONS

The comparative case study components described in Appendices B, C, and D illustrate the common themes discussed in Chapter 4. Despite changes in technology, these themes are relatively unchanged over the past century, reflecting tension between individual freedom and mass executive orders. In some instances, these emerging trends are variations on earlier themes related to fundamental attribution error (FAE), (which equates to assigning your motives more value than those of a rival group), and to individual and institutional biases discussed in Chapters 2, 3, and 4. In others, they are unique to the circumstances of their time. Lessons can be drawn from the past century to identify best and worst practices in preparing for internal security crises at the intersection of common law, psychology, and the history of executive prerogative.

The study of emerging political, social, and technological trends discussed in Chapter 4 reveals a convergence of issues which could lead to unintended consequences. However, given the knowledge gained through the case study and the availability of the anticipatory meta-governance (AMG) model introduced in Chapter 4, these consequences should not be unanticipated. The study findings address psychological and ethical themes and the findings which arose from the legal comparisons. The conclusions address the common themes, case study findings, application of the meta-anticipatory governance model, and recommendations for follow-on research.

Common Psychological and Ethical Themes

The themes below arose from the open and axial coding process that began with the evidence comparison tables in Appendices B, C, and D. The tables also inform the discussion of legal and psychological factors, and the influence of speculative fiction on decision makers in the Chapter 2 literature review. This summary starts by summarizing the basic factors and builds to the more complex problem sets.

Cognitive Limits

As described in Chapters 2 and 4, human cognitive limits set the parameters for complex problem analysis. These limiting effects include framing effect (how a situation is described), the endowment effect (maintaining the security status quo), and the affect heuristic (emotional response guiding the rational response). Heuer (1999), Schneier (2008) use the
control, optimism, recency, and vividness biases to explain how each bias tends to reinforce existing beliefs leading to confirmatory (or confirmation) bias and premature closure in decision making (Heuer, 1999; Johnston, 2005; Schneier, 2008; Clark, 2010). Schneier (2008, p. 64) emphasizes the pernicious effect of the availability heuristic, which means that people tend to “assess the frequency of a class or probability of an event by the ease with which instances or occurrences can be brought to mind.” The collective impact of these biases is to reinforce long-held beliefs as to the nature of a problem and to restrain the introduction of new perspectives.

Fear

The most basic theme arising from the case studies is how fear may drive the promulgation of internal security legislation, executive measures, and administrative regulations. Although the language describing such measures is confident, even at times bellicose, the emotion of fear underlies all decision making related to internal security. Schneier (2006; 2008) addresses the overlap between fear and perceptions of security. Fear is multi-faceted, i.e. it includes: fear of the unknown, fear of a perceived threat group, fear of being seen not to act with sufficient alacrity or purpose, and a fear of failure to protect the state or the populace. Fear appears to be amplified, or at least influenced by the presence of an identifiable group which poses a potential threat to the security of the state or to the safety of the populace.

Kahneman & Renshon (2007a) addressed the specific concern as to “why hawks win” in a 2007 Foreign Policy article of the same name and noted a bias toward aggressive action. This finding would benefit from additional discussion as it does not appear to have recognition in the wider strategic security community. Some of Kahneman & Renshon (2007a)’s assertions are disputed by Continetti (2007), who states that both hawks and doves will tend to take hostile or accommodating behavior at face value, which simply reinforces their existing beliefs as to the intent of their adversary.

Kahneman & Renshon (2007b) responded to a series of web log posts by clarifying their position. They admit that cognitive biases “are not the main explanation for the decision to go to war and the failure to make peace as conflicting interests are real and many other factors—including beliefs, values, and material constraints—can affect any given decision.” It appears that ground truth will remain difficult to discern when an adversarial approach is the norm both in politics and in intelligence and security analysis, and when confirmatory biases make the analysis process less neutral than expected.
Propaganda

Wartime propaganda serves to unite a nation by representing an enemy population as evil, reinforces the moral requirement to defeat them, and prepares the populace for the sacrifices which lie ahead. Its use of Manichean metaphors to differentiate between the good guys and the bad guys is obvious and need not be discussed further. Preparatory propaganda, however, is more insidious as it serves to reinforce perceptions of non-native groups, i.e. aliens, as an outgroup based on racial prejudice or limited evidence.

Propaganda amplified by popular culture (e.g. speculative fiction, movies, music videos, television, video games) can reinforce negative perceptions of aliens. The presence of an identifiable threat group can lead to a distrust of aliens, and isolation of the group through the creation of lists\(^1\) which are used to exclude aliens from sensitive areas, and which the case studies illustrate – precede surveillance, confiscation of property, and internment. The rationale for such exclusions is to prevent espionage, sabotage, and subversion. However, the description of the threat groups in the speculative fiction and popular entertainment indicates that racial prejudice is probably a factor as well. The language used to describe the threat group, often expressed through metaphors, can reinforce existing biases toward an outgroup, and orient both analysts and decision makers toward an aggressive policy position.

In the British case, identification of the German enemy and its continual reinforcement through fiction and non-fiction took place over 44 years, making the case for alien registration and detention easy to legislate in 1914. That DORA 1914 and its associated annual DORRs did focus the British war effort is not contested. However, that the rhetoric and metaphors used to make the case against Germany is only being evaluated 100 years post war displays the pernicious effects of fear unsupported by evidence, confirmatory bias and groupthink. Samuel I. Hayakawa’s (1990) and Gerald Zaltman’s (1996; 2003; 2003 February; 2008) warnings on metaphor monitoring must guide pre-crisis analysis to avoid the appearance of confirmatory bias.

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\(^1\) The creation of lists is a key step toward the isolation of a suspect population. It continues to be a bellwether indicator of tensions and a political flashpoint. See Johnson, (2015, 20 November) “Donald Trump would ‘certainly’ and ‘absolutely’ create a database of Muslims” [link](https://www.washingtonpost.com/news/post-politics/wp/2015/11/20/donald-trump-would-certainly-and-absolutely-create-a-database-of-muslims/). Carrol (2015, 24 November) points out that Mr. Trump did not state this directly, but rather was referring to all refugees [link](http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/).
and groupthink arising in intelligence and assessments, and in internal security policy, law, and executive measures.

**Non-official sources influencing policy making.** The review of speculative fiction in the U.K. from 1871 to 1914 (Appendix F) indicates a high degree of influence among policy makers, i.e. senior officials referred to it in their speeches in the House of Commons or the House of Lords and made major decisions based on its influence. This four-decade long pre-crisis preparation facilitated the building of east coast naval bases, the creation of MI 5 and MI6, the acceptance of British propaganda in regard to German Army atrocities in 1914, and the acceptance of strict internal security legislation throughout World War I and the decades which followed. The case studies do generate sufficient evidence to indicate a continuing trend in any of the nations studied. However, there are occasional source analogs, i.e. anecdotes, as to its potential influence, and the need for continuing research in this area.²

**Time Pressure and Delegation of Authority**

One of the most common themes is the perceived need to take decisive and comprehensive action to pre-empt a threat. The legislative strategy used to initiate comprehensive action on a compressed timescale is to pass statutes delegating authority to executive agencies which would not normally hold such decision-making powers. Such delegation facilitates dealing with the large volume of multi-jurisdictional decisions required in a complex and rapidly evolving crisis. In effect, some acts of Parliament or Congress delegate to ministers, departments, agencies, boards or other authorities the power to make and to apply subordinate legislation described only in general terms in the acts. Delegated legislation is a term used to describe these regulations, orders, rules, by-laws and other instruments authorized by statutes.

**Means of delegation.** Canada and the United Kingdom have historically delegated authority from Parliament to the Governor-in-Council (GIC), which is in effect the Prime Minister and Cabinet, who then issue Orders-in-Council (OIC).³ The President of the United

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States makes frequent use of Executive Orders (EO), which are beyond the scrutiny of Congress. Congress and Parliament should scrutinize most delegated legislation to ensure that their provisions do not exceed the powers approved by Congress or Parliament by statute. Given the bias toward action, such scrutiny, when it occurs, is post hoc, and often only in the light of a new crisis which puts the government in a bad light.\footnote{\textit{The 22-member House Permanent Select Committee on Intelligence (HPSCI) and the 15-member Senate Select Committee on Intelligence (SSCI) have filled this role in the U.S.A. since 1980. The 4-member external Security Intelligence Review Committee (SIRC) has overseen CSIS operations in Canada since 1984. The 9-member Intelligence Security Committee (ISC) has filled this role in the U.K. since the passage of the \textit{Intelligence Services Act 1994}. Since the passage of the \textit{Justice and Security Act, 2013}, the ISC has been a committee of Parliament, and its non-partisan members are subject to the \textit{Official Secrets Act, 1989}.}}

\textbf{A bias toward action.} The theme of the need to act decisively in crisis is apparent in each of the three anchor cases, and in many of the acts passed in what pass for peacetime conditions. This finding is supported by the lack of debate in passing internal security legislation, which indicates overwhelming non-partisan support. This finding is most noticeable in the crises with the greatest degree of uncertainty as to the magnitude and immediacy of the threat, such as DORA, 1914, WMA 1914 in the October Crisis of 1970, and the Patriot Act of 2001. The finding also illustrates the influence of confirmatory bias, which often leads to premature closure in decision making, and the lack of consideration of the long-term consequences of internal security legislation.

In the Canadian case, each of the three sub-cases based on WMA 1914 illustrate how the combined influence of racial prejudice and confirmatory bias led to large-scale interment of recently arrived immigrants in World Wars I and II, and to large-scale arrests during the October Crisis of 1970. The suspension of the common law principles of probable cause and habeas corpus for what appears to have been a negligible threat in World Wars I and II has left a legacy of bitterness which has contributed to a sense of separateness of Ukrainian- and Japanese-Canadians of the Prairie Provinces. The enactment of the WMA in October 1970 remains a controversial subject 45 years later.

From the Federalist perspective, the WMA and the CAF deployments in Quebec and Ontario worked as planned, as they ended the threat of violent revolution in Quebec led by the FLQ. From the perspective of Quebec nationalists, the heavy-handed response of the Government of Canada confirmed that they were not \textit{maîtres chez nous} (masters in our own...
and that it was time to seek a political solution to a centuries-old problem through supporting nationalist parties such as the PQ and BQ which seek independence from Canada.

**Use of omnibus legislation.** It is almost inevitable that comprehensive omnibus bills will be used to effect the large-scale changes necessary to prepare a society for its defense in a timely manner in wartime. The need to centralize planning, to regulate employment, and to set priorities in the use of raw materials and production of finished products demands it. The case studies clearly explain the prevalence of this legislative tactic to centralize decision making across a broad range of activities.

The Canadian *National Resources Mobilization Act, 1940*\(^5\) synchronized effort across the breadth of civilian industry and regulated the work force. Although the original version of DORA 1914 was only two paragraphs long, the four succeeding acts extended to control almost all aspects of daily life in British society (Appendix B). The Canadian WMA 1914 was similar in scope (Appendix C) as its Clause 6 permitted the Governor-in-Council to take any measure he thought necessary to prosecute the war.

The ten titles of the original *USA PATRIOT Act of 2001* covered security related issues such as surveillance, border security, anti-money laundering measures, and provisions for improved intelligence. Title X, “Miscellaneous” authorized a wide range of activities which do not fit this traditional definition. It also included hazardous materials licenses, training the drug enforcement agencies of other nations, biometric identification, regulation of charities, and telemarketing and consumer fraud. The rapid passage of the *USA PATRIOT Act of 2001* would not have been possible without extensive preparatory work. Given the sense of urgency at the time of its passage, such measures were accepted as valid.

As Appendix D (U.S.A.) illustrates, this tendency was repeated numerous times in U.S. history as 18 of the 70 laws or executive measures studied are categorized as omnibus in nature. This legislative tactic of embedding significant executive measures direction deep within a large omnibus bill can contribute to the erosion of trust between an Administration and its electors.

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\(^5\) The Canadian *National Resources Mobilization Act, 1940*, 4 George VI, c. 13 (NRMA) designated essential industries and regulated the registration and employment of men for industrial production and for military service. Similar in scope to DORA 1914 in the U.K., NRMA 1940 was revised seven times. By 1943 its scope had expanded to include many aspects of daily civilian life such as regulating the insurance industry, sugar in candy, real estate, bed spreads, tobacco, advertising, brewing, and beauty and barber equipment.
This appears to be the case in the insertion of indefinite detention provisions in Sections 1021 and 1022 of the 2012 NDAA, whose purpose is to authorize annual defense appropriations.

**Loss of civil liberties and human rights.** Civil liberty organizations such as the ACLU, EFF, and EPIC have criticized the loss of presumed liberties under the *USA PATRIOT Act* of 2001 (PA). Contentious provisions include PA 206 (roving wiretaps), PA 2013 (delayed warrant *sneak and peek* searches), PA 215 (searches for *any tangible thing* and a non-disclosure gag order), and PA 505 (use of NSL administrative subpoenas for investigations related to terrorism and the gag order). For U.S. citizens, the act of talking or corresponding with a non-U.S. citizen abroad potentially leaves their metadata and content open to collection in accordance with Section 702 of the *FISA Amendments Act of 2008* – which prohibits the intentional collection of the communications of U.S. citizens. No such protections exist for non-U.S. citizens.

**Loss of individual legal protections.** Common law protections of individual civil liberties and human rights tend to be superseded by mass restrictions in crisis. These restrictions include the loss of arrest based on probable cause as opposed to suspicion, the loss of habeas corpus (a speedy trial), the loss of the presumption of innocence in a trial, the loss of jury trial (which may be replaced by a military tribunal), and the loss of civilian penalties through the declaration of martial law. In a sense guilt by association is the common theme.

**Passive Acceptance of Regulations.** Clark (1919) remarked on how easily the British populace accepted a near total restriction of civil liberties. The same passive acceptance of the validity of the Department of Homeland Security’s color-coded warning scheme in 2001-2010 is apparent. Closely related to the passive acceptance of regulations in Appendices B, C, and D is the acceptance of long-term temporary security measures as normal as crisis extend from wartime into peacetime, and temporary security institutions evolve into permanent bureaucratic structures. This tendency includes the acceptance of relatively unchecked executive powers and of technical innovations use in surveillance without substantial debate.

**Summary of Psychological and Ethical Themes**

The psychological and ethical themes support the assertion that complex social and political change brought about or influenced by internal security law has links to basic psychological processes at individual and group level. Strategies to mitigate cognitive biases include the creation of a multi-tiered analytical community which generates alternative perspectives. A multi-layered analytical community would avoid groupthink and facilitate both
a concurrent long-term examination of emerging problems at an earlier stage of their development and a continuing examination of their evolving consequences.

Case Study Findings

For the purposes of this study, best practices in a nation with a common law heritage is assumed to incorporate laws and internal security measures which tend to reinforce the role of the judiciary as a check on executive branch powers, as incorporated in their constitutions; and which tend toward providing greater transparency to the elected representatives in the legislature. Best practices have not been consistently applied in the common law nations. Based on the case study data, the executive branches of each nation apply executive measures to limit the freedom of groups of people based on ethnicity, citizenship, and perceived loyalty to the federal government, and they have overridden the protective principles of common law during perceived crisis or national emergencies. Based on the case study, the most frequently observed practical impact of overriding common law during a crisis or national emergency is to limit the applicability of the principle of habeas corpus.

Despite its central role in common law, the principle of habeas corpus has been demonstrated to have certain limitations: 1) it is technically only a procedural remedy; as it is a guarantee against any detention that is forbidden by law, but it does not necessarily protect other rights, such as the entitlement to due process, a fair trial in which judgement is based on evidence available to both the prosecution and the defense; therefore, 2) if an imposition such as internment without trial is permitted by the law, then habeas corpus may not be a useful remedy.

In each of the three nations studied, the principle has been temporarily or permanently suspended, in all federal jurisdictions or in selected jurisdictions under perceived threat. This suspension might be due to what might be construed by some government institutions as a series of events of such relevance to the government as to warrant a suspension. In the 20th and 21st Centuries, such events may have been frequently referred to as “national emergencies;” and, national emergencies can be prolonged and detainees have been incarcerated without trial for months to over decades without being brought to trial.

Based on the historical data, speculative spy and invasion scare fiction tends to:

1) be a “story with a purpose” (Boyle, 1977, p. 108), which is to draw attention to the author’s opinion of threats to the political status quo. In other words, spy fiction is thinly veiled propaganda;
2) reflect existing international and internal tensions, as well as sustain them;
3) become integrated within the perceptions of some influential internal security
decision makers (e.g. the Admiralty’s decision to build east coast naval bases
following publication of Erskine Childer’s *The Riddle of the Sands* in 1903
(Knightley, 1986, p.17), Lord Robert’s 1914 reference in Parliament to William
Le Queux’s fictional invasion plans (Knightley, 1986, pp. 15-17); references to
James Bond (and his many imitators throughout the Cold War), Tom Clancy’s
influence on the U.S. Congress in transitioning from the Cold War after
publication of *The Hunt for Red October* (1984) through to *Executive Orders*
(1996), U.S. Supreme Court Justice Antonin Scalia in referencing Jack Bauer in a
2007 decision regarding the legality of torture (Keslowitz, 2008); Secretary of
Defense and CIA Director Leon Panetta in describing the James Bond film
*Skyfall* as very realistic in Oct 2012 (Bauer, 2012, 9 Nov);
4) influence public opinion through their black-and-white simplistic messages and
their frequency of occurrence; and,
5) be difficult to measure their impact other than in generalities.

The legal case studies and the tabular comparisons indicate that:
1) internal security law is multi-faceted, as it contains elements of immigration
policy, suspensions of common law due process, financial surveillance, and
invasion of privacy through surveillance of individuals and groups;
2) many of the temporary laws enacted to authorize executive measures are passed in
great haste, often after a catastrophic event such as the outbreak of a war (e.g.
UK-DORA 1914, Canada-WMA 1914, USA-ARA1940); a strategic surprise (e.g.
Pearl Harbor, 9/11);
3) internal security laws may be enacted in nations beyond the borders where the
precipitating incident occurred (e.g. Canada in WWI, WWII, and post 9/11; UK
post 9/11);
4) internal security laws tend to influence those laws enacted by close allies in
content and language (e.g. UK *DORA 1914* as a template for *WMA 1914* in
Canada, the *Espionage Act of 1917* in the USA; as the *USA PATRIOT Act 2001*
became for the *Anti-terrorism Act 2001* in Canada, and *ATCSA 2001* in the UK;
5) internal security laws, as they evolve within a nation’s jurisprudence, tend to reflect similar concerns over many years (e.g. the roots of ROIA 1920, EPA 1940, Canada’s WMA 1914, WMA 1939, and WMA 1970, - and of 21st Century British internal security law are evident in DORA 1914);

6) internal security measures are frequently targeted to monitor and to pre-empt harm from threat groups;

7) the most frequent groups targeted in the application of internal security law are:
   (a) recent immigrants (e.g. Russian Jews in Britain 1905-191; Ukrainians in Canada 1914-1920; Japanese in Canada and the USA, 1941-1946; Muslims in the USA, Canada, and the UK (2001 to present day);
   (b) citizens of enemy nations while at war or in a period leading to war (e.g. Germans in the UK (Aliens List 1909, Aliens Restriction Act 1914 & 1919, 1939-1945), the Japanese in the USA (ARA 1940);
   (c) citizens of minority groups which have long-standing grievances with the majority group (e.g. Irish in the UK, French-Canadians);
   (d) citizens whose loyalty is questioned (e.g. communists and socialists in the aftermath of the Russian Revolution and during the Cold War in Western democratic nations);

8) once passed into law, internal security laws tend to become entrenched through the establishment of internal security agencies designed to execute executive measures (e.g. MI5, FBI at various times throughout its history);

9) the internal security bills tabled in crises are often of such depth of detail, complexity in subjects addressed, and breadth of application across government agencies that it should be assumed that they have been drafted well before the proximate cause of the national emergency;

10) major internal security law initiatives are often hidden deep within omnibus bills which address diverse subjects (e.g. U.S. DoD NDAAs);

11) fundamental human rights and inalienable civil liberties become described as privileges in crisis;

12) the perceived need to act pre-emptively to prevent harm facilitates the erosion of check and balances between the executive, the legislature, and the judiciary; and,
13) which tend to default to accepting the opinion of the executive.

Temporary executive measures passed in anticipation of pre-empting harm to state institutions or casualties often lead to unanticipated (usually unintended) consequences; such as:

1) the extension of temporary internal security measures for many years, and decades into the future;

2) the extension of temporary internal security laws into social policy domains in which the impact is not immediately evident:

   (a) regulation of alcoholic beverage use:

   (i) DORA 1914’s regulation of public house (pub) opening hours to lunch and supper meal times lasted until passage of the Licensing Act, 1988, and contributed to the development of a binge-drinking culture which continues to plague the UK over a century after DORA’s enactment);

Best Practices

There is a degree of normative judgement applied in describing any practice as best or worst. During internal security crises, the protection of individual rights must be balanced against competing demands for timely pre-emptive measures against groups which are assessed by intelligence and security agencies to be a threat to the host nation. The threat assessment is based on observed hostile associations or beliefs, or which have been demonstrated through threats, actions, or statements of intent to cause harm. The nation-states which share a common law heritage place great emphasis, in theory, on protecting the fundamental human rights and civil liberties of individual citizens. Inevitably, as time is assumed to be crucial in crisis response, the executive measures taken to pre-empt violence focus on identifiable groups rather than individuals. Criminal law, which applies after a crime has been committed, gives way to executive measures designed to prevent crimes from occurring.

Worst Practices

Again, this description depends on the perspective of the observer and the evolving view of the law or the ethics of certain executive measures. The efficient arrest and detention of suspects may succeed at tactical level in the heat of the crisis. There would be immediate negative effects on the suspect group. Obviously the aggrieved group would see mass arrests and internment as a worst practice in the immediate aftermath of the crisis. However, the perspective of the suspect group can be gradually be accepted over time, as was the case with
internments of Ukrainian-Canadians during World War I, and Japanese-Americans and Japanese-Canadians during World War II. Each of these nominally successful executive measures led to public apologies by the Canadian and American governments and large compensation packages for the survivors and their families. The internments, which were perceived as necessary and prudent at the time have become a shameful memory for both nations.

Another case is the use of the War Measures Act to legalize mass arrests in Quebec during the October Crisis of 1970 to pre-empt “an apprehended insurrection.” Although the measures received great support from both the Anglophone and Francophone communities in Canada at the time, the majority Francophone Québécois perspective has shifted over time to view the arrests and detentions as very heavy handed and it had left a negative impression amongst the majority Francophone population in Quebec which has had a detrimental effect on Canadian unity. It is an example of an unanticipated and unintended negative consequence of a successful security operation, and of an internal security law. The tactical successes achieved must be balanced against the strategic consequences which evolve over time.

**Continuing Challenges**

The case studies illustrate the immediate, long-term, and still unfolding impact of internal security law within the societies of Canada, the U.K., and the U.S.A. However, many of the emerging themes are international in scope. The Western democratic societies which share the common law legal system face fluid complex security challenges which bridge the traditional gap between internal and external security. The identification and monitoring of aliens, (i.e. non-citizens and new immigrants) within national borders has long been one of the primary means of mitigating internal security threats – especially when followed by mass detention. These internal executive measures are now of limited utility as globalization, the borderless European Community (EC), visa-free entries from the many EC nations to the U.S.A., and massive immigration from the Developing World contribute to the erosion of physical and cyber borders.

**Mass Migration**

As described in Chapter 4, the boundaries between internal and external security are being dissolved by the pressure of people seeking to leave the unstable conditions in the Developing World south of the equator, particularly in Africa and in the Levant. The scope of this mass movement of people is the largest since World War II in Europe. It may become
unparalleled in human history as it poses new challenges at the intersection of foreign policy, international aid, human rights, and the definition of alien versus citizen.

**Possible Outcomes.** The phenomena of globalization and mass immigration challenge national sovereignty, state authority, and the effectiveness of internal security measures. The borderless Internet and satellite television, combined with reduced visa restrictions facilitate circumvention of nation-state control measures and exert influence on immigrant communities. Internal security now starts at the point of embarkation for immigrants, and potentially at Internet Service Providers (ISP) sites which enter the Western democratic nation. These de facto protections are already in place through the use of common arrest warrants, shared airline passenger lists, and numerous bilateral intelligence sharing agreements between the Western democratic nations.

**Common Law Limitations.** Western democratic nations face a dilemma that common law traditions are ill-suited to address. The speed of communications, air travel, and massive numbers of undocumented immigrants combine to abrogate the time consuming common law protections of procedural fairness, i.e. probable cause rather than suspicion for an arrest, the right to a trial in a timely manner, the presumption of innocence, and stringent standards for the admissibility of evidence. However, the comparative case studies demonstrate the unintended problems that can arise when individual legal protections are waived in times of crisis. These superficial but predictable similarities include the detention of ethnic communities based on suspicion rather than probable cause, the alienation of said communities leading to later reparations, and creating expensive and time consuming surveillance and intelligence analysis organizations. The structural similarities include the creation of interim organizations to implement executive measures which become more entrenched, the unintended loss of traditional freedoms among citizens, and the unanticipated changes in the legal systems as a declared crisis extends from temporary to permanent.

**Trends**

Two converging trends since 9/11 are discernible in the case studies. The first trend is the delegation of intrusive search powers to executive agencies which have been the purview of the courts under common law. This delegation of authority is in response to the need for timely intervention to pre-empt a terrorist attack. This delegation of authority, particularly through the *USA PATRIOT Act* sections 206, 213, 215, and 505 is understandable from the perspective of the
U.S. security agencies which fear mission failure in a presumed race against time. On the other hand, there is a danger that role of the judiciary and the legislature will erode if such executive powers gradually become permanent through the legislative branch’s passive acceptance of a permanent state of crisis. The second trend and unintended consequence is the potential for the dampening of democratic dissent if aboriginal and environmentalist land claims, anti-war protesters, Black Lives Matter or other civil liberties protests, immigration activists, LGBTQ demonstrations, or other protests groups become regarded as a threat to the state. This concern applies in Canada, the U.K., and the U.S.A.

**On Designing Balance in Internal Security Programs**

The comments which follow are based on contemporary (c. November 2015) and relatively recent (i.e. post-Cold War) security and intelligence organizations vice the historical insights gleaned in the earlier years (i.e. 20th Century) of the case studies. As the longitudinal case study illustrates, the common law nations in the study are both strengthened and limited by their past history in internal security. The comments below recognize the need for intelligence burden sharing amongst close allies while retaining accountability to their citizens through specially selected committees formed by their elected representatives.

**Canada.** Canada is unique amongst the Five Eyes (FVEY) intelligence-sharing community as Parliament does not have proactive oversight of intelligence operations (McGregor, 2015, 30 January; Roach & Forcese, 2015, 9 March). The external Security Intelligence Review Committee (SIRC) meets monthly to reviews complaints made against CSIS after the fact and tables an annual report to Parliament. Although its five members have Privy Council status and can review classified information, SIRC has been criticised for its weak powers of active oversight. The post of Inspector-General of CSIS was abolished in 2012, saving $1M (CBC News, 2012, 27 April), but leaving less means of oversight - whether active accountability or post hoc review. The Chair of SIRC had also been left vacant for two and a half year years (November 2011 to 2012 and January 2014 to May 2015), leading to accusations that the Canadian government does not take intelligence oversight seriously. The Communications Security Establishment (CSE) does not have an external oversight program nor a review body of any kind (Deibert, 2015, 27 March). The Office of the Commissioner of CSE

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6 Demonstrating Kahneman & Renshon’s (2007a) assertion on loss aversion.
7 Lesbian Gay Bisexual Transsexual Queer.
(OCCSE) provides annual reports to the Minister of National Defence to assure that Minister that CSE is operating within the law, but it does not report to Parliament. 8

These statements are not meant to impugn the integrity of CSIS and CSE members, but merely to point the potential loophole that could lead to the employment of unchecked executive measures in crisis. It could be argued that a Parliamentary review committee for CSIS and CSE operations would duplicate the work of SIRC. However, the creation of a Parliamentary body similar in mandate and powers to the British Intelligence and Security Committee (ISC) of Parliament or the American House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI) would be a step in closing a gap in the structural oversight of executive measures in Canada.

The employment of unchecked executive measures pertains to immigration policy as well as to security and intelligence. The Liberal Government of Canada elected on 19 October 2015 pledged to accept 25,000 Syrian refugees by 31 December 2015. The department of Immigration Refugees and Citizenship Canada addressed security concerns after the Paris massacre of 13 November 2015 by stating that no fighting-age single males would be accepted amongst the refugees unless they were part of a family group or were members of the LGBTQ community and were fleeing persecution (Francis, 2015, 23 November; McIlveen, 2015, 28 November). Emigration journalist Kingsley (2015, 24 November) observes that the policy may exacerbate the conflict in Syria even as it may alleviate some fear in Canada. Kingsley (2015, 24 November) asserts that it will drive young men severed from emotional and financial supports (i.e. their families) to choose between indeterminate life in a refugee camp, risk voluntary employment as a guerilla fighter or being coerced by Assad regime or opposition press-gangs seeking to replenish their ranks. It appears that the Canadian government is reacting to crisis-engendered fear through executive measures and neglecting the need to look at the longer-term third and fourth orders of consequences that are unanticipated and unintended.

Canada would benefit from an intelligence and security advisory body which is able to step back from the immediate crisis deadlines driven by election campaign promises, humanitarian impulses, and concerns of terrorist infiltration. This advisory body could examine the immediate refugee crisis and immigration policy from a long-term perspective of the

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8 The OCCSE is headed by a retired judge with 11 staff members (Deibert, 2015, 27 March).
prospects for successful integration over decades. It could also assess the impact of the refugee selection policy on the countries they are leaving, with the intent of not prolonging or worsening the situation.

U.K. Despite making the Intelligence and Security Committee a Committee of Parliament\(^9\) in 2013, there are continued calls for reform of intelligence and security oversight in the U.K. Former Home Secretary David Blunkett called for stronger powers of oversight following the Snowden revelations of 2013 (Travis, 2014, 14 October) as he believes that continued secrecy undermines public confidence in its operation. Blunkett, oversaw the implementation of the *Regulation of Investigatory Powers Act 2000* (RIPA) which guides surveillance activities. He warned the ISC that it was no longer good enough for the security services to argue that “we know and you mustn’t know” to maintain public confidence in their activities (Travis, 2014, 14 October, para. 6). Blunkett called for stronger judicial oversight by the Investigatory Powers Tribunal\(^10\) (IPT), the associated complaints review body, and the need to update RIPA 2000 at “each fixed-term parliament” if it was to continue to command public confidence “because people are pushing the boundaries all the time” (Travis, 2014, 14 October, paras. 10-12).

The case for stronger judicial oversight may be supported by revelations that Britain’s intelligence and security agencies have been routinely spying on Members of Parliament (MP), which presumably abrogates the Wilson doctrine of 1966 which banned such practices. Secret court cases in 2014-2015 reveal that the Wilson doctrine had not become established through precedent and it was merely in operation at the pleasure of the Prime Minister of the day.

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\(^9\) The Intelligence and Security Committee (ISC) was established by the *Intelligence Services Act 1994* to examine the policy, administration and expenditure of the Security Service, Secret Intelligence Service (SIS), and the Government Communications Headquarters (GCHQ). The *Justice and Security Act 2013* reformed the ISC making it a Committee of Parliament; providing greater powers; and increasing its remit (including oversight of operational activity and the wider intelligence and security activities of Government). Other than the three intelligence and security Agencies, the ISC examines the intelligence-related work of the Cabinet Office including: the Joint Intelligence Committee (JIC); the Assessments Staff; and the National Security Secretariat. The Committee also provides oversight of Defence Intelligence in the Ministry of Defence and the Office for Security and Counter-Terrorism in the Home Office. ISC members are appointed by Parliament, and the Committee reports directly to Parliament. The Committee may also furnish reports to the Prime Minister on national security sensitive matters. The nine ISC members have access to highly classified material in carrying out their duties and are subject to Section 1(1) (b) of the *Official Secrets Act 1989*. The ISC takes evidence from Cabinet Ministers and senior officials – all of which is used to formulate its reports ([http://isc.independent.gov.uk/](http://isc.independent.gov.uk/)).

\(^10\) The IPT is the only judicial body with the power to investigate the conduct of the Security Service (MI5), the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ) (RIPA 2000, ss. 65 (2) (a) and 65 (3) (a) ([http://www.ipt-uk.com/](http://www.ipt-uk.com/)).
The U.K. government’s current position, as finally disclosed at the IPT on 14 October 2015, is that even if the Wilson doctrine had any real force in law, it could never have survived in an age of bulk data collection\(^\text{11}\) (IPT Announcements, 2015, 14 October; Bowcott, Cobain & Mason, 2015, 14 October; Cobain, 2015, 14 October).

A case can be made that there is need to assure the Prime Minister that his or her MPs are not open to blackmail or coercion, and that they are not above the law that governs every other citizen. Communications monitoring may well be a valid exercise in defensive security; however, its use should be subject to application of the common law principle of probable cause as opposed to mere suspicion, subject to high-level Cabinet authorization, monitored as to its continued requirement, and subject to post hoc judicial review by an external review agency. To do otherwise detracts from the free exchange of confidences necessary to obtain compromises in either a domestic or international setting, and diminishes the role played by the legislature in a democratic society.

**U.S.A.** For the most part, a gradual transfer of authority from the executive agencies to the judiciary and to legislative authorities would return some balance to internal security in the U.S.A. This recommendation is of particular significance in the U.S.A. where the Executive Orders (EO) issued by the President have the full force of law when they take authority from a legislative power which grants its power directly to the executive by the U.S. Constitution,\(^\text{12}\) or are made pursuant to Acts of Congress that delegate some degree of discretionary power to the President. Although (probably) rooted in the *U.S. Constitution* and Acts of Congress, in practical terms EOs are beyond the routine jurisdiction of the courts and congressional oversight of EOs is minimal.

**Document sharing between criminal and intelligence agencies.** Strict adherence by the NSA to reasonable articulable suspicion (RAS) standards in querying and archiving telephony metadata authorized in accordance with EO 12333. On 15 January 2009, the Department of

\(^{11}\) The Tribunal made declarations that the Wilson Doctrine applies only to targeted, and not incidental, interception of Parliamentary communications, but that it has no legal effect, save that in practice the Security and Intelligence Agencies must comply with their own Guidance, which has now been disclosed in the Judgment (Investigatory Powers Tribunal: Announcements, 14 October 2015, retrieved from [http://www.ipt-uk.com](http://www.ipt-uk.com)).

\(^{12}\) Article II, Section 1, Clause 1 of the *U.S. Constitution*, refers to the title of President as the head of the executive branch, as well as head of state and head of government. The President is instructed therein by the declaration “take Care that the Laws be faithfully executed” made in Article II, Section 3, Clause 5 or face impeachment. Most Executive Orders base their legitimacy on these Articles, stating that their issuance to be justified as part of the President’s sworn duties.
Justice notified the FISA Court that only 1935 of the 17,835 telephone alert identifiers on the alert list were RAS approved (DoJ OIG, 2015, p. 51), which was seen to be “a flagrant violation of the Court Order in this matter.” Strict adherence by the FBI to the minimization standards related to the preservation of information collected in accordance with a with a PA 215 search. Such standards should specify the time parameters of an executive agency’s legal authority to collect, retain, and disseminate such information. While the Attorney General adopted the FBI Standard Minimization Procedures for Tangible Things Obtained Pursuant to Title V of the Foreign Intelligence Surveillance Act on March 7, 2013 (Final Procedures), the OIG assessed that such measures only came seven years after the expressed requirement in the USA PATRIOT Reauthorization Act of 2006 (DoJ-OIG, 2015, p. 63).

Greater transparency. The three DoJ OIG Reviews of the use of PA 215 published in March 2007, March 2008, and May 2015 were heavily redacted, particularly to prevent comparison of the use of Section 215 against U.S. citizens and non-U.S. citizens. Compliance with such measures must be clarified by the DoJ NSD-OI, the HPSCI and the SSCI. Intelligence sharing in near real time has become essential in monitoring air travel, and to a lesser degree illegal immigration by land and sea. Many of the perceived abuses of the common law principles and of the Fourth Amendment to the U.S. Constitution protections against illegal search and seizure find their genesis in this relatively recent technical challenge. The sharing of such information amongst close allies, such as amongst the FVEY community would be accepted as necessary by most reasonable people.

Recommendations

The case study reflects what appear to be replicable tendencies of governments in crisis situations, and of the societies which look to their governments to protect them. The British, Canadian, and American societies described in the case study sought security through the identification and isolation of perceived enemies. Each society paid a high price for its

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13 The Department of Justice National Security Division (NSD) Office of Intelligence performs the functions formerly conducted by the Office of Intelligence and Policy Review (OIPR). The NSD Office of Intelligence has grown dramatically in an effort to ensure: that Intelligence Community agencies have the legal authorities necessary to conduct intelligence operations, particularly operations involving the FISA; that the office exercises meaningful oversight over various national security activities of IC agencies; and that it can play an effective role in FISA-related litigation. The office has grown from fewer than 20 lawyers in 2000 to approximately 100 lawyers today (c.2014) and has structured itself into three specific sections aligned with the office’s core functions: operations, oversight and litigation. (http://www.justice.gov/nsd/office-intelligence)
inattention to long-term consequences of crisis legislation through the alienation of ethnic minorities and through the passive acceptance of intrusive laws years after the crises ended.

Reform Internal Security Intelligence

Clark (2010, p. 8) notes that the purpose of intelligence is to reduce uncertainty in conflict. The problem with this premise is that more information does not always lead to making better informed decisions as it tends to reinforce existing biases. Outliers in the information deluge tend to be ignored, not necessarily by the intelligence analysts, but by the policy makers and politicians who have already taken their decisions and use intelligence selectively to validate their decisions.

It is recommended that the scrutiny which has historically occurred in the aftermath of internal security crises should occur much earlier in the decision making process. In effect, major decisions which affect outgroups in internal security dilemmas require a long-term vulnerability analysis in which the vulnerability of the threatened group and the perceived threat group is weighed in equal measure. This recommendation flies in the face of the traditional role of intelligence “to reduce uncertainty” (Clark, 2010, p. 8) – and to gain advantage - in conflict situations. The answer may lie in taking a much longer-term view, which runs counter to the prevailing orthodoxy in intelligence which emphasizes current intelligence.

Presidential Daily Brief. Numerous American intelligence scholars (Betts, 2007; Clark, 2010; Johnstone, 2005; Pillar, 2012; Richelson, 2012) have commented on the pre-eminence of the President’s Daily Brief (PDB) in the U.S. IC, and the emphasis placed on current intelligence. This is perhaps an unavoidable aspect of human nature and planning strategies as the most pressing problems tend to get attention from decision makers first. Issues which do not appear to be urgent are left to wait until they become urgent. Perhaps it is time to consider the need for placing greater emphasis on estimative, as opposed to current intelligence. This reorientation in focus need not be at the expense of current or tactical intelligence programs which require high levels of readiness and prioritization of effort.

Looking out generations ahead rather than focusing on winning the immediate crisis may shorten the recovery period post crisis or conflict. Such a mental shift will require a continued utilization of current intelligence methods, reinforced with long-term estimative techniques. For example, estimative analysis with longer-term alternative futures analysis (Heuer & Pherson, 2011, pp. 126-131) reinforced with deep cultural intelligence analysis might be a possible way
ahead as it would mitigate the cognitive limitations described throughout this study and reduce the effects of mirror imaging and confirmatory bias. Another approach is that of adversarial collaboration (Heuer & Pherson, 2011, pp. 256-261), which is supported by Richards Heuer, as well as Daniel Kahneman and Amos Tversky (Heuer & Pherson, 2011, p. 256).

These recommendations are offered due to the numerous instances observed in the study of the unintended consequences of intrusive security legislation which affect large numbers of people for long periods of time. A renewed emphasis on basic and estimate intelligence need not be at the expense of diminishing current intelligence.

**Outsourcing intelligence analysis through crowdsourcing.** Out-sourcing of many aspects of basic and estimative intelligence could be realized through adoption of the three-part model introduced in Chapter 4, which integrates U.S. IC resources with subject matter experts in academia and industry as well as cultural experts. The proposed AMG model employs proposes a more independent approach than what has been used in past outsourcing of intelligence.

Project CAMELOT and the Civil Operations Rural Development Support (CORDS) teams informed counter-insurgency operations during the Vietnam War. The U.S. Army Human Terrain (analysis) System (HTS) teams provided cultural awareness and intelligence to American Army commanders and troops during the campaigns in Iraq and Afghanistan from 2007 until 2014 through both briefings and analytical tools such as the Combined Information Data Network Exchange (CIDNE). Socio-Cultural Research and Advisory Teams (SCRAT) work with the U.S. armed services in Africa to prepare American troops for their interactions with the African troops they assist. Both the HTT and the SCRAT worked under the operational control of the senior U.S. armed services commander. The Minerva Project, initiated under U.S. DoD sponsorship in 2008, funds research for projects selected by the Pentagon.

The significant difference in the Anticipatory Meta-Governance Model introduced in Chapter 4 is its independence from direct subordination to a military or intelligence community chain of command which anticipates adherence to certain policy positions in key assumptions. For example, in the case of pre-World War I United Kingdom, the key assumption that Germany

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15 The author of this study worked alongside the SCRAT in CJTF Horn of Africa 2013-2014.

16 Further information on the Minerva Project is available at [http://minerva.dtic.mil/overview.html](http://minerva.dtic.mil/overview.html).
posed a direct threat to Britain would not be accepted at face value. Likewise, the key assumption that ethnic minority groups pose an internal security threat to their host societies would not be accepted at face value. Such open parameters are not meant to negate an actual threat based on independently verified evidence, but serve to assure value-neutral analysis that is not colored by confirmatory bias and premature closure in decision making due to conformance with an official policy position. Given the need for government employees to conform to policy positions within government agencies, the Anticipatory Meta Governance (AMG) Model facilitates unrestricted external input in a manner similar to crowdsourcing. Certain guidelines would have to be put in place to regulate the flow of information and to focus research. However, public policy use of crowdsourcing has proved to encourage idea generation, arguing opposing viewpoints, breaking large multi-year tasks into smaller segments, and stepping outside traditional intelligence analysis and policy boundaries.

Once of the chief values of the AMG model is that it amplifies the receipt of what Leon Fuerth (2009; 2011; 2013) describes as “faint signals.” Faint signals are the early reports which emerge from a wide variety of non-government sources in academia, commerce, industry, and social media. Many early reports in widely varied disciplines such as dual use bio-agents, nanotechnology, petroleum exploration, and social trends arise from crowdsourcing. Internet forums and propaganda sites extolling the virtues of violent extremist organizations also offer clues as to the structure of their social networks.

The concepts of anticipatory governance (Barber, Fisher, Selin, & Guston, 2008; Fuerth 2009; 2011; 2013; Fuerth & Faber, 2012; Guston, 2012; 2013), crowdsourcing (Aitamurto & Landemore, 2015; Brabham, 2008; Estellés-Arolas & González-Ladrón-de-Guevara, 2012; Prpić, Taeihagh, & Melton, 2014; Prpić, Taeihagh, & Melton, 2014, 5 May). Tapscott, 2006) and open governance (Aitamurto & Landemore, 2015; Gore, 2006) are well-established with a rapidly growing literature. The AMG model extends the concept of anticipating the direction of political, social, technological change through collaborative foresight, engagement with the primary sources through crowdsourcing, and integration within the overall conceptual framework of pushing the limits on policy making beyond government. The inclusion of a multi-generation timescale as described by Lonergan (1957) and Lederach (2005) could mitigate the extreme urgency that has attended crises.
Mass collaboration has shown great promise in driving change through the *Internet of Things* (Tapscott & Williams, 2006). The intelligence and security communities of Western Democracies could benefit from leveraging its promise. Use of the AMG model could facilitate this necessary evolution. Future researchers should seek to explore this confluence between emerging trends in politics, social evolution, and technology as mitigated by the concepts of anticipatory governance, crowdsourcing, open governance, and multi-generational analysis.
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War Measures Act, R.S.C., 1927, c. 206.


Hong Kong


Ireland, Republic of


Massachusetts, The Colonie of


United Kingdom


Aliens Restriction Act, 1914, 4 & 5 Geo. V, c.12. An Act to enable His Majesty in time of war or imminent national danger or great emergency by Order in Council to impose Restrictions on Aliens and make such provisions as appear necessary or expedient for carrying out such restrictions into effect. Retrieved from http://www.legislation.gov.uk/ukpga/1914/12/pdfs/ukpga_19140012_en.pdf


Act 2003 and Part 3 of the Police Reform and Social Responsibility Act 2011; to make provision about firearms, about sexual harm and violence and about forced marriage; to make provision about the police, the Independent Police Complaints Commission and the Serious Fraud Office; to make provision about invalid travel documents; to make provision about criminal justice and court fees; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted

Anti-terrorism, Crime and Security Act 2001. An Act to amend the Terrorism Act 2000; to make further provision about terrorism and security; to provide for the freezing of assets; to make provision about immigration and asylum; to amend or extend the criminal law and powers for preventing crime and enforcing that law; to make provision about the control of pathogens and toxins; to provide for the retention of communications data; to provide for implementation of Title VI of the Treaty on European Union; and for connected purposes, (2001, c. 24). Retrieved from http://www.legislation.gov.uk/ukpga/2001/24/contents#pt2-pb1-l1g4


Atomic Energy Authority Act 1971, (1971, c.11). An Act to provide for the transfer to British Nuclear Fuels Limited and The Radiochemical Centre Limited of parts of the undertaking of the United Kingdom Atomic Energy Authority and of property, rights, liabilities and obligations appertaining to those parts of the Authority's undertaking; to make provision with respect to persons employed by the Authority and engaged in those parts of the Authority's undertaking, with respect to the control and finances of the said companies, and with respect to the application of pension schemes maintained by the Authority; to amend the provisions of the Nuclear Installations Act 1965 relating to permits under section 2 of that Act; to make provision relating to factories, offices, building operations and other works on sites in respect of which such permits are in force; to provide for the application of security provisions where such permits are in force and also where companies are designated by the Secretary of State in connection with an agreement relating to the gas centrifuge process for producing enriched uranium; and for purposes
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Parliament for the Union of Canada, Nova Scotia, and New Brunswick, and the
Government thereof; for purposes connected therewith.). Retrieved from

Canada Act 1982, (1982 c. 11). An Act to give effect to a request by the Senate and House of
Commons of Canada. Retrieved from


Coroners and Justice Act 2009, c. 25. An Act to amend the law relating to coroners, to
investigation of deaths and to certification and registration of deaths; to amend the
criminal law; to make provision about criminal justice and about dealing with offenders;
to make provision about the Commissioner for Victims and Witnesses; to make provision
relating to the security of court and other buildings; to make provision about legal aid and
about payments for legal services provided in connection with employment matters; to
make provision for payments to be made by offenders in respect of benefits derived from
the exploitation of material pertaining to offences; to amend the Data Protection Act
1998; and for connected purposes. Retrieved from

Counter-Terrorism Act 2008, (2008, c. 28). An Act to confer further powers to gather and share
information for counter-terrorism and other purposes; to make further provision about the
detention and questioning of terrorist suspects and the prosecution and punishment of
terrorist offences; to impose notification requirements on persons convicted of such offences; to confer further powers to act against terrorist financing, money laundering and certain other activities; to provide for review of certain Treasury decisions and about evidence in, and other matters connected with, review proceedings; to amend the law relating to inquiries; to amend the definition of “terrorism”; to amend the enactments relating to terrorist offences, control orders and the forfeiture of terrorist cash; to provide for recovering the costs of policing at certain gas facilities; to amend provisions about the appointment of special advocates Northern Ireland; and for connected purposes.

Royal Assent 26 November 2008. Retrieved from


Counter-Terrorism and Security Act 2015, (2015, c. 6). An Act to make provision in relation to terrorism; to make provision about retention of communications data, about information, authority to carry and security in relation to air, sea and rail transport and about reviews by the Special Immigration Appeals Commission against refusals to issue certificates of naturalisation; and for connected purposes. Royal Assent 12 February 2015.


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Criminal Justice Act 2003, c. 44. An Act to make provision about criminal justice (including the powers and duties of the police) and about dealing with offenders; to amend the law
relating to jury service; to amend Chapter 1 of Part 1 of the Crime and Disorder Act 1998 and Part 5 of the Police Act 1997; to make provision about civil proceedings brought by offenders; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2003/44/contents

Data Retention and Investigatory Powers Act 2014, c. 27. An Act to make provision, in consequence of a declaration of invalidity made by the Court of Justice of the European Union in relation to Directive 2006/24/EC, about the retention of certain communications data; to amend the grounds for issuing interception warrants, or granting or giving certain authorisations or notices, under Part 1 of the Regulation of Investigatory Powers Act 2000; to make provision about the extra-territorial application of that Part and about the meaning of “telecommunications service” for the purposes of that Act; to make provision about additional reports by the Interception of Communications Commissioner; to make provision about a review of the operation and regulation of investigatory powers; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2014/27/contents


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Defence of the Realm (Amendment) Act 1915, 5 Geo. 5, c. 34.

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Defence of the Realm (Acquisition of Land) Act, 1916. 6 & 7 Geo. 5, c. 63. 22 December 1916. Retrieved from https://archive.org/stream/realmdefense00grearich#page/10/mode/2up


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Defence of the Realm Regulations (Venereal Disease), HC Deb 19 June 1918 Vol 107 cc444-73.


Emergency Laws (Re-enactments and Repeals) Act 1964, c.60. An Act to repeal the remaining Defence Regulations (that is to say those set out in the Emergency Laws (Repeal) Act 1959), except the Defence (Armed Forces) Regulations 1939, and to re-enact certain of those Defence Regulations with modifications; and to continue for limited periods the Ships and Aircraft (Transfer Restriction) Act 1939 and certain powers of the Board of Trade relating to jute products. Retrieved from http://www.legislation.gov.uk/ukpga/1964/60/contents


Emergency Powers (Defence) Act 1939, 2 & 3 Geo. 6, c. 62. An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency; and to make further provision for purposes connected with the defence of the realm. Retrieved from http://www.gutenberg.us/articles/emergency_powers_(defence)_act_1939

Emergency Powers (Defence) Act 1940. 3 & 4 Geo. 6, c. 20, Halisbury’s Statutes of England 33 (London, United Kingdom, 1941), pp. 541-542.


Identity Cards Act 2006, c.15. An Act to make provision for a national scheme of registration of individuals and for the issue of cards capable of being used for identifying registered individuals; to make it an offence for a person to be in possession or control of an identity document to which he is not entitled, or of apparatus, articles or materials for making false identity documents; to amend the Consular Fees Act 1980; to make provision facilitating the verification of information provided with an application for a passport; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2006/15/pdfs/ukpga_20060015_en.pdf


Intelligence Services Act 1994, c. 13. An Act to make provision about the Secret Intelligence Service and the Government Communications Headquarters, including provision for the issue of warrants and authorisations enabling certain actions to be taken and for the issue of such warrants and authorisations to be kept under review; to make further provision about warrants issued on applications by the Security Service; to establish a procedure for the investigation of complaints about the Secret Intelligence Service and the Government Communications Headquarters; to make provision for the establishment of an Intelligence and Security Committee to scrutinise all three of those bodies; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/1994/13/contents


Justice and Security Act 2013, c. 18. An Act to provide for oversight of the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and other activities relating to intelligence or security matters; to make provision about closed material procedure in relation to certain civil proceedings; to prevent the making of certain court orders for the disclosure of sensitive information; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2013/18/contents


Munitions of War Act, 1915, 5 & 6 Geo. 5, c. 54.


Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo.4, ch. 50 (Eng.).

Prevention of Terrorism Act 2005, c. 2. An Act to provide for the making against individuals involved in terrorism related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity; to make provision about appeals and other proceedings relating to such orders; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2005/2/pdfs/ukpga_20050002_en.pdf

Protection of Freedoms Act 2012. An Act to provide for the destruction, retention, use and other regulation of certain evidential material; to impose consent and other requirements in relation to certain processing of biometric information relating to children; to provide for a code of practice about surveillance camera systems and for the appointment and role of the Surveillance Camera Commissioner; to provide for judicial approval in relation to certain authorisations and notices under the Regulation of Investigatory Powers Act 2000; to provide for the repeal or rewriting of powers of entry and associated powers and for codes of practice and other safeguards in relation to such powers; to make provision about vehicles left on land; to amend the maximum detention period for terrorist suspects; to replace certain stop and search powers and to provide for a related code of practice; to make provision about the safeguarding of vulnerable groups and about criminal records including provision for the establishment of the Disclosure and Barring Service and the dissolution of the Independent Safeguarding Authority; to disregard convictions and cautions for certain abolished offences; to make provision about the release and publication of datasets held by public authorities and to make other provision about freedom of information and the Information Commissioner; to make provision about the trafficking of people for exploitation and about stalking; to repeal certain enactments; and for connected purposes. (2012, c. 9). Retrieved from http://www.legislation.gov.uk/ukpga/2012/9/contents


Regulation of Investigatory Powers Act (RIPA). (2000). An Act to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed; to provide for Commissioners and a tribunal with functions and jurisdiction in relation to those matters, to entries on and interferences with property or with wireless telegraphy and to the carrying out of their functions by the Security Service, the Secret Intelligence Service and the Government Communications Headquarters; and for connected purposes. 28 July 2000. (2000, c.23). Retrieved from http://www.legislation.gov.uk/ukpga/2000/23/contents


Security Service Act 1989, c. 5. An Act to place the Security Service on a statutory basis; to enable certain actions to be taken on the authority of warrants issued by the Secretary of State, with provision for the issue of such warrants to be kept under review by a Commissioner; to establish a procedure for the investigation by a Tribunal or, in some cases, by the Commissioner of complaints about the Service; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/1989/5/contents


Terrorism (Northern Ireland) Act 2006, c. 4. An Act to provide for Part 7 of the Terrorism Act 2000 to continue in force for a limited period after 18th February 2006 subject to modifications and to authorise the making of provision in connection with its ceasing to have effect; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2006/4/introduction

Terrorism Act 2006, c. 11. An Act to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2006/11/introduction

Terrorist Asset-Freezing etc. Act 2010, c. 38. An Act to make provision for imposing financial restrictions on, and in relation to, certain persons believed or suspected to be, or to have been, involved in terrorist activities; to amend Schedule 7 to the Counter-Terrorism Act 2008; and for connected purposes. Retrieved from http://www.legislation.gov.uk/ukpga/2010/38/contents


United States of America


Alien Registration Act of 1940 (Smith Act), Pub. L. 76-670, 54 Stat. 670 (1940). An Act to prohibit certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens; to require the fingerprinting and registration of aliens; and for other purposes. Retrieved from http://legisworks.org/sal/54/stats/STATUTE-54-Pg670.pdf


Communications Assistance for Law Enforcement Act (CALEA) 1994, An Act to amend title 18, United States Code, to make clear a telecommunications carrier’s duty to cooperate in the interception of communications for Law Enforcement purposes, and for other


Cyber Intelligence Sharing and Protection Act, Bill H.R. 624, 13 February 2013, 113th Congress, 1st Session. An Act to provide for the sharing of certain cyber threat intelligence and cyber threat information between the intelligence community and cybersecurity entities, and for other purposes. Retrieved from http://www.gpo.gov/fdsys/pkg/BILLS-113hr624ih/pdf/BILLS-113hr624ih.pdf


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now District Director of Immigration and Customs Enforcement; Robert Mueller, Director of the Federal Bureau of Investigation; and John Does 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, Defendants. United States District Court for the Eastern District of New York. Decided February 16, 2006. Citation(s) 414 F.Supp.2d 250 (E.D. N.Y. 2006). Retrieved from http://ccrjustice.org/sites/default/files/assets/files/Arar%20Court%20of%20Appeals%20Decision.pdf


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and http://www.truthtechnologies.com/pages/aml_software_sentinel_info4c_datasource

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Tertiary Sources


Appendix A

List of Abbreviations, Acronyms, Backronyms, Declassified Code Words, and Short Forms
(all acronyms are considered to be of U.S. origin unless otherwise indicated)

AB or Alta – Province of Alberta
ACLU – American Civil Liberties Union
ACP – Aid of the Civil Power (Canada)
ACS – Automated Case Support (FBI case file system)
AEAA – Atomic Energy Authority Act 1954 and 1971 (U.K.)
AFRG – Assets Freezing Review Group (U.K., reviewing cases of designated persons IAW the
Terrorist Asset-Freezing (Temporary Provisions) Act 2010, c. 2
AG – Attorney General
amdt – amended/amendment
AML – Anti-Money Laundering
approx – approximately
auth(s) – authority, authorizes
AQ – Al Qaeda
ASBO – Anti-Social Behaviour Order (U.K.)
aval – available
BC – Province of British Columbia
BLUF – Bottom Line Up Front, colloquial term which signifies the absolute essential
information, conclusion, or consequence.
Boundless Informant or BOUNDLESSINFORMANT – Big data analysis and data visualization
tool used by NSA to count metadata
bp – best practice
BQ – Bloc Québécois (Canada)
BSA – Bank Secrecy Act of 1970
BTP - British Transport Police
c/cc – column/columns (U.K. Hansard)
c. – circa (followed by a year)
C- - Counter- (e.g. CT counter-terrorism, C-Espionage, etc.)
CAF – Canadian Armed Forces
<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>CAN</td>
<td>Canada</td>
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<tr>
<td>CBRN</td>
<td>Chemical, Biological, Radiological, Nuclear (combinations possible, e.g. RN)</td>
</tr>
<tr>
<td>CCF</td>
<td>Cooperative Commonwealth Federation (pioneering socialist party of the present day New Democratic Party (NDP) in Canada.</td>
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<tr>
<td>CCRF</td>
<td>Canadian Charter of Rights and Freedoms, 1981</td>
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<td>CCTV</td>
<td>Closed Circuit Television</td>
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<tr>
<td>CDT</td>
<td>Center for Democracy and Technology</td>
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<td>CI</td>
<td>Counter-Intelligence</td>
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<td>CIA</td>
<td>Central Intelligence Agency</td>
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<tr>
<td>CID</td>
<td>Committee of Imperial Defence (U.K., pre-WWI through outbreak of WWII)</td>
</tr>
<tr>
<td>CID</td>
<td>Cruel, Inhuman, Degrading (from the UN Convention against Torture).</td>
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<tr>
<td>CIDB</td>
<td>Canadian Incident Database</td>
</tr>
<tr>
<td>CISA</td>
<td>Cybersecurity Information Sharing Act of 2014 (proposed)</td>
</tr>
<tr>
<td>CISPA</td>
<td>Cyber Intelligence Sharing and Protection Act of 2012-2013 (proposed)</td>
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<tr>
<td>CMA</td>
<td>Competent Military Authority (U.K.) in relation to DORA and DORR/DRR</td>
</tr>
<tr>
<td>CMP</td>
<td>Closed Material Proceedings (U.K., use of secret evidence in open trials)</td>
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<tr>
<td>CORG</td>
<td>Control Order Review Group (U.K.)</td>
</tr>
<tr>
<td>CPS</td>
<td>Crown Prosecution Service (U.K.)</td>
</tr>
<tr>
<td>CPSR</td>
<td>Computer Professionals for Social Responsibility</td>
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<tr>
<td>CRS</td>
<td>Congressional Research Service</td>
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<tr>
<td>CSE</td>
<td>Communications Security Establishment (Canada)</td>
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<tr>
<td>CSIS</td>
<td>Canadian Security Intelligence Service</td>
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<tr>
<td>ctee</td>
<td>committee</td>
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<tr>
<td>D</td>
<td>Democrat</td>
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<tr>
<td>DC</td>
<td>District of Columbia</td>
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<tr>
<td>DCI</td>
<td>Director Central Intelligence</td>
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<tr>
<td>DDA</td>
<td>Dangerous Drugs Act, 1920 (U.K.)</td>
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<tr>
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<td>defn.</td>
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<td>dept(s)</td>
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DHS – Department of Homeland Security
DI – Defence Intelligence (U.K.)
DND – Department of National Defence (Canada)
DNI – Director National Intelligence
DNI – Internet metadata
DNR – telephony metadata
DoD – Department of Defense (U.S.A.)
DoJ – Department of Justice
DORA – *Defence of the Realm Act, 1914* (U.K.)
DORR – Defence of the Realm Regulations (DRR also used) (U.K.)
EAW – European Arrest Warrant
EC – Electronic Communication (FBI ACS)
ECJ – European Court of Justice
ECHR – European Court of Human Rights
EFF – Electronic Frontier Foundation
EIF – Entry Into Force (of legal documents, acts, treaties)
EIT – Enhanced Interrogation Techniques
EM – Executive Measure
EMO – Emergency Measures Organization (Canada)
emph. – emphasiz-e (-ing)
en – endnote
EO – Executive Order
EPIC – Electronic Privacy Information Center
estb. – establish(ed) (ing)
EU – European Union
exec - executive
FAA – *FISA Amendments Act of 2008*
FCC – Federal Communications Commission
FISA – *Foreign Intelligence Surveillance Act of 1978*
FISAMS – FISA Management System (FBI)
FISC – Foreign Intelligence Surveillance Court
FLQ – Front de libération du Québec
fn – footnote
fol – follow (ed)/(ing)
FinCEN – Financial Crimes Enforcement Network (U.S. Treasury Department)
FVEY – Five Eyes Intelligence Community, comprised of the Australia, Canada, New Zealand, the U.K., and the U.S.A,
GC – Grand Committee (U.K. House of Lords)
GCHQ – Government Communications Headquarters (U.K.)
GIC – Governor-in-Council (Canada, i.e. Cabinet)
GoC – Government of Canada
GO – General Orders
GOC – General Officer Commanding (Canada and U.K. during World War I and II)
GOP – Grand Old Party (The Republican Party in the U.S.A.)
govt. – government (generic)
HC – House of Commons (Canada and U.K.)
HL – House of Lords (U.K.)
HM – His (or Her) Majesty’s (placed before Factory (F), Forces, Government (G), Ship (S), Stationary Office (SO))
HO – Home Office (U.K.)
HPSCI – House Permanent Select Committee on Intelligence (U.S.A.)
H.R. – House of Representatives (U.S.A.)
H. Res. – House Resolution
HSA – Homeland Security Act of 2002
IAW – In accordance with
IBA – Independent Broadcasting Association (U.K.)
IC – Intelligence Community
ID – identification (colloquial, generic)
incl. – included/es/ing
indep - independent
info – information (colloquial)
intl - international
IPCC – Independent Police Complaints Commission (U.K.)
IPS – Immigration Passport Services (U.K.)
IPT – Investigatory Powers Tribunal (U.K.)
IRA – Irish Republican Army
IRS – Internal Revenue Service
IRTL – Independent Reviewer Terrorism Legislation (U.K.)
IRTPA – *Intelligence Reform and Terrorism Prevention Act of 2004*
ISA – Intelligence Services Act 1994 (U.K.)
ISC – Intelligence and Security Committee (U.K.)
ISE – Information Sharing Environment
ISIS – Islamic State of Iraq and the Levant
ISP – Internet Service Provider
JCHR – Joint Committee on Human Rights (U.K. Parliament joint HC/HL)
JICC – Joint Intelligence Community Council
K - thousand
LAC – Library and Archives Canada
LEA – Law Enforcement Agency
M - million
MI - Military Intelligence
MLCA – *Money Laundering Control Act of 1986*
MMLI – Ministry of Munitions Labour Intelligence Division (U.K., WWI)
MO – Military Operations
MoD – Ministry of Defence (U.K.)
NA – National Archives (U.K.)
N/A – Not applicable
NAJC – National Association of Japanese Canadians
NCPC – National Counter Proliferation Center
NCTC - National Counter Terrorism Center
NDA – *National Defence Act, 1986* (Canada) (As amended)
NDAA – National Defense Authorizations Act (for fiscal year….)
NIA – *Nuclear Installations Act 1965* (U.K.)
NIC – National Intelligence Centers
NIR – National Identity Register (U.K.)
NPRM – Notice of Proposed Rulemaking
NS – (or N.S., Province of Nova Scotia)
NSA- National Security Agency (U.S.A.)
NSA 1947 – *National Security Act of 1947*
NSB – National Security Branch (U.S. FBI)
NSC – National Security Council (U.K., estb. 12 May 2010 and U.S.A.)
NSD – National Security Division (U.S. Department of Justice, created under Section 506 of the 2005 USA PATRIOT Act).
NSL – National Security Letter
NSLB – National Security Law Branch (U.S. Department of Justice)
NYT – *New York Times*
ODNI – Office of the Director National Intelligence
OGA/D – Other Government Agencies/Departments
OIC – Orders-in-Council (Canada and U.K.)
OIPR – Office of Intelligence Policy and Review
ON or Ont – Province of Ontario
OPSEC – operations security
PA – *USA PATRIOT Act of 2001*
PAA – *Protect America Act of 2007*
PBC – Public Bill Committee (U.K. HC)
PCLOB - Privacy and Civil Liberties Oversight Board (U.K.)
PCS – Placed on Calendar Senate
pd - period
PEP – Politically Exposed Person
PII – Public Interest Immunity (U.K. principle of common law which permits the non-disclosure of evidence to one party if it would not be in the public interest)
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PIOB – President’s Intelligence Oversight Board

PIPEDA – *Personal Information Protection Electronic Data Act, 2002*

PL or Pub. L. – Public Law (U.S.A.)

PM – Prime Minister

P.M.S. - Parliamentary Military Security Department, No.2 (successor to MMLI Division, U.K.)

POGG – “Peace, order, and good government” (referring to sect. 91 of Canada’s 1867 Constitution, the BNA Act, which assigns all matters – and powers - not specifically assigned to the provinces to the federal government).

POTUS – President of the United States

PP – Prohibited Place (U.K.)

PQ – Parti Québécois (Canada)

PRC – People’s Republic of China

PRISM – NSA data collection program SIGAD US-984XN (replaced TSP)

PSP - President’s Surveillance Program (2001-2007)

pt /pts– part(s) or point(s) (depending on context)

Q – Question

QC or Que – Province of Quebec

QC – Queen’s Counsel (Canada and the U.K.). (Used to recognize Canadian lawyers for exceptional merit and contribution to the legal profession).

ques. – question(s)

R – reading (of an act, bill, committee report, or other piece of legislation)

R. - Republican

RAS - reasonable articulable suspicion (NSA data queries and archiving)

rcds - records

RCMP – Royal Canadian Mounted Police

re – regarding

reg/regs – regulation/regulations


ROIR – Restoration of Order in Ireland Regulations (U.K.)

R.S.C. – Revised Statutes of Canada

s/ss. – section/sections (of a bill or act)
S. – Senate (U.S.A.) bills
SAR – Suspicious Activity Report
S.C. – Statutes of Canada
SCA – Stored Communications Act of 1986
SCI – Sensitive Compartmented Information
sch/schs – schedule/schedules
SCOTUS – Supreme Court of the United States
secy - secretary
Sen. – Senate and/or Senator
ser. – serial (sequence in a list)
SI – Statutory Instrument (U.K.)
SIAC – Special Immigration Appeals Committee (U.K.)
SIGAD – SIGINT Activity Detector
SIGINT – Signals Intelligence
SIS – Secret Intelligence Service (U.K. MI6)
sitn - situation
SLC – Senate Legislative Calendar
SO – Standing Order (parliamentary procedure)
SOP – Standard Operating Procedure(s)
SSCI – Senate Select Committee on Intelligence
stmt – statement
SWIFT – Society for Worldwide Interbank Financial Transactions
TIA – Total Information Awareness
TIDE – Terrorist Identities Datamart Exchange (commonly referred to as the “No Fly List”)
TPIM – Terrorism Prevention and Investigation Measures (U.K.)
trng - training
TSA – Transportation Security Administration
TSP – Terrorist Surveillance Program, part of PSP 2001-2007
UC – unintended or unanticipated consequence
UDHR – Universal Declaration of Human Rights (UN)
UK or U.K. – United Kingdom of Great Britain and Northern Ireland
UMWA – United Mine Workers of America
UN – United Nations
UNHCR – United Nations High Commissioner for Refugees
unk – unknown
UNSCR – UN Security Council Resolution (followed by a number)
USA FREEDOM - *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (Act) of 2015.*
USA PATRIOT – *Uniting and Strengthening America through the Provision of Appropriate Tools Required to Obstruct and Interdict Terrorism (Act) of 2001 (as amended).*

USCIS - U.S. Citizenship and Immigration Services
USG - U.S. Government
USSID - United States Signals Intelligence Directive
VoIP – Voice over Internet Protocol
vol. - volume
WH – White House
WMA – *War Measures Act, 1914 (as amended) (Canada)*
WMD – Weapons of Mass Destruction
w/o - without
WP – *The Washington Post*
WS – Written Statement (U.K. House of Lords)
WWI – World War I
WWII – World War II
yrs - years
## Appendix B

### Legislative Purpose and Duration – United Kingdom

**Origins of the Defence of the Realm Act, 1914, Related Legislation and Executive Measures**


<table>
<thead>
<tr>
<th>Ser</th>
<th>Act, Bill, Event, or Regulation</th>
<th>Size1</th>
<th>Consider/Scope</th>
<th>Key Debates3</th>
<th>Vote</th>
<th>Duration</th>
<th>Purpose</th>
<th>Remarks/UC3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Aliens Act, 1905 (Superseded Aliens Act, 1793, 33 Geo. 3 c. 4); Act for Establishing Regulations Respecting Aliens, 1798; and the Act for the Registration of Aliens, 1836). (AA1905)</td>
<td>9 pgs.</td>
<td>Anarchist menace, indigence, overcrowding health risks, labour law, and economic conditions.</td>
<td>Three attempts to pass bill Mar &amp; Apr 1904, Aug 1905; HC Deb 29 March 1904 vol 132 cc987-95 HC Deb 25 April 1904 vol 133 cc1131-63 HC Deb 14 February 1905 vol 141 cc108-416 HC Deb 18 April 1905 HC divided: Aye-241 No - 117 (Division List No. 92.)</td>
<td>8 Aug 1905 - 1919</td>
<td>Later subsumed within the Aliens Restriction Act, 1914 and the Aliens Restriction (Amendment) Act, 1919</td>
<td>Limit “undesirable” (i.e., poor) aliens, and especially Jewish, immigration. Focus on denial of entry – rather than deportation.</td>
<td>Liberal tradition of safe haven ends, with leniency for those fleeing political or religious persecution.11 Limited ability to deport aliens. Public right of appeal to Immigration Board. Peak of 505 accepted in 1906, but declines to five in 1910.12 UCs:</td>
</tr>
</tbody>
</table>

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1 The size of each law or regulation is included as a criterion to illustrate the depth of review in debating and passing internal security legislation. When large omnibus bills are passed in a matter of hrs or days it is obvious that little analysis of the consequences of the bill’s provisions was done by legislators. Conversely, when small bills of just a few paragraphs or pages are hotly debated and require several attempts to pass the bill, this indicates lukewarm support of a contentious issue.

2 In some cases, all recorded debates are included in this table. In others, the debates are so numerous that only key debates which illustrate aspects of the research questions are included. Potential researcher bias is mitigated by including all recorded debates which occurred on contentious issues. Acts, bills, or executive measures within omnibus legislation are identified to facilitate supporting research as trying to capture every possible interpretation, reference, or nuance would not be possible.

3 Unanticipated (or unintended) consequences), (Merton, 1936).

4 Royal Commissions on Immigration were established in 1892 and in 1902 (Pellew, 1989, p. 370) to address immigration from Eastern Europe. The Commission’s Report in 1903, led to the Aliens Act, 1905 on the second attempt (Bonner, 2007, p. 106). Approx. 120-150K Jews immigrated to the U.K. in the period 1880 – 1914 fleeing persecution in Czarist Russia (Bashford & McAdam, 2014, p. 314; Coleman, 1994).

5 The move to restrict alien immigration was part of a trend amongst developed nations, which started in the 1850s to regulate Chinese migration, initially in the context of the gold rushes in California and the self-governing colony of Victoria in Australia (Bashford & McAdam, 2014, p. 309). In effect, the core rationale for restricting the entry of aliens centered on the regulation of labor (Bashford & McAdam, 2014) and on their ability to support themselves and their dependents. The usual practical screening measure was to accept cabin passengers and to deny entry to steerage passengers (Bashford & McAdam, 2014, p. 318).

6 See MP Mr. Samuel Roberts (Sheffield, Ecclesall) – HC Deb 14 February 1905 vol 141 cc108-41, cc. 117-118.

7 In the British Parliamentary system, votes passed unanimously are noted in the legislative record or Hansard as passed. If there is significant opposition, a division is noted and the votes of individual Members of Parliament (MP) in the House of Commons (HC) or members of the House of Lords (HL) are recorded by name.

8 Criteria which met this definition included: “(a) could not demonstrate the means to “decently support” themselves and any dependents; (b) were a “lunatic or an idiot,” or had any other disease or condition likely to render them a public charge; or (c) had been sentenced for an extraditable, non-political crime in a foreign country with which Britain had an extradition treaty (AA1905, s. 1(3)).

9 Many scholars emphasize the exclusionary nature and racial prejudice associated with AA1905. It should be remembered that AA1905 also established the right of asylum for people fleeing political or religious persecution (Bashford & McAdam, 2014, p. 312, fn 14; Adle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1 (Leyden: A.W. Sijthoff, 1966), p.11. Historian Irial Glynn has noted that “the 1951 Refugee Convention emphasized individual persecution, much like the British 1905 Aliens Act”: Irial Glynn, “The Genesis and Development of Article 1 of the 1951 Refugee Convention, *Journal of Refugee Studies* 25 (2011): p.134, p141.). Moreover, as Bashford & McAdam (2014) explain, AA1905 specifically mentioned religious persecution. The concept of asylum in domestic law started to transform from an exception to extradition for a political offence, which was its 19th Century connotation, into a basis for admission for humanitarian reasons. In effect, it was a major evolutionary step in common law – although it was not recognized as such at the time.

### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<th>Ser</th>
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<td></td>
<td>- Establishes right to political asylum, i.e. entrenches refugee law for first time.</td>
<td>- Codifies evolving int'l law re refugees.</td>
<td>- Bifurcates concept of asylum into protection in extradition and refugee law.</td>
<td>- Liberal Party governments accept that free trade necessitates free movement of labour.</td>
<td>- Basis for the Immigration Acts and policies of the 1950s and 1960s which still influence U.K. society.</td>
<td>- Influenced U.S.</td>
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7 MF Hr. Herbert Robertson at sect. 334 – “It was therefore perfectly clear that for the purposes of this Bill the definition of “steerage passenger” could not be taken from the Merchant Shipping Act, and it was therefore essential that the words “steerage passenger” should be defined in this Act.”

13 As per fs 4 and 14, the practical application of the refuge clause lagged well behind the enactment of AA1905. While important as a milestone in common law, the practical application of this clause was not apparent for decades due to the atmosphere of perpetual crisis in the U.K. due to WWI, the Troubles in Ireland, WWII, and the retreat from the British Empire in the two decades following WWII. Bashford & McAdam (2014) note a degree of hypocrisy in the British position as the defense of an individual’s right to asylum, almost chauvinistically argued into British domestic law at the beginning of the 20th Century, was rejected by British delegates during the UDHR’s drafting in 1947-1948. It was a British amendment that reduced the UDHR’s asylum provision to nothing more than a restatement of the existing position under international law; i.e. it was the prerogative of the receiving nation state to grant asylum should it so choose. Bashford & McAdam (2014) note that their findings contradict the commonly held perception that refugee law only emerged in 1938 prior to WWII, which has been popularized by leading legal scholar James C. Hathaway, (2014; 1990). See biography at https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=ich. Bashford & McAdam (2014) make a strong case that the “received narrative” that international instruments developed in the 1930s and 1940s, and that all this progressed to the 1951 Convention is valid on a narrow view of just where and how international “refugee” law emerged. Another view is that these lost decades (i.e. between 1914 and 1939) were characterized by retreat. Thus, the (re)emergence of the term “persecution” in the 1940s was not revolutionary, but evolutionary.

14 Bashford & McAdam, 2014, pp. 328-333. AA1905 is at the intersection of domestic and international law – i.e. crossroads of several historical traditions within domestic and international law: 1) the history of political asylum and extradition, 2) of excluding the enemy alien who might threaten a state’s political security, of immigration law in which undesirable aliens were denied and excluded, and of international refugee law.

15 Protection from surrender for political offenses (the “political offense exception”) was already an established part of extradition law. Protection from removal to persecution grew out of the political offense exception, but developed within refugee law, and over time came to be housed domestically within immigration statutes as a humanitarian measure (Bashford & McAdam, 2014, pp. 334-336).

16 Winston Churchill, then a Liberal Party member, supported the free movement of labour as a prerequisite to free trade (Bashford & McAdam, 2014, p. 316). Churchill opposed the Aliens Bills as he did not agree with any immigration restrictions on people fleeing persecution (p. 322).

17 Bashford & McAdam, 2014. Legislation to promote emigration to the Dominions (i.e. Australia, Canada, New Zealand, etc.) was the basis of British migration policy for over a century, being renewed as late as 1952 (Coleman, 1994) so legislation focused on permitting entry was a departure from routine discourse. There are no controls on emigration from the UK, although departing passengers have been required to show a passport since WW I (Coleman, 1994).
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<td>Immigration Act of 1917.18</td>
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<td>HC Deb 24 July 1905</td>
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<td>- Remains relevant as the right to asylum hotly contested c. 2015 with the flight of Ks of refugees from Africa to southern Europe.</td>
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8 Lord Newton at c324 – “This annual farce, or harlequinade, with which we terminate the legislative business of the session derives some point on this occasion from the fact that my noble and learned friend induced the House, certainly against my view, to pass what I can only term a sort of blood-and-thunder Resolution in the earlier portion of this session. What is the result? In spite of this Resolution we have swallowed the Aliens Bill practically at two sittings, and I presume we shall be expected to digest the Unemployed Workmen Bill in all its stages in one or two sittings.”


19 Committee of Imperial Defence (CID), created December 1902 (UK NA, CAB3, n.d.; Stafford, 1988, p. 7; MacKintosh, 1962), partly in response to German naval production. CID was busy, holding 99 meetings by 1908 (http://discovery.nationalarchives.gov.uk/details/r/C3810) and drafting Alien Regulation (entry, living areas, movement,) C-Sabotage Measures C-Espionage Measures.

<table>
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<tr>
<td>4</td>
<td>Official Secrets Act, 1911, c.28&lt;sup&gt;22&lt;/sup&gt; (OSA)</td>
<td>8 pgs 13 para.</td>
<td>Post Agadir Crisis – 1 Jul 1911</td>
<td>HL Deb 17 July 1911 vol 9 c494 HL Deb 25 July 1911 vol 9c641-7 HL Deb 01 August 1911 vol 9 c738738 § House in Committee (according to order). Bill reported w/o amendment. HL Deb 02 August 1911 vol 9 c805 HC Deb 17 August 1911 vol 29 c2076 HC Deb 18 August 1911 vol 29 cc2251-60 HC Deb 18 August 1911 vol 29, cc2254-60 Clause added “penalties for spying”</td>
<td>Royal Assent</td>
<td>1911-1920 1911-1963 (repealed Republic of Ireland, OSA, s.3 Repeals) 104 yrs 1911-2015 (if amnds, orders, regs. incl.)</td>
<td>Long title: “An Act to re-enact the Official Secrets Act 1889 with Amendments.”</td>
<td>“Enemy” deemed to incl. potential enemies, i.e. alien residents. UCs: – uses ethnic profiling to classify people as criminals before crime is committed.&lt;sup&gt;23&lt;/sup&gt; - First definition of “prohibited place” (PP) in Sect.3 repeated in U.K. amnds/related acts.&lt;sup&gt;24&lt;/sup&gt;</td>
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<sup>23</sup> This presumption of guilt by association alone assumes away the common law principles – and individual protections - of probable cause for arrest, the right to a speedy trial through a writ of habeas corpus, the presumption of innocence at trial, the burden of proof on the prosecution, and of punishment proportionate to the crime. Perversely, it facilitated arrest on suspicion, indefinite detention without trial, the presumption of guilt at trial, the burden of proof lying with the defence, and of punishments which are based on perceived “hostile origins or associations” rather than the seriousness of the offence. (See fn 53).

UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<th>Act, Bill, Event, or Regulation</th>
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<tr>
<td>5</td>
<td><strong>Aliens Restriction Act, 1914, 4 &amp; 5 Geo. V, c.12</strong></td>
<td>2 pgs.</td>
<td>1 day Enemy aliens resident in U.K.</td>
<td>HC Deb 05 August 1914 vol 65 c2041 HL Deb 05 August 1914 vol 17 cc374-84 HC Deb 07 August 1914 vol 65 c2157W HC Deb 10 August 1914 vol 65 cc2268-9W</td>
<td>Passed</td>
<td>5 Aug 1914 – 28 Dec 1919 5 Aug 1914 5 yrs, 5 mo</td>
<td>Regulate (identify, control movement of) aliens IAW supplementary statutory and prerogative powers</td>
<td>All aliens, not only enemy, have to register. OICs for EMs: Internment, exclusion from PP, deportation. Designated ports, quasi-police duties on immigration carriers, designates living areas for arrivals. 500 internment camps set up across U.K.¹⁴¹</td>
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<td>6</td>
<td><strong>Defence of the Realm Act, 1914, 4 &amp; 5 Geo. 5 c. 29</strong></td>
<td>One para</td>
<td>1 day</td>
<td>Nil (ref A; fn 26; Proclamation (Eby, 1988, p. 206 offers that there was five minutes of debate – which was probably procedural) HC Deb 20 April 1915 vol 71 cc174-5 re: Enemy aliens and strikes.⁵</td>
<td>Unanimous</td>
<td>8 Aug 1914 to 1988 74 yrs</td>
<td>Long title: “An Act to confer on his Majesty in Council to make Regulations during the present War for the Defence of the Realm.” Practical aspects: 1) Prevent comms to enemy; 2) secure docks, harbours, railways; 3) Trial of civilians by court martial; 4) centralize munitions production (b) Amended six times (Ref film (02:05)) (c) Controlled daily life (d) Helped win war through massive increase in industrial production. (e) censorship¹⁷ (f) prohibition (g) widening of police powers UCs: - As per sers 1 and 15.</td>
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²⁶ Parliamentary Archives, HL/PO/PU/1/1914/4&5GVc29. Synopsis retrieved from http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/yourcountry/collections/the-outbreak-of-the-first-world-war/dora/²⁷ c175: 50. Sir J. LONSDALE asked the Prime Minister whether, having regard to the information in the possession of the intelligence department of the Admiralty that there is an extensive conspiracy being carried out by German agents in this country to foment strikes among workmen in order to hamper the performance of war contracts, the Government intend to impose any further restrictions upon the large number of enemy aliens allowed to remain at large in the United Kingdom? § The PARLIAMENTARY SECRETARY to the ADMIRALTY (Dr. Macnamara): The possibility of such influences as those mentioned in the question being at work requires vigilant attention. Ample powers are, however, provided under the Defence of the Realm Act and other Regulations to deal with enemy aliens, and no further steps are in contemplation.”
²⁸ Private correspondence was also censored. Military censors examined 300,000 private telegrams in 1916 alone (Mason, 2015, IWM No.8)
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<tr>
<td>7</td>
<td>DORA (No. 2), 1914, 4 &amp; 5 Geo. V, c. 63, 28 Aug 1914</td>
<td>TBC</td>
<td>1 day</td>
<td>HC Deb 27 August 1914 vol 66 cc138-9</td>
<td>N/A Proclamation</td>
<td>As per above</td>
<td>Enlarge scope of DORA: Extends application of court martial to civilians found without authorization in any area used to train troops.</td>
<td>Loss of common law protections.</td>
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<td>8</td>
<td>DOR Consolidation Act, 1914 5 &amp; 6 Geo. V, c. 8, 27 Nov 1914</td>
<td>2.5 pgs.</td>
<td>3 days</td>
<td>HC Deb 23 Nov 1914 vol 68 cc909-20</td>
<td>TBC</td>
<td>27 Nov 1914 until repealed 1927 by statute law reform.</td>
<td>Long title: “To consolidate and amend the Defence of the Realm Acts.” i.e., Consolidate DORA and DORA No. 2.</td>
<td>More hotly debated than two previous DORA bills. Refines martial law: -Trial by Court Martial for major offences, and trial by Summary Courts for minor offences for civilians, -Death penalty could be applicable to war conditions.&quot;</td>
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29 Murray, 2006, p. 7; Clark, 1919, p. 36. Murray quotes Ewing & Gearty (2000) and Lowry (1977-1978) regarding the WWI era and the significance of DORA. ‘The former state that WWI remains ‘the most significant period in the twentieth century in terms of its impact and the legacy it bequeathed to the law and practice of civil liberties;’ and the latter avers that DORA jurisprudence remains of ‘particular doctrinal importance’ to the resultant era of national security law.

30 Lord Allenby at sect.541, para.2. “These emergency measures were hurriedly drawn, with the result that certain omissions took place. It has been found necessary to ask your Lordships to amend the Defence of the Realm Act. The No. 2 Bill which I am now submitting enables the military authorities to deal with the spreading of false reports in the same way as they can now deal with a communication of information to the enemy. It enables the Admiralty or Army Council to apply to training camps certain provisions which apply now only to defended harbours, such as the prohibition of signalling and the requirements that lights shall be extinguished after a certain hour and that all persons shall remain indoors after a certain hour at night. It enables the military authorities to exercise their existing powers for the acquisition or use of land or the making of by-laws without the existing restrictions such as consents of local authorities, publication in newspapers, etc., which occupy time and are inapplicable to war conditions.”

31 See the Marquess of Crewe at c166.

32 See Lord Richard Haldane, November 27, 1914, House of Lords Debates, 5th Series, Vol.18, c205 re discussion of the death penalty. According to Lord Haldane, who as Lord Chancellor and government spokesperson, stated elsewhere that “the principle of trial before a jury is a principle which is very deep” in British jurisprudence, “and one which we should all respect” (Chester, 2013, fn4). The HL members were aware of the tremendous shift in power they were considering for delegation. At c210, Lord Parmoor states, “We all know that at periods of panic and in war times there is an amount of prejudice and bias which makes it all the more necessary that every British civil subject should have the rights and protection which not only the Common Law but also the Statute Law of this country have given him over a long series of years.” However, Lord Crawford at c213 proposes the sharing of any information between the Post Office and the Army as they are both “servants of the state,” which presages future ISE debates in the U.S.A. and other Western democracies. The Marquess of Crewe cautioned at c218 that “Here we are told that we are doing something which is a gross invasion of popular liberties and a departure from those main securities for the liberty of the subject which were obtained after a contest with the Stuart Kings.” Lord Halibury also raised the extra administrative burden which would accrue to the Army of administering justice nation-wide at sect. 219.

33 HL Deb, 27 Nov 1914, c208, Lord Loreburn: “Therefore I beg to intimate that when we reach the Committee stage or after the Third Reading I shall propose this Amendment—‘Any British subject who has not accepted military or naval employment shall have the right, if he demands it, to be tried by the ordinary Courts of Law for any offence punishable under or by virtue of this Act if such Courts are available, and all such Courts shall have jurisdiction to try any such offences in accordance with Regulations to be made from time to time by Order in Council.’ It is quite true that in the earlier Acts which were passed some two or three months ago great powers were given to Courts-Martial short of that of imposing the penalty of death. At the same time we know the circumstances under which those measures were passed, and I think it would have been better if in those Acts as well there had been the power for a British subject to come to the Courts of Law if they were available.” c216: Amendment moved—“To insert the words: "Any British subject who has not accepted military or naval employment shall have the right, if he demands it, to be tried by the ordinary Courts of Law for any offence punishable under or by virtue of this Act if such Courts are available, and all such Courts shall have jurisdiction to try any such offences in accordance with Regulations to be made from time to time by Order in Council。”
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

<table>
<thead>
<tr>
<th>Ser</th>
<th>Act, Bill, Event, or Regulation</th>
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<th>Key Debates²</th>
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<th>Duration</th>
<th>Purpose</th>
<th>Remarks/UC³</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>Defence of the Realm (Amendment), No. 2, Act, 1915</td>
<td>Nationalization of all industry</td>
<td>HC Deb 27 November 1914 vol 68 cc1600-16</td>
<td>Royal Assent recv</td>
<td>as per ser. 6. 74 yrs</td>
<td>Convert non-defence industry to munitions prod’n,³⁴ direct factory prod’n</td>
<td>Leved against those found to be acting &quot;with the intent of assisting the enemy&quot;³⁴⁶</td>
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³⁵ Mr. ALDEN asked the Attorney-General what steps the Government proposes to take to amend the Defence of the Realm Act by the provisions of which British citizens are deprived of their right to be tried by the ordinary tribunals of the land?

³⁶ "Sub-section (3) of Section one of the Defence of the Realm Consolidation Act, 1914 (which gives power to take possession and use for the purpose of His Majesty’s naval and military services certain factories or workshops or the plant thereof), shall apply to any factory or workshop of whatever sort, or the plant thereof...”

³⁷ HL Deb, 4 Feb 1915, cc443-444, Lord Parmoor: “The title of the Bill, which is ‘to restore to civilians their right to be tried in the ordinary criminal Courts,’ expresses in ordinary language, easy to be understood, what the real purport and object of this Bill are. Apart from any technical phrases I seek to do nothing more than, as I have already said, reaffirm principles which at any rate in this House have found acceptance for many centuries of time... But if the Defence of the Realm Act is left unamended, at any rate for the first time under the sanction of Parliament expression will have been given to principles inconsistent 444 with that contained in our Great Charter of seven hundred years ago.”

³⁸ Council.”—(Earl Loreburn.)’ A compromise was made with the Lord Chancellor that the death penalty would not be invoked without a trial for high treason (c224).
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</thead>
<tbody>
<tr>
<td>1</td>
<td>vol 18, cc 1453-94 “Powers for Expediting Production of War Material” HC Deb 10 Mar 1915, c.1453. HL Deb 11 March 1915 vol 18 c665</td>
<td></td>
<td></td>
<td>sation question, 36</td>
<td>Passed HC</td>
<td>less for e.g. an invasion. 39 HC-2 nd Reading, Bill reported w/o amdt. Estb compensation Boards which preserve the right of eminent domain 40 HC- 3 rd Reading</td>
<td>HL-1st Reading</td>
<td>try civilians by the Army was never exercised in England, Scotland, or Wales. This sect. was not involved in England, Scotland and Wales, but a proclamation was issued for all of Ireland in immediate aftermath of the Easter Uprising in April 1916. Reinforces common law heritage.</td>
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<tr>
<td>2</td>
<td>vol 18 cc676-703</td>
<td></td>
<td></td>
<td>“Bill committed to a Ctee of the Whole House Tomorrow.”</td>
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<td>HL-2 nd Reading</td>
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<td>3</td>
<td>vol 18 cc724-41</td>
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<td>HL-2 nd Reading</td>
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<td>4</td>
<td>vol 70 c1918</td>
<td></td>
<td></td>
<td>HL. Amnds accepted, reported w/o amdt</td>
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<td>HL-2 nd Reading</td>
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<td>5</td>
<td>vol 70 cc1918-20</td>
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<td>6</td>
<td>vol 18 c759</td>
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<td></td>
<td>DORA Regulations:</td>
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<td>“Lords Amnds considered.” Cl.1. - (Right of British Subject Charged with Offence to be Tried by Civil Court.) 43</td>
<td></td>
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<tr>
<td>7</td>
<td>vol 18 cc724-41</td>
<td>Lord Joicey at c737: “This Bill has been well described as a most drastic measure. I doubt whether any powers have been asked from Parliament at any time in the history of this country so drastic as these. This Bill practically gives a blank cheque to His Majesty’s Government to take over any works which they feel disposed to take over.” (Prelude to an appeal for fair compensation).</td>
<td>IAW the Vexatious Indictment Act, 1859, as amended.</td>
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36 HC Deb, 09 March 1915, vol 70, cc1271-97, c1274, Mr. Bonar Law: “They are tremendous powers and powers which, if abused, would do incalculable harm to the industries of this country. If they were abused even from want of consideration—which I do not expect—or through not completely understanding the circumstances of the factory, they would do great harm. At the same time, I am not prepared to offer any opposition to the proposal of the Government …I think strongly that, in a crisis such as that which exists now, there is only one thing we can do: We have got to make the Government more or less dictators and to trust them to do what is wise in this matter and give them full power to use to the utmost all the resources of the country, including the industrial resources. I say, without hesitation, that there is one point which I have not looked into which I think ought to be considered, and that is the question of compensation…. I think that it is a pretty strong thing to ask us to rush this Bill through in one day; yet since the Government are going to act upon it, I think that we should give them what they want and allow it to go through in that way.” Bonar Law, who received a copy of the draft Bill from the AG (Sir J. Simon) on 8 Mar 1915, alluded to the re-rolled Renault automotive factory in Paris, France which was turning out 3000 rounds of High Explosive ammunition daily.


40 Right of British (civilian) subjects charged with an offence against DORA to be tried by a civil court maintained in most circumstances. Ammdt to the draft Bill reported.

41 | HL Deb 15 March 1915 vol 18 cc724-41, Lord Joicey at c737: “This Bill has been well described as a most drastic measure. I doubt whether any powers have been asked from Parliament at any time in the history of this country so drastic as these. This Bill practically gives a blank cheque to His Majesty's Government to take over any works which they feel disposed to take over.” (Prelude to an appeal for fair compensation). | | | IAW the Vexatious Indictment Act, 1859, as amended. |
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</table>
| 10  | Munitions of War Act 1915, 5 & 6 Geo. 5 | 54 & 99 | Creation of Ministry of Munitions; of Controlled Establishments | HC Deb 07 June 1915 vol 72 cc88-152 HL Deb 09 June 1915 vol 19 cc25-44 HC Deb 01 July 1915 vol 72 cc2087-8 HL Deb 02 July 1915 vol 19 cc206-41 HC Deb 02 July 1915 vol 72 cc2136-8 HC Deb 13 July 1915 vol 73 cc739-40 HL Deb 13 July 1915 vol 19 cc352-3 HC Deb 15 July 1915 vol 73 cc975 | Unk | 2 Jul 1915 - end war | Centralize munitions production under the Minister of Munitions Practical aspects: Makes strikes in munitions factories illegal. Ties workers to factories. Permits “dilution” of skilled labour jobs by unskilled workers. | Internal security org. estb. (MMLI/PMS 2) CWC created to oppose the Act in March 1916. UC: Contributed to socialist political climate in Scotland (see fn 51). Impact of the Act on labour relations was questionable: apart from Russia, no other Great Power suffered as many wartime strikes as Britain. |}

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45 The Munitions of War Act, 1915 was an Act of Parliament which brought private companies supplying the armed forces under the control of the newly created Ministry of Munitions, regulating wages, hours and employment conditions. It was a criminal offence for a munitions worker to leave his job at such a Controlled Establishment without the consent of his employer, which in practice was “almost impossible” to obtain (Woolacott, 1994, p.90). The Clyde Workers’ Committee (CWC) was established in 1916 to oppose the Act.
46 “Copy presented of Provisional Rules constituting and regulating Munitions Tribunals made under the Munitions of War Act, 1915, by a Secretary of State as far as relates to offences and by the Minister of Munitions as far as relates to other matters...” (http://hansard.millbanksystems.com/commons/1915/jul/15/munitions#S5CV0073P0_19150715_HOC_27)
47 Copy presented of Provisional Rules, dated 23rd July, 1915, made under Section 8 of the Munitions of War Act, 1915, by the Minister of Munitions as to Badges [by Act]; to lie upon the Table (http://hansard.millbanksystems.com/commons/1915/jul/27/munitions#S5CV0073P0_19150727_HOC_23)
49 Ministry of Munitions Labour Intelligence division, renamed Parliamentary Military Security Department, No.2.
50 CWC strike leaders were internally deported to Edinburgh, Scotland for a year (Byers, 2002, para.11). Several strike leaders later became MPs in the House of Commons, and two - Lord Shinwell and Baron Kirkwood - became Peers of the Realm in the House of Lords (paras. 21-22).
51 http://www.nationalarchives.gov.uk/pathways/firstworldwar/britain/p_munitions.htm
### Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99

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<tr>
<td>11</td>
<td>HC Deb 27 July 1915 vol 73 c2119</td>
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<td>HC Deb 21 September 1915 vol 74 cc320-1</td>
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<td>HC Deb 21 October 1915 vol 74 c1992</td>
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<td>HL Deb 14 Dec 1915 vol 20 c922</td>
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<td>HL Deb 04 Jan 1916 vol 77cc819-932</td>
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<td>HL Deb 05 Jan 1916 vol 20 c810</td>
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<td>HL Deb 11 Jan 1916 vol 20cc852-68</td>
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<td>HL Deb 13 Jan 1916 vol 20cc891-919</td>
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<td>HL Deb 18 Jan 1916 vol 20 cc947-8</td>
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<td>HL Deb 19 Jan 1916 vol 20 c956</td>
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<td>HC Deb 01 Mar 1916 vol 80 c1033</td>
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<td>HC Deb 21 October 1915 vol 74 c1992</td>
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**Vote**
- N/A
- Unk
- Passed

**Duration**
- 1916-1918
- Ordered to be vacated
- Sent to Cttee of Whole House
- Amdts reported
- 3rd Reading, returned to HC w/Amdts
- Discussion of impact of Munitions of War Acts 1915 and 1916

**Purpose**
- Many Amdts proposed: Employee dismissals Regulating hrs of labour. New Clause: (preservation of Trade Union Customs.)
- Guarantees profits for factory owners?
- Munitions workers as indentured civil servants who could not resign
- Labour dilution leads to unrest: negotiated agreements for the formation of joint committees of employers and shop stewards on the River Clyde factories in Scotland led to the amended Act in 1916
- UC: Greater role of women Wages negotiated with trade unions

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48 “73.Mr. PRINGLE asked the Minister of Munitions when he proposes to lay upon the Table the Rules for ascertaining the net profits of controlled establishments in accordance with Sections 5 and 17 of the Munitions of War Act, 1915? 321 §Dr. ADDISON The Rules in question were laid on the Table of both Houses on the 16th September.”

53 Lord Newton at column 853 – “When my noble friend Lord Curzon introduced the original Bill last summer he alluded to it as in the nature of a tripartite treaty—that is to say, a treaty between the Government on the one hand and employers and employed on the other. The main principles of that measure, as your Lordships are aware, are three. First, the prevention of strikes and lockouts and the substitution of compulsory arbitration in their place; secondly, the declaration of munition works as “controlled” establishments, together with a limitation of profits and the suspension of trade union rules; and thirdly, the prevention of waste caused by the transference of workers from one employer to another. Those were, put shortly, the main principles of the Munitions of War Act. All those provisions have proved to be absolutely necessary, but at the same time it has been found desirable to enlarge to a certain extent the scope of the Act.”

54 Sect. 885 – “After the termination of the War it shall be an implied term of any contract of service between the owner of any controlled establishment and any person employed in such establishment that the provisions contained in Schedule II. of the Munitions of War Act, 1915, shall apply to such contract, and be enforceable by 886 any civil action. And this Section shall continue to be in operation notwithstanding that the Munitions of War Act, 1915, or this Act shall have then ceased to operate.— [Mr. Roch.]”
12 Defence of the Realm (Acquisition of Land) Act, 1916 6 & 7 Geo. 5, c. 63\(^6\) 19 pgs. 15 clauses Expropriation of land, usage, power to remove bldgs. & works; continuation of land holdings, compensation, HC Deb 19 July 1916 vol 84 cc1097-156 HL Deb Amdt 20 Dec 1916 HC Deb 22 December 1916 vol 88 c1869 HC Deb 31 December 1916 vol 88 cc1667-1709 Dozens of mentions, the last one being:\(^7\) HC Deb 31 March 1998 vol 309 cc1052-134 22 Dec 1916-present N/A Royal Assent Long title: “An Act to make provision with respect to the possession and acquisition of land occupied or used for the Defence of the Realm in connection with the present War and for other purposes connected therewith.” Diminution of real property rights.

13 Defence of the Realm Regulation (DORR) 3A 1 Sep 1914 N/A N/A N/A Expropriate land for military purposes. Other Military Land Use Acts had been enacted over the past century. DORR 3A simply reinforced the pattern.

14 DORR 12A N/A N/A N/A Search vehicles and seize contents. Probable cause replaced by suspicion.

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\(^5\) Dr. Addison: “The effect of the Order under Section 6 is to make mandatory upon all controlled establishments engaged in the engineering, shipbuilding, metal and kindred trades in Great Britain the recommendations contained in the circular known as L 2, relating to the remuneration and employment of women on certain classes of munition work. The effect of the Order under Section 7 is to make mandatory on all controlled establishments engaged in the above-mentioned trades in the United Kingdom, subject only to the exception mentioned below, the recommendations contained in the circular known as L 3, as to the remuneration of men on certain classes of munition work.”

\(^6\) Although National Archives records include much material on the requisitioning of property during the two world wars, there is no single consolidated and comprehensive list of such property. Much of what survives relates to applications for compensation and to assessments of the value of requisitioned real estate. Statutes governing the purchase and/or leasing of lands for military purposes (still in force in 1914) included the Defence Act 1842 and the Military Lands Act 1892. Successive Defence of the Realm Acts from 1914 onward gave the government wide-ranging coercive powers during wartime, and the Defence of the Realm (Acquisition of Land) Act 1916 provided specifically for the requisitioning of land. Land was requisitioned for airfields, allotments and accommodation for government departments. The Office of Works carried out work for other government departments on land acquisition and the erection and conversion of buildings for wartime purposes. The Defence of the Realm (Acquisition of Land) Act 1916 provided that questions concerning compensation, or as to the purchase price of land were to be settled by a panel of referees appointed by the Railway and Canal Commission. This panel became the Land Values Reference Committee. The Acquisition of Land (Assessment of Compensation) Act 1919 provided a mechanism for resolving disputes over payments to owners after the end of the war. See National Archives files at [http://discovery.nationalarchives.gov.uk/browse/r/r/C2539192](http://discovery.nationalarchives.gov.uk/browse/r/r/C2539192).

\(^7\) Intervention by Gerald Howarth, MP: “I have a couple of questions about sections 41 to 50 of the Civil Aviation Act 1982. I am glad that the Government have tabled amendment No. 541, which limits the number of clauses from that Act to be devolved. I am slightly concerned about the detail of how the Act will work in terms of devolving power. Section 41 of the 1982 Act will be devolved to the Scottish Parliament and, under that section, the Secretary of State has power to acquire and manage land for civil aviation purposes. Section 41(3) states: ‘nothing in this subsection shall be taken to affect the operation of section 5 of the Defence of the Realm (Acquisition of Land) Act 1916 (which confers on a person from whom land was acquired under that Act a right of pre-emption in the case of the subsequent sale of the land) as respects any land acquired under that Act.’
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<tr>
<td>15</td>
<td>DORR 13A</td>
<td></td>
<td></td>
<td>HC Deb 19 June 1918 Vol 107 cc444-73</td>
<td>N/A</td>
<td>1918</td>
<td>Prevent soliciting for sexual purposes.</td>
<td>Possible remanding in cells for a week. UC: -Undermines common law protection.</td>
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<tr>
<td>16</td>
<td>DORR 14(58) (Restriction on residence and movement)</td>
<td>Risk of sabotage by aliens.</td>
<td>Decided by CMA, appeals to Executive not Courts (N/A for all DORRs)</td>
<td>N/A</td>
<td>1918-1923</td>
<td>Prevent alien access to sensitive sites. (Use in Ireland)</td>
<td>Control alien movement within U.K. During WWI, 612 persons removed from PP (fn 41).</td>
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<tr>
<td>18</td>
<td>DORR 21</td>
<td>Reports causing disaffection or alarm to HMIs.</td>
<td>N/A</td>
<td>N/A</td>
<td>1914-1920</td>
<td>Maintain morale.</td>
<td>UC: Quashes political</td>
<td></td>
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</table>

58 According to Bonner (2007, p. 52), DORR 14 was a precursor to the prohibition and exclusion orders promulgated IAW the Prevention of Violence (Temporary Provisions) Act 1939 and the similar powers in operation from 1974 IAW the successive Prevention of Terrorism (Temporary Provisions) Acts.

59 Bonner, 2007, p. 53. There were no definitions of the terms “hostile origins” or “hostile associations.” Determinations of individual risk were decided on a case by case basis. Bonner (2007, p.52) draws an analogy between DORR 14B and the Prevention of Terrorism Act 2005. The major difference is that the modern Act permits a broader, and more public, administrative challenge. Bonner (2007, p. 53) estimates that 160 DORR 14B orders were executed during WWI. Bonner (2007, pp. 55-60) recounts several unsuccessful DORR 14B ultra vires court challenges, and that the House of Lords ultimately considered DORR 14B to be intra vires, or within the authority of the executive to pass whatever regulations they considered necessary IAW the parent Act, DORA 1914, even if no specific mention had been made of internment without trial. In effect the fundamental common law principle of habeas corpus, and other remedies for checking executive power, were suspended without official notice. Powell (2006, p. 83) notes the case of R. v. Halilday, ex parte Zadig [1917] A.C. 260, WL 17997.

60 See Bonner’s (2007, pp. 74-76) comment as to retrospective 3500 arrests based on “hostile associations” during the Easter Rising of 1916. Many of those arrested were released but 1836 men and five women were interned in camps and mainland prisons. The unanticipated consequence of such concentrations was the counter-productive establishment of a “Sinn Fein University” (p. 76) in a manner similar to internment in Northern Ireland 1971-1975.
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<tr>
<td>19</td>
<td>DORR 27</td>
<td></td>
<td>Sedition</td>
<td>HC Deb, 26 Nov 17, Vol. 99</td>
<td>N/A</td>
<td>TBC</td>
<td>Maintain morale.</td>
<td>Censorship of negative war news. 27 prosecutions IAW DRR 27 were conducted by 26 Nov 1917, and another 15 had been stayed.</td>
</tr>
<tr>
<td>20</td>
<td>DORR 40B (EIF summer 1916)</td>
<td></td>
<td>Intoxication</td>
<td>N/A</td>
<td>N/A</td>
<td>TBC</td>
<td>Prevent intoxication of troops, war industry workers</td>
<td>Drug use was a medical problem until 1916. Possession, distribution, sale of cocaine and opium controlled under emergency HO authority. UCs: This control, obtained under emergency conditions, was retained, setting a precedent of treating drugs as a criminal matter and as a threat to national security. Formed basis of DDA, 1920.</td>
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<td>21</td>
<td>DORR 40D (EIF 26 Mar 1918; revoked Nov 1918), Based on principle of the Contagious Diseases Acts, 1864 and on expanding scope of DRR 13A.</td>
<td></td>
<td>Venereal disease prevention</td>
<td>HC Deb 19 June 1918 Vol 107 cc444-73</td>
<td>N/A</td>
<td>7 mos.</td>
<td>Preserve military manpower.</td>
<td>UC: - Criminalize disease. - Presumption of soliciting on the part of the woman in F/M conversations. - Preemptive arrests. - Opposed by civil libertarians and feminists. - Supported by the Scottish Union of</td>
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63 Defence of the Realm Regulations (Venereal Disease), HC Deb 19 June 1918 Vol 107 cc444-73. See also Grayzel, 2002, pp.70-71 regarding the implementation of DORR 40D. By October 1918 there had been 2013 prosecutions and 101 convictions for violating DORR 40D – which led to strong feminist protests as the soldiers were not arrested.
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<td>HC Deb 18 November 1919 vol 121 cc827-53</td>
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<td>Temp EMs become permanent, w/ removal of s.1 reference to “state of war”</td>
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<td>HL Deb 15 December 1919 vol 38 cc21-9</td>
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<td>Right of immigration appeal rescinded.</td>
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</table>
|     |                                 |      |                | HC Deb 28 December 1919 vol 123 cc1300-2 | | | | UC: Influenced immigration policy for a century.

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64 Davidson, 2000, p. 33. The Scottish Union of Women Workers had been providing voluntary morality patrols since early 1915 with official backing from the Scottish Office, the police, and the military, even going so far as to supervise potential dens of inequity such as ice cream parlours (p.30).

65 Davidson, 2000, p. 33.

66 The 1919 Act, with its series of Immigration Orders starting from 1920, has provided the framework for immigration control of foreigners ever since (Coleman, 1994).

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<td>23</td>
<td><strong>Restoration of Order in Ireland Act, 1920</strong>&lt;br&gt;10 &amp; 11 Geo. 5 c. 31&lt;br&gt;(ROIA)&lt;br&gt;w/ accompanying Restoration of Order in Ireland Regulations&lt;br&gt;(ROIR)</td>
<td>Irish nationalists</td>
<td>Introduced&lt;br&gt;2 Aug 1920&lt;br&gt;(5-7 days, approx. 3 days in HC and 3 days in HL).&lt;br&gt;HC Deb 20&lt;br&gt;October 1920 vol 133 c909&lt;br&gt;HC Deb 28&lt;br&gt;October 1920 vol 133 c1950W&lt;br&gt;HC Deb 28&lt;br&gt;October 1920 vol 133 cc1950-1W&lt;br&gt;HC Deb 03&lt;br&gt;March 1921 vol 138 cc1986-9&lt;br&gt;HC Deb 03&lt;br&gt;March 1921 vol 138 c1989&lt;br&gt;HC Deb 25&lt;br&gt;May 1921 vol 142 c130&lt;br&gt;Jan – Jun 1921 Summary</td>
<td>Royal&lt;br&gt;Assent 9&lt;br&gt;Aug 1920&lt;br&gt;EII 13&lt;br&gt;Aug 1920&lt;br&gt;Repealed by&lt;br&gt;Statutes Law&lt;br&gt;Revision Act, 1953</td>
<td>33 yrs</td>
<td>Long title: “An Act to make provision for the Restoration and Maintenance of Order in Ireland.”&lt;br&gt;(Convictions)&lt;br&gt;(Trials)&lt;br&gt;(Arrests)*68</td>
<td>Court martial&lt;br&gt;(Judge Advocates)&lt;br&gt;training &amp; experience required to try capital crimes.&lt;br&gt;EM – replace jury trials with Court Martials presided over by GOC 6th Div as Military Governor.&lt;br&gt;EM – mass internment through Summary Trials at battalion level, based on suspicion of IRA membership.&lt;br&gt;EM – ban on public assembly&lt;br&gt;EM – official Crown reprisals - 191 houses burned.</td>
<td>Extend DORA:&lt;br&gt;Aim - increase convictions of nationalist rebels while averting the need to declare martial law.69&lt;br&gt;Extends DORR 14B to ROIR.70&lt;br&gt;No political policy; Mil. comds rule through EMs.&lt;br&gt;UCs:&lt;br&gt;- Arms smuggling and sedition convictions increase; murder convictions decrease due to intimidation.71&lt;br&gt;- Court martial convictions used by IRA as propaganda.72&lt;br&gt;- Indirectly punishes Loyalist landlords.&lt;br&gt;- Starts IRA counter-reprisals and Loyalists lose more property.73&lt;br&gt;- EMs intensified conflict, losses on both sides.74</td>
<td>Extend DORA:&lt;br&gt;Aim - increase convictions of nationalist rebels while averting the need to declare martial law.69&lt;br&gt;Extends DORR 14B to ROIR.70&lt;br&gt;No political policy; Mil. comds rule through EMs.&lt;br&gt;UCs:&lt;br&gt;- Arms smuggling and sedition convictions increase; murder convictions decrease due to intimidation.71&lt;br&gt;- Court martial convictions used by IRA as propaganda.72&lt;br&gt;- Indirectly punishes Loyalist landlords.&lt;br&gt;- Starts IRA counter-reprisals and Loyalists lose more property.73&lt;br&gt;- EMs intensified conflict, losses on both sides.74</td>
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68 HC Deb 03 March 1921 - “12.Lieut.-Commander KENWORTHY asked the Chief Secretary whether Mrs. James Ryan, wife of the hon. Member for South Wexford, who is in prison without charge, was arrested on 16th February last at Wexford for having refused to allow a martial law proclamation to be exhibited in the window of her private house and imprisoned in Waterford gaol; whether she was taken away from an infant aged eight months; what steps have the authorities taken to see that the infant, now parentless, is provided for; and whether it is with his approval that the military power compels a lady in Mrs. Ryan's position to exhibit a martial law proclamation in her private house?”

69 Ainsworth, 2000, Sect. 2.
70 Bonner (2007, p. 76) records 4554 ROIR orders for internment by July 1921.
71 Ainsworth, 2000, Sect. 2, fn 23.
## UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<td>Clause 2 - Emergency regulations by OIC</td>
<td>HC Deb 25 Oct 1920 vol 133 cc1399-467</td>
<td>Aye-257; No-55</td>
<td>1&lt;sup&gt;st&lt;/sup&gt; reading</td>
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<td>Clause 3 - Short title &amp; application</td>
<td>HC Deb 26 Oct 1920 vol 133 c1591-708&lt;sup&gt;16&lt;/sup&gt;</td>
<td>Aye-300</td>
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<td>Act does not apply in Ireland</td>
<td>HC Deb 27 Oct 1920 vol 133 c1779</td>
<td>Aye-248</td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; reading</td>
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<td>HC Deb 27 October 1920 vol 133 cc1781-847</td>
<td>Aye-250</td>
<td>Clause 1 Amdts</td>
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<td>HC Deb 27 October 1920 vol 133 cc1847-51</td>
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<td>HC Deb 27 October 1920 vol 133 cc1869-89</td>
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<td>HL agrees, sends amdts</td>
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<td>HC Deb 28 Oct 1920 vol 133 c1948</td>
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<td>1&lt;sup&gt;st&lt;/sup&gt; reading</td>
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<td>Intent to use bill against striking miners (col.116)</td>
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<td>HL Deb 28 Oct 1920 vol 42 cc97-123</td>
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<td>HC Deb 29 Oct 1920 vol 133 c2117</td>
<td>Passed w/Clauses 2 amdts rm to HC</td>
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<td>HL Deb 29 Oct 1920 vol 42 c125</td>
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<sup>16</sup> See col 1633-1634.

<sup>19</sup> Repealed through Schedule 2, Civil Contingencies Act 2004 (CCA). See in particular s.20-23 CCA 2004 regarding the present powers for making of emergency regulations.

<sup>27</sup> Long title - “An Act to make exceptional provision for the Protection of the Community in cases of Emergency.”

<sup>28</sup> Emergency Powers Act (Royal Proclamation), HC Deb 03 May 1926 vol. 195 cc35-9.
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<td>25</td>
<td>Prevention of Violence (Temporary Provisions) Act, 1939, 2 &amp; 3 Geo. 4, ch. 50 (Eng.) (PV (TP) A)</td>
<td>Unk</td>
<td>Urgency of IRA threat fol 20 yr terrorist campaign Casualties to date Coord with foreign nations Limits to: 1) existing criminal and CT law, 2) the utility of identity docs, 3) search powers Division of powers between Parliaments Expulsion orders, detention Habeas corpus COAs: 1 Proscribe orgs 2 passports and identity cards 3 Internment 4 Supplementary Police powers</td>
<td>HC Deb 19 Jul 1939 vol 350 c407 24 Jul 1939 vol 350 cc1047-127 26 Jul 1939 vol 350 c1502 vol 350 cc1502-89 HL Deb 27 Jul 1939 28 July – 12:00PM – 12:20PM resolves into committee, 12:25 PM – 1:20PM, HC: Considers HL Amnds, agrees, returns to the HL for Royal Assent</td>
<td>Aye-218 No - 17</td>
<td>28 Jul 1939- Nov 1954</td>
<td>Long title: &quot;An Act….&quot; 1st reading 2nd Reading Whole House Cttee Deb 1st reading 2nd reading 3rd reading (standing order XXXIX suspended, allowing for more than one reading in a single day)</td>
<td>2nd Reading</td>
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81 "...to prevent the commission in Great Britain of further acts of violence designed to influence public opinion or Government policy with respect to Irish affairs; and to confer on the Secretary of State extraordinary powers in that behalf; and for purposes connected with the matters aforesaid."
82 Presented by Sir Samuel Hoare, Home Secretary; supported by Mr. Colville, the Attorney-General, the Lord Advocate, and Mr. Peake; to be read a Second time To-morrow, and to be printed. [Bill 203.] (http://hansard.millbanksystems.com/commons/1939/jul/19/prevention-of-violence-temporary)
83 Sir Samuel Hoare introduced the Bill, “I am sorry to have to ask the House of Commons for the Second Reading of a Bill of this kind at so late a date in the Session. I hope, however, that I shall be able to show that there is no other course open to the Government, that we urgently need these powers now; why is it that we want these particular powers; arid can we be assured that these powers are not excessive for the purpose and will not indirectly undermine some of the most cherished liberties of our fellow subjects?”
84 IRA bombing campaign (16 Jan 1939 – Mar 1940). Sir Samuel Hoare quotes from Part III of the S-Plan in introducing the second reading of the Bill, “...It must be shown that this is the time to strike, that England has never been in so critical a condition, barred as she is by political tradition from adopting the only measures that would ensure her strength, namely, totalitarian methods.” According to Hoare, “Since January there have been no fewer than 127 terrorist outrages, 57 in London and 70 in the provinces.” Col 1051 – “In this space of time they have brought a large number of these terrorists to trial. No fewer than 66 have been convicted by the ordinary processes of law. In addition, they have seized 1,500 sticks of gelignite, 1,000 detonators, two tons of potassium chlorate and oxide of iron, seven gallons of sulphuric acid and four cwts. of aluminium powder, enough to cause millions of pounds worth of damage and, what is more important than damage to property, the loss of the lives of at least 1,000 men and women.” Hoare argued (Col 1052), “Experience has shown that further powers are essential if grave loss of life and property is to be avoided; but there are two other reasons why we need these further powers. I said just now that in the early chapters of this campaign attention was concentrated upon damage to property. In recent weeks several cases have been brought to our notice that show that the campaign henceforth is to be much more ruthless and is not to take account of human life. Thirdly, and perhaps this is the most important reason 1052 why these powers are urgently required, we have in our possession reliable information that the campaign [sic] is being closely watched and actively stimulated by foreign organisations. I would ask the House not to press me for details. It would not be in the public interest to divulge them but they must accept my assurance that these are not unchecked suspicions founded upon gossip, but definite conclusions reached upon reliable data.” Hoare adds at col 1053, “Let us be quite clear on 1053 that point at the start of these discussions. They do not carry arms, so that we cannot prosecute them under the Firearms Act; they are clever enough not to have explosives on their premises, so that we cannot prosecute them under the Explosives Act, so that the police cannot search their homes.”
85 Mr. Ellis Smith (Stoke-on-Trent, South): “In view of the importance of this question and of the danger of creating precedents which may have an effect upon the future of this country, I think Members should have been presented with a copy of the Lords Amendments prior to their being considered in this House, so that they could have been given consideration to them.”
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<td>26</td>
<td>Emergency Powers (Defence) Act 1939, 2 &amp; 3 Geo. 6 c. 62</td>
<td>8 paras</td>
<td>N/A</td>
<td>HC Deb 28 July 1939 vol 350 cc1882-3 HC Deb 01 August 1939 vol 350 c2167 HL Deb 15 November 1949 vol 165 cc665-61 HL Deb 09 November 1954 vol 189 cc1227-32 HC Deb 06 February 1962 vol 653 cc269-382</td>
<td>Expiring Laws Continuance Act used (Repealed by the Expiring Laws Continuance (No.2) Act, 1954)</td>
<td>Home Secretary given denial of entry/expulsion powers. Continues police powers</td>
<td>Oversight of sect. 2(1)²⁶</td>
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²⁶ Lord Shepherd, “The Prevention of Violence (Temporary Provisions) Act, 1939, governs the violence that we experienced in this country from Irish republicans. Whilst it is true that there are no Irishmen suffering under the provisions of this Act at the moment, it is thought desirable to retain it in force for the present.”

²⁷ Refusal of admission. The Attorney-General, in thanking Mr. Thorpe for his explanation “reminiscent on Regulation 18B.”


²⁹ Goldman, 1973, p. 120. IAW the Public Records Act, 1958 Home Office records related to DRR 18B are not to be declassified for 100 years post WW II due to their sensitivity. Goldman (1973, p. 126), notes that a legal observer in 1940 had assessed that none of the 75, 353 enemy aliens arrested up to March 1940 had been proven to be German spies. This could indicate fear of aliens and paranoia on a massive scale.

³⁰ Long title: “An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency, and to make further provision for purposes connected with the defence of the realm.”
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<td>HC Deb 23 July 1941 vol 373 cc 941-1024</td>
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<td>sedition in newspapers</td>
<td>challenge their detention by way of an appeal to an Advisory Committee (bp) Some attempted to plead habeas corpus in the courts, which was refused as the evidence was secret, which presaged the PII and CMP post 9/11.</td>
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92 MP Mr. Stephen Ross asked the Secretary of State for the Home Department (Mr. Brittan) how many persons were detained in connection with terrorist-type offences under Acts other than the Prevention of Terrorism (Temporary Provisions) Acts and the Emergency Provisions (Northern Ireland) Acts in each of the years from and including 1969 to 1985 to date. §Mr. Brittan: “The information requested is not available.”  
95 An Act to make new provision for and in connection with the interception of communications sent by post or by means of public telecommunication systems and to amend section 45 of the Telecommunications Act 1984.”
might increase considerably."

103 We debate the Bill at a time when there is profound concern about the erosion of civil liberties in Britain and about serious allegations made in connection with the security services. That concern will have been deepened as a result of the 59-minute smug, complacent and insensitive speech that we have just heard from the Home Secretary.”

BLUF – limited to nil accountability for intelligence oversight.

106 Shared, as opposed to single-point executive accountability became a major focus of debate. MP Gerald Kaufman criticized the degree to which the Executive controlled the accountability mechanisms involved for the formation of a select committee reporting to Parliament. “The drawback about the office of commissioner is that he will be appointed by the Prime Minister and will report to the Prime Minister. There will be no accountability to Parliament. We strongly take the view that the House must seize the opportunity of the Bill to start the process of making the security services responsible to Parliament. We believe that the commissioner should be appointed not by the Prime Minister but by the House, and that he should report not to the Prime Minister but to a Select Committee of the House. He should be a servant of Parliament, not a functionary of the Government.”

107 Question as to whether the commissioner overseeing interception activities would report to PM or to a select cttee?

108 MP Mr. Soley, (s. 1259) – “Other countries throughout the western world have the kind of system that we have described. The Canadians, with a system otherwise almost identical to our own, have it. Are we saying that the Canadians are in some way better than the British and that we cannot have it? Are we saying the same about the Western Europeans?”

109 James Malone stated that there was no basis in law for capturing his communications. The ECHR agreed (Defty, Bochel, & Kirkpatrick, 2014).

110 UK Govt had received the 1957 Birckett Report, the 1980 White Paper, and the 1981 Diplock Report which provided a review of the procedures, safeguards and monitoring arrangements relating to interception of communications, but none of them recommended a single legal framework to cover all interception matters (Wong, 2005, p.10). The 1957 Birckett Report had recommended ‘There should be a regular review of outstanding warrants not less than once a month by both the Home Office and by every authority that is granted a warrant to intercept.’ (HC Deb, 12 Mar 1985, c. 173, MP Gerald Kaufman).

111 MP Harry Cohen (HC Deb, 12 Mar 1985, c. 247) observed that with plans to introduce itemized billing “which will show the date of every call, who made it and who received it and the cost in terms of time used,” the potential to collect data beyond simply monitoring the content might increase considerably.

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95 HL Liaison Committee First Report, 13 July 2005, Appx 2: Memorandum by Lord Lloyd of Berwick on the Case for Interception of Communications, para.2, “The value of interception”: Telephone interception has been of great value in identifying those involved in serious crime, and frustrating their activities. But the material obtained by interception cannot be used as evidence at their trial. As a result some serious criminals escape prosecution. This is the consequence of section 9 of the 1985 Act, now reproduced in section 17 of the Regulation of Investigatory Powers Act 2000” (http://www.publications.parliament.uk/pa/ld200506/ldselect/ldliaison/292905.htm)

96 MP David Winnick (HC Deb, 12 Mar 1985, c.169) stated that it is “quite likely that MI5 is out of control.” MP Ian Mikardo observed (c. 201) that “The problem is not phone taps authorized by the Secretary of State; it is the very much larger number of phone taps that are made without any application for an authorization.” MP Mr. Austin Mitchell (same ref, c.244):“In a modern pluralistic society, we are all dissenters. Whether it is on the bomb, the environment, fluoridation, women’s rights, animal rights or Welsh nationalism, most people are rebels in some way. They can feel threatened by a service that is extending itself. The danger is that our political debate and system is coarsened. The rights of one are the rights of all. The threat to the privacy of one’s telephonic communications or civil rights is a threat to the privacy and rights of all. That is what this debate is about and why there is such passion on this side of the House. Because we are all dissenters and rebels, the Bill and the system leave a nasty taste in the mouth.” MP Gerald Kaufman (same ref, c. 167) “I beg to move, to leave out from “That” to the end of the Question and to add instead thereof: ‘That this House declines to give a Second Reading to a Bill which gives statutory authority to interception of communications on criteria at once so vague and so sweeping as to permit interception on an unacceptably wide basis, and which provides insufficient safeguards for those adversely affected by unlawful interception.’ The advance publicity orchestrated by the Home Secretary for his speech in the Daily Telegraph yesterday said: ‘Mr. Brittan, Home Secretary, is preparing a trenchant counter to the Government’s critics of telephone tapping for tomorrow’s Commons debate on the issue.’ I hope that, if that speech was trenchant, the Home Secretary will never set out to be soporific. We debate the Bill at a time when there is profound concern about the erosion of civil liberties in Britain and about serious allegations made in connection with the security services. That concern will have been deepened as a result of the 59-minute smug, complacent and insensitive speech that we have just heard from the Home Secretary.”
The amendments are aimed at giving Parliament a role in the supervision of security services activities. Under the Bill the tribunal will report to the Prime Minister when it discovers a contravention of the rules. The commissioner will be appointed by the Prime Minister and will report to the Prime Minister. The Prime Minister will have to lay before Parliament the commissioner's annual reports, but the Prime Minister will be able to censor those reports on what he or she regards as national security grounds. The Prime Minister will be able to consult the commissioner about such decisions, but in the end that decision is the Prime Minister's responsibility. **S. 1242:** “The discretion to allow interception under the Bill is already much wider than we should like it to be. The commissioner's role is to review the implementation of the Clause 6 safeguard arrangements. Under that clause the arrangements have been properly in one of the most dangerous areas of activity in terms of civil liberties—one of the areas where, as the Sunday Telegraph has indicated, the Government are most in danger of going down the road that ends in the police state.” The vote recorded in s.1262 defeated the amendment to the draft Bill in which the commissioner reported to a select committee vice the PM.

97 MP Mr. Kaufman (s.1241), “The amendments are aimed at giving Parliament a role in the supervision of security services activities. Under the Bill the tribunal will report to the Prime Minister when it discovers a contravention of the rules. The commissioner will be appointed by the Prime Minister and will report to the Prime Minister. The Prime Minister will have to lay before Parliament the commissioner's annual reports, but the Prime Minister will be able to censor those reports on what he or she regards as national security grounds. The Prime Minister is required to consult the commissioner about such decisions, but in the end that decision is the Prime Minister's responsibility.”

98 Lord Mishon (HL Deb 16 May 1985, c. 1266) asked whether the report of the proposed commissioner “should just be dealt with by the Commissioner and the Prime Minister, or should it go before a select committee of the House?”

99 Viscount Whitelaw (c.145): can assure the noble Lord, Lord Foot, that in the Government’s view the commissioner’s statutory terms of reference mean that he will have to review the implementation of the Clause 6 safeguard arrangements. Under that clause the arrangements have to secure certain objectives such as minimising disclosure, and the commissioner will be able to judge their adequacy (that is the term in the Bill) only if he sees, as a matter of practice, those objectives are being secured. If they are not, then the arrangements will not be adequate and he will be obliged to report his conclusions to the Prime Minister. In that sense, the commissioner's task will not in essence differ from that of the existing monitor of interception arrangements.

100 Issue and duration of warrants, Clause 6 – safeguards, Tribunal, Exclusion of evidence, Interpretation.

101 Proposed amds to New Clause 1 - Appointment of select committee, Clause 2 – warrants for interception, Clause 7 – The Tribunal, Schedule 1 – The Tribunal.
### Table: Unintended Consequences in Internal Security

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<tr>
<th>Ser</th>
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<td>HC Deb 15 Dec 1988 vol 43 c1104-81</td>
<td>Aye - 163 No - 232</td>
<td>Home Secretary oversight</td>
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<td>HC Deb 15 Dec 1988 vol 143 cc1182-7</td>
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<td>HC Deb 16 Jan 1989 vol 145 c114</td>
<td>Aye - 276 No - 214 Div No 44 Passed</td>
<td>HC 3rd Reading Review principles</td>
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<td>HC Deb 16 Jan 1989 vol 145 cc114-8</td>
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<td>HC Deb 17 Jan 1989 vol 145 cc180-309</td>
<td>Aye - 215 No - 263 Div No 51</td>
<td>HC Ctte re Amdt 71 on lifelong duty of confidentiality Re Amdt 13 on person v. Crown servant cc. 1080-81, 1086, 1103, referral to OSA 1911</td>
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<td>HC Deb 23 January 1989 vol 145 cc743-98 – 3R</td>
<td>Aye - 197 No – 246 Div No 52</td>
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<td>HL Deb 24 Jan 1989 vol 503 c888</td>
<td>Aye - 175 No - 275</td>
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<td>HC Deb 25 Jan 1989 vol 145 cc1047-142</td>
<td>Aye -191 No – 296 Div No 95</td>
<td>HC Ctte re Amdt 14 disclosure vs insert damaging disclosure HC Ctte re Amdt To Clause 1</td>
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<td>HC Deb 15 Feb 1989 vol 147 cc338-58</td>
<td>Aye - 191 No – 296 Div No 95</td>
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<td>HC Deb 15 Feb 1989 vol1cc373-385</td>
<td>Aye - 276 No - 214 Div No 44 Passed</td>
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<td>Royal Assent</td>
<td>Aye - 204 No - 105</td>
<td>1 Mar 1990 to present</td>
<td>Long title‖</td>
<td>BLUF – prevent unauthorized disclosures of classified info by crown servants, government contractors, or UK IC members.</td>
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“An Act to place the Security Service on a statutory basis; to enable certain actions to be taken on the authority of warrants issued by the Secretary of State, with provision for the issue of such warrants to be kept under review by a Commissioner; to establish a procedure for the investigation by a Tribunal or, in some cases, by the Commissioner of complaints about the Service; and for connected purposes.” The purpose of the Act is to “protect national security against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.”


“An Act to replace section 2 of the Official Secrets Act 1911 by provisions protecting more limited classes of official information.”
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<td>Intl relations Investigatory Powers Penalties Prescribed bodies and persons Arrest, search, and trial</td>
<td>damit to extend meaning of intl org to exclude ECC from op of OSA in Clause 3</td>
<td>Aye 183, Noes 286. Ayes 168, Noes 285</td>
<td>HL Ctee: Amdt 1 Public Interest Defence Amdt 2 Damaging disclosures Amdt 6 causing serious harm 3rd Reading &amp; Amdt 1 to Clause 1 on disclosure Rtn to HC w/amdts Clause 2, sect.8 amdtt to permit disclosure of info linked to child abuse De-linking child abuse testimony from OSA 1989</td>
<td>Repeal/replaces s. 2 OSA 1911, removing the public interest defence created by that section. Considerable reference in all debates to OSA 1911 BLUF – evergreen evolving Act (bp)</td>
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<td>31</td>
<td>Intelligence Services Act 1994, c. 13 (ISA)</td>
<td>20 pgs.</td>
<td>SIS/Chief GCHQ/Dir Warrants Authorization of acts inside and outside British islands Commissioner, tribunal, investigation of complaints ISC Supplementary</td>
<td>Contents 101; Not-Contents, 157. Contents 85; Not-Contents, 120 Contents 64; Not-Contents, 95. Contents, 73; Not-Contents, 121</td>
<td>Aye 122 No 299</td>
<td>1994 to present</td>
<td>Long title HC Money 2nd Reading – Bill to move to a Ctee of the Whole House vace to a Standing Ctee. Estb Oversight Ctee</td>
<td>Supported in HC by 54 signatures of all parties</td>
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112 [http://www.parliament.uk/edm/2015-16/38](http://www.parliament.uk/edm/2015-16/38)
114 [http://www.theyworkforyou.com/debates/?id=1994-02-22a.244.0](http://www.theyworkforyou.com/debates/?id=1994-02-22a.244.0)
115 An Act to make provision about the Secret Intelligence Service and the Government Communications Headquarters, including provision for the issue of warrants and authorisations enabling certain actions to be taken and for the issue of such warrants and authorisations to be kept under review; to make further provision about warrants issued on applications by the Security Service; to establish a procedure for the investigation of complaints about the Secret Intelligence Service and the Government Communications Headquarters; to make provision for the establishment of an Intelligence and Security Committee to scrutinise all three of those bodies; and for connected purposes.
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<td>32</td>
<td>Terrorism Act 2000, c. 11 (TA2000)</td>
<td>160 pgs.</td>
<td>I – Introductory, includes defn of “terrorism”117; II- proscribed organizations; offences; III - terrorist property; IV - terrorist investigations; V- CT powers; VI- miscellaneous118 VII – Northern Ireland Schedule 7: Port and Border Controls119</td>
<td>HL Deb 06 April 2000 vol 611 c1427-90 HL Deb 06 June 2000 vol 613 c1078-103 (House in Committee) HC Deb 20 July 2000 vol 354 cc608-41</td>
<td>2nd R Diplock provision explained; tie back to 1989 and 1973 Acts. Amts to Bill</td>
<td>19 Feb 2001-present (Amended by the Anti-Terrorism Act 2001) (Succeeded by the Counter-Terrorism and Security Act 2015)</td>
<td>Long title: “An Act to make provision about terrorism; and to make temporary provision for Northern Ireland about the prosecution and punishment of certain offences, the preservation of peace and the maintenance of order.” Superseded and replaced the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996.</td>
<td>8 mentions in HL Committee Global focus. Stop-and-search powers IAW s. 44 of Act ruled illegal by ECHR.121 Use of s.44 grows over 10 yrs to include non-terrorism.122 Defn of phrase of threat mirrors the common law, as it was codified with respect to written words, in 27 Geo II c.15 (1754) and in 4 Geo IV c.54 (1823). Borrowed from PTA 1989; 1984; 1976; 1974; and PV (TP) A 1939 - which had its roots in DORA 1914.</td>
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117 Amends 15 other Acts and four Statutory Instruments (Schedule 16).
118 Sections (2)(b) and (e) of the Act have been criticised by legal scholar Colin Gearty (2005) as falling well outside the scope of what is generally understood to be the definition of terrorism, i.e. acts that require life-threatening violence.
120 Schedule 7 has been used in conjunction with Part V, “Counter-Terrorist Powers: Suspected terrorists,” para 40 Terrorist interpretation, (1) In this Part “terrorist” means a person who— (a) has committed an offence under any of sections 11, 12, 15, 54 and 56 to 63, or (b) is or has been concerned in the commission, preparation or instigation of acts of terrorism. (2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1”.
121 UK Border Agents detained, searched, and questioned journalist David Miranda, spouse of The Guardian’s Glenn Greenwald for nine hours, using these authorities. Greenwald was the journalist entrusted by Edward Snowden to break his silence.
123 Stop-and-search would possibly abrogate the Fourth Amendment to the U.S. Constitution as well.
125 Long title – “An Act to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed; to provide for Commissioners and a tribunal with functions and jurisdiction in relation to those matters, to entries on and interferences with property with or without telegraphy and to the carrying out of their functions by the Security Service, the Secret Intelligence Service and the Government Communications Headquarters; and for connected purposes.”
126 RIPA regulates how certain public bodies, (i.e. intelligence and security services) may conduct surveillance and access a person’s electronic communications. RIPA enables certain public bodies to demand that an ISP provide access to a customer’s communications in secret; enables mass surveillance of communications in transit; enables certain public bodies to demand ISPs fit equipment to facilitate surveillance; enables
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<sup>123</sup> Sect. 97 - Committee assisted by the Foundation for Information and Policy Research.

<sup>124</sup> Part 2 re-enacted and widened provisions of the Emergency Laws (Re-enactments and Repeals) Act 1964, (1964, c.60) which in themselves dated from the Defence (General) Regulations 1939 (SRO 1939/927). In October 2008, PM Gordon Brown invoked Part 2 within the Landsbanki Freezing Order 2008 to freeze the British assets of Icelandic bank Landsbanki during the Icelandic financial crisis, by virtue of the fact that the Treasury reasonably believed that “action to the detriment of the U.K.’s economy (or part of it) has been or is likely to be taken by a person or persons” (http://www.legislation.gov.uk/ukpga/2001/24/section/4/)

<sup>127</sup> Pre-passage sittings observed in Hansard: 1) HL 21, 22, 26, 27, 28 Nov; 4, 6, 10, 11, 13 Dec 2000; and 2) HC 28, 29 Nov; 5, 6, 10 Dec 2000.

<sup>128</sup> Long title - An Act to amend the Terrorism Act 2000; to make further provision about terrorism and security; to provide for the freezing of assets; to make provision about immigration and asylum; to amend or extend the criminal law and powers for preventing crime and enforcing that law; to make provision about the control of pathogens and toxins; to provide for the retention of communications data; to provide for implementation of Title VI of the Treaty on European Union; and for connected purposes.

<sup>129</sup> Lord Rooker, Minister of State, Home Office: “The order that we are about to debate is significant. It concerns a derogation that the United Kingdom proposes to make from Article 5 (detention) of the European Convention on Human Rights. That article affects the right to liberty and security. It is not a step to be taken lightly, and I want to make clear at the outset that the Government have given very careful consideration to the matter before embarking down this road (§77 §) I shall cover three issues: first, the technicalities of the order; secondly, the domestic powers that...”
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<td>11</td>
<td>Retention of Communications Data</td>
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<td>HL Deb 27 November 2001 vol 629 cc183-200</td>
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<td>Estb. ident.</td>
<td>UC: Used against Iceland 2008, described as a “completely unfriendly act” by PM Geir Haarde.</td>
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<td>16 Dec 2004: Law Lords ruled that S. 23 was incompatible with the ECHR, but under the terms of the Human Rights Act 1998 it remained in force.</td>
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<td>Amends Sect. 8 of Terrorism Act 2000 (c.11)</td>
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we propose to take which require the order to be made; and, thirdly, the conditions that must be satisfied for a member state to derogate from an article of the European convention.”

123 MP Simon Hughes at col. 1117 – “We have disagreed about the content because we have also kept to two other very straightforward positions. First, the provisions of a Bill that proceeds through an emergency process, without proper scrutiny and in double-quick time, should return for scrutiny at a later date—a perfectly normal constitutional principle. Secondly, we believe that a Bill that was intended to deal with terrorism and related activities should be limited to terrorism and related activities, and many of our amendments have been intended to deal with that issue specifically.”

131 Lord Scott of Foscote notes the “requirement that before a person is to be extradited, it must be shown that there is a proper case for him to answer. That is colloquially called the sufficiency test—there must be a sufficient case. We would not extradite if, by our standards, there was no proper case to be answered.”


133 Speech excerpt, HC Hansard, 19 Nov 2008, 1232 PM. Mrs. Maria Miller (Basingstoke) (Con): “Naomi House provides emergency support for terminally ill children living in my constituency and in the constituencies of a great number of right hon. and hon. Members in all parts of the House. Some six weeks ago, Singer and Friedlander, a British bank that was taken over by an Icelandic bank in 2006, was put into administration by Her Majesty’s Treasury. Naomi House had £5.7 million on deposit with that bank, which amounts to one third of its assets….When the Government took that action, specific reassurances were given to charities such as Naomi House that special arrangements would be made for them. Indeed, the Leader of the House made it clear on two separate occasions, both here in the House and in the media, that charities such as Naomi House would receive particular support. Yet now it would appear that under the Financial Services Authority regulations, Naomi House may not be eligible for any such special protection and faces the prospect of a protracted fight to recover any of its money at all. That would have serious consequences for the services that this unique charity provides for very ill children in Hampshire, the Isle of Wight, Dorset, West Sussex, Berkshire, Wiltshire and Surrey” ([http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081119/debtext/81119-0004.htm#081119000006](http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081119/debtext/81119-0004.htm#081119000006)).
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<td>35</td>
<td>Criminal Justice Act 2003, c. 44 (CJA)</td>
<td>476 pgs. Omnibus</td>
<td>1 - Amdts of the Police and Criminal Justice Act 1994 - Bail 3 - Conditional Cautions 4 - Charging, etc. 5 - Disclosure 6 - Allocation and Sending of Offences 7 - Trials on Indictment without a Jury 8 - Live Links 9 - Prosecution Appeals 10 - Retrial for Serious Offences 11 - Evidence 12 - Sentencing 13 - Misc.</td>
<td>HC Deb, 2 April 2003, c925 HC Deb, 19 May 2003, c688 HC Deb, 19 May 2003, c692 HC Deb, 19 May 2003, c697 HC Deb, 20 May 2003, c941 HC Deb 20 November 2003 vol 413 cc1025-36 HC Deb 20 November 2003 vol 413 c1037</td>
<td>House divided: Ayes 283, Noes 160.</td>
<td>20 Nov 2003</td>
<td>Long title(^\mbox{137}) Introduction – 68 speeches(^\mbox{138}) 2(^{nd}) allotted day - many amsds voted on(^\mbox{139}) - Lack of time to debate complex issues.</td>
<td>Detention of a terrorist suspect for questioning increased from 7 to 14 days. (Sec.306, Clause 45) Justified by claim that forensic analysis of CW materials might not be complete in 7 days. UK Bar Council quotes 1957 SCOTUS argument vs. double jeopardy. UC – technology leads practice, leads law. Allows double jeopardy (autrefois acquit) when “new and compelling evidence is presented” (Clause 66).</td>
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<td>36</td>
<td>Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 25) Order 2003 (Statutory)</td>
<td>2 pgs.</td>
<td>12 Mar 2003 “Whereas a draft of this Order has been laid before Parliament in accordance with section 29(3) 12 Mar 2003 Preamble: Whereas a draft of this Order has been laid before Parliament IAW section</td>
<td>Initial - N/A Order by Secretary of State IAW Sect. 29</td>
<td>14 Mar 2003 - 14 Dec 2004</td>
<td>Long title: “Sections 21 to 23(b) of the Anti-terrorism, Crime and Security Act 2001 shall not expire in accordance with Renewed Part 4 (Immigration and Asylum) ATCSA 2001. W/o the 4 Mar 2004 motion, the powers of the</td>
<td>Royal Assent</td>
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\(^{135}\) MP Patrick Kormack – “We are debating an extremely serious matter this afternoon: the Government’s timetable, which was never generous, but has been transformed into a guillotine of severe proportions. The subjects that the House will be called upon to debate today and tomorrow are so important that none of us should speak in this debate for more than a few seconds or minutes….Frankly, this is a disgrace. The Executive should not be able to put the Commons in a straitjacket in this manner. In future, if we are to have proper programming of Bills that allows adequate discussions of important issues, the tolerables must be properly agreed. There must be flexibility if the Government subject us to an avalanche of extra amendments. Otherwise, we are going to turn this place into a total non-entity, which it is close to being already.”


\(^{137}\) Long title: “An Act to make provision about criminal justice (including the powers and duties of the police) and about dealing with offenders; to amend the law relating to jury service; to amend Chapter 1 of Part 1 of the Crime and Disorder Act 1998 and Part 5 of the Police Act 1997; to make provision about civil proceedings brought by offenders; and for connected purposes.”

\(^{138}\) See speeches at [http://www.theyworkforyou.com/debates/?id=2003-04-02.929.0](http://www.theyworkforyou.com/debates/?id=2003-04-02.929.0)


\(^{140}\) Bar Council quoting Justice Hugo Black of the United States Supreme Court in Green v. United States, 355 U.S. 184 (1957): “The underlying idea ... deeply ingrained in at least the Anglo-Saxon system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby compelling him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty” ([https://supreme.justia.com/cases/federal/us/355/184/case.html](https://supreme.justia.com/cases/federal/us/355/184/case.html))

\(^{141}\) Declared unconstitutional 16 Dec 2004, partly on the basis that there was no “public emergency threatening the life of the nation” which would be necessary to justify this detainment regime ([http://www.publications.parliament.uk/pa/id200405/ldjudgmt/d041216/adoth-1.html](http://www.publications.parliament.uk/pa/id200405/ldjudgmt/d041216/adoth-1.html))
of the Anti-terrorism, Crime and Security Act 2001(a) and has been approved by a resolution of each House of Parliament; now, therefore, the Secretary of State, in exercise of the powers conferred upon him by section 28(2)(c) of that Act, hereby makes the following Order:

(2) (c) of ATCSA 2001.

Pre-emptive Act Long title \(13\) Repeals Part 4 (Immigration & Asylum) of ATCSA 2001
Propose amds
1st reading

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<td>37</td>
<td>Terrorism Act 2000 (Continuance of Part VII) Order 2005,</td>
<td>29 pgs.</td>
<td>Control orders; Appeals and other proceedings; Supplemental; Schedule (i.e., close surveillance while under an exclusion order)</td>
<td>HL Deb 09 February 2005 vol 669 cc872-9</td>
<td>11 Mar 2005-14 Dec 2011 (Repealed by s. 1 of the Terrorism Prevention and Investigation Measures Act 2011) (TPIMA)</td>
<td>Control orders remained in effect until 25 Jan 2012.</td>
<td>Pre-emptive Act Long title</td>
<td>Established control orders, (house arrest; limits access phone/Internet surveillance, relocation, lose passport). Overseen by CORG. Extended Parliamentary dispute which lasted over 50 hrs, leading to constitutional crisis. Passed just in time to be applied to the Part 4 terrorist suspects. Establishes independent reviewer in s.14 (2) (bp) UC. Weakened common law as it levied a</td>
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<td>38</td>
<td>Prevention of Terrorism Act 2005, c.2 (PTA)</td>
<td>29 pgs.</td>
<td>Control orders; Appeals and other proceedings; Supplemental; Schedule (i.e., close surveillance while under an exclusion order)</td>
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143 Long title – “An Act to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity; to make provision about appeals and other proceedings relating to such orders; and for connected purposes.”
144 Essentially an exclusion order, similar in nature to the Aliens Restriction Act, 1914. Also included in the Australian Anti-Terrorism Act 2005.
145 Immediate criticism came from Amnesty International (2005), Human Rights Watch (2005), JUSTICE and Liberty (2005) regarding the abuse of civil liberties through the wide range of restrictions and the use of closed courts. A compromise between HC and HL was reached in the evening of 11 March, pointing out that an Act that removes the 790-year-old principle of habeas corpus, codified in Magna Carta, should not have been rushed through Parliament in the first place and that a review leaves it to the opposition to defeat the legislation, unlike a sunset clause, which would require the government to prove that these extraordinary powers were still a necessary and proportionate response to the threat of terrorism in the UK; comparisons were made with the detention provisions of South Africa's apartheid-era Terrorism Act No 83 of 1967. Few critics claimed that the terrorist threat was not real, merely that arbitrary powers are more likely to lead to a miscarriage of justice and that prosecution in a court of law would be a better solution. The most commonly presented counter-argument was that protecting British citizens’ freedom to live and go about their lives without fear of terrorism is more important than the civil liberties of suspected terrorists. The difficulty in proving the continuing necessity of these executive measures is a challenge. An Independent Reviewer, The Lord Carlisle of Berriew, QC was appointed to provide this oversight.
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<td>39</td>
<td>Identity Cards Act 2006, c.15</td>
<td>48 pgs.</td>
<td>Total population register Gateway to essential social services Tied to passport renewal Total Info Awareness across UK govt</td>
<td>HC Deb 10 Mar 2005&lt;br&gt;HL Deb 17 March 2005 vol 670 cc1438-41</td>
<td>30 hr ping pong, HC rejects HL amds&lt;br&gt;PTA 2005: Northern Ireland</td>
<td>Long title&lt;br&gt;Govt commits to intro ID cards.&lt;br&gt;NIR use -legal limits. Enabling purpose.&lt;br&gt;Data sharing &amp; ID cards, population register&lt;br&gt;Intro</td>
<td>punishment w/o conviction of a crime. Demonstrated use of annual sunset clauses (bp) in protecting govt cohesion.</td>
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147 An Act to make provision a national scheme of registration of individuals and for the issue of cards capable of being used for identifying registered individuals; to make it an offence for a person to be in possession or control of an identity document to which he is not entitled, or of apparatus, articles or materials for making false identity documents; to amend the Consular Fees Act 1980; to make provision facilitating the verification of information provided with an application for a passport; and for connected purposes.

148 In the Report stage between the readings, the Bill was amended to prevent the National Identity Register (NIR) database being linked to the Police National Computer.

149 The NIS card was defeated three times in HL debates by Jan 2006, primarily due to concerns with the cost of the program (http://news.bbc.co.uk/2/hi/uk_news/politics/4616356.stm). A leaked U.K. govt document, published 29 Jan 2008, suggests that “universal compulsion should not be used unless absolutely necessary... due the need for inevitably controversial and time-consuming primary legislation,” but that “various forms of coercion, such as designation of the application process for identity documents issued by UK ministers (e.g. passports) were an option to stimulate applications in a manageable way.” (Francis Elliott, ID cards may be issued by coercion, says leaked memo, The Times, 28 January 2008; http://www.no2id.net/; http://craphound.com/NIS_Options_Analysis_Outcome.pdf). The card was to be multi-functional, including individual identity data, preventing identity theft and human smuggling, and functioning as a “gateway to services,” which would include obtaining medical assistance, a driver’s license, and renewing a passport. The National Identification Service card for all citizens concept was put aside in 2010, although some aspects remain in biometric cards for foreign workers.
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150 Consider Clause 21 – Grounds of Proscription, (glorification of terrorism); Clause 5 – preparation of terrorist act; Clause 6 – training for terrorism, Amdt 58: (4A) It shall be a defence to an offence under section 6(1), for the defendant to show that he reported any suspicion to the police or in the case of an employee to his employer or other person in authority over him;’ Clause 8 – Attendance at a place used for Terrorist Training, Amdt 59: It shall be a defence to an offence under this section for a defendant to show on the balance of probabilities that his attendance at any place used for terrorist training was— (a) for the purpose of preventing the instruction or training taking place; or (b) for the purpose of gathering information about the instruction or training; or c) involuntary. At the end of the day’s debate, “Bill (clauses 1 to 4, 23 and 24, 21, 22, 5 to 20, schedule 1, clauses 25 to 27, schedule 2, clauses 28 to 36, schedule 3, clauses 37 and 38, new clauses, new schedules, remaining proceedings), reported, with amendments; to lie upon the Table” (3 Nov 2005, col. 1072).

151 “An Act to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes.”

152 Program (prgm) describes the scheduling of readings, resolutions, and committee hearings of draft Bills in Parliament. The program motion seeks acceptance of the program by all parties in the HC or HL though a vote, e.g. HC Deb, 9 Nov 2005, Col. 310-315.

153 Encouragement of terrorism.

154 Amdt 55 to Clause 23 proposed to lengthen the maximum period of detention without charge from 14 to 90 days (based on police recommendations). Police experts justified 90 days by the claim that necessary evidence to decide charges might be encrypted on one of thousands of hard disks, and it could take this long to search heavily encrypted complex storage media (http://www.theyworkforyou.com/debates?hd=2005-11-09&number=3425). A few minutes later, MPs voted for a rebel Labour amendment increasing the detention period to 28 days, which passed by 323 votes to 290.

155 PM Blair was defeated due to division within his Labour Party caucus. The Conservative leader, Michael Howard, said the result left Mr. Blair "seriously weakened" and called on him to "consider his position". He added: "The prime minister has shown he no longer carries his party with him - and that is not good for the country." (Matthew Tempest, The Guardian, 9 Nov 2005, 1936 GMT). Tempest (2005, 9 Nov) quotes Shami Chakrabarti, Director of the civil liberties lobby group, Liberty, who said she was "heartened" by the vote, but she warned it still doubled the existing permitted period for detention without charge. She also criticised the "overt political campaigning of senior police officers" for their part in lobbying MPs. Rebel Labour Party voters are noted at [http://www.publicwhip.org.uk/division.php?dates=2005-11-09&number=84](http://www.publicwhip.org.uk/division.php?dates=2005-11-09&number=84).

156 Amendment proposed: No. 1, in page 22, line 19, leave out "three months" and insert "28 days". — [Mr. Winnick.]
## UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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157 “Laid before Parliament.”
158 An Act to provide for Part 7 of the Terrorism Act 2000 to continue in force for a limited period after 18 February 2006 subject to modifications and to authorise the making of provision in connection with its ceasing to have effect; and for connected purposes.
159 The right to trial by jury was suspended for certain “scheduled offences” and the court consisted of a single judge. These courts were convened due to the possibility of a perverse verdict not IAW the evidence and due to documented intimidation of jury members. The courts were revised by the Justice and Security (Northern Ireland) Act 2007, but remain in use in much the same format.
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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160 http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4545692.stm
161 The Bill contains a number of provisions which the Government states are designed to enhance counter-terrorism powers. The main elements of the Bill are: 1) a provision to allow the pre-charge detention of terrorist suspects to be extended from 28 days to 42 days in certain circumstances; 2) changes to enable the post-charge questioning of terrorist suspects and the drawing of adverse inferences from silence; 3) imposing requirements on people convicted of terrorist offences to let authorities know where they are living and any changes to their circumstances; 4) enhanced sentencing of offenders who commit offences with a terrorist connection; and 5) provision for inquests and inquiries to be heard without a jury. The Bill would also confer further powers to gather and share information for counter-terrorism and other purposes, and amend the law relating to asset-freezing procedures.
162 “…confer further powers to gather and share information for counter-terrorism and other purposes; to make further provision about the detention and questioning of terrorist suspects and the prosecution and punishment of terrorist offences; to impose notification requirements on persons convicted of such offences; to confer further powers to act against terrorist financing, money laundering and certain other activities; to provide for review of certain Treasury decisions and about evidence in, and other matters connected with, review proceedings; to amend the law relating to inquiries; to amend the definition of "terrorism"; to amend the enactments relating to terrorist offences, control orders and the forfeiture of terrorist cash; to provide for recovering the costs of policing at certain gas facilities; to amend provisions about the appointment of special advocates in Northern Ireland; and for connected purposes.”
163 14 sittings of the HC Ctee occurred (http://services.parliament.uk/bills/2007-08/counterterrorism/stages.html)
164 Rapid bicameral review of amtds to proposed bills and return to the other chamber, a.k.a. lutte a la corde.
165 Clause 64 - Certificate requiring inquest to be held without a jury - Counter Terrorism Bill". 24 January 2008.
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<td>46</td>
<td>Terrorist Asset-Freezing (Temporary Provisions) Act 2010, c. 2</td>
<td>3 pgs.</td>
<td>Temp validity of certain OICs Protection of things done or omitted in interim period</td>
<td>Refs for all debates: 169</td>
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<td>Passed in response to the UK Supreme Court’s 27 Jan 2010</td>
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166 This Act required 16 HC Cttee Sittings, nine HL Cttee Sittings, and numerous Reports. Full details of the debates may be retrieved from [http://services.parliament.uk/bills/2008-09/coronersandjustice/stages.html](http://services.parliament.uk/bills/2008-09/coronersandjustice/stages.html). Only key votes are recounted in the Table.

167 An Act to amend the law relating to coroners, to investigation of deaths and to certification and registration of deaths; to amend the criminal law; to make provision about criminal justice and about dealing with offenders; to make provision about the Commissioner for Victims and Witnesses; to make provision relating to the security of court and other buildings; to make provision about legal aid and about payments for legal services provided in connection with employment matters; to make provision for payments to be made by offenders in respect of benefits derived from the exploitation of material pertaining to offences; to amend the Data Protection Act 1998; and for connected purposes.”

168 David Howarth, Liberal Democrat shadow justice secretary: “Holding [inquests] in secret, with coroners hand-picked by the government, would be another blow to our civil liberties,” retrieved from [http://news.bbc.co.uk/2/hi/uk_news/7828401.stm](http://news.bbc.co.uk/2/hi/uk_news/7828401.stm)

169 [http://services.parliament.uk/bills/2009-10/terroristassetfreezingtemporaryprovisions/stages.html](http://services.parliament.uk/bills/2009-10/terroristassetfreezingtemporaryprovisions/stages.html)

The review groups. The bellwether for their effectiveness may be the continued independence of the Independent Reviewer Terrorism Legislation and of the review groups.

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**Table Notes:**

- [Amdt 1](#) – date of 31 December be replaced with 31 March. Content - 125, Not-Content – 307.
- [Amdt 6](#) - Content-48, Not-content-162.
- [Amdt 8](#) - Contents 54; Not-Contents 95.
- The Act was passed following the [HM Treasury v Ahmed ruling](#) by the Supreme Court of the United Kingdom on 27 January 2010 that asset-freezing orders made under the United Nations Act 1946, specifically the Terrorism (United Nations Measures) Order 2006, the Terrorism (United Nations Measures) Order 2002, the Terrorism (United Nations Measures) Order 2001 and the Al-Qaida and Taliban (United Nations Measures) Order 2006, were unlawful, because the 1946 Act was not intended to authorise coercive measures which interfere with fundamental rights without Parliamentary scrutiny. Lord Phillips, Presiding Judge ruled that, "Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country" ([HM Treasury v Ahmed et al., 2000, para.157]).
- [http://services.parliament.uk/bills/2010-12/terroristassetfreezingetchl/stages.html](#) “An Act to make provision for imposing financial restrictions on, and in relation to, certain persons believed or suspected to be, or to have been, involved in terrorist activities; to amend Schedule 7 to the Counter-Terrorism Act 2008; and for connected purposes.” [16th December 2010]
- Such statutory tests include a multi-source evidence review, meeting reasonable belief and public protection criteria, as well as necessity and proportionality tests, as well as the use of a devil’s advocate approach to ensure conclusive hearing of evidence from all perspectives ([Anderson, 2015, p.13-14, 31]). Such tests restore some of the individual civil liberties abrogated in the execution of mass public protection executive measures. The bellwether for their effectiveness may be the continued independence of the Independent Reviewer Terrorism Legislation and of the review groups.

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<sup>179</sup> MP Damien Green, (col. 962), “This is a significant victory for the British people. I pay tribute not only to Members on both sides of the House who have supported the Bill, but to the various pressure groups involved. Liberty and Justice have been mentioned, but I also pay tribute to the NO2ID campaign, which can chalk itself up as one of the most successful pressure groups in history. It was formed less than 10 years ago, and within a decade of its formation it has achieved its principal aim.”

<sup>180</sup> [http://services.parliament.uk/bills/2010-12/identidadocuments/stages.html](http://services.parliament.uk/bills/2010-12/identidadocuments/stages.html)

<sup>181</sup> Compensation of £30 to be paid to approximately 12,000 ID card holders (HL Deb, 17 Nov 2010, col. 783; 998-999).

<sup>182</sup> “An Act to make provision for and in connection with the repeal of the Identity Cards Act 2006.”


<sup>184</sup> Tehrik-e Taliban Pakistan (TTP). See HC Deb, 19 Jan 2011 at [http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110119/debtext/110119-0004.htm#1101197800001](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110119/debtext/110119-0004.htm#1101197800001)
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<td>50</td>
<td>Terrorism Prevention and Investigation Measures Act 2011, c.23 (TPIMA)</td>
<td>59 pgs.</td>
<td>Control Orders Transition to TPIMs “Conditions A-E” Significant cttee work.</td>
<td>7 Jun 2011 TPIMs (2d reading)</td>
<td>7 Jun 2011 (passed 2nd reading)</td>
<td>14 Dec 2011 to present</td>
<td>Long title&lt;sup&gt;199&lt;/sup&gt; Reform EMs: Abolish Control Orders, impose TPIMs. Regulate stop-and-search under s. 44 of the Terrorism Act 2000 Access to intelligence by Opposition parties.</td>
<td>Two-yr limit for TPIMs.&lt;sup&gt;200&lt;/sup&gt; Criticized as rebranding.&lt;sup&gt;191&lt;/sup&gt; UC: Stop-and-search use had grown. New Clause 3 (amtd 5 Jul 2011) New Clause 1 relocation of terrorist suspects</td>
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<sup>185</sup> Committee comprised of Parliamentarians with police/legal witnesses.  
<sup>186</sup> Ms. Theresa May, Minister for Women and Equalities, The Secretary of State for the Home Department. “The TPIM Bill establishes 12 types of measures that could be imposed as part of a TPIM notice. It also provides clear limits on the restrictions that may be imposed under each measure. These measures include: an overnight residence measure; a travel measure, mainly to prevent travel outside the United Kingdom; an exclusion measure to prevent individuals entering specified areas or places; a financial services measure; an electronic communication device measure; an association measure; a reporting measure and a monitoring measure” (http://www.theyworkforyou.com/debates/?id=2011-06-07c.70.0).  
<sup>187</sup> Other Committee sittings were held at 21 June, 4:00 P.M., at 9.00 am and 1.00 pm on Thursday 23 June; at 10.30 am and 4.00 pm on Tuesday 28 June; at 9.00 am and 1.00 pm on Thursday 30 June; and at 10.30 am and 4.00 pm on Tuesday 5 July 2011. (http://www.publications.parliament.uk/pa/cm201011/cmpublic/terrorism/110621/am/110621s01.htm). The control orders had included relocation of terrorism suspects and exclusion areas. See Qs 6 and 7 in the link – the majority (9 of 12) of the extant control orders include relocation as a condition. Qs 19 and 20 – seven people under control orders had absconded since their implementation, and the location of six was unknown. Q23 - three of 12 control orders are “post acquittal.”  
<sup>188</sup> http://www.publications.parliament.uk/pa/cm201011/cmpublic/terrorism/110705/pmp/110705s01.htm  
<sup>189</sup> An Act to abolish control orders and make provision for the imposition of terrorism prevention and investigation measures. [14th December 2011].  
<sup>190</sup> According to Stuart Osborne, Deputy Assistant Commissioner, Metropolitan Police, and Senior National Co-ordinator for Terrorism Investigations, “Often it is only after months of investigation that the police are able to produce evidential material that results in the consideration of a control order or a TPIM. Throughout all of our CT investigations we heavily engage with the Crown Prosecution Service where we think that prosecution may be possible. Before anybody is placed on a TPIM, it is mandatory that we consult the CPS to ensure that a prosecution is not possible. The new measures involve the CPS to a much heavier degree in looking at the sufficiency of evidence” (ref as per previous fn).  
<sup>191</sup> See Matthew Rider (2011, 28 January), “Control orders have been rebranded: Big problems remain,” The Guardian. MP Mr. Gerry Sutcliffe, speaking at the 21 June 2011 meeting of the Committee investigating the TPIM Bill, described the TPIM regime as “mini control orders” in Q66. The cost of an individual control order is estimated at £1.8 million per person by Lord Carlisle in responding to Mr. Sutcliffe in Q83. Mr. Sutcliffe notes that it takes up to 12 months to train a surveillance officer.  
<sup>192</sup> The Bill was published as a Justice and Security Green Paper on 3 October 2011, and was introduced in Parliament on 28 November 2012.  
<sup>193</sup> “A Bill to provide for oversight of the Security Service, the Secret Intelligence Service, GCHQ and other activities relating to intelligence or security matters; to provide for closed material procedure in relation to certain civil proceedings; to prevent the making of certain court orders for the disclosure of sensitive information; and for connected purposes.”  
<sup>194</sup> Clause 1, Schedule 1, Clauses 2 to 15, Schedules 2 and 3, Clause 16.
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<th>Duration</th>
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<th>Remarks/UC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Senior Courts Act 1981, c.54 Special Immigration Appeals Commission Act 1997, c.68</td>
<td>17 Jul 2012 cc120-180 cc200-222</td>
<td>Cl 6, 7, 8</td>
<td>Agree</td>
<td></td>
<td></td>
<td>PII vs. CMP&lt;sup&gt;205&lt;/sup&gt;</td>
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<td>2</td>
<td></td>
<td>23 Jul 2012 cc487-562</td>
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<td>HL PBC Day 3 Cl 6 - CMP in court Cl 8 - Special Advocates Interim effectiveness Pre-Olympics secur obsession&lt;sup&gt;201&lt;/sup&gt; Cl 7 - Gisting&lt;sup&gt;202&lt;/sup&gt;</td>
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<td>3</td>
<td></td>
<td>cc579-592</td>
<td>Report w/o Amdts</td>
<td>Agree</td>
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<td>HL PBC Day 4 Unchallenged CMP, RIPA evidence Cl.13 disclosure Cl. 14 certification Order motion Report Amdts</td>
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<tr>
<td>4</td>
<td></td>
<td>9 Oct 2012 cc931-932</td>
<td>Content - 162 Not-content-247 Content-170 Not-content-200 Content-134 Not-content-182</td>
<td></td>
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<td></td>
<td>ISC role in selecting IC agency heads Power withhold info from ISC</td>
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<tr>
<td>5</td>
<td></td>
<td>19 Nov 2012 cc1626-1688</td>
<td>Content 25 Not-content 164 Content 87 Not-content 183 Amdt 89-93 agreed</td>
<td></td>
<td></td>
<td></td>
<td>CL 2 ISC functions, Cl 3 reports Report Day 2 CMP in court PII weight 5 yr expiry Disclosure to OGD, allies SIAC</td>
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<tr>
<td>6</td>
<td></td>
<td>cc1690-1706</td>
<td>Privilege amdt.&lt;sup&gt;205&lt;/sup&gt; passed</td>
<td></td>
<td></td>
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<td>UC: CMPs end adversarial common law practice of challenging evidence; corrosion of trust in system</td>
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<tr>
<td>7</td>
<td></td>
<td>21 Nov 2012 cc1885-1909 cc1910-1911 cc1911-1927</td>
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<td>8</td>
<td>HL Deb 28 Nov 2012 c196</td>
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<sup>193</sup> Amendments based on the Report of the Joint (HC/HL) Committee on Human Rights (JCHR).

<sup>200</sup> Public Interest Immunity (PII) is a principle of English common law under which the courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. PII, which was known as Crown Privilege, is similar in effect to a gag order. In <i>R v Chief Constable of West Midlands, ex parte Wiley</i> [1995], the House of Lords decided that a minister could discharge his duty by making his own judgment of where the public interest lies (that is, to disclose or to assert PII). PII is similar to state secrets privilege in U.S. law, and similar usage is evident in USA PATRIOT Act s. 215. Closed Material Proceedings (CMP) is similar to a closed trial in which secret evidence is not necessarily shared with the defence lawyer. and

<sup>201</sup> Baroness Williams of Crosby (cc168-169): “...the dreadful atrocity of 9/11 produced a great wave of attempts to introduce more security legislation in the United States. After a while this included a certain disregard for some of the crucial rights of human beings there. American citizens found time and again, understandably given the terrible effects of 9/11, that their fundamental rights began to be disregarded in the interests of security. It was an extraordinarily difficult balance that to this day United States jurists feel strongly has gone against the basic liberties of the human being...I am sorry to put it so strongly, but we are becoming obsessive on this issue. We are getting the balance badly wrong. This Bill is critical for the future of our liberties in this country and for the attitudes to justice of ordinary people whose support for that justice is critical in a democracy; there is no substitute for civic support for the rule of law.”

<sup>202</sup> Gisting is summarizing the issues contained in evidence not disclosed in cases of Public Interest Immunity or Closed Material Proceedings.

<sup>203</sup> Proposed amdt was that the ISC was to be a Select Committee, comprised of members of both Houses. Defeated.
<table>
<thead>
<tr>
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<td></td>
<td></td>
<td>Aye 8</td>
<td>No - 10</td>
<td>HC PBC: 1st Sitting, HC as ISC majority</td>
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<td>Aye  8</td>
<td>No - 11</td>
<td>2nd Sitting Estb ISC staff secretariat?</td>
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<td>Div. 4</td>
<td>Aye - 9</td>
<td>Osmotherly Rules deemed adequate for info disclosure</td>
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<td>Div. 5</td>
<td>Aye - 9</td>
<td>3rd Sitting ISC access sub judice info</td>
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<td>Div. 6</td>
<td>Aye - 10</td>
<td>ISC Ann Report</td>
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<td>Div. 7</td>
<td>Aye - 10</td>
<td>4th Sitting CMP initiation</td>
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<td>N/A</td>
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<td>PII disclosure</td>
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<td>Div. 8</td>
<td>Aye - 9</td>
<td>5th Sitting CMP Amdt 55</td>
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<td>Aye - 9</td>
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<td>Div. 12</td>
<td>Aye - 2</td>
<td>6th Sitting Court applic’ns New Cl. 9</td>
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<td>Div. 13</td>
<td>Aye - 9</td>
<td>Disclosure Judge, Special Advocate, PII</td>
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<td>Div. 14</td>
<td>Aye - 9</td>
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<td>Div. 15</td>
<td>Aye - 9</td>
<td>7th Sitting CMP vs. ex parte complete disclosure,</td>
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<td>Div. 16</td>
<td>Aye - 9</td>
<td>Admissibility intel evidence</td>
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<td>Div. 17</td>
<td>Aye - 9</td>
<td>8th Sitting Sec State powers IAW Pt 2 to expire in 1 yr.</td>
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<td></td>
<td>Div. 18</td>
<td>Aye - 9</td>
<td>Ss. 6-9 expire in 1 yr.</td>
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<td>Div. 19</td>
<td>Aye - 9</td>
<td>Chair voted 13 Aye/14 No by convention.</td>
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<td>Div. 20</td>
<td>Aye - 9</td>
<td>Bill Reported Prgm Motion 2</td>
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</table>

194 Amendment 71, in clause 7, page 5, line 47, at end add ‘and that damage outweighs the public interest in the fair and open administration of justice,’

195 Amdt 1 – “Require” rather than “consider requiring” disclosure in Clause 7; Amdt 2 – i.e., gisting; Amdt 3 – “so far as is possible to do so.”

196 Amdts 78-81.

197 Proposed amnds to Pt. 2 Disclosure of Sensitive Material.

200 Sub judice (Lat.), under judicial consideration and therefore prohibited from public discussion elsewhere.
## UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

<table>
<thead>
<tr>
<th>Ser</th>
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<th>Size</th>
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</table>

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205 Wiley Balance test, as explained in R v Chief Constable of West Midlands, ex parte Wiley [1995] 1 AC 274. The House of Lords decided that a minister could discharge his duty by making his own judgment of where the public interest lies, and was not obliged to claim PII in all cases where it may be applicable.


208 To make provision about anti-social behaviour, crime and disorder, including provision about recovery of possession of dwelling houses; to make provision amending the Dangerous Dogs Act 1991, Schedules 7 and 8 to the Terrorism Act 2000 and the Extradition Act 2003; to make provision about firearms and about forced marriage; to make provision about the police, the Independent Police Complaints Commission and the Serious Fraud Office; to make provision about criminal justice and court fees; and for connected purposes.
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

#### Consider/Scope

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<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Police, etc. 12 – Extradition 13 – Criminal justice and court fees</td>
<td>16 pgs.</td>
<td>Emergency legislation – 3 day debate</td>
<td>Refs for all debates</td>
<td>2014 to present</td>
<td>Amends RIPA 2000</td>
<td>Passed in wake of</td>
<td>reflect human rights and proportionality concerns. See Fact Sheet210 Blending domestic crime and CT leading to erosion of common law protections</td>
</tr>
</tbody>
</table>

#### Notes

210 29 Oct 2013, col. 1527 - Lord Borrie (Lab): My Lords, reading the House of Commons Hansard in relation to this Bill, I noticed that one Conservative Member of Parliament said that it was, “a Christmas tree of a Bill”. — [Official Report, Commons, /10/13; col. 696.] That makes it very difficult to discuss many of its aspects due to lack of time. Even in the last few minutes of Third Reading in another place, a second Conservative MP said, “we are yet to have a proper debate on the extradition provisions”. — [Official Report, Commons, 15/10/13; col. 700.] I think I am right in saying that there never was an opportunity to discuss the extradition provisions, hence the importance of this House debating these matters becomes enormous. A Bill of this sort with 13, 14 or 15 parts, with a very disparate group of subjects to discuss, means that even in this House we shall find it quite difficult to do proper justice to all the matters that should be raised.

211 “In a decision of great potential importance, the Divisional Court (a Lord Justice and High Court Judge sitting together) today (17 Jul 2015) declared section 1 of DRIPA, an Act of Parliament passed in 2014, to contravene the EU Charter of Fundamental Rights as it was interpreted in the Digital Rights Ireland judgment of April 2014 (https://terrorismlegislationreviewer.independent.gov.uk/).

212 “While the Bill may be law by the end of the week, it may be junk by the end of the year”...—[Official Report, Commons, 15/7/14; col. 731.]

213 “What then—another emergency Bill?”

214 “I believe that this Bill is building on a modus operandi that has been going on for too long without clarity or transparency, and because it has been happening it does not mean that it should go on happening. In some ways it could be argued that at least Clause 4 puts a legal framework around something that, as the Home Secretary herself has said, was just previously assumed by Government, but at least let us be honest about the extent and genesis of these powers... This Bill sets a precedent from which, even with reviews and a sunset clause, I believe it will be hard to row back. I sincerely hope that we do not regret it.” (Col. 643-644).

215 “Rushing through emergency legislation that has been privately consulted upon by an elite group of parliamentarians and international companies does not send a reassuring message of transparency and accountability that such an important issue deserves” (Col. 646-647).

216 Other U.K. safeguards include the Intelligence and Security Committee, the independent commissioners for oversight, the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Investigatory Powers Tribunal.
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<tbody>
<tr>
<td>54</td>
<td>Counter-Terrorism and Security Act 2015, c.6 (CTSA)</td>
<td>80 pgs., Omnibus</td>
<td>Clause 1: seizure of passports from terrorist suspects Communications data, Immigration, transportation security; Citizenship; Judicial oversight of Temporary Exclusion Orders (Col. 736-737) Cl. 31-Academic freedom of expression Cl. 42 – Privacy and Civil Liberties Board</td>
<td>Bill died on order paper twice, 220 Refs for all debates 221 26 Nov 2014</td>
<td>12 Feb 2015 to present</td>
<td>“An Act to…” 222</td>
<td>HC 1st reading HC 2nd reading HC Money resolution HC Pgm motion HC PBC Stage 1st Sitting 2nd Sitting 3rd Sitting HC Report HC Programme motion HC Report #2 HC 3rd reading HL 1st reading HL 2nd reading HL PBC: 1st Sitting 2nd Sitting 3rd Sitting HL Report #1 HL Report #2 HL 3rd reading HC Money Resolution HC Programme HC Ping Pong \ Royal Assent</td>
<td>Comprehensive approach Amends Terrorism Act 2000 and Data Retention and Investigatory Powers Act 2014. Fast-track legislation 223 following the beheading murder of Fusilier Lee Rigby (col. 207; 218) Creates the Privacy and Civil Liberties Board (bp)</td>
</tr>
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</table>

219 Seven parts of Bill described at [http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP14-63](http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP14-63)

220 “FIND THIS QUOTE!”

221 [http://services.parliament.uk/bills/2014-15/counterterrorismandsecurity/stages.html](http://services.parliament.uk/bills/2014-15/counterterrorismandsecurity/stages.html)

222 “…make provision in relation to terrorism; to make provision about retention of communications data, about information, authority to carry and security in relation to air, sea and rail transport and about reviews by the Special Immigration Appeals Commission against refusals to issue certificates of naturalisation; and for connected purposes.”

223 Home Secretary Theresa May, HC Hansard, 2 Dec 2014, (col. 207): “Since April 2010, in Great Britain, more than 800 people have been arrested for terrorism-related offences, more than 210 have been charged, and more than 140 have been successfully prosecuted.”
### Appendix C

#### Legislative Purpose and Duration – Canada

**Origins of the War Measures Act, 1914, Related Legislation and Executive Measures**

<table>
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<tbody>
<tr>
<td>1</td>
<td>British North America Act, 1867, 30 Victoriae,ca p.3 (BNA Act)</td>
<td>s.91 - POGG2 s.91 (7) - sustain federal war emergency legislation. s.92 - division of confederated powers between the GoC and the Provinces</td>
<td>British</td>
<td>1867 to present, subsumed with the Constitution Act, 1982, being Sched. B to the Canada Act, 1982 (UK) 1982, c11</td>
<td>Creation of a new nation: the Dominion of Canada</td>
<td>Created federal division of powers between GoC and the original four Provinces of NB, NS, Ont, and Que.</td>
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2. “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order, and good Government of Canada” (POGG).


4. House of Commons Debates, 12th Parliament, 4th Session: Vol. 1, Vol. CXVIII (18-22 Aug 1914), pp. 44-48. N.B. Exchange between Mr. German and Mr. White as to “Has Parliament power to give authority to Government here proposed?” which included a discussion as to the BNA Act apportionment of powers to the Provinces for property and civil rights (s.92). Mr. White described the actions of the British and French governments, and financial measures taken against enemy countries.

5. House of Commons Debates, 12th Parliament, 4th Session: Vol. 1, Vol. CXVIII (18-22 Aug 1914), pp. 51-52. Verbal exchange between sitting P.M. Borden (yes) and past P.M. Laurier (no) noteworthy as to whether the Bill just passed refers to the present war – or to future wars as well.

6. 5 Geo. V, (1914, c.2), Section 6.


11. U.S.A. did not resort to mass internment, which may have been due to either more liberal views of immigrants, or simply due to not having sufficient time to engage the executive agencies required to conceive, design, and execute a mass detention scheme. However, the U.S.A. has a history of President’s seizing powers held by Congress. Thousands of aliens suspected of being Communists or anarchists were arrested, detained, and deported by the DoJ Bureau of Information (FBI predecessor) during the Palmer Raids of 1920 during the first Red Scare (Scheppel, 2006, p. 221). When Congress passed a bill (H.J. Res. 373) by a vote of 343 to 3 on 4 June 1920 repealing President Wilson’s emergency powers, Wilson used a pocket veto to kill it after the 2d session of the 66th Congress had adjourned sine die on June 5, 1920. (A pocket veto is a legislative maneuver that allows a president or other official with veto power to exercise that power over a bill by taking no action (instead of affirmatively vetoing it). Finally, on 21 March 1921, the remaining emergency measures were repealed, but only after Wilson had left office (Public Law: Appropriations, Legislative, Executive and Judicial Expenses, 41 Stat. 1259–1260 (1921)).
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<td>6</td>
<td>Senate Debates, 12th Parliament, 4th Session: Vol. 1, Extra Session, 1914, pp. 15-18. In response to a question on reading the HC debates, the Hon. Mr. M. Lougheed replied “There was no or no debate upon the Bill. It was referred to a special committee of the House, a very representative committee, and they adopted the bill in its entirety, with the exception of clause 12, which has been stricken out” (pp. 15-16, N.B. Clause 12 addressed amending the Immigration Act, 1910).</td>
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<td>13</td>
<td>Humphries, 2014, 23 August, para. 9; Lindsay, 2014, p. 162.</td>
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<td>14</td>
<td>Internment of Persons of Ukrainian Origin Restitution Act, (S.C. 2005, c. 52),</td>
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<tr>
<td>3</td>
<td><em>Military Service Act, 1917</em> 7-8 George V, S.C., c. 19¹⁰ (MSA)</td>
<td>N/A</td>
<td>Labour strife, Red Scare</td>
<td>20 Apr 1918, OIC removes all exemptions from MSA. (Source verification required)</td>
<td>N/A OIC</td>
<td>29 August 1917-1918</td>
<td>Long title: “An Act respecting military service”  Enacts conscription to compensate for losses on the Western Front. After registration, all eligible men within certain ages and occupations and were deemed to be enrolled in the Armed Forces.¹⁵</td>
<td>Exacerbated existing tensions between English and French speaking Canadians. Easter Riots 1918 in Quebec City.¹⁸ Troops quelled riots w/o declaration of martial law, but retroactive OIC 4 Apr 1918 IAW WMA justified deployment.¹⁹ OIC permitted a GOC to intervene whether or not requested by civil authorities; suspend habeas corpus; induct males demonstrating against the MSA into the military – and subject them to military law.¹⁹ UC: Political tensions continued into second conscription crisis in WWII. 20 Apr 1918 OIC left farming operations across Canada short of much needed labour.¹⁵</td>
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<tr>
<td>4</td>
<td>WMA use during Winnipeg</td>
<td>N/A</td>
<td>Nil</td>
<td>15 May 1919 – 26 Jun 1919</td>
<td>N/A</td>
<td>Quell dissent, put down “enemy aliens” amongst the Winnipeg Trade Labour Committee (TLC).</td>
<td>Winnipeg General Strike 1919. UC: reinforced precedent in use of Canadian Army to protect private property</td>
<td></td>
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¹⁵ Lindsay (2014)’s thesis. (This author’s 20 plus years’ experience in Canadian emergency response supports this thesis).


¹⁷ See Scott Thompson, “National registration, surveillance, and governance in wartime Canada, 1917-1947,” Ch. 12, pp. 186-204 in Boersma, van Brakel, Fonio, & Wagenaar (2014). Those men not reporting to the nearest post office for induction were liable to prosecution under Section 101 of the MSA, 1917 (p. 191).

¹⁸ The Easter Riots occurred between 28 March and 1 April 1918. The WMA was invoked by the Federal Government to respond to the anti-conscription riots, which were feared would sweep the Province of Quebec. Protestors fired on the soldiers, who returned fire, resulting in 5 killed, 150 wounded, and $300K damage. 32 soldiers were wounded, and the military presence in Quebec City lasted until the end of the War (Auger, 2008, p. 507; Humphries, 2014, 23 August, para. 13). The rapid movement of 4000 troops into Quebec demonstrated the Government’s capacity to quash dissent and to deter further riots (Marx, 1970, p. 53).

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<tbody>
<tr>
<td>6</td>
<td>Canadian Army troops requisitioned for ACP operations by Cape Breton County Judge Duncan</td>
<td>Labour strife, Red Scare</td>
<td>N/A</td>
<td>N/A</td>
<td>1922-1925 (intermittent)</td>
<td>Quell dissent, arrest &quot;Communist&quot; agitators amongst miners. Provincial Police force of 1K raised.</td>
<td>Cape Breton coal strikes (12K miners walk out, 2M strike days). Use of Canadian Army to protect BESCO property. J.B. McLachlan later leader of the CCF party arrested for &quot;sedition.&quot; Other socialist leaders added to police files. Cape Breton provinces became the heart of the CCF and NDP socialist parties in 1930s through 1960s.</td>
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20 Approx. 30K people left their jobs in a city of 300K, effectively stopping all essential services and limiting food distribution. The strikers claimed that they were striking for better wages, bargaining rights, and working conditions. The GoC saw them as trying to establish a soviet-style government. The Mayor of Winnipe requested military aid IAW the Militia Act, R.S.C. 1906. Prosecutions for sedition were conducted in the civil courts.

21 The offence of *sedition*, while seldom used in Canada, formed the basis of the Crown’s case in two major labour disputes. The best known case occurred during the Winnipeg General Strike, 15 May – 25 June 1919. Six members of the Winnipeg Trades and Labour Council (TLC) with non-Anglo-Saxon names were convicted of sedition and conspiracy (http://www.thecanadianencyclopedia.ca/en/article/winnipeg-general-strike-feature/; http://manitobia.ca/content/en/themes/strike/6). The definition of sedition was also broadened following the Strike.

22 See Frank, 1999, p. 161 regarding Dominion Police and RCMP surveillance of organized labour, with the RCMP labelling Cape Breton miners union leader J.B. McLachlan as "an Agitator of the worse type."

23 CCC s. 98 was extremely broad and carried a penalty of up to 20 years in prison. It was used during the 1920s and early half of the 1930s to harass Communists, other left parties and organizations, and labour unions. The best-known use of Section 98 was in a crackdown designed to "strike a death blow at the Communist Party;"[3] The RCMP and OPP arrested eight leaders of the Communist Party 11 August 1931, who were later convicted under the law in *Rex v. Buck et al.* and sentenced for up to five-year prison terms (Fidler, 1984). In subsequent years, public opinion turned in favour of the Communists and against the law, which was opposed by Liberals, moderate leftists, as well as far-left organizations like the Canadian Labour Defence League, a Communist legal defence committee. As a result of public opposition, the Communists were released early from jail and the law was repealed in 1936 following the election of Prime Minister Mackenzie King in 1935.

24 Opposition to CCC s. 98 was an important campaign for crystallizing an early civil rights movement within an otherwise fractured left-wing in Canada. Although the law was repealed, it served as the model for the Defence of Canada Regulations under the *War Measures Act* to suppress aliens and dissenters during the Second World War and during the October Crisis of 1970 (Berger, 1981, pp. 130-135).

25 Second largest use of the Canadian Army in Canadian history to quell a domestic crisis to that point in time with 2000 troops deployed to protect British Empire Steel and Coal Company (BESCO) facilities. (The largest deployment was the response to the North-West Rebellion of 1885. This was later eclipsed with the deployment of 11,000 troops during the October Crisis of 1970. See Frank (1999); Mellor (1983); Macgillivray (1974); and Ch. in Macgillivray & Tennyson (Eds.) (1980) regarding the Red Scare and the deployment of the Canadian Army to control the revolting and hungry, at times starving, populace of industrial Cape Breton. The privately owned mines were nationalized in 1967 under the Cape Breton Development Corporation (DEVCO).
### Key Debates

- **Finlayson**
  - **Act, Bill, Event or Regulation**: IAW the Militia Act, 1906.
  - **Size**: N/A
  - **Consider/Scope**: N/A
  - **Key Debates**: N/A
  - **Vote**: N/A
  - **Duration**: 1923
  - **Purpose**: Executive powers of Governor-in-Council upheld – five years post WWI
  - **Remarks/UC**: McLachlan charged with “seditious libel” in Oct 1924. UC: Cape Breton, NS becomes a socialist CCF/NDP stronghold for over four decades as deployments seen as aligning federal power with capitalism.

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"[V]ery clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in over-ruling the decision of the Government that exceptional measures were still requisite. . . . It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence." (1923 D.L.R. LEXIS 980 at 15–16). See also [1923] A.C. 695 at p. 698 and at p.708.


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<tr>
<td>8</td>
<td>War Measures Act, 1914, c.2 Proclamation in 1939 based on consolidating amendments made in R.S.C. 1927, c.206.</td>
<td>Not aval online</td>
<td>Nil</td>
<td>N/A</td>
<td>3 Sep 1939, with effect from 25 August to Sep 1945 officially (See sers. 9, 11, 12, 14 with respect as to how the courts interpreted the practical duration)</td>
<td>Prepare nation for war. Transfer Parliament’s powers to the Governor-in-Council (i.e. Cabinet) which governs by Order-in-Council to: Facilitate C-espionage; Centralize industrial production; Authorize surveillance - which facilitates identifying &amp; censoring dissent. OIC created 64 Regulations for the Defence of Canada.</td>
<td>WMA proclaimed: Outlaws dissenting organizations, individuals Registration, forced displacement of 22K Japanese Canadians to concentration camps, confiscating property, 1800 fishing boats seized, stripping of citizenship and the eventual deportation from Canada of 4000 Canadians of Japanese descent. 6,414 separate special orders were declared under WMA authority during World War II. UC: Japanese immigration stopped completely during WWII and does not resume until 1967 when a revised immigration law admitted immigrants who met language and education criteria.</td>
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28 Obviously, 64 Regulations had to be prepared in advance of the proclamation (Lindsey, 2014, fn 14), many of which related to the change nature of warfare. Some Regulations dealt with air raid precautions and aerial bombardment. Other Regulations dealt with quashing dissent against the government and the war effort by identifying and limiting the activities of communist, fascist, and religious organizations.

29 Such as Jehovah’s Witnesses and the Communist Party of Canada; and in restricting the bargaining rights of labour unions.

30 Such as incarcerating the Mayor of Montreal, Camilien Houde, for speaking against conscription.

31 Official total of 22, 837 persons of Japanese descent living in Canada, of which 21, 975 (96.2 percent) were resident in British Columbia (HC Debates, 20th Parliament, 4th Session: Vol. 3, pp. 2216).

32 See “Naturalized Canadians Repatriated to Japan 1946” located at Library and Archives Canada, Immigration Branch (RG 76), Volume 647, file A665889. part 2, Microfilm C-10587, retrieved from [http://collectionscanada.gc.ca/obj/005/02/005-114227-003.pdf](http://collectionscanada.gc.ca/obj/005/02/005-114227-003.pdf). Many families had less than 24 hrs to pack prior to internment (Schepelle, 2006, p. 224).


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<td>9</td>
<td>Reference as to the Validity of Orders in Council of the 15th Day of December 1945 in Relation to Persons of the Japanese Race</td>
<td>NA</td>
<td>Validity of WMA and of OICs post-war Deportation Nature of citizenship</td>
<td>HC Deb, 20th Parliament, 1st Session, Vol. III, pp. 3695 – 3705. 17 Dec 1945 36</td>
<td>N/A</td>
<td>1945-1946</td>
<td>Three OICs (P.C. 7355-7357) pass in Dec 1945: (a) P.C. 7355 - mandate deportation to Japan of Japanese nationals resident in Canada; (b) P.C. 7356 - order deportations of naturalized British subjects of Japanese descent who had made requests for repatriation to Japan before or during the war; and (c) P.C. 7357 - begin investigations into the status of naturalized ethnic Japanese citizens of Canada to determine whether they should be deported as well.</td>
<td>Supreme Court affirms all orders as within the scope of Governor in Council authority to promulgate under the WMA, even though the war was over.</td>
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35 NAJC hired Price Waterhouse to examine records to estimate the economic losses to Japanese Canadians resulting from property confiscations and loss of wages due to internment. Statisticians consulted the detailed records of Custodian of Aliens, and in their 1986, valued the total loss to Japanese Canadians totalled $443 million (in 1986 dollars). On 22 September 1988, Prime Minister Brian Mulroney apologizes in the House of Commons on behalf of Canada, and re-instates Canadian citizenship to those 4000 people who were deported to Japan. The compensation package provides $C21K to each surviving internee, and awarded $12 million to the NAJC to promote human rights and support the community, and $24 million for the establishment of the Canadian Race Relations Foundation to promote the elimination of racism. Nothing was given to those that had been interned and died before compensation was approved. (http://www.cic.gc.ca/eng/multiculturalism/asian/20years-jap.asp)

36 MP Mr. Stewart (Winnipeg-North) recounts how Prime Minister MacKenzie King “had to admit when he spoke on this matter on August 4th last year that not one of them had committed an act of sabotage against Canada” (HC Deb, 1945, p. 3702).


38 Legislative history - House of Commons Journals, 20th Parliament, 1st Session: Vol. 86, p. 634. Tabled 5 Oct 1945, sponsored by Mr. L. St-Laurent (HC Journals, No. 22. 5 Oct 1945, p. 103; HC Debates, 1945, p. 799). Second reading 23 Nov (approved unanimously, (Vol. III, 1945, p. 2999), third reading 4-7 Dec 1945. The short title is changed from Emergency Powers Bill to the National Emergency Transnational Powers Act, 1945” (p. 2993) by the Chairman. Senator Church makes a comparison of the expiry dates of wartime controls is made with Australia and the United States (pp. 3018-3019) and adds “The original bill not only gives the Minister the powers of the War Measures Act, but has added a whole lot of controls nobody ever heard of; virtually abolishing the high court of parliament” (p. 3019). Bill 15 reported to the Senate 6 Dec 1945 (p. 3037).

40 HC Journals No. 67, Friday 7th December 1945, pp. 443-44.
UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<td>11</td>
<td>Kellock–Taschereau Commission (Royal Commission)</td>
<td>688 pgs.</td>
<td>Extent of Soviet espionage in Canada to Betrayal of secrets regarding radar, atomic bomb Habeas corpus. Secret evidence: IAW OSA 1939 Passports Self-incrimination Limits to: 1) detention w/o trial &amp; counsel; 2) to WMA post war; 3) to GIC authority post war; 4) classified evidence; 5) inquiries</td>
<td>Appointed by PC 411.5 Feb 1946 Public outcry due to aggressive nature of the inquiry. The Emergency Committee for Civil Rights had prominent members, including C.B. Macpherson, Leopold Infeld, and A.Y. Jackson, who asserted that the Commission endangered “the basic rights of Canadians” and “does violence to the rights of free men.”</td>
<td>N/A</td>
<td>Arrests 15 Feb 1946. Accused were detained up to five weeks, and were first coerced by RCMP to confess guilt, then advised that they were witnesses before the Royal Commission, and not told that they were being questioned with the intent of garnering evidence against them. 1st Report, 2 Mar 1946 2nd Report, 14 Mar 1946</td>
<td>Investigate extent of Soviet espionage in Canada and complicity of Canadians.</td>
<td>Emergency arising from the War.</td>
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<tr>
<td>12</td>
<td>Cooperative Committee on Japanese-Canadians v. Attorney General of Canada</td>
<td></td>
<td>Validity of GIC OICs post-war</td>
<td>HC Journals No. 92, Tues 17 Jun 1947, pp. 535-539</td>
<td>N/A</td>
<td>1947</td>
<td>Raised again before the Privy Council after failure in Supreme Court.</td>
<td>All three P.C. orders (7355-7357) were deemed again to be valid exercises of power under WMA. Enabled by Emergency Transitional Powers Act, 1945.</td>
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39 Legislative history - Senate Journals, 20th Parliament, 1st Session: Vol. 86, p. 422. First reading 7 Dec 1945, second reading 10-11 Dec 1945. Sen. J.W. de B. Farris observes to section 2, “Continuation of national emergency,” of the proposed Bill 15 in that it “definitely and extensively invades the powers normally exercised by the Provinces under section 92 of the British North America Act, and more particularly in connection with property and civil rights” (p.398). Discussion ensues as to whether Bill 15 grants the Governor in Council even more powers than were held under the WMA (pp. 398–404). The bill was referred to the Committee on Banking and Commerce after second reading due to conflicting interpretations as para. (b) of section 2 “facilitating the readjustment of industry and commerce to the requirements of the community in time of peace” (p.412) required clarification.


41 HC Journals, 20th Parliament, 3rd Session, Vol. 92. It was noted (p. 536) that an Office of the Custodian of Enemy Property was opened in Vancouver 10 Dec 1941, which would indicate that a certain amount of forethought and pre-planning went into this decision. P.C. 1665, 27 March 1942 vested control of their property in the Custodian of Enemy Property. “A summary of the cash which has been collected by the Custodian on behalf of Japanese evacuees, covering not only real estate but fishing vessels, fishing gear, cars and trucks, farm equipment, household effects and sundries, totals $5,373, 317. 64” (p. 536).
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<td>14</td>
<td>Reference As To the Validity of the Wartime Leasehold Regulations, P.C. 9029, [1950] S.C.R.124</td>
<td>Continuing defence power to dictate prices.</td>
<td>HC Deb, 5 Dec 1949&lt;sup&gt;46&lt;/sup&gt;</td>
<td>N/A</td>
<td>21 Nov 1941-1 Apr 1950</td>
<td>Maintain the price structure directed in P.C. 9029 as specified by the Wartime Prices and Trade Board until 1 Apr 1950 at which time the Provinces may assume responsibility.</td>
<td>P.C. 9029 cites Fort Frances [1923] in determining that the defence power still exists. As at end WWII in 1945, the Supreme Court of Canada was reluctant to second-guess the other branches’ judgment that the emergency outlasted the war.</td>
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<td>15</td>
<td>Emergency Powers Act, 1951, 15 Geo.6, c.5 (Can.)&lt;sup&gt;47&lt;/sup&gt; (EPA)</td>
<td>Activation of emergency powers</td>
<td>HC Journals, 21st Parl., 4th Sess. Vol. 94 Considered intra vires</td>
<td>HC passes without division 6 Mar 1951, Senate passes 15 Mar 1951.</td>
<td>21 Mar 1951-1954</td>
<td>“An act to confer certain emergency powers upon the Governor in Council.” i.e., prepare Canada for the Korean Conflict.</td>
<td>Many WMA provisions remain in effect nine yrs post WWII, as Cold War provides justification. Significant reluctance to enact the WMA seen the HC Hansards. UCs of EPA 1951:</td>
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<sup>47</sup> HC Debates, 20th Parliament, 4th Session: Vol. 3, pp. 2219. MP Mr. Thatcher states “We are not threatened with a stab in the back from Japanese Canadians. We are not threatened by any fifth column today. I cannot see any reason why we should continue these orders in council....No charges of disloyalty were even made against Japanese Canadians.” Later in the debate Mr. Thatcher states, “We must not permit in Canada the hateful doctrine of racialism which is the basis of the nazi [sic] system everywhere” (p.2221). Mr. Pearkes states (pp. 2230-2232) that one reason to extend the order in council is to avoid revenge crimes against returned Japanese Canadians.
<sup>48</sup> Reference As To the Validity of the Wartime Leasehold Regulations, [1950] S.C.R. 124. HC Debates, 21st Parliament, 1st Session: Vol. 3, pp. 2755-2757. The Minister of Finance, Mr. D.C. Abbott, writes to Mr. T.C. Douglas, Premier of Saskatchewan, and to Mr. Maurice Duplessis, Premier of Quebec regarding the GoC’s intent to retain wartime price and rental guidelines until the Provinces pass legislation to regain control.
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<tr>
<td>16</td>
<td>WMA 1914 amdts through R.S.C. 1952, c. 288 and the Canadian Bill of Rights, 1960, S.C. 8 &amp; 9 Eliz. II, c.44.</td>
<td></td>
<td>Hewitt (1994) en4(^4):</td>
<td>TBC</td>
<td>1952 through 1970s</td>
<td>When the WMA is enacted, the Bill of Rights is suspended. The act of proclaiming the WMA is deemed conclusive evidence that a war, invasion, or insurrection, - real or apprehended exists – until ended by a further proclamation (s.2).</td>
<td>1960 amdnt provides that anything done IAW the WMA is deemed not to be an infringement, abrogation or abridgement of any right or freedom recognized in the Canadian Bill of Rights. Provided for laying of a WMA proclamation before Parliament after its issue and for the consideration of its abrogation by both the Senate and HC, (i.e. oversight). UC: - Gradual recognition of permanence of some emergency powers by institutionalization of executive agencies dealing with emergency management.(^4)</td>
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<td>17</td>
<td>WMA 1914 proclamation</td>
<td>Preamble(^4) See fn 53 (Hewitt en4)</td>
<td>N/A before proclamation</td>
<td>16 Oct 1970, Vote N/A as GIC proclaims</td>
<td>16 Oct 1970-1 Dec 1970</td>
<td>Strategic aim: To defeat an &quot;apprehended insurrection.&quot;</td>
<td>WMA proclaimed 16 Oct 1970. FLQ(^4) is defeated, the kidnappers are</td>
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\(^4\)HC Journals, 21st Parliament, 4th Session: Vol. 94, No. 42, p. 249, Friday 6 Apr 1951. P.C. 1608, 4 Apr 1951 with regard to using chromium coating on a steel coin to replace nickel in all coins minted after 1 Jul 1951. This chromium-finished steel construction lasted until 1982 when the coin was minted in cupronickel.


\(^7\)Hewitt (1994, en4): “The number of pages in the House of Commons Debates serves as one indicator. From 1963 through September 1970, there are 22 pages with references to the topic, while during the crisis of 6 October to 1 December there are 592 pages. Thus 96 percent of the political attention paid to the issue took place in less than two months.”

\(^8\)Lindsay (2014) notes the origin and historical progression of these powers in the WMA 1914 and its successors, and that former wartime executive measures are now used to guide the response to peacetime disasters at federal and provincial level.

\(^9\)15 Oct 1970 Student debate at UQAM, traditional FLQ support base, unanimously supports FLQ as authorities close the University.

\(^10\)Hewitt (1994, p. 23, Table 1) lists 19 “Major FLQ Incidents of Separatist Violence 1963-70,” which illustrates that the FLQ was a small, but substantive revolutionary movement with the potential to inflict greater damage. A more comprehensive survey, which includes FLQ threats and thefts as well as kinetic incidents, is found at the Canadian Incident Data Base (CIDB), located at [http://extremism.ca/Default.aspx](http://extremism.ca/Default.aspx). The CIDB lists 143 incidents involving the FLQ between 1963 and 2000. Of note: 1) 113 of the 143 incidents occurred in the city of Montreal; 2) four occurred outside Canada; 3) only four incidents occurred between 1966 (X2), 1989 (X1), and 2000 (X1); 4) FLQ conspiracies to kidnap the Israeli Consul and the U.S. Consul General were disrupted by the RCMP in February and June 1970 respectively.
Regulation enactment was held over until Mon 19 Oct 1970.

The proclamation of the War Measures Act is this: it authorizes internment and imprisonment without trial; it enables the who

The Watchdog of Freedom” (p.236). The House of Commons also held a rare Sat 17 Oct 1970 session, although the vote to support Public Order Regulation enactment was held over until Mon 19 Oct 1970.

The Quebec cabinet minister Pierre Laporte. (Not specified in the WMA). Laporte is executed 17 Oct 1970, which intensifies the Crisis.

- Economic power in Quebec shifts to

See American blogger Hensinger (2009, 6 July), and former Quebec Minister of Finance Tetley (2007) for pro-


MP Andrew Brewin (Greenwood), (HC Deb, 16 October 1970, p.235) notes three consequences of the WMA: 1) suspends the constitution of the country; 2) enables the federal government to override provincial governments and legislation; 3) “tears up the Bill of Rights.” “The effect of the proclamation of the War Measures Act is this: it authorizes internment and imprisonment without trial; it enables the wholesale confiscation of property; it even authorizes the deportation or exile of Canadian citizens.” Brewin went on to say, “I fear Mr. Speaker that this legislation will in the long run have a counterproductive effect. I know that the government claims that it is respond

Did they actually mention the War Measures Act? In the long run, will the people in that province this particular type of intervention? I venture to suggest that they will not….Parliament’s chief and most glorious function is to be the watchdog of freedom” (p.236). The House of Commons also held a rare Sat 17 Oct 1970 session, although the vote to support Public Order Regulation enactment was held over until Mon 19 Oct 1970.

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The government claims that it is responding to the request of the government of Quebec and the city of Montreal. But did those authorities really ask for the suspension of the constitution? Did they ask for the legislative blunderbuss of being presented to us? Did they actually mention the War Measures Act? In the long run, will the people in that province this particular type of intervention? I venture to suggest that they will not….Parliament’s chief and most glorious function is to be the watchdog of freedom” (p.236). The House of Commons also held a rare Sat 17 Oct 1970 session, although the vote to support Public Order Regulation enactment was held over until Mon 19 Oct 1970.

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<tr>
<td>18</td>
<td>Public Order Regulations, 1970 (POR)</td>
<td>2 pgs., 12 paras</td>
<td>N/A Proclamation</td>
<td>N/A Proclamation</td>
<td>16 Oct 1970 - 30 Apr 1971</td>
<td>“To provide emergency powers for the preservation of public order in Canada.” (Preamble)</td>
<td>Issued “under the authority conferred by the War Measures Act” by the “Governor-General-in-Council, on the recommendation of the prime minister, pursuant to the War Measures Act.” No time limit. FLQ “declared to be an unlawful organization.” Guilt by association for supporters.</td>
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63 See Clément (2008) on the long-term social and political ramifications of the implementation of the War Measures Act.
64 [http://faculty.marianopolis.edu/c.belanger/quebechistory/docs/october/regsoct.htm](http://faculty.marianopolis.edu/c.belanger/quebechistory/docs/october/regsoct.htm)
65 Public Order Regulations, 1970, para. 3.
66 Public Order Regulations, 1970, paras. 4-6. Prison terms of up to five years were possible for verbal or financial support.
68 Lone dissenting voice was David MacDonald, the Progressive Conservative MP from Egmont (PEI), who feels that the War Measures Act had had “very detrimental effects.” (McGill Annex D, p. 30).
69 Wartime powers of the Governor-in-Council.
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77 Long title: “An Act to establish the Canadian Security Intelligence Service, to enact an Act respecting enforcement in relation to security and related offences and to amend certain Acts in consequence thereof or in relation thereto.”
78 The bombing of Air India Flight 182 on 23 June 1985 was the worst terrorist incident in Canadian history as 268 Canadian citizens were killed. One of the key findings of the 2010 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 addressing the pre-bombing phase of the investigation stated that “The institutional arrangements and practices of information-gathering agencies were wholly
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<td>22</td>
<td>Emergencies Act, R.S.C. 1985, c. 22 (4th Supp.), and S.C. 1988, c.29 (EA)</td>
<td>38 pgs.</td>
<td>I-Public welfare emergency II-Public order emergency III-Intl emergency IV-War emergency V-Compensatio n VI-Parliamentar y supervision VII-Consequenti al and related provisions.</td>
<td>Bill C-77 HC Deb, 18 Nov 1987\textsuperscript{79} HC Deb, 11 Jul 1988 SC Deb, 28 Apr 1988\textsuperscript{80}</td>
<td>Div. No. 292 Yea – 95 Nays – 36 Amdts concurred N/A</td>
<td>21 Jul 1988 to present</td>
<td>Long title:\textsuperscript{81} (Repeals and replaces WMA 1914) HC- 2nd Reading Many allusions to WMA enactment in 1970 HC- 2nd Reading SC – 2nd Reading</td>
<td>Differs from WMA: 1. A declaration of an emergency by Cabinet must be reviewed by Parliament within 7 days. (note use of word temporary in long title and below) 2. Any temporary laws made under the Act are subject to the Charter of Rights and Freedoms 1982. There has never been a National Emergency IAW EA 1988, but there were 224 local emergencies declared between 2000 &amp; 2010.\textsuperscript{82} UC. Civilian disaster response is rooted in WMA 1914 and its continuation Acts through the 1950s at federal and provincial levels. Canada’s federal Public Safety Canada and provincial EMO are staffed by many ex-military and police members, and are focused on response, as opposed to mitigation and recovery measures, which deficient in terms of internal and external sharing of information, as well as analysis,” (\url{<a href="http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/key-findings.pdf%7D">http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/key-findings.pdf}</a>) \textsuperscript{79} Much of the debate addressed the history of the WMA. See HC Deb, 33\textsuperscript{rd} Parliament, 2\textsuperscript{nd} Session, Vol. 9, 18 Nov 1987, pp. 10935-10942, retrieved from \url{<a href="http://parl.canadiana.ca/view/oop.debates_HOC3302_09/523?r=0&amp;s=1%7D">http://parl.canadiana.ca/view/oop.debates_HOC3302_09/523?r=0&amp;s=1}</a>. NDP MP Simon de Jong notes that Vancouver Mayor Tom Campbell called for WMA use against the Kool-Aid youth aid agency in 1970, and the potential for abuse of democratic movements at p.10941. MP Les Benjamin observes at p. 10935 that “There must be safeguards in the law so that our police and security forces will not be able to carry on as they did between 1920 and 1950, following people who were not attempting a violent overthrow of government, but trying, through dissent and debate, to bring about a fundamental change in this nation and the purpose of our society.” \textsuperscript{80} SC Deb, 33\textsuperscript{rd} Parliament, 2\textsuperscript{nd} Session, Vol.3, 28 Apr 1988, pp. 3255-3259. \textsuperscript{81} “An Act to authorize the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof.” \textsuperscript{82} Lindsay, 2014, pp.159-160.</td>
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\(^{83}\) Lindsay, 2014, p. 161 notes the enduring influence of BNA Act 1867, s.91 (i.e., POGG), which he describes as the Federal Government’s “foot in the door” in Canadian emergency management.

\(^{84}\) “An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger.”

\(^{85}\) Immigrant and visitor are replaced by foreign national. Regulations is replaced by instructions from the Minister.

\(^{86}\) Sinha & Young (2002, 31 January [2001, 26 March]). This limitation may have been made noting the broad powers the word necessary had imparted in Cl. 6 of WMA 1914.


\(^{92}\) Provisions related to preventative arrest and investigative hearings.

\(^{93}\) “An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism.”
## UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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</table>
| Omnibus87 | 1) – Terrorism49  
2) – Official Secrets Act  
3) – Canada Evidence Act  
4) – Proceeds of Crime (Money Laundering) Act  
5) – Amdts to other Acts80  
V.1 – CSE41 | 23 Oct – 20 Nov 2001  
22 Nov 2001  
26-27 Nov 2001  
28 Nov 2001  
22 Oct – 22 Nov 2001  
29 Nov 2001  
29 Nov 2001  
3-10 Dec 2001  
11-18 Dec 2001 | Div. No. 190  
Yea - 189  
Nay - 47  
18 Dec -1610 hrs  
Yea - 24  
Nay – 45  
18 Dec – 1630 hrs  
Yea – 45 | | | HC – 2nd Reading86  
Referred to Std Ctte Justice & Human Rights SC JHR Eighth Report85  
Report w/Amnds HC – 3rd Reading86  
Passed Special SC Ctte  
SC – 1st Reading  
SC – 2nd Reading  
Referred to Special SC Ctte | & surveillance powers.  
Designates 50 terrorist organizations in Canada  
CSE recognized in law. |

87 Bill C-36 amended the scope of: the Identification of Criminals Act, the Patent Act, the Income Tax Act, the Excise Act, the Customs Act, the Visiting Forces Act, the Crown Liability and Proceedings Act, and the Military Rules of Evidence. Part 1 amends the Criminal Code of Canada (CCC) to implement international conventions related to terrorism, to create offences related to terrorism, including the financing of terrorism and the participation, facilitation and carrying out of terrorist activities, and to provide a means by which property belonging to terrorist groups, or property linked to terrorist activities, can be seized, restrained and forfeited. It also provides for the deletion of hate propaganda from public web sites and creates an offence relating to damage to property associated with religious worship. Part 2 amends the Official Secrets Act, which becomes the Security of Information Act. Part 3 amends the Canada Evidence Act to address the judicial balancing of interests when the disclosure of information in legal proceedings would encroach on a specified public interest or be injurious to international relations or national defence or security. Part 4 amends the Proceeds of Crime (Money Laundering) Act, which becomes the Proceeds of Crime (Money Laundering) and Terrorist Financing Act. Part 5 amends the Access to Information Act, Canadian Human Rights Act, Canadian Security Intelligence Service Act, Corrections and Conditional Release Act, Federal Court Act, Firearms Act, National Defence Act, Personal Information Protection and Electronic Documents Act, Privacy Act, Seized Property Management Act and United Nations Act. The amendments to the National Defence Act clarify the powers of the Communications Security Establishment to combat terrorism. Part 6 of Bill C-36 enacted the Charities Registration (Security Information) Act.

80 S. II.1 includes: Interpretation; Financing; List of entities; Freezing of property; Seizing and restraint of property; Forfeiture of property; Participating, facilitating, instructing and harbouring; Proceedings and aggravated punishment; Investigative hearing; Recognizance with conditions; Consequential amendment.


85 Communications Security Establishment (CSE), Canadian partner of US NSA and British GCHQ. Acts affected include: Personal Information Protection and Electronic Protection Act, Privacy Act, Seized Property Act, and the United Nations Act. The new act amended portions of the National Defence Act and officially recognized CSE’s three-part mandate: 1) To acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities; 2) To provide advice, guidance and services to help protect the performance of electronic information and of information infrastructures of importance to the Government of Canada; 3) To provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.

86 HC Deb, 17 Oct 2001, 1130 hrs, Mr. Monte Solberg (Medicine Hat, Canadian Alliance); 72 hour preventive detention and the importance of common law protections discussed in the context of providing a degree of confidence in border control with the USA.


90 HC Deb 28 Nov 2001, 1415 hrs: Mr. Bill Blaikie (Winnipeg—Transcona, NDP): "Mr. Speaker, in recent days we have been treated to the kind of gap between rhetoric and reality that causes Canadians to have a lot of cynicism about Canadian politics. The leader of the Conservative Party has said that Bill C-36 is about shutting down the information commission[er], that it is a power grab, that it is muzzling a parliamentary watchdog, that it represents a culture of secrecy, that it is an assault on Canadian civil liberties, that it is comparable to the War Measures Act and that it must be stopped. If that is the case, why is it that the Conservative Party voted for Bill C-36 when it could have joined New Democrats and the Bloc in opposing Bill C-36? It is one thing to approve of a bill and suggest how to improve it, but to denounce it in its final form and then vote for it is the height of cynicism." 1425 hrs: Ms. Alexa McDonough (Halifax, NDP): "Mr. Speaker, today a broad coalition of community organizations is calling on the government to withdraw Bill C-36. Since September 11 alarming incidents of racial hatred have occurred right across the country. We need leadership from the government. We need concrete measures to combat racism. Instead, the government show some leadership and launch an urgent positive plan of action to combat racism? ... Mr. Speaker, I guess tokenism is the best we can hope for from an arrogant majority government. On September 21 the House unanimously supported the NDP motion for parliamentarians to stand together in protecting the human rights of all of our citizens. In total contradiction, the government is about to ram through Bill C-36. The legislation is the most flagrant attack on the civil liberties of Canadians since the War Measures Act. In response to
the rising tide of opposition, will the government learn from the mistakes of the past and withdraw Bill C-36? Hon. Herb Gray (Deputy Prime Minister, Lib.): Mr. Speaker, the bill is not an attack on civil liberties. It is there to provide a foundation of protection for civil liberties.

97 SC Deb, 18 Dec 2001, 1540-1550, Sen Lynch-Staunton: “…This bill amends 22 acts. This bill in many cases is worded in such a way that certain clauses can lend themselves to contradictory interpretations…. That is the kind of blind faith we are being asked to accept…. let me refer to the War Measures Act, which rightfully has a place in this debate. That act was meant only to be used for the crisis caused by World War I. It stayed on our books for nearly 75 years. As has been recalled more than once here, in 1970, under a regulation arising from the War Measures Act, as it was proclaimed in October, nearly 500 Canadians were arrested in peacetime on suspicion of belonging to an unlawful organization. The War Measures Act was never enacted to be used in peacetime….1550 hrs: We are told that the bill, thanks to the amendments, contains some built-in oversight provisions such as judicial review and various existing agencies will be called on to ensure that the clauses we have been particularly concerned about are applied in the way the government intended…. More important, without warning, without public evidence, without going to court to prove his assertion, the Solicitor General can put any entity on that list. An individual so listed who has reason to feel that he has been wrongly listed has only one recourse, and that is to go to the Solicitor General and ask to be taken off. The Solicitor General, within 60 days, will agree or not, without showing any evidence of why that person was put on the list in the first place. Only then does the judiciary come into play. The listed individual, having lost his appeal to the Solicitor General, who has no obligation to give any reason for that person being on the list, by that time has had his assets seized, his bank accounts frozen, has become a non-person, his reputation sullied, is then allowed to go to court. If he loses his case, or the government loses the case, then there is the right to an appeal. That is not judicial review. That is not protection of the innocent…. They were told: “Here is a list. Go and knock on the door and arrest them.” I believe, of the 480 or so people who were arrested, only 18 were eventually found guilty, and not all of them under the War Measures Act. The solution to the FLQ crisis in terms of finding out who were the kidnappers, the murderers and who were members of the main cells, had nothing to do with the War Measures Act. It was all police work, as it is in enforcing the Criminal Code, the Emergencies Act and other acts. All the tools are there. The ones that are missing are in C-36 are the ones that can be used to excess, and that is why I will vote against this bill. 1610 hrs Sen Kinsella: “….a motion to the effect that the Standing Senate Committee on Human Rights be given the mandate to carry out the parliamentary oversight that was envisaged and underscored by Senator Carstairs and Senator Fairbairn.”

101 (Bill C-42). “An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety.”

102 The Bill is one of three in the government’s legislative response to the events of September 11 in the United States. Bill C-36, the Anti-terrorism Act, received Royal Assent on 18 December 2001. On 28 November 2001, the House of Commons unanimously consented on a motion to delete from Bill C-42 section 4.83 in clause 5 amending the Aeronautics Act. The same day, that section was introduced as Bill C-44 in order to provide for speedier passage than consideration as part of Bill C-42 would have allowed for.

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<tr>
<td>25</td>
<td>Public Safety Act Omnibus 2001</td>
<td></td>
<td>Bill C-42</td>
<td></td>
<td>N/A</td>
<td>Did not become law.</td>
<td>Long title(^{101})</td>
<td>See Intro in Goetz et al.(^{102})</td>
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8 Name on is the same person to whom one would go to ask to be taken off. The Solicitor General, within 60 days, will agree or not, without going to court to prove his assertion, the Solicitor General

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<tr>
<td>27</td>
<td>Combating Terrorism Act 2012</td>
<td>22 pgs.</td>
<td>Bill S-7</td>
<td>31 May 2012</td>
<td>25 Apr 2013 to present</td>
<td>Long title</td>
<td>HC votes occurred within days of the Boston Marathon</td>
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98 Amendments were proposed to the Aeronautics Act, the Explosives Act, the Export and Import Permits Act, Immigration Act, the National Defence Act, the National Energy Board Act, and to the Biological Toxins Weapons Convention Implementation Act.

99 HC Deb, 28 Nov 2001: Mr. Peter MacKay (Pictou—Antigonish—Guysborough, PC/DR): “Mr. Speaker, in Bill C-42 the government has decided to introduce the ability for ministers to pass interim orders declaring emergencies, just as in Bill C-36 the government will grab more executive power. There is no provision for these orders to come to parliament for debate. The orders appear to have no set criteria, do not have to be publicized in the Canada Gazette for 23 days, nor pass through parliament. Why has the government decided to introduce the ability for ministers to pass interim orders declaring emergencies, just as in Bill C-42, which was almost a knee-jerk reaction, if I may use the expression, to the airline safety bill introduced two weeks earlier by the U.S. congress. The Canadian government, because it was not ready to introduce a bill on airline safety, decided to introduce a bill on public safety. Again, I have trouble understanding the minister when he says that these powers already exist. He is not the only one who said that in the House. The Prime Minister said so too, as so did the Minister of National Defence. If they already exist, why insult us by introducing a bill that is a serious threat to democracy and the rights and freedoms of Quebecers and Canadians? The reason is very simple: these powers simply did not exist.”

100 HC Deb, 3 Dec 2001, Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): “…It is a cause for concern. It comes after the difficulties encountered by the Liberal government last week. The week started very badly with the introduction of Bill C-42, which was almost a knee-jerk reaction, if I may use the expression, to the airline safety bill introduced two weeks earlier by the U.S. congress. The Canadian government, because it was not ready to introduce a bill on airline safety, decided to introduce a bill on public safety. Again, I have trouble understanding the minister when he says that these powers already exist. He is not the only one who said that in the House. The Prime Minister said so too, as so did the Minister of National Defence. If they already exist, why insult us by introducing a bill that is a serious threat to democracy and the rights and freedoms of Quebecers and Canadians? The reason is very simple: these powers simply did not exist.”

101 “An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act.”

102 “An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act.”

103 Gather information for an investigation of a terrorism offence and to allow for the imposing a recognizance with conditions on a person to prevent them from carrying out a terrorist activity; enactment provides for those sections to cease to have effect or for the possible extension of their operation. The enactment also provides that the Attorney General of Canada and the Minister of Public Safety and Emergency Preparedness include in their respective annual reports their opinion on whether those sections should be extended. It also amends the Criminal Code to create offences of leaving or attempting to leave Canada to commit certain terrorism offences. The enactment also amends the Canada Evidence Act to allow the Federal Court to order that applications to it with respect to the disclosure of sensitive or potentially injurious information be made
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<td></td>
<td>S.C. 2013, c.9⁹⁴</td>
<td>Omnibus</td>
<td>24 Apr 2013</td>
<td>Passed w/amdts Div. No. 666 Aye – 183 Nay - 93</td>
<td>SC- 3rd Reading HC – 3rd Reading¹⁰⁷</td>
<td>Bombing of 15 Apr 2013 The amdts to the Canada Evidence Act permit evidence to be heard “in private” to protect the source – similar to the PII and CMP provisions in the U.K., and s.215 USA PATRIOT Act. AG Annual Report stmnt on need for extension</td>
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public and to allow it to order that hearings related to those applications be heard in private. In addition, the enactment provides for the annual reporting on the operation of the provisions of that Act that relate to the issuance of certificates and flats. The enactment also amends the Security of Information Act to increase, in certain cases, the maximum penalty for harbouring a person who committed an offence under that Act. Lastly, it makes technical amendments in response to a parliamentary review of these Acts. (https://openparliament.ca/bills/41-1/S-7/)


¹¹¹ Minister of Citizenship & Immigration Chris Alexander: “Canadians value their citizenship,” the minister said. “They understand it applies to us who live here and who are connected to Canada. It’s not for sale, it’s not free and it’s not without any obligations . . . “All we’re saying is these most serious crimes, not just crimes of violence but crimes of loyalty, where you’re really embracing an ideology or embracing an allegiance to another power or a hostile view of the world, those should be grounds when someone is a dual national for revoking citizenship” (Black, 2014, 27 June, paras. 8-9). Christopher Veeman Executive Member, National Immigration Law Section, Canadian Bar Association (CBA) noted (30 Apr 2014, 3:30) before the Citizenship & Immigration Committee that the CBA is of the view that this bill, which is entitled the Strengthening Canadian Citizenship Act, proceeds on the assumption that by making something harder to obtain you increase its worth. The CBA takes the view that citizenship is a bundle of rights that should be assessed on the rights that it gives to the holder. Simply making it harder to obtain doesn’t make it better” (https://openparliament.ca/bills/41-2/C-24/?tab=mentions&page=16).


¹¹³ Long title: “An Act to amend the Citizenship Act and to make consequential amendments to other Acts.”

¹¹⁴ This position was opposed by numerous civil rights groups, including: Amnesty International, the B.C. Civil Liberties Association, the Canadian Association of Refugee Lawyers, and the Constitutional Rights Centre. It was used to strip citizenship from the leader of the Toronto 18 terrorist group, Jordanian-born Zakaria Amara 27 Sep 2015, and his co-conspirators Asad Ansari and Saad Khalid. Also used to strip the citizenship of Mohamed Hersi, convicted of trying to join the Somalia-based extremist group al-Shabaab, and Hiva Mohamme Alizadeh, convicted in an Ottawa in a terror plot. Those receiving such letters have 60 days to respond.

¹¹⁵ Audrey Macklin, a professor of law who specializes in immigration and citizenship law at the University of Toronto stated, “The reforms make citizenship harder to get and easier to lose,” ” said “If you take the view that citizenship is a commodity, you want to make it more valuable. Then like any commodity its value increases if it’s scarce, hard to get and easy to lose.” Black forecasts that revocation could occur for lying on any aspect of a citizenship application or for minor crimes once citizenship is granted (Black, 2014, 27 June, paras.13, 17-18)
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<sup>110</sup> SC Deb, 19 Jun 2014, 1520 hrs, Hon. Jane Cordy: “The new law will violate mobility rights and will put all naturalized citizens under the tacit threat of having their citizenship revoked by making it possible for government officials to strip a naturalized Canadian of citizenship if they believe that person never intended to live in Canada, for example if she/he decides to study, accept a job, or move in with a romantic partner outside of Canada. In contrast, citizens by birth never have to worry that time spent away from Canada might put their citizenship status at risk. I believe requiring citizens to indicate that they intend to live in Canada if granted citizenship is unconstitutional, as it would distinguish between naturalized and other Canadian citizens, and would violate mobility rights under the Charter… Full examination can rarely be accomplished as we continue to rush through yet another bill. This bill arrived in this chamber on Monday, and while the committee did a pre-study of the bill last week, the majority of the senators in this chamber were not engaged in that process… Yet we hear from ministers that bills are terrific just as they are — no need for amendments. They continue to treat the legislative processes of our democracy with contempt, as they view it as nothing more than a nuisance and routinely dismiss the viewpoint of any Canadian who may disagree with them. We consistently get the message from this government that they are not interested in anyone’s opinion but their own and the Senate should just rubber-stamp their legislation and, by the way, do it fast. And if we dare to question aspects of the legislation or propose amendments, we are subject to partisan attacks by the minister, as was the case during our committee’s analysis of this bill.”

<sup>114</sup> Earning citizenship would be more difficult for the elderly and less educated, such as children 14-18. The naturalization rate of 70-80 percent could drop (Black, 2014, 27 June, para. 42).

<sup>116</sup> MP Ms. Rosane Doré Lefebvre (Alfred-Pellan, NDP), HC Deb, Vol. 147, 41<sup>st</sup> Parliament, 2<sup>nd</sup> Session, No.166, 30 Jan 2015 at 1035 complains that few witnesses were heard in Citee, and those that were heard supported the Conservative Party perspective on the draft Bill.
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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| 30  | Anti-terrorism Act S.C. 2015, c.20 (ATA 2015) | Omnibus (intro 2 new laws and amds to 15 Acts) | Bill C-51, Bill died on order paper twice. | 30 Jan 2015 | 176-87 | 18 Jun 2015 | Long title: | Contentious Bill and Act which is still subject to protests from civil liberties organizations.  
Executive comment dominates the debate as no Canadian legislators are permitted to view the classified information necessary for informed analysis (bp).  
Increase intelligence flow Criminalizes promotion of terrorism.  
Framing debate in tough vs. soft does not help.  
UC: Divisive law which influenced Muslim perceptions in Fall 2015 election campaign. |

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117 Fraser, 2014, p. 199.  
118 This Act is based on the concept of “activities that undermine the security of Canada.” (para. 3, “Purpose”) This extremely broad concept is more sweeping than any definition of security in Canadian national security law. In some respects it parallels the “total information awareness” sought by the NSA in 2003, or perhaps a unitary view of governmental information holding and sharing.  
119 “An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts.”  
120 The broad-based opposition includes: Former Prime Ministers and Supreme Court Justices, the CBA, First Nations and environmental groups, major daily newspapers.  
121 Birbeck, 2015, 27 September: “C-51 anti-terror law causes some Muslims to reconsider vote: ‘All my information is that there are no Muslims who are supporting the Conservatives,’ says Montreal Muslim.”
Appendix D

Legislative Purpose and Duration – U.S.A.
(From the Patriots of 1776 to the USA PATRIOT Act 2001 & Related Acts)

<table>
<thead>
<tr>
<th>Ser</th>
<th>Act, Bill, Case, Event, Law, or Regulation</th>
<th>Bill Size/Scope</th>
<th>Debate</th>
<th>Vote</th>
<th>Duration of Act</th>
<th>Purpose</th>
<th>Remarks/Unintended Consequences (UC)</th>
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<tbody>
<tr>
<td>1</td>
<td>Constitution of the United States, Article 1, “The Legislative Branch,” Section 9, “Limits on Congress,” Clause 2</td>
<td>In effect</td>
<td>“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it…”</td>
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<tr>
<td>2</td>
<td>Constitution of the United States, (Fifth Amendment to) Bill of Rights</td>
<td>paragraph</td>
<td>8 Jun 1789 to 15 Dec 1791 (intermittent)</td>
<td>15 Dec 1791 to present, adopted 1 Mar 1792</td>
<td>“[No person shall]… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”</td>
<td>Common law principles of habeas corpus and procedural fairness are evident. Preventive detention w/o due process logically contravenes the Fifth Amendment.(wp)</td>
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<tr>
<td>3</td>
<td>Constitution of the United States, (Sixth Amendment to)</td>
<td>paragraph</td>
<td>15 Dec 1791 to present, Adopted 1 Mar 1792</td>
<td>“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury… and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining</td>
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</table>

1 The Bill of Rights, which consists of the first 10 Amendments to the U.S. Constitution, was drafted to calm the concerns of Anti-Federalists who had opposed Constitutional ratification, these amendments guarantee a number of personal freedoms, limit the government’s power in judicial and other proceedings, and reserve some powers to the states and the public. Originally the amendments applied only to the federal government, however, most were subsequently applied to the government of each state by way of the Fourteenth Amendment, through a process known as incorporation.

2 The main principle of procedural fairness in a criminal trial is establishing guilt in committing a crime beyond a reasonable doubt, which does not apply in cases of preventive detention which is meant to pre-empt a criminal act.
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<th>Purpose</th>
<th>Remarks/Unintended Consequences (UC)</th>
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<tr>
<td>4</td>
<td>Alien and Sedition Acts of 1798</td>
<td>Four separate Acts:</td>
<td></td>
<td></td>
<td></td>
<td>Strengthen national security during the Quasi-War w/ France Increased residency from 5 to 14 yrs to obtain U.S. citizenship; Imprison/deport aliens considered &quot;dangerous to the peace and safety of the United States;&quot; Imprison/deport male citizens of a hostile nation, above the age of 14, in time of war. Restricted speech critical of the federal government;</td>
<td>UC: Challenged the Bill of Rights, but ultimately led to a new American definition of freedom of speech and the press.</td>
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<tr>
<td></td>
<td>5th Congress, 2nd Session, c54</td>
<td>1) The Naturalization Act (4 pgs.)</td>
<td></td>
<td></td>
<td>18 Jun 1798 - 25 Jun 1798-1801</td>
<td></td>
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<tr>
<td></td>
<td>ch.58</td>
<td>2) Alien Friends Act (2 pgs.)</td>
<td></td>
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<td></td>
<td>ch.66, 1 Stat. 570</td>
<td>3) Alien Enemies Act (2 pgs.)</td>
<td></td>
<td></td>
<td>6 Jul 1798 – present</td>
<td></td>
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<tr>
<td></td>
<td>ch.74, 1 Stat. 596, 596-97</td>
<td>4) Sedition Act (2 pgs.)</td>
<td></td>
<td></td>
<td>14 Jul 1798-1800</td>
<td></td>
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<tr>
<td>4</td>
<td>Ex parte Merryman,8 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)</td>
<td>N/A</td>
<td>N/A</td>
<td>Apr – May 1861</td>
<td>Test the authority of the President to suspend &quot;the privilege of the writ of habeas corpus&quot; under the U.S. Constitution’s Suspension</td>
<td>President Lincoln quietly invoked martial law in Maryland to deal with riots 27 Apr 1861, and suspended habeas corpus along the Philadelphia to Washington railway line.9 Chief Justice Roger Taney ruled that suspending the writ of habeas corpus was a</td>
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</table>

3 Long title: An Act to Establish a Uniform Rule of Naturalization.
4 Long title: An Act concerning Aliens.
5 Long title: An Act respecting Alien Enemies.
7 Used to detain, deport and confiscate the property of Japanese, German, Italian, and other Axis nation citizens residing in the United States during WWII.
8 U.S. Army Lieutenant John Merryman was arrested and charged with treason 25 May 1861 for having destroyed bridges leading into Maryland 29 April 1861, as per direction from the State Governor Hicks. Merryman was held despite Chief Justice Taney’s issue of a writ of habeas corpus to bring him to trial or free him. Taney’s written opinion of 1 Jun 1861 observed that not even the Kings of England had reserved to themselves the degree of powers that Lincoln had assumed.
9 By year-end Lincoln had suspended the writ of habeas corpus along the railway lines between Philadelphia and New York, from New York to Bangor, Maine, and throughout the State of Missouri. In Sep 1862 he suspended the writ nation-wide with Proclamation 94.
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</table>
| 5   | Proclamation 94, Suspending the Writ of Habeas Corpus | 2 paras.        | N/A    | N/A  | 24 Sep 1862 to 15 Sep 1863 | Passed the House of Representatives on 8 Dec 1862 (90-45) Passed the Senate on 28 Jan 1863 (33-7) Agreed to by the House of Representatives on 2 Mar 1863 (99-44), and by the Senate on 2 Mar 1863 (voice vote) Signed into law by President Abraham Lincoln on 3 Mar 1863 | Clause, when Congress was in recess and thus unavailable to do so itself.  
   power held exclusively by Congress.  
   President Lincoln ignored his ruling, based on Congress being recessed. |
| 6   | Habeas Corpus Suspension Act, 12 Stat. 755 (1863) | 4 pgs.          | Intro as H.R. 591, by Thaddeus Stevens on 5 Dec 1862 Committee consideration by House and Senate Judiciary Cttees. Reported by the joint conference committee on 27 Feb 1863; | Passed the House of Representatives on 8 Dec 1862 (90-45)  
   Passed the Senate on 28 Jan 1863 (33-7)  
   Agreed to by the House of Representatives on 2 Mar 1863 (99-44), and by the Senate on 2 Mar 1863 (voice vote)  
   Signed into law by President Abraham Lincoln on 3 Mar 1863 | 3 Mar 1863 | Long title  
   In effect, Congress retroactively legitimized POTUS suspension of habeas corpus.  
   UC:  
   The next nation-wide suspension of habeas corpus ordered by POTUS and supported by Congress occurred 17 Oct 2006, when President G.W. Bush suspended the right of habeas corpus to persons “determined by the United States to be terrorists.” |
| 7   | Proclamation 104, (13 Stat. 734, Suspending the Writ of Habeas Corpus Throughout the United States) | 5 paras.        | N/A    | N/A  | 15 Sep 1863 | Revoking the suspension of habeas corpus | “Martial law cannot rise from a threatened invasion.  
   The necessity must be actual and present; the invasion real; such as effectively closes the courts”  
   UC:  
   “During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely |
| 8   | Proclamation 148, 14 Stat. 774 (1865) | N/A             | N/A    | 1 Dec 1865 |  
   Primary Holding:  
   It is unconstitutional to try civilians by military tribunals unless there is no civilian court available.  
   “Martial law cannot rise from a threatened invasion.  
   The necessity must be actual and present; the invasion real; such as effectively closes the courts”  
   UC:  
   “During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely |
| 9   | Ex parte Milligan, 71 U.S. (4 Wall. 2) 1866 | N/A             | N/A    |  
   Primary Holding:  
   It is unconstitutional to try civilians by military tribunals unless there is no civilian court available.  
   “Martial law cannot rise from a threatened invasion.  
   The necessity must be actual and present; the invasion real; such as effectively closes the courts”  
   UC:  
   “During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely |

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10 Long title: An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases. It was introduced as “A bill to indemnify the President and other persons for suspending the privilege of the writ of habeas corpus, and acts done in pursuance thereof.” Retrieved from [http://legisworks.org/sal/12/stats/STATUTE-12-Pg755.pdf](http://legisworks.org/sal/12/stats/STATUTE-12-Pg755.pdf)
11 See [https://supreme.justia.com/cases/federal/us/71/2/case.html](https://supreme.justia.com/cases/federal/us/71/2/case.html)
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<td>10</td>
<td>Proclamation 204 - Suspending the Writ of Habeas Corpus in the County of Union, South Carolina</td>
<td>2 pgs.</td>
<td>N/A</td>
<td>N/A</td>
<td>10 Nov 1871</td>
<td>To support “An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes,” enacted 20 Apr 1871.</td>
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<td>11</td>
<td>Organic Act of 1900, c. 339, 31 Stat. 153 (1900); 48 U.S.C. 532 (1940)</td>
<td>20 chapters Omnibus</td>
<td>After Queen Liliʻuokalani was overthrown in 1893, the Committee of Safety led by Lorrin A. Thurston established the Provisional Government of Hawaii in 1898 to govern the islands in transition to anticipated annexation to the USA.</td>
<td>N/A</td>
<td>30 Apr 1900 to 21 Aug 1959</td>
<td>An Act to Provide a Government for the Territory of Hawaii</td>
<td>Isei &amp; Nisei people of Japanese descent form 37 percent of population. 7 Dec 1941. Governor of the Territory of Hawaii suspends the writ of habeas corpus and places Hawaii under martial law administered by CG, Hawaiian Department. 736 Issei are arrested by the Custodian Detention Program and detained w/o charge. UC: Martial law lasts until 24 Oct 1944. Some Issei are held until 1947. In 1993, a joint Apology Resolution regarding the overthrow was passed by the U.S. Congress and signed by President Bill Clinton. The resolution apologized for the overthrow of the Hawaiian Kingdom and acknowledged the United States had annexed Hawaii unlawfully. On 1 Oct 1993 Clinton signed a letter of apology to all detainees, opening the way to paying</td>
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</table>
An Act to amend section three, title one, of the Act entitled “An Act to punish acts of interference with the foreign relations, and the foreign commerce of the United States, to punish espionage, and to prevent insubordination in the military, and to prevent the support of U.S. enemies during wartime."

15 Jun 1917 to present

Long title

The Act’s intent is to prohibit interference with military operations or recruitment, to prevent insubordination in the military, and to prevent the support of U.S. enemies during wartime.

Banned statements impeding the draft, promoting military insubordination, or conveying false statements with the intention to interfere with military operations.

UC: In 1919, the U.S. Supreme Court unanimously ruled through Schenck v. United States that the act did not violate the freedom of speech of those convicted under its provisions. The constitutionality of the law, its relationship to free speech, and the meaning of its language have been contested in court ever since.

16 https://japaneseinternmentmemories.wordpress.com/2012/03/04/presidential-letter-of-apology-2/

17 House Vote #19 in 1917: TO PASS H. R. 291, (P. 1141), retrieved from https://www.govtrack.us/congress/votes/65-1/h19


Rutherford’s conviction was overturned on appeal. The most controversial sections of the Act, a series of amendments consolidated in the Sedition Act of 1918, were repealed 3 March 1921, the original Espionage Act of 1917 remains in force.

20 An Act to punish acts of interference with the foreign relations, and the foreign commerce of the United States, to punish espionage, and to better to enforce the criminal laws of the United States, and for other purposes.

21 The U.S. Supreme Court upheld the Sedition Act in Abrams v. United States, 250 U.S. 616 (1919), although Justice Oliver Wendell Holmes used his dissenting opinion to comment on what has come to be known as “the marketplace of ideas.” Justice Holmes was joined in expressing a dissenting opinion by Justice Louis Brandeis. Subsequent Supreme Court decisions, such as Brandenburg v. Ohio (1969), make it unlikely that similar legislation would be considered constitutional today.

22 An Act To amend section three, title one, of the Act entitled “An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and to better to enforce the criminal laws of the United States, and for other purposes.” The Act extended the Espionage Act of 1917 to cover a broader range of offenses, notably speech and the expression of opinion that portrayed the government or the war effort in a negative light or which interfered with the sale of government war bonds. Notable persons arrested under this Act include anarchists Mollie Steimer, Jacob Abrams, Hyman Lachowsky, and Samuel Lipman (1918).
<table>
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<tr>
<td>15</td>
<td>Abrams v. United States, 250 U.S. 616, 1180, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).</td>
<td>N/A</td>
<td>Argued 21-22 Oct 1919; Decided 10 Nov 1919</td>
<td>Dissenting opinion (7-2)</td>
<td>N/A</td>
<td>Try Jacob Abrams and four other Russian-Jewish immigrants for publishing pamphlets critical of the U.S. war effort against the fledgling U.S.S.R., and which called for a general strike.</td>
<td></td>
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<td>16</td>
<td>Alien Registration Act of 1940 (Smith Act), Pub. L. 76-670, 54 Stat. 670 (1940) (ARA)</td>
<td>2 pgs.: I – Subversive Activities II – Deportation III - Alien Registration</td>
<td>Introduced as H.R. 5138 by Howard W. Smith (D – VA) 22 June 1940 and by the on Signed into law by President Franklin D.</td>
<td>28 Jun 1940 to</td>
<td>Long title 25 Update the Alien Act of 1918</td>
<td>Drafted to ensure that IWW labor organizer Harry Bridges could be deported legally in 1940. Approx. 215 people were indicted under ARA 1940, incl. alleged anarchists, communists, and fascists. UC: Prosecutions under the Smith Act continued until a series of U.S. Supreme</td>
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23 Holmes wrote: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger (this author’s italics, CPD) that they will bring about the substantive evils that Congress has a right to prevent.”

24 Holmes’ dissenting opinion in Abrams appears to protect free speech: “The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out...” Holmes insisted that the “marketplace of ideas” is the foundation of the constitutional system, not merely the First Amendment, and efforts to suppress opinions by force therefore contradict a fundamental principle of the Constitution.

25 An Act to prohibit certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens; to require the fingerprinting and registration of aliens; and for other purposes.
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| 17  | Executive Order No. 9066, 7 Fed. Reg.1407 (1942) (EO 9066) | 5 paras. | One hr debate in the Senate and 30 min in the House of Representativ es. | 1942 - N/A Proclamation 4417 by President Ford 19 Feb 1976 to rescind EO9066 1980 – President Carter convenes Commission on Wartime Relocation and Internment of Civilians (CWRIC) to study EO9066 impact. | 19 Feb 1942 to 19 Feb 1976 (34 yrs) | “Authorizing the Secretary of War to Prescribe Military Areas.” | EO 9066 was facilitated by racial prejudice, war hysteria and reactions to the Niihau Incident. It authorized exclusion zones, which was used to evacuate enemy aliens and 120K American citizens of Japanese ancestry from coastal zones. Similar orders enacted by the GIC in Canada in 1942 to intern 30K citizens of Japanese ancestry.  
UC: 1982 - CWRIC report, Personal Justice Denied, concludes that the incarceration of Japanese-Americans had not been justified by military necessity. The report determined that the decision to incarcerate was based on “race prejudice, war hysteria, and a failure of political leadership.” |
| 18  | National Security Act of 1947, Pub. L. 80-253, 61 Stat.495 (1947) | See long title Intro as S. 758 by John Gurney (R-SD) 3 Mar 1947. Signed into law by President Harry S. Truman on 26 July 1947 | Passed by voice in vote in both chambers with little debate after three days of Conference Committee discussion (Zegart, 1999, p. 68) | 26 July 1947 | Long title Consolidation of armed services under the National Military Establishment, renamed the Department of Defense (1949), Creation of: 1) National Security Council (for executive policy coord); 2) the CIA; and 3) the JCS. | |

26 The CWRIC recommended legislative remedies consisting of an official Government apology and redress payments of $USD 20,000 to each of the survivors; a Civil Liberties Public Education Fund was set up to help ensure that this would not happen again. The Civil Liberties Act of 1988, Pub.L.100-383, 102 Stat. 904 (1988) is enacted. A total of 82,219 persons received redress checks.

27 Long title: “An Act to promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security.”


34 An Act to protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.
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<tr>
<td>64</td>
<td>64 Stat. 987 (1950), also known as the Subversive Activities Control Act of 1950 or the McCarran Act (SACA) (EDA)</td>
<td>I–Subversive activities control: Immigration, nationality II–Emergency Detention Declaration of internal security emergency (s.102) Board of Detention &amp; Preliminary hearing w/i 48 hrs (bp) Classified evidence (s.109(g)) Judicial review (bp) (s.111) Espionage &amp; sabotage defined (s.115)</td>
<td>22 Sep 1950 22 Sep 1950 22 Sep 1950</td>
<td>H.R. 313-20(^{29}) S. 51-7(^{31}) POTUS Veto H.R. 286-41(^{32}) S. 57-10(^{33}) H.R. overrides POTUS veto</td>
<td>Whenever there shall be in existence ... an [internal security] emergency, the President, acting through the Attorney General, is hereby authorized to apprehend and by order detain ... each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage and sabotage. § 103(a) (1950).</td>
<td>Initially supported by the courts, the law lost support as McCarthyism faded.</td>
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\(^{28}\) Title I of the Internal Security Act of 1950 excluded aliens who sought to engage in activities which would be prejudicial to the public interest, or which would endanger the welfare of the United States. Specifically anarchists; members of a Communist organization or any fascist party; aliens who advocated world communism or totalitarianism; aliens who advocated, taught, wrote or published material advocating unconstitutional overthrow of the government of the United States; aliens who were affiliated with any organization that wrote or distributed material advocating unconstitutional overthrow of the government; and aliens who were assumed likely engage in espionage and sabotage (Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 987, 1006-10 (1950)).

\(^{30}\) House Vote #259 in 1950: HR 9490. Protect the U.S. Against Certain UnAmerican And Subversive Activities By Requiring Registration of Communist Organizations: Adoption of Conference Report, retrieved from https://www.govtrack.us/congress/votes/81-1950/h259

\(^{31}\) Senate Vote #442 in 1950: HR 9490. Protect the U.S. Against Certain UnAmerican And Subversive Activities By Requiring Registration of Communist Organizations: Adoption of Conference Report, retrieved from https://www.govtrack.us/congress/votes/81-1950/s442

\(^{32}\) House Vote #264 in 1950: HR 9490. Protect the U.S. Against Certain UnAmerican And Subversive Activities By Requiring Registration of Communist Organizations: On Question Will the House, on Reconsideration, Pass the Bill The objections of the Pres. To the Contrary Not Withstanding?, retrieved from https://www.govtrack.us/congress/votes/81-1950/h264

\(^{33}\) Senate Vote #444 in 1950: HR 9490. Passage Over the Pres.’ Veto, retrieved from https://www.govtrack.us/congress/votes/81-1950/s444

\(^{34}\) Congress modeled this legislation after laws promulgating Japanese American internment (Izumi, 2006, p.4).

\(^{35}\) Title II of the EDA included procedural safeguards which sought to protect individuals from wrongful detention. The AG had to issue a warrant for apprehension before arrests were made (§ 104(a)), and only DoJ officials could arrest the suspects (§ 104(b)). Persons apprehended by law Title II would be confined in detention camps prescribed by the AG, which assured DoJ, rather than DoD, control of the detention process (§ 104(c)). After arrest, each apprehended person would be brought before a preliminary hearing officer, who would hear evidence and decide whether there was a probable cause for his or her detention pursuant to Title II (§ 104(d)). Title II also established the Detention Review Board (§ 105(a)), which was empowered to review a detention order upon petition by a detainee (EDA 1950, ch. 1024, § 109, 64 Stat. 1019, 1022 (1950) (repealed 1971). (This safeguard was in keeping with the common law principle of habeas corpus). The Detention Review Board was also empowered to: 1) revoke the detention order if it found no reasonable ground for detention (§ 10(a)), 2) to hear the claim for loss of income resulting from groundless detention and, if necessary, order compensation (§ (10(b)), and 3) to conduct a judicial review for any detainee whose petition for release had been rejected by the Detention Review Board (§ 111).
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<tr>
<td>22</td>
<td>Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, (42 U.S.C. § 3711)</td>
<td>48 pgs.</td>
<td>Social research grants, Handgun controls, Wiretaps, FBI budget expansion, Miranda warnings</td>
<td>TBC</td>
<td>19 Jun 1968 to 1990</td>
<td>Limit crime</td>
<td>Title III originally covered only wire and oral communications but was significantly revised by Title I ECPA in 1986 to include electronic communications. The ECPA includes two additional titles to protect the privacy of stored communications and regulate the use of pen register and trap and trace devices.</td>
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37 It has not been seriously challenged since it was decided in 1969. Very few cases have actually reached the USSC in past decades that would test the limits of Brandenburg.
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<tr>
<td>24</td>
<td>Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896 (1974)</td>
<td>TBC</td>
<td>TBC</td>
<td>TBC</td>
<td>1974 - present</td>
<td>“An Act to amend title 5, United States Code, by adding a section 552a, to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.”</td>
<td>Strengthen FOIA. Protect citizens against secret government collection of personal information.</td>
</tr>
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\(^{39}\) Foreign Intelligence Surveillance Act of 1978, The Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee) revelations with regard to past abuses of electronic surveillance for national security purposes and to the somewhat uncertain state of the law on the subject (Bazan, 2007, Summary).

\(^{40}\) Only one in four proposed bills make it through the committee consideration stage and are returned to the House or the Senate for a vote ([https://www.govtrack.us/congress/bills/95/s1566](https://www.govtrack.us/congress/bills/95/s1566)) and click on “Reported by Committee.” There are 6,261 bills and resolutions currently (c. 2015) before the United States Congress. Of those, only about 5% will become law. They must be enacted before the end of the 2015-2017 session (the “114th Congress”), retrieved from “Bills and Resolutions” ([https://www.govtrack.us/congress/bills/](https://www.govtrack.us/congress/bills/)).

\(^{41}\) NSA Project MINARET targeted the personal communications of leading civil rights leaders, Americans who criticized the Vietnam War, including Senators (e.g., Frank Church and Howard Baker), journalists, and athletes. See Pilkington, 2013, 26 September, “Declassified NSA files show agency spied on Muhammad Ali and MLK” and ACLU (2002).

\(^{42}\) FBI Counter Intelligence Program, 1956-1971 mounted against subversive organizations such as the Black Panthers and anti-Vietnam War protesters. See ACLU (2002), The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King.
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<tr>
<td>28</td>
<td>Intelligence Identities Protection Act of 1982, Pub. L. 97-200, 96 Stat.122 (1982)</td>
<td>3.5 pgs.</td>
<td>Intro as H.R. 4 by Edward Boland (D-MA) on 5 Jan 1981 Committee consideration by HPSCI Reported by the joint conference</td>
<td>Passed the House on 23 Sept 1981 (355-57) Passed the Senate on 18 Mar 1982 (90-6, in lieu of S. 391) Agreed to by the House 3 Jun 1982, (319-36)</td>
<td>23 Jun 1982 to present</td>
<td>Long title: “An Act to provide certain pre-trial, trial, and appellate procedures for criminal cases involving classified information.” The primary purpose of CIPA was to limit the practice of graymail by criminal defendants in possession of sensitive government secrets. “Gray mail” refers to the threat by a criminal defendant to disclose classified information during the course of a trial. The gray mailing defendant essentially presented the government with a “dilemma”: either allowed disclosure of the classified information or dismiss the indictment. The procedural protections of CIPA protect unnecessary disclosure of classified information.</td>
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44 EO 12333 “United States Intelligence Activities” was amended three times under President George W. Bush. The NSA direction at para. 1.12 (b) (3)-(4) on foreign intelligence collection was expanded to include domestic surveillance operations after the September 11 attacks without a direct order from the President (Farivar, 2014, 20 August), who later provided legal cover under EO 12333.
45 http://www.gpo.gov/fdsys/pkg/STATUTE-96/pdf/STATUTE-96-Pg122.pdf
46 Long title - “An Act to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources.”
47 Biden, 1982, 6 April. Biden criticized use of the vague phrase (bp and wp) “reason to believe,” (found in ss. 601-602) which he saw as “an unnecessarily broad and inappropriate standard for determining criminal liability in these situations.”
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50 Long title – “An Act to amend title 18, United States Code, with respect to the interception of certain communications, other forms of surveillance, and for other purposes.” The ECPA has been amended by the Communications Assistance for Law Enforcement Act (CALEA) of 1994, the USA PATRIOT Act (2001), the USA PATRIOT reauthorization acts (2006), and the FISA Amendments Act (2008). The ECPA includes Title I, the Wiretap Act (18 U.S.C. Ch. 119), Title II, the Stored Communications Act (18 U.S.C. Ch. 121), and the Pen-Register Act (18 U.S.C. Ch.206). Thus, it is unclear how ECPA applies to these packets: whether the email is in transit, and therefore governed by Title I, or in “electronic storage” and governed by Title II. Title I, the Wiretap Act, and Title II, the Stored Communications Act, have vastly different standards and requirements, which creates uncertainty for users, law enforcement, and the courts.

51 [https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1284](https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1284)

52 Created in 1989, the Statutory Inspector General (IG) is responsible for independent oversight of the CIA. The IG is nominated by the President and confirmed by the Senate, and may only be removed from office by the President. The IG’s authorities and responsibilities are provided in 50 U.S.C. §403q. The CIA Office of Inspector General (OIG) is an independent office of the CIA that is headed by the Inspector General and promotes economy, efficiency, effectiveness and accountability in the management of CIA activities by performing independent audits, inspections, investigations, and reviews of CIA programs and operations. The OIG also seeks to detect and deter fraud, waste, abuse and mismanagement. The OIG advances the Agency’s mission by providing findings and recommendations expeditiously to the Director, the Agency and the Congressional intelligence committees. The OIG works directly with the Department of Justice and other appropriate federal agencies when investigating alleged violations of law. See the history of the OIG’s predecessor organizations from 1952 to 1989 at [https://www.cia.gov/offices-of-cia/inspector-general/history.html](https://www.cia.gov/offices-of-cia/inspector-general/history.html); Snider, 2007.

53 The IG is required by law to: 1) Conduct, supervise, and coordinate, independently, audits, inspections, and investigations, relating to the programs and operations of the CIA to ensure that such programs and operations are conducted efficiently and in accordance with applicable laws and regulations; 2) Keep Director of the CIA (D/CIA) fully and currently informed concerning violations of law and regulations; fraud, and other...
serious problems, abuses, and deficiencies that may occur in CIA programs and operations, and to report the progress made in implementing corrective action; 3) Take due regard for the protection of intelligence sources and methods in the preparation of IG reports; 4) Provide a semi-annual report to the D/CIA summarizing the activities of the OIG during the immediately preceding six-month period, which the D/CIA is required to submit to the congressional intelligence committees within 30 days.(bp)

54 IG is to: Report immediately to the Director CIA any particularly serious or flagrant abuses, problems, or deficiencies relating to the administration of CIA programs or operations. The Director CIA is then required to transmit such reports to the intelligence committees within seven days.(bp)

55 The SSCI Committee Study of the Central Intelligence Agency's Detention and Interrogation Program describes the CIA’s Detention and Interrogation Program and its use of various forms of torture (enhanced interrogation techniques or EIT) in U.S. government communiqués on detainees between 2001 and 2006 during the War on Terror. The 6, 700-page Study details actions by CIA officials and findings of the study of the Detention and Interrogation Program. On 9 Dec 2014, eight months after voting to release parts of the report on 3 Apr 2014, the SSCI released a 525-page excerpt that consisted of key findings and an executive summary of the Study. It took the SSCI five years and $40 million to compile the Study, (Ackerman, Rushe, & Borger, 2014, 9 December) the rest of which (approx. 6000 pages) remains classified.

56 The Senate Study rebuts CIA claims that the use of such methods generated intelligence that prevented further terrorist attacks and therefore saved lives. SSCI Chair Diane Feinstein said its investigators had not found a single case where that was true.

57 According to Feinstein, “The Intelligence Committee as well often pushes intelligence agencies to act quickly in response to threats and world events. Nevertheless, such pressure, fear, and expectation of further terrorist plots do not justify, temper, or excuse improper actions taken by individuals or organizations in the name of national security. The major lesson of this report is that regardless of the pressures and the need to act, the Intelligence Community’s actions must always reflect who we are as a nation, and adhere to our laws and standards. It is precisely at these times of national crisis that our government must be guided by the lessons of our history and subject decisions to internal and external review.” (Forward, p. 2 of 6).

58 Long title – “An Act to amend title 18, United States Code, to make clear a telecommunications carrier’s duty to cooperate in the interception of communications for Law Enforcement purposes, and for other purposes.”

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## UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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⁵⁸ In the 103d Congress, the Subcommittee on Civil and Constitutional Rights held two joint hearings with the Senate Judiciary Subcommittee on Technology and the Law on the impact of advanced telecommunications services and technologies on electronic surveillance, March 18 (incl Director FBI Louis Freeh) and August 11, 1994 [http://askcalea.fbi.gov/docs/hr103827.pdf].

⁶⁰ In 2004, the United States Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Federal Bureau of Investigation (FBI), and Drug Enforcement Administration (DEA) filed a joint petition with the Federal Communications Commission (FCC) to expand their powers to include the ability to monitor VoIP and broadband internet communications — so that they could monitor Web traffic as well as phone calls. See FCC 06-56, retrieved from [https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-56A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-56A1.pdf).

⁶¹ According to the ACLU, EPIC, EFF, CPSR surreptitiously: I. The FBI has Disregarded the Congressional Limitations and Statutory Obligations Imposed on Law Enforcement by CALEA: CALEA explicitly called on law enforcement to issue a technical capacity notice by October 25, 1995, one year after the law’s enactment. Carriers were given three years after the notification to install capacity meeting the notification requirements. Thus, under the statutory timetable, industry’s deadline for compliance was to have been October 1998. Section 104(a) (2) requires that the technical capacity notice provide a numerical estimate of law enforcement’s anticipated use of electronic surveillance for 1998. The notice is required to establish the maximum interceptions that a particular switch or system must be capable of implementing simultaneously. By mandating the publication of numerical estimates of law enforcement surveillance activity, Congress intended CALEA’s notice requirements to serve as accountability “mechanisms that will allow for Congressional and public oversight. The bill requires the government to estimate its capacity needs and publish them in the Federal Register.” II. The FBI Has Not Maintained Narrowly Focused Capability for Law Enforcement Agencies to Carry Out Authorized Intercepts: e.g. “the FBI comments call for CALEA compliance by carriers providing access to information services, private communications services, and paging services - an expansion of surveillance capabilities never contemplated by Congress.” III. The FBI Has Ignored Privacy Protection Requirements.

⁶² https://www.eff.org/pages/calea-faq#19 and https://www.eff.org/issues/calea

⁶³ Long title: “An Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.”
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<tr>
<td>33</td>
<td>Authorization for the Use of Military Force Act of 2001, Pub. L. 107-40, 115 Stat. 224 (2001). (AUMF)</td>
<td>2 pgs. Global</td>
<td>Intro 14 Sept 2001 by Sen. T. Daschle (D-SD) as S.J. Res. 23. (1078)</td>
<td>S.J. Res. 23 passes in Senate 14 Sep 2001 by roll call vote (98-0). House passes H.J. Res. 64 14 Sep 2001, (420-1). Passes House same day without objection.</td>
<td>18 Sep 2001-present</td>
<td>“Joint resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.”</td>
<td>Sect. 2 provides sole unconstituted powers to POTUS.64 AUMF cited by DoJ as authority for engaging in electronic surveillance in ACLU v. NSA without obtaining a warrant of the Special Court as required by the Constitution. AUMF also cited by variety of US officials as justification for continuing US military actions world-wide. The phrases “Al-Qaeda and associated forces” or “affiliated forces” have been used by these officials. However, these phrases do not appear in AUMF. AUMF unsuccessfully cited by the George W. Bush administration in Hamdan v. Rumsfeld, in which SCOTUS ruled that military commissions at Guantanamo Bay were not competent tribunals as constituted and thus illegal.</td>
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64 AUMF Section 2 – Authorization For Use of United States Armed Forces: (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines (this author’s italics) planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. Used to underpin attacks in Afghanistan launched 7 Oct 2001.

66 Most of the elected representatives in both the House of Representatives and the Senate had not read the proposed bill H.R. 3162 (Michael Moore, Fahrenheit 9/11 (documentary), Timestamp: 01:01:39–01:01:47). However, other preliminary discussion had occurred - see fn78.


69 Committee consideration of the proposed anti-terrorism legislation had occurred within the United States House Committee on the Judiciary; Permanent Select Committee on Intelligence; Committee on Financial Services; Committee on International Relations; Committee on Energy and Commerce (Subcommittee on Telecommunications and the Internet); Committee on Education and the Workforce; Committee on Transportation and Infrastructure; and the Committee on Armed Services.


71 Salih, 2005, October.
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<tr>
<td>37</td>
<td>PA 209 Seizure of voice-mail messages pursuant to warrants</td>
<td>U.S.A.</td>
<td>N/A</td>
<td>IAW ser. 34</td>
<td>2001</td>
<td>Respond to 9/11, track widespread terrorists, with lower burden of proof.</td>
<td>Amends Title III Wiretap Statute. UC: Replaces probable cause with suspicion.</td>
</tr>
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<td>38</td>
<td>PA 213 Sneak &amp; Peek</td>
<td>U.S.A.</td>
<td>N/A</td>
<td>IAW ser. 34</td>
<td>2001-2015</td>
<td>Respond to 9/11, search with delayed notification of warrant. Avoid tipping off terrorist cells while gathering evidence and intel. Standardize SOPs.</td>
<td>UC: Use in everyday crime investigation, possibly abrogates Fourth Amendment. Electronic version of a “no-knock warrant.”</td>
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66 The letter stated that “[t]he Committee is interested in hearing from you [John Ashcroft] and FBI Director Robert F. Mueller concerning the Department of Justice’s use of [the Act’s new investigative tools to combat new terrorist threats against the United States] and their effectiveness. In light of the broad scope of the Act, we are initially seeking written responses to the following questions, and we plan to schedule a hearing in the near future to allow further public discussion of these and other issues relating to the Department of Justice’s activity in investigating terrorists or potential terrorist attacks” (Frank James Sensenbrenner & John Conyers Jr. (June 13, 2002). Letter to Attorney General John Ashcroft). Only 28 questions were answered publicly, with seven answered under separate cover to the Committee (Act Asst AG Daniel J. Bryant (July 26, 2002). “Response to 50 questions.” United States Department of Justice, retrieved from http://judiciary.house.gov/Media/PDFS/patriotresponses101702.pdf).


68 Traditional distinctions between foreign and domestic are much less clear than in the past, now that the same communications devices, software, and networks are used globally by friends and foes alike. Internet servers in the same network may be located in different countries. These technological innovations, as well as changes in the nature of potential asymmetric threats, have legal implications for the right of privacy, strategic relationships among nations, and the levels of innovation and information-sharing practices that underpin the global economy.

70 The intelligence gathering process can be lengthy when authorities are trying to conduct network or link analysis of the members of a terrorist cell.

71 Sneak and peek warrants are especially beneficial to illegal drug manufacturing investigations because they allow investigative teams to search the premises for chemicals and drug paraphernalia so that they can return with a traditional search warrant. (bp)

72 See Timm (2011, 26 October) on how USA PATRIOT Act powers, particularly sections 213, 215, and 505 are being used to sidestep civil liberties.
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<td>39</td>
<td>PA 215 Search for “any tangible thing” and obtain information “relevant to an authorized [national security] investigation”</td>
<td>Global</td>
<td>Post enactment: House Committee on Judiciary posed seven questions re the impact of PA 215 on news media.</td>
<td>IAW ser. 34</td>
<td>2001-2015</td>
<td>Respond to 9/11, collect metadata (i.e., an Administrative subpoena)</td>
<td>Possibly abrogates Fourth Amendment. Strong argument that PA’s language does not authorize collection of metadata, and certainly not content of telephony. Known as the “library records” or the “business records” clause. UC: American Library Association (ALA) becomes one of the staunchest supporters of civil liberties.</td>
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<td>40</td>
<td>PA 215 Bulk collection of records</td>
<td>Global</td>
<td>Public debate ongoing</td>
<td>IAW ser. 34</td>
<td>2001-2015</td>
<td>Legal basis for collection. Extend targeted surveillance to mass surveillance. Obtain metadata.</td>
<td>The word “relevant” used to encompass almost any possible search term.</td>
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<td>41</td>
<td>PA 215 Non-disclosure (i.e. Gag) order</td>
<td>U.S.A.</td>
<td>Public debate ongoing</td>
<td>IAW ser. 34</td>
<td>2001-2015</td>
<td>Respond to 9/11, prevent warning of terrorists. Facilitate timely search and seizure. Remove possibility of a civil suit by service provider or customer.</td>
<td>UC: Possibly abrogates First Amendment, affects expression of political dissent.</td>
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<td>42</td>
<td>PA 216 Modification of authorities relating to use of pen registers and trap and trace devices</td>
<td>U.S.A.</td>
<td></td>
<td>IAW ser. 34</td>
<td>2001-2015</td>
<td>Respond to 9/11. Detect key words and traffic patterns related to terrorism. Justified FBI Carnivore (DCS100) ISP screening to queue deeper searches.</td>
<td>UC: Replaces probable cause with suspicion.</td>
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<td>43</td>
<td>PA 219 Single-jurisdiction search warrants for terrorism</td>
<td>U.S.A.</td>
<td></td>
<td>IAW ser. 34</td>
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<td>44</td>
<td>PA 312, 313 Banking regulations (SARs)</td>
<td>Global, if SWIFT transaction incl.</td>
<td></td>
<td>IAW ser. 34</td>
<td>2001-2015</td>
<td>Respond to 9/11, Reinforce BSA 1970, Scrutinize foreign financial institutions, transactions; Prevent money laundering.</td>
<td>UC: Cause some ex-pat dual citizens to give up U.S. citizenship</td>
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| 45  | PA 326 Customer Identification Program (CIP) Joint Final Rule | Global, if SWIFT transaction incl. | IAW ser. 34 | 2001-2015 | Reinforce BSA 1970 and AML compliance programs
Prevent identity theft. | Used to rank customer risk of default, especially PEPs.
UCs: IRS use in white collar crime investigations. Possible consequence blackmail, political influence. Undermines probable cause. |
| 47  | PA 352 Anti-Money Laundering (AML) programs | Global, if SWIFT transaction incl. | IAW ser. 34 | 2001- | Requires:
1. Policies, procedures and controls designed to detect and prevent money laundering;
2. A compliance officer whose role is to oversee the program;
3. Training employees on how to detect and prevent money laundering; and
4. Periodic audits of the anti-money laundering program. | Redefines: “financial institutions” IAW BSA 1970, to include boat, car sales, travel agencies, pawn brokers; “insurance company” to include: (i) the issuing, underwriting, or reinsuring of a life insurance policy; (ii) the issuing, granting, purchasing, or disposing of any annuity contract; or (iii) the issuing, underwriting, or reinsuring of any insurance product with investment features similar to those of a life insurance policy or annuity contract, or which can be used to store value and transfer that value to another person. |
| 48  | PA 412 | 2 pgs.
Intl | IAW ser. 34 | “Mandatory detention of suspected terrorists; habeas corpus; judicial review.” | “The Immigration and Nationality Act (8 U.S.C. 1101 et seq.)” is amended.” |
|     | PA 412 (a) (6) | | | | |

79 For example, see Truth Technologies Sentinel™ global customer verification resource suite, located at truthtechnologies.com.
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<sup>80</sup> Section 552(a)(3) 5 U.S.C. is amended as follows:
(1) in subparagraph (A) by inserting "and except as provided in subparagraph (E)”, after "of this subsection”; and
(2) by adding at the end the following:
"(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. § 401a(4))) shall not make any record available under this paragraph to— (i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or (ii) a representative of a government entity described in clause (i).” In effect, this amendment prohibits the disclosure of information by an U.S. IC agency.

<sup>81</sup> Given the massive changes to government structure being contemplated, committee consideration was given by the House Homeland Security (Select), House Agriculture, House Appropriations, House Armed Services, House Energy and Commerce, House Financial Services, House Government Reform, House Intelligence (Permanent Select), House International Relations, House Judiciary, House Science, House Transportation and Infrastructure, House Ways and Means.

<sup>82</sup> The IRTPA of 2004 contained: 1) National Security Intelligence Reform Act of 2004 in Title I; 2) the Stop Terrorist and Military Hoaxes Act of 2004; 3) the Weapons of Mass Destruction Prohibition Improvement Act of 2004; 4) the Prevention of Terrorist Access to Destructive Weapons Act of 2004 in Title VI; and the 5) 9/11 Commission Implementation Act of 2004 in Title VII. Notably Title VI also described the “Pre-trial Detention of Terrorists.”

<sup>83</sup> Long title - An Act to reform the intelligence community and the intelligence and intelligence-related activities of the United States Government, and for other purposes. The IRTPA consists of eight titles: 1) "Reform of the intelligence community", also known as the National Security Intelligence Reform Act of 2004; 2) "Federal Bureau of Investigation"; 3) "Security clearances"; 4) "Transportation security"; 5) "Border protection, immigration, and visa matters"; 6) "Terrorism prevention"; 7) Implementation of 9/11 Commission recommendations”, also known as the 9/11 Commission Implementation Act of 2004; and 8) "Other matters."
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85 The Bush Administration threatened to veto the 2006 Defense Appropriations bill over S.Amdt.1977, 109th Cong., 2005. (Suleman, 2005, p. 257). The bill was permitted to proceed once the following three amnds were added: 1) legal defenses available to U.S. personnel accused of abuse, 2) procedure for status review for detainees outside of the United States, and 3) detainee treatment training for Iraqi forces.
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| 55  | USA PATRIOT Act Additional Reauthorization Amendments Act of 2006, Pub. L. 109-178, 120 Stat. 278 (2006) | 5 pgs. | 10 Feb 2006 – S. 2271 intro by Sen. Snow. 13 Feb 2006 – reported by committee | 1 Mar 2006 – passes Sen. 95-4. 7 Mar 2006 – passes H.R. 280-138. 9 Mar 2006 – POTUS signs | 9 Mar 2006- | “A bill to clarify that individuals who receive FISA orders can challenge nondisclosure requirements, that individuals who receive national security letters are not required to disclose the name of their attorney, that libraries are not wire or electronic communication service providers unless they are required to disclose the name of their attorney to identify to the Director or requesting official the person to whom such disclosure will be made or was made prior to the request, but permits withholding the identity of an attorney to whom a disclosure was or will be made to obtain legal advice or assistance with respect to the request. Considers a library not to be a wire or electronic service communication provider for purposes of granting national security letters, unless the library provides “electronic communication service.” | Guantanamo Bay from applying for a writ of habeas corpus. President Bush’s signing stmt, para. 8, extends his authority beyond Congressional oversight.  
86 “The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks” (http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-1.html). This POTUS stmt is possibly at odds with the division of powers outlined in the U.S. Constitution, Art. I, x 9, when the authority to suspend the writ of habeas corpus is considered. However, this would not be without precedent is U.S. history given that President Abraham Lincoln suspended habeas corpus, called out the state militias, appropriated the funds to buy 19 ships, enlarged the Army, and ordered Southern ports blockaded during the Civil War – all without Congressional approval (Scheppel, 2006, pp. 218-219). While Lincoln demonstrated decisive leadership at a critical juncture in U.S. history, he also set a precedent through his decision to postpone calling a special session of Congress until July 1861 and ruling through decree. Congress approved all of Lincoln’s executive measures in arrears, less the suspension of habeas corpus, Congress extended the executive measures for the remainder of the War. The only documented challenge to executive authority occurred in Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866), in which the Court confirmed the old English common law precedent that military law could not apply to civilians where the ordinary courts were open.  
87 Long title - A bill to clarify that individuals who receive FISA orders can challenge nondisclosure requirements, that individuals who receive national security letters are not required to disclose the name of their attorney, that libraries are not wire or electronic communication service providers unless they provide specific services, and for other purposes (https://www.govtrack.us/congress/bills/109/2271). Amends federal criminal law, the Fair Credit Reporting Act, the Right to Financial Privacy Act, and the National Security Act of 1947 to require a person making a disclosure to identify to the Director or requesting official the person to whom such disclosure will be made or was made prior to the request, but permits withholding the identity of an attorney to whom a disclosure was or will be made to obtain legal advice or assistance with respect to the request. Considers a library not to be a wire or electronic service communication provider for purposes of granting national security letters, unless the library provides "electronic communication service." (https://www.govtrack.us/congress/bills/109/2271/summary).  
88 This was a vote to pass S. 2271 (109th). It was taken under a House procedure called “suspension of the rules” which is typically used to pass non-controversial bills. Votes under suspension require a 2/3rds majority. A failed vote under suspension can be taken again. (https://www.govtrack.us/congress/votes/109-2006/h20).  
89 "The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." (http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/print/20060309-8.html)  
90 Senator Leahy condemned POTUS’ statement as “nothing short of a radical effort to re-shape the constitutional separation of powers and evade accountability and responsibility for following the law ... The President’s signing statements are not the law, and we should not allow them to be the last word. The President’s constitutional duty is to faithfully execute the laws as written by the Congress. It is our duty to ensure, by means of congressional oversight, that he does so” (Leahy: President Strikes Again In PATRIOT Act Bill Signing Statement; Suggests He’ll Pick And Choose Which Parts Of Law To Follow” (Press release). Office of Patrick Leahy, Senator for Vermont. 2006-03-15. |
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<td>57</td>
<td>Executive Order (EO) 13440 “Interpretation of the Geneva Conventions Common Art. 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency”</td>
<td>5 paras.</td>
<td>N/A</td>
<td>N/A</td>
<td>20 Jul 2007 – 22 Jan 2009 (Rescinded by President Obama EO 13493)</td>
<td>Orders limited compliance with the Geneva Conventions in the treatment of captives held in extrajudicial detention by the CIA.</td>
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93 Critical to an understanding of the FISA structure are its definitions of terms such as “electronic surveillance” and “foreign intelligence information.” Pub.L. 110-55 limits the construction of the term “electronic surveillance” so that it does not cover surveillance directed at a person reasonably believed to be located outside the United States. The act also creates a mechanism for intelligence information acquisition, without a court order, under a certification by the Director of National Intelligence (DNI) and the Attorney General (AG), of foreign intelligence information concerning a person reasonably believed to be outside the United States. The Protect America Act provides for review by the Foreign Intelligence Surveillance Court (FISC) of the procedures by which the DNI and the AG determine that such acquisition does not constitute electronic surveillance.
### UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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<tr>
<td>59</td>
<td>National Defense Authorizatio n Act (NDAA) for Fiscal Year 2008</td>
<td>601 pgs. Omnibus</td>
<td>H.R. 1585 (110th) intro 20 Mar 2007 by Rep. I. Skelton (D-MIS) 17 May 2007 20 May 2007 1 Oct 2007 12 Dec 2007 14 Dec 2007 28 Dec 2007</td>
<td>In addition to the votes below, 42 minor votes were held(^{96}) H.R. 397-25 Sen. 92-3 H.R. 370-49 Sen. 90-3 POTUS vetoed(^{96}) (No Override Attempt)</td>
<td>Did not become law</td>
<td>Long title(^{100}) Passed House Reported by Armed Svcs Ctte to Ctte of the Whole House Passed Senate w/changes H.R. agrees to Conference Report(^{101}) Sen. agrees to Conference Report</td>
<td>The NDAAs are among the most labor intensive Bills due to their omnibus scope. The Bush Administration veto was forecast seven months before the event – as per fn99.</td>
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\(^{94}\) The ACLU describes the PAA as the “Police America Act.”

\(^{95}\) Bills tabled under suspension in the other chamber require a clear two-thirds majority.

\(^{96}\) In other words, electronic surveillance may occur within the U.S.A. if directed at someone who is reasonably believed to be located outside the U.S.A. This might suggest that under FISA, prior to the passage of Sect. 105A of Pub. L. 110-55, some interceptions directed at a person abroad covered by the language of these subsections might have been regarded by the FISC as requiring court authorization. Subsection 101(f) (4) of the act defines “electronic surveillance” under FISA to include “the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.” Subsection 101(f) (4) does not explicitly address the location of the parties to the communication or the location of the acquisition of the information involved.

\(^{97}\) Sub-sect. 101(f) (4) of FISA appears to cover some communications between: 1) parties in the United States, 2) between a party in the United States and a party outside the United States, or 3) between parties abroad, if the other requirements of the subsection were satisfied.

\(^{98}\) See Details/Votes at [https://www.govtrack.us/congress/bills/110/hr1585](https://www.govtrack.us/congress/bills/110/hr1585)

\(^{99}\) Bush Administration advisors had noted problems with the draft H.R. 1585 as early as 16 May 2007, the day before the House passed it. See [http://www.presidency.ucsb.edu/ws/index.php?pid=24352](http://www.presidency.ucsb.edu/ws/index.php?pid=24352)

\(^{100}\) Long title: “To authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.”


\(^{102}\) “Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.” Press Release, 28 Jan 2008, retrieved from [http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/print/20080128-10.html](http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/print/20080128-10.html)
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<td>62</td>
<td>Executive Order (EO) 13491 - Ensuring Lawful Interrogation 8[106]</td>
<td>6 paras.</td>
<td>N/A</td>
<td>N/A</td>
<td>22 Jan 2009</td>
<td>Adopts Common Article 3 Standards of the Geneva Conventions “as a minimum baseline.” Prohibits CIA from holding detainees other than on a “short-term, transitory basis” and to limit interrogation techniques to those included</td>
<td>LAW Sec.4. (a), “The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.” UC. These EO limitations are not part of U.S. law, and could be overturned by a future President with the stroke of a pen. According to the SSCL, these limitations should be enshrined in legislation.(bp)</td>
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104 Section 702 authorizes the NSA PRSIM program.
105 CDT seeks the following limitations to Section 702 collection: 1) refined purpose for collection; 2) have a higher standard for collection targeting (i.e., probable cause rather than suspicion); 3) prohibit “about” collection, which are essentially fishing expeditions waiting for target related data to emerge; and 4) review surveillance directives to ensure that they comply with the law. CDT seeks the following retention guidelines: 1) closing the “backdoor search loophole,” in software which permits unauthorized access to computers; 2) limiting domestic criminal investigative use; and 3) removing the crypto-analytic exception. See also LIBERTY AND SECURITY IN A CHANGING WORLD: Report and Recommendations of The President’s Review Group on Intelligence and Communications Technologies, 12 December 2013.
## UNINTENDED CONSEQUENCES IN INTERNAL SECURITY

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107 FM 2-22.3, Human Intelligence Collector Operations

108 Long title: “An Act to authorize appropriations for fiscal year 2010 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.”

109 Boumediene v. Bush, 553 U.S. 723 (2008), was a writ of habeas corpus submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps in Cuba. The Supreme Court received over two dozen briefs of amicus curiae on the case, including some written strictly on the history and application of Habeas Corpus in England, Scotland, Hanover, Ireland, Canada, British-controlled territories, India, and the United States. Twenty-two amicus briefs were filed in support of the petitioners, Boumediene and Al Odah, and four were filed in support of the respondents, the Bush Administration. Argued December 5, 2007; decided June 12, 2008. Foreign terrorism suspects held at the Guantanamo Bay Naval Base in Cuba have constitutional rights to challenge their detention in United States courts. 476 F.3d 981, reversed and remanded.

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115 2012 NDAA, s. 1021 - Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force.

116 2012 NDAA, s. 1022 - Military custody for foreign al-Qaeda terrorists.

117 Example of how important provisions can be buried within omnibus legislation.

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<td>69</td>
<td>Cyber Intelligence Sharing and Protection Act of 2014</td>
<td>27 pgs.</td>
<td>Intro as H.R. 3523 in 112th Congress by Passed House 26 Apr 2012 (248-168)</td>
<td>Has not become law</td>
<td>Long title Amends NSA 1947, which</td>
<td>CISPA has garnered numerous tech industry</td>
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112 https://www.govtrack.us/congress/bills/112/hr1540, click on “Show 35 additional votes.”
113 Conference Reports resolve differences between the House and Senate versions of the proposed bill.
114 PANDA Video, 2014, timestamp 14:44, slide entitled “How is it bad?” comparing AUMF and NDAA s.1021 (b) (1) on the left and NDAA s.1021 (b) (2) on the right. AUMF and NDAA s.1021 (b) (1) are the same, which provides a certain uniformity of understanding, and reinforcement of the AUMF. s.1021 (b) (2) is much more expansive as it includes associates with potentially tangential links to the primary suspects or perpetrators. Thus, 2012 NDAA expands the targeting profile, the countries being protected (coalition allies), and the time frame to the present from the 9/11 attacks. s. 1021 (b) (2) facilitates the arrest and indefinite detention of suspected terrorists – or their helpers, or simply their families – before an attack is launched. While more cost effective to pre-empt an attack rather than deal with consequence management, it also negates the basic common law protections against arbitrary prosecution.
115 People Against the National Defense Act (PANDA) is a civil liberties protection organization focused on potential for abuse of ss.1021-1022 of 2012 NDAA. President Dan Johnson organized a chapter at Bowling Green University in Jan 2012 before expanding to national scope in Apr 2012. PANDA launches information campaign named “Operation Homeland Liberty.”
116 See Christopher Hedges, Democracy Now: http://www.democracynow.org/2012/1/17/journalist_chris_hedges_sues_obama_admin
117 Christopher Hedges, Daniel Ellsberg, Jenifer Bolen, Noam Chomsky, Alexa O’Brien, US Day of Rage, Kai Wargalla, Hon. Brigitta Jonsdottir, M.P. (Plaintiffs-Appellees) v. Barack Obama (individually and as a representative of the United States of America), Leon Panetta (individually and as a representative of the Department of Defense) (Defendant-Appellants), John McCain, John Boehner, Harry Reid, Nancy Pelosi, Mitch McConnell, Eric Cantor as representatives of the United States of America (Defendants). The plaintiffs contended that Section 1021(b) (2) of the law allows for detention of U.S. citizens and permanent residents taken into custody in the U.S. on “suspicion of providing substantial support” to groups engaged in hostilities against the U.S., (such as al-Qaeda and the Taliban respectively), that the NDAA arms the U.S. military with the ability to imprison journalists, activists and human-rights workers for indefinite periods based on vague allegations. On 16 May 2012, US District Judge Katherine B. Forrest ruled in a 68-page opinion that Section 1021 of the NDAA was unconstitutional because it violates the First and Fifth Amendments in response to the lawsuit filed by journalist Chris Hedges, Noam Chomsky, Naomi Wolf and others. On 17 July 2013, the Second Circuit Court of Appeals overturned the District Court’s permanent injunction blocking the indefinite detention powers of the NDAA because the plaintiffs lacked legal standing to challenge the indefinite detention powers of the NDAA. The Supreme Court declined to hear the case on 28 April 2014, leaving the Second Circuit decision intact.
118 Long title: “To provide for the sharing of certain cyber threat intelligence and cyber threat information between the intelligence community and cybersecurity entities, and for other purposes.”
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<td>1</td>
<td>Protection Act(^{123}) (CISPA)</td>
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<td>Mike Rogers (R-MI) 30 Nov 2011. Reintro as H.R. 624 in 113(^{th}) Congress by Mike Rogers (R-MI) 13 Feb 2013(^{124}) Received in the Senate 22 Apr 2013. Reintro as H.R. 234 by Dutch Ruppersberger (D-MD) on 8 Jan 2015 and has since been Referred to two additional committees 2 Feb 2015, by HPSCI &amp; SSCI.</td>
<td>(failed to become law when it did not pass the Senate in the same session) Passed House 18 Apr 2013 (288-127)</td>
<td>N/A</td>
<td>lacks provisions for cybersecurity. Intends to establish a multi-agency National Cyber Security Council chaired by DHS to coordinate efforts across U.S. society, including assessing the risks and vulnerabilities of CI systems, which control the flow of money, energy, food, transportation and other vital resources that the economy needs to function. (Chabrow, 2012, 19 July). (BP or WP?)</td>
<td>supporters;(^{126}) and broad-based opposition from many civil rights orgs.(^{127}) The proposed National Cyber Security Council and Center could facilitate info sharing amongst private sector and the federal government depts/ agencies to share threats, incidents, best practices and fixes, while preserving the civil liberties and privacy of users. It could also facilitate a return to the Total Information Awareness prgm which ran from Feb to May 2003 until dismantled by Congress. UC? Bill was condemned by Internet privacy and civil liberties advocates - including a coalition of 40+ organizations that includes ACLU and EFF for its very broad language and lack of limits on how and when the government can monitor Internet browsing information. Reddit co-founder Alexis Ohanian posted a YouTube video calling for Google, Facebook and Twitter to understand that CISPA would invalidate their current privacy policies with their respective user bases (Smith, 2013, 12 April).</td>
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\(^{123}\) Prior attempts to pass a cybersecurity bill include: 1) S, 2105 Cybersecurity Act, 15 Feb 2012, Reported by Ctee, reintroduced 1 Jul 2012 w/o federal imposition of security standards on ISPs, as well as including stronger privacy and civil liberties protections (Chabrow, 2012, 19 July); 2) S. 2151 (Secure IE), 1 Mar 2012; 3) H.R. 3674 (Precise Act), reported by committee 18 Apr 2012 by Representative Dan Lungren (R-CA) (https://www.govtrack.us/congress/bills/112/hr3674). The draft bill changed as “Lungren dropped many of the critical infrastructure and DHS provisions” due to the House (Smith, 2012, 19 April); 4) H.R. 4257 (Federal Information Security Amendment Act of 2012), reported by committee 18 Apr 2012 (https://www.govtrack.us/congress/bills/112/hr4257) by Representative Darrell Issa (R-CA).  

\(^{124}\) H.R. 624: To provide for the sharing of certain cyber threat intelligence and cyber threat information between the intelligence community and cybersecurity entities, and for other purposes. Retrieved from http://www.gpo.gov/fdsys/pkg/BILLS-113hr624ih/pdf/BILLS-113hr624ih.pdf  

\(^{125}\) CISPA is supported by trade associations representing more than eight hundred private companies, including the Business Software Alliance, CTIA – The Wireless Association, Information Technology Industry Council, Internet Security Alliance, National Cable & Telecommunications Association, National Defense Industrial Association, TechAmerica and United States Chamber of Commerce, in addition to individual major telecommunications and information technology companies like AT&T, IBM, Intel, Oracle Corporation, Symantec, and Verizon (http://intelligence.house.gov/hr-3523-letters-support; Couts, 2012, 12 April). Google has not taken a public position on the bill (Sasso, 2012, 23 April) but has shown previous support for it, and now says they support the idea but believe the bill needs some work (https://www.rt.com/usa/congress-house-bill-cispa-031/). Google, Microsoft, and Yahoo leaders are also on the executive council of TechNet, a technical trade association of 70 plus companies which sent a letter supporting CISPA in April 2013 (Moyer, 2013, 13 April; Smith, 2013, 12 April).  

\(^{126}\) ACLU, EFF, CDT, TCP, the Sunlight Foundation, Reporters Without Borders, etc. Mozilla, owner of Firefox browsers has stated opposition to the bill. OMB of the Executive Office of POTUS.
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129 As an omnibus bill, the USA FREEDOM Act had extensive committee consideration by Judiciary, Permanent Select Committee on Intelligence, Financial Services, and the United States House Judiciary Subcommittee on Crime, Terrorism, Homeland Security and Investigations.
130 Long title: “To reform the authorities of the Federal Government to require the production of certain business records, conduct electronic surveillance, use pen registers and trap and trace devices, and use other forms of information gathering for foreign intelligence, counterterrorism, and criminal purposes, and for other purposes (https://www.govtrack.us/congress/bills/114/hr2048).”
131 These critics include: 1) former NSA crypto-mathematician William Binney, who worked three decades at NSA before retiring in 2001. According to Binney, the USA Freedom Act, which was seen as having the best chance to limit surveillance “won’t do anything” if it passes. “Why do you think NSA [and other intelligence agencies] support it?”; 2) Thomas Drake, a former NSA senior executive prosecuted unsuccessfully under the Espionage Act before pleading guilty to a misdemeanor in 2011, who called the bill the “Free-dumb Act 2.0,” and said that he sees it as a ploy by government officials “to keep the status quo in place.” Drake also stated that the fixation on the call record program in public debate is unfortunate, because NSA Internet surveillance is far broader and more invasive, and that “It’s a shiny, shiny bright spot, [but] there’s a whole lot more being collected,” he says, including a “staggering” amount of American communications. Drake believes support from the Obama administration for the Freedom Act is motivated in part by a desire to hobble lawsuits against the call record program, three of which are pending with appeals courts and may lay the groundwork for a major Supreme Court privacy ruling; and 3) Kirk Wiebe, formerly a senior NSA analyst, who says that the anticipated Freedom Act likely will be “more of the same” and is “not going to change anything” in a meaningful way. Like Drake, he has no hope for meaningful reform and doesn’t believe efforts to lobby Congress would work. “We’ve tried,” he says, “It makes no difference.” He believes well-funded government contractors and powerful, “co-opted” lawmakers who lead key committees make up a virtually unstoppable surveillance-industrial complex (Nelson, 2015, 27 April).
Appendix E

Legal System Definitions

The research approach that guides this examination of internal security law is the case study method. The cases selected compare the history of internal security law in three similar nations over a century seeking common problems, solutions, and gaps. Given that much of the primary source literature review and discussion examines internal security law as promulgated through Acts of Parliament in the U.K. and Canada, or in the U.S. Congress, it is helpful to describe the types of legal systems which govern these nations.

**Administrative law.** Administrative law governs the activities of administrative agencies of government. Government agency action can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is considered a branch of public law. The executive agencies may rule through the promulgation of regulations on an emergency basis through an *administrative law* process known as *rulemaking*. The growth in regulations in peacetime has led to criticism that the rulemaking process reduces the transparency and accountability of democratic government.¹

**Civil law legal systems.** The *civil law* (jus civil or civilian law) legal system originates in Roman law in the Justinian Code. Civil law is widely employed in Europe, and in nations which were colonized by European powers. Its most prevalent characteristic is that its core principles are codified into a referable system which serves as the primary source of law. Civil law proceeds from abstract concepts, formulates general principles, and distinguishes substantive rules from procedural rules (Fromont, 2001, p. 8). Civil law holds case law to be secondary and subordinate to statutory law, and thus can be contrasted with common law systems whose intellectual framework comes from judge-made decisional law. In contrast to common law systems, civil law jurisdictions deal with case law apart from any precedent law value, and courts generally decide cases using codal provisions on a case-by-case basis, without reference to other (or even superior court) judicial decisions. In recent years, an increasing use of precedent law

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¹ Most countries that follow the principles of common law have developed procedures for judicial review that limit decisions made by administrative law bodies. These procedures for judicial review may be coupled with legislation that establish standards for rulemaking. *Administrative law* may also apply to review of decisions of quasi-public bodies, e.g., disciplinary boards, non-profit corporations, and other decision-making bodies that affect the legal rights of members of a particular group or entity.
has been observed to be influencing civil law jurisprudence in many nations’ highest courts (Reynolds, 1998, p. 58).

**Civil law in Quebec.** The Canadian Province of Quebec (Québec en français) employs a bi-juridical system based on the Napoleonic Civil Code for areas under provincial jurisdiction, such as education, health care, highways safety, municipal and provincial taxes, small claims, youth justice, and the criminal and penal sectors (http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm#quebec). Quebec is also governed by Federal laws - which originate in common law. The Supreme Court of Canada has the final jurisdiction authority in all criminal, civil, and constitutional matters (http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm#supreme).

Preparation for, and the conduct of war is a federal responsibility in Canada, as is the prevention of terrorism - and counter-terrorist response. (One of the case studies examined in this dissertation is the October Crisis of 1970, in which Canadian executive authorities worked with Quebec provincial and municipal authorities to combat the separatist Front de Libération du Québec (FLQ).

**Common law legal systems.** Common law (also known as case law or precedent law) is law developed by judges through court decisions that decide individual cases, as opposed to statutes adopted through the legislative process, or regulations issued by the executive branch of government. In common law legal systems, a precedent or authority is a principle or rule established in a previous legal case that is either binding on, or of high persuasive value for a court when deciding subsequent cases based on similar issues or facts. Common law legal systems place high value on deciding cases according to consistent principles so that similar facts will yield similar and predictable outcomes, and observance of precedent is the legal means by which consistency of outcomes is attained.

Common law is the basis of approximately one-third of the world’s legal systems, including the United Kingdom, where it originated; the United States, and Canada, where it forms the legal system less provincial areas of jurisdiction (e.g. education and health care) in the Province of Quebec. Case law is also “A professional name for the aggregate of reported cases as forming a body of jurisprudence; or for the law of a particular subject as evidenced or formed by the adjudged cases; in distinction to statutes and other sources of law”
Common law is taught and refined through the examination of previous case studies. The body of past common law binds judges that make future decisions, just as any other law does, to ensure consistent treatment. This legal doctrine of judicial precedent is known formally as stare decisis.

**Criminal law.** According to legal scholar Lloyd Duhaime, criminal law is “That body of the law that deals with conduct considered so harmful to society as a whole that it is prohibited by statute, prosecuted and punished by the government, and:

The body of law which regulates the repression of crime; prohibition of specified conduct which, in the view of the government, as expressed by statute, interferes with the peace and good order of society to the extent that the proof of such conduct will result in criminal punishment upon the transgressor, in either a fine or a denial of liberty (e.g. jail; incarceration). (http://www.duhaime.org/LegalDictionary/C/CriminalLaw.aspx)

The interaction between federally derived internal security law and criminal law will be analyzed throughout the study, with a view to offering best practices on facilitating its application.

**Statutory vs. regulatory law.** Statutes are the “Body of written laws that have been adopted by the legislative body” (http://thelawdictionary.org/statute-law/). Statutes are promulgated by legislatures in anticipation of emerging social or technological dilemmas which tests a society’s acceptance of a behavior, business practice, or social custom. Regulatory law usually means law promulgated by an executive branch agency under a delegation from a legislature.

**The United States Code.** The Code of Laws of the United States of America, (abbreviated as Code of Laws of the United States, United States Code, U.S. Code, or U.S.C.) is the official compilation and codification of the general and permanent federal statutes of the United States of America (http://www.gpo.gov/help/index.html#about_united_states_code.htm). The U.S. Code contains 51 well-organized Titles, or subject matter areas, and eliminates expired sections. Private laws, which apply to a limited number of people; and appropriation acts and budget laws, which apply for a limited period of time, such as for one fiscal year, are not included in the U.S.C.
Inaugurated in 1926, the next main edition was published in 1934, and subsequent main editions have been published every six years since 1934 by the Office of the Law Revision Counsel (LRC) of the House of Representatives. The official version of those laws not codified in the United States Code can be found in United States Statutes at Large. Of the 51 titles, the following titles have been enacted into positive (statutory) law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49, and 51. When a title of the Code is enacted into positive law, the text of the title becomes legal evidence of the law. Titles that have not been enacted into positive law are only prima facie evidence of the law. In that case, the Statutes at Large still govern. The U.S. Code does not include regulations issued by executive branch agencies, decisions of the Federal courts, treaties, or laws enacted by State or local governments. Regulations issued by executive branch agencies are available in the Code of Federal Regulations. Proposed and recently adopted regulations are found in the Federal Register.

**Summary of legal comparisons**

Generally speaking, few laws come into being without reference to the preceding body of statutory law, which is described through the legal concept of precedent law. Furthermore, there is almost always some sort of threat which gives rise to calls for the passage of legislation which facilitates extraordinary measures by the state to protect its interests, and the safety of its people. This observation is particularly relevant in the case of Britain and the U.K., which has been dealing with internal security measures through the common law legal system for almost a millennium. One of the unifying principles across civil and common law is the doctrine of *habeas corpus*. A writ of habeas corpus is intended to allow a detained person to have charges brought against them in court in a reasonable period of time – as opposed to being detained.

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3 “Positive law typically consists of enacted law - the codes, statutes, and regulations that are applied and enforced in the courts. The term derives from the medieval use of positum (Latin “established”), so that the phrase positive law literally means law established by human authority.” Black’s Law Dictionary 1200 (8th ed. 2004). Source – fn2 in http://uscode.house.gov/codification/term_positive_law.htm

4 In some cases, *statutory law* may simply codify *common law* developments. Many international treaties reflect this. For example, the United Nations Convention on the Law of the Sea codified such common law developments as a *territorial sea* and an *exclusive economic zone*. 
indefinitely with no charges. While traditionally a criminal law remedy, habeas corpus has been applied in cases concerning child custody immigration, mental health and, more recently, in national or homeland security. The doctrine of habeas corpus is of particular importance in internal security crises, as it sets limits (in theory) on the length of detention without trial. The predominant feature of martial law is the suspension of habeas corpus, effectively denying persons detained from having their detention challenged quickly by an independent court or judge during the suspension.
## Appendix F

### Instances of Spy Fiction Influencing Policy

<table>
<thead>
<tr>
<th>Ser (a)</th>
<th>Time (b)</th>
<th>Selected Fiction (c)</th>
<th>Sales/Readership (d)</th>
<th>Policy Impact (e)</th>
<th>Remarks (f)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1871-1914</td>
<td>Approx. 400 books and uncounted short stories and newspaper articles published between the birth of Germany and the outbreak of World War I (Reiss, 2005).</td>
<td>Millions</td>
<td>Contributes to existing fears through a fusion of racial prejudice, patriotism, profit, and paranoia.</td>
<td>(1) Wood (2014) opines that the invasion scare genre “is best understood not simply as objective assessments of Britain’s liability to invasion, but as a literary response to the change (social, economic, political, military…) in Britain’s circumstances from the late-Victorian period to the outbreak of war in 1914.” (2) Invasion scare literature genre instrumental in creating - and sustaining - a four-decade long climate of fear in which American sociologist Robert K. Merton’s self-fulfilling prophecy or self-confirming beliefs (Wohlstetter, 1981, pp. 32-33) came to pass.</td>
</tr>
</tbody>
</table>


| 2 | 1871 | George Chesney’s *The Battle of Dorking: Reminiscences of a Volunteer* | Unknown | (1) Kirkwood (2012) asserts that British Army maneuvers held in Oct 1871 included a corps of 33K men using Prussian infantry tactics due to the influence of this seminal work.  
(2) Kirkwood (2012, p.16) notes that its frequent citation by Members of both Houses of Parliament, and its citation by senior military officers engaged in public and private debate backs this assertion, as does Chesney’s integration into the pro-military reform wing of the Conservative Parliamentary Party of the 1890s.  
(3) First Lord of the Admiralty Lord Selbourne called for a feasibility study by NID which concluded that the fictional plan was not feasible (Andrew, 1986, p. 37).  
(4) Stafford (1988, p. 34) quotes Childers’ biographer Andrew Boyle (1977, p. 111), who notes that “For the next ten years, Childers’ book remained the most powerful contribution of any English writer to the debate on Britain’s alleged military unpreparedness.”  
(5) Knightley (1986, p. 17) notes that Winston Churchill had stated that the threat posed by the fictional Baltic Sea invasion plan led to the establishment of Royal Navy bases at |
The doyen of contemporary British military historians, John Keegan (2002, p.4), describes *The Riddle of the Sands* as “the first serious novel of intelligence to appear and still one of the best.” |

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1 Childers’ intent in writing the book was clearly to arouse public opinion to demand government action. He added a postscript, “Is it not becoming patent that the time has come for training all Englishmen systematically either for the sea or for the rifle?” (Andrew, 1986, p. 37).
Invergordon, Firth of Forth, and Scapa Flow.

<p>| | | | |</p>
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<th></th>
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</thead>
<tbody>
<tr>
<td>4</td>
<td>1890-1927</td>
<td>William Le Queux(^2) (selected novels)</td>
<td>Most of his 200 novels were presented in serialized form in daily newspapers (Stafford, 1988, p. 15), which ensured widespread readership and advertising.</td>
</tr>
<tr>
<td></td>
<td>1894-1904</td>
<td><em>The Great War in England 1897</em> (1894)</td>
<td>Unknown, but issued in 16 editions. Plausible plot given Anglo-French competition in Africa. Fashoda Incident on the White Nile river in 1898 almost leads to war.</td>
</tr>
</tbody>
</table>

\(^2\) Le Queux’s massive oeuvre includes approximately 200 works which concerned the perceived German threat against the United Kingdom and the British Empire. His output was unmatched by any of his contemporaries. Le Queux published an average of five novels a year between 1890 and his death in 1927 (Moran & Johnson, 2010, p.12; Stafford, 1988, p. 21). Most of his novels were presented in serialized form in daily newspapers (Stafford, 1988, p. 15), which ensured widespread readership and advertising. Le Queux is frequently described as the most influential author of invasion scare and spy fiction literature (James, 1954; Andrew, 1986; Knightley, 1986; Stafford, 1988; Clarke, 1992; Wolstenholme, 2013; Wood, 2014) writing in English before World War I. Le Queux’s best-known works are the anti-French and anti-Russian invasion fantasy *The Great War in England in 1897* (1894) and the anti-German invasion fantasy *The Invasion of 1910* (1906), the latter of which was a phenomenal bestseller, selling over a million copies (Reiss, 2005).
<table>
<thead>
<tr>
<th>Year</th>
<th>Title</th>
<th>Description</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1906-1914</td>
<td><em>The Invasion of 1910</em> (1906)</td>
<td>Over a million copies (Reiss, 2005) sold - with the assistance of publisher Lord Northcliffe, translated in 27 languages assuring worldwide readers.</td>
<td>(7) Lord Roberts aided Le Queux’s critical reception through supplying military expertise in planning the fictional invasion routes (Stafford, 1988, p. 24) as it aided his campaign for universal conscription. James (1954, p. 424); Andrew (1986, pp. 38-40), Knightley (1986, pp. 16-17), and Stafford (1988, p. 24) note that Lord Roberts read and contributed military expertise to the proofs of Le Queux’s (1906) <em>The Invasion of 1910.</em> (8) Lord Roberts, Colonel Edmunds (p. 18), and other influential members of British society became ardent, and publically vocal supporters of the German threat (Knightley, 1986, p. 9-13, 16). Lord Queux and Northcliffe influenced both their readership and decision-makers. “Next to the Kaiser, Lord Northcliffe has done more than any living man to bring about the war” - Bingham, 2005, para. 11 Acceleration of calls for universal male conscription and to reveal German spies.</td>
</tr>
<tr>
<td>1908-1909</td>
<td></td>
<td>(9) Prime Minister Henry Campbell-Bannerman denounces Le Queux’s <em>The Invasion of 1910</em> as “calculated to inflame public opinion abroad and alarm the more ignorant public at home.” (Reiss, 2005)</td>
<td>Indicates level of readership.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(9) Stafford (1988, p. 46) reports two speeches by British peers in the House of Lords that indicate acceptance of the prevailing worries of social degeneration and alien invasion.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(9) Lord Malmesbury warned the House in 1908 that “socialism, narcotic-like, has drugged the spirit of patriotism into forced slumber. Lord Curzon addressed the same audience in 1909, predicting that a successful German invasion would unchain forces of disorder throughout the land leading to a total subversion of the existing</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Event</td>
<td>Author/Source</td>
<td>Notes</td>
</tr>
<tr>
<td>------</td>
<td>----------------------------------------------------------------------</td>
<td>--------------------------------------------------</td>
<td>------------------------------------------------</td>
</tr>
<tr>
<td>1908</td>
<td>Lord Baden-Powell supported Lord Roberts and Le Queux’s worries of German invasion, even going so far as to predict a German invasion during the August 1908 Bank holiday (Stafford, 1988, p. 11).</td>
<td>(9) Stafford (1988, p.8) states that Field Marshal Lord F.S. Roberts (Head of the National Service League and Retired Commander-in-Chief of the Forces) told the House of Lords that there were 80K German reservists living in Britain waiting orders to mobilize.</td>
<td>Although the Boy Scout movement was not militaristic in the then maligned sense of the word, boys who enrolled “were exposed to a constant diet of patriotic nationalism and pro-war propaganda” (Paris, 2000, p. 108).</td>
</tr>
<tr>
<td>1909</td>
<td>Spies of the Kaiser: Plotting the Downfall of England (1909)</td>
<td>Unknown</td>
<td>Acceleration of calls to reveal German spies, assessed as numbering between 60K and 300K. (Actual German community was 44K). Third print run in 1909 alongside a contest in the Weekly News which offered a £10 Sterling reward for information leading to the arrest of German spies (Hiley, 1985, p.844).</td>
</tr>
<tr>
<td></td>
<td>(Cumulative impact of invasion scare literature, led by Le Queux)</td>
<td>Creation of Security Service (MO5, later MI5) and Secret Intelligence Service (later MI6)</td>
<td>Journalist Charles Lowe wrote in 1910, “Among all the causes contributing to the continuance of a state of bad blood between England and Germany.</td>
</tr>
</tbody>
</table>

3 Lord Baden-Powell was the hero of the siege of Mafeking and the founder of the Scouting Movement.
saboteurs, focusing his operational plans both before and during the war on defeating the saboteurs imagined by Le Queux.

perhaps the most potent is the baneful industry of those unscrupulous writers who are forever asserting that the Germans are only awaiting a fitting opportunity to attack us in our island home and burst us up.”

(Reiss, 2005) Moran & Johnson (2010, p.2) firmly assert that “early 20th century spy fiction was designed, above all else, to alert both the government and the people of England to the vulnerabilities of the British Empire.”

<table>
<thead>
<tr>
<th>Year</th>
<th>Date</th>
<th>Author</th>
<th>Book Title</th>
<th>Publication Details</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>1913</td>
<td>Saki.</td>
<td><em>When William Came: A Story of London Under the Hohenzollerns</em></td>
<td>Unknown</td>
<td>Much of the book is an argument for compulsory military service. Written several years in the future the book describes German occupation.</td>
</tr>
<tr>
<td>8</td>
<td>2007</td>
<td>Character “Jack Bauer” in 24</td>
<td>N/A</td>
<td>USSC Judge Antonin Scalia stated that torture Administration of Justice and National Security in Democracies conference.</td>
<td></td>
</tr>
</tbody>
</table>

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4 Pseudonym for Hector Hugh Munro, the well-known satirist who was later killed in World War I.
| 9 | 2012 | Secretary of Defense and CIA Director Leon Panetta in describing the James Bond film *Skyfall* as very realistic in Oct 2012 (Bauer, 2012, 9 Nov); | N/A | National Security in Democracies |
Appendix G

Glossary of Concepts and Definitions

The following concepts and definitions provide supplemental material not contained in the text of the study.

**Anticipatory Governance.** Anticipatory Governance is a systems-based approach for enabling governance to cope with accelerating, complex forms of change. Anticipatory Governance is a “systems of systems” comprising a disciplined foresight-policy linkage, networked management and budgeting to mission, and feedback systems to monitor and adjust. Anticipatory Governance would register and track events that are just barely visible at the event horizon; it would self-organize to deal with the unexpected and the discontinuous; and it would adjust rapidly to the interactions between our policies and our problems (Fuerth & Faber, 2012, p.7).

**Complicated problems:** 1) Originate from isolated causes that are clearly identifiable and fall within distinct bureaucratic categories; 2) Can be dissected into isolated chunks addressed, and pieced back together; 3) Consequences are generally proportionate to their causes (for every input, there is a proportionate output); and 4) Fixtures can be put in place for permanent solutions. (Fuerth & Faber, 2012, p. 4)

**Complex (or wicked) problems:** 1) Result from concurrent interactions among multiple systems of events, and they erode the customary boundaries that differentiate bureaucratic concepts and missions; 2) Cannot be broken apart and solved piece-by-piece. They must be understood and addressed as a system; 3) Do not automatically stabilize, but intrinsically unravel into chaos if not systemically managed. Instead, they morph into new problems as the result of interventions to deal with them; 4) Cannot be permanently solved. Instead, they morph into new problems as the result of interventions to deal with them. (Fuerth & Faber, 2012, p. 4)

**Complicated versus complex problems.** The Scientific Method seeks to predict future behavior based on past performance, all conditions beings equal (Lat. ceteris paribus). As with any complex\(^1\) problem, the independent variables, their properties, and their interdependencies

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\(^1\) Complicated problems, even those as detailed as the Apollo 11 moon landing or open heart surgery, are solvable as the many variables are known, and thus predictable. Complex problems, such as crafting internal security legislation, intelligence community reform, or raising a child with well-founded ethics and a resilient personality
are not all known and thus predictable during internal security crises. The presumption is that the *rational actor* paradigm applies, i.e., responsible individuals should be assumed to be acting in good faith in defense of their society. The inherent problem is reflected in the concept of *bounded rationality*\(^2\) (Merton, 1936; Simon, 1955; 1957; Heuer, 1999; Gairdner, 2008; Kahneman, 2003; 2011) i.e., individual and institutional cognitive limits tend to inhibit the ability to see beyond the immediate crisis.

Complex social problems are often best analyzed in hindsight (posteriori), when more of the variables are more visible, and their properties are stable. The *intelligence process* seeks to reduce uncertainty in conflict based on *pattern analysis* of past events (Johnston, 2005; Clark, 2007). When there is no discernable pattern prediction and forecasting becomes very difficult if not impossible. Human societies are similar to biological organisms, in that they are characterized by an enormous number of interacting variables that influence the behavior of each other, resulting in never before encountered circumstances (Diamond, 1999, pp. 422-423). As a result, small changes at an elementary level can lead to large changes in the greater whole. The limited ability to assess variables in complex adaptive problems leads to missed or misconstrued information, decisions which do not consider all the factors, and ultimately to unanticipated or unintended consequences of purposive actions in a social context.

**Executive branch.** The term executive branch includes security intelligence agencies, police, and the court systems. Given a wartime context and heightened threat perception, executive branch may also include the military forces employed in conducting internal security

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operations – either in support of civilian police agencies, in joint military-police operations, or in military led operations.

**Extraordinary (and executive) measures.** Bonner (2007, p. 21) defines *extraordinary measures* as “a product of the empowerment through law of the executive branch of government to take action affecting the rights of legal individuals, without any need for prior judicial approval of that action.” The execution of such extraordinary measures is not normally described in detail in such legislation which might limit the courses of action open to tactical level commanders; but rather in departmental policies, executive orders or regulations, and in operational level plans. Once this legislative authority has been transferred to the executive branch agencies, they are known as *executive measures*. In practice, measures which normally lie within the mandate of the judiciary may be delegated by the legislature to police, soldiers, and immigration officials without the need to refer to the court system to execute their duties, presumably on a temporary basis.

**Extraordinary rendition** occurs when one state moves its suspects to another state for interrogation away from the scrutiny from the first state’s legal oversight bodies (Bonner, 2007, p. 332). The practice is controversial as the information gained may be obtained through torture or maltreatment of the detainee.

**Habeas corpus** (n.) is a writ requiring a person to be brought before a court, mid-15c., Latin, literally “(you should) have the body,” in phrase habeas corpus ad subjiciendum “produce or have the person to be subjected to (examination),” opening words of writs in 14c. Anglo-French documents to require a person to be brought before a court or judge, especially to determine if that person is being legally detained. From habeas, second person singular present subjunctive of habere “to have, to hold” (see habit (n.)) + corpus “person,” literally “body” (see corporeal). ([http://www.etymonline.com/index.php?term=habeas%20corpus](http://www.etymonline.com/index.php?term=habeas%20corpus)). Duhaime (n.d.) defines habeas corpus Latin: a court petition which orders that a person being detained be produced before a judge for a hearing to decide whether the detention is lawful ([http://www.duhaime.org/LegalDictionary/H/HabeasCorpus.aspx](http://www.duhaime.org/LegalDictionary/H/HabeasCorpus.aspx)).

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3 Statutes or Acts are in effect implemented through their regulations and the related policies. However, the legislation (which includes both the statute and the regulations) are paramount. Governments cannot through policy fetter its statutory discretion or override legislation in normal peacetime circumstances.
**I & W.** One of the inherent challenges in addressing complex problems is that not all variables are known, and thus it is difficult to forecast outcomes any degree of certainty. The traditional nation-state approach to this conundrum is to establish a system of indicators and warnings (I & W) which provide advance warning of threats, and physical security measures which make it difficult for an adversary to mount a successful attack. I & W provides the triggers which lead to operational decisions. The most common strategy in enacting such security measures is to seek as much information as possible through intelligence networks and surveillance operations. However, one of the challenges in dealing with complex, i.e., *unbounded problems*, is the difficulty in assessing the sufficiency of information prior to taking a decision (Simon, 1955; 1957; Heuer, 1999; Gairdner, 2008; Kahneman, 2003; 2011; Schneier, 2008; Lowenthal, 2012).

**Loss aversion** is a component of *prospect theory* (Kahneman & Tversky, 1992). The main evidence for loss aversion in prospect theory was the extreme reluctance of people to accept gambles with equal probabilities to win and lose. Loss aversion also contributes to the explanation of an important phenomenon of choice known as the *status-quo bias*. Focusing attention on considerations that become relevant only if war occurs leads decision-makers to plan for the worst-case scenario – often a recipe for self-fulfilling prophecies.

**Policies.** Policies describe the intended security goal in broad terms, including any political constraints (i.e., must do) and restraints (i.e., must not do). Policies lay the foundation for detailed operational plans, which provide a detailed description of tasks, responsibilities, and timescale. A timescale, by timed phase or by event achievement, facilitates setting the priorities of effort, and establishing measurable benchmarks for each participating security agency.

**TVRA.** The who or what must be protected variables may be determined after a lengthy *threat vulnerability risk analysis* (TVRA) which seeks to identify that element which the state cannot afford to lose and continue to function effectively. The outcome of a TVRA might be a tangible assets, such as government leaders, command centers, or critical infrastructure. The outcome might also be an intangible asset, such as public confidence in the state’s ability to protect them, or the population’s trust in the state’s intent. Intangible assets frequently have a high emotive component, and thus are much more difficult, if not impossible to measure accurately. This unpredictability in assessing political variables can also lead to unanticipated
consequences when the perception of the initial threat changes, as when the suspected threat group gains political legitimacy and the state is seen as an unjust oppressor. Given that the need for operational security may mask counter-espionage success stories, it is also hard to gauge the effectives of internal security measures that prevent attacks or espionage from occurring.

**Unintended Consequences.** *Unintended consequences*[^4] are outcomes that are not the ones intended by a purposeful action designed to cause or to lead social change. The case studies in Chapter 4 and Appendices B, C, and D illustrate the dilemmas which internal security policy makers must try to resolve in addressing *complex adaptive problems*. These problems are characterized as follows: 1) the constituent elements are not all known, 2) those elements that are known are dynamic; and 3) the nation-state security agencies must adapt their strategies and extraordinary measures to evolving circumstances in a collaborative and timely manner.

Appendix H

United Kingdom Government Document Review Strategy

The United Kingdom government hosts numerous on-line archives which hold copies of major documents dating prior to Union in 1707.

The National Archives site, found at http://discovery.nationalarchives.gov.uk/ permits indexed searches. The National Archives\(^1\) gateway website, found at https://www.nationalarchives.gov.uk/ provides access to 1,000 years of history and records from The National Archives and to over 2,500 linked archives across the U.K. This study made extensive use of the Records of the Security Service (KV series, 1905-2009), retrieved from http://discovery.nationalarchives.gov.uk/details/r/C280 as well as archived bills and legislation at http://www.legislation.gov.uk/.\(^2\) The British Library,\(^3\) hosts a site dedicated to the 800\(^{th}\) Anniversary of the Magna Carta, (http://www.bl.uk/magna-carta). Major U.K. government debates are found at the House of Commons and the House of Lords Debates (Hansard) 1803 – 2005, retrieved from http://hansard.millbanksystems.com/. Parliamentary business, including draft bills and legislation from 2005 to the present, may be retrieved from http://services.parliament.uk/bills/.

Other government on-line sources included the Open Data portal (https://data.gov.uk/) and the United Kingdom House of Commons Library research service, retrieved from http://www.parliament.uk/mps-lords-and-offices/offices/commons/commonslibrary/; and the Publications website retrieved from https://www.gov.uk/government/collections/ provides access to information ranging from consultations, corporate reports, statistical analysis, Freedom of Information requests, policy and guidance documents, and international treaties. The City of Glasgow, Scotland archives were consulted concerning the government surveillance, arrest, and detention of labour leaders in the Clydeside region during World War I, retrieved from http://sites.scran.ac.uk/redclyde/redclyde/index.html.

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\(^1\) The National Archives, Kew, Richmond, Surrey, TW9 4DU, Tel: +44 (0) 20 8876 3444.
\(^2\) This website http://www.legislation.gov.uk/ is managed by The National Archives on behalf of HM Government. Publishing all UK legislation is a core part of the remit of Her Majesty’s Stationery Office (HMSO), part of The National Archives, and the Office of the Queen’s Printer for Scotland.
\(^3\) http://explore.bl.uk/primo_library/libweb/action/search.do?dscnt=1&dstmp=1432419261796&vid=BLVU1&fromLogin=true
Appendix I

**Canadian Government Document Review Strategy**

English and French language databases consulted included the Library and Archives Canada, retrieved from [http://www.bac-lac.gc.ca/eng/Pages/home.aspx](http://www.bac-lac.gc.ca/eng/Pages/home.aspx) in English and [http://www.bac-lac.gc.ca/fra/Pages/accueil.aspx](http://www.bac-lac.gc.ca/fra/Pages/accueil.aspx) en français. Parliamentary resources consulted included the:

Canadian Parliamentary Historical Resources, such as the Hansard 1867 – 2002 from the Library of Parliament, retrieved from [http://parl.canadiana.ca/](http://parl.canadiana.ca/);

the Parliament of Canada, House of Commons Debates (Hansard) from 2002 to present, retrieved from [http://www.parl.gc.ca/HouseChamberBusiness/ChamberSittings.aspx](http://www.parl.gc.ca/HouseChamberBusiness/ChamberSittings.aspx); and


Federal Courts Reports were retrieved from [http://reports.fja.gc.ca/eng/](http://reports.fja.gc.ca/eng/). Landmark court cases were retrieved using legal search engines such as CanLII (Canadian Legal Information Institute), retrieved from [https://www.canlii.org/en/](https://www.canlii.org/en/), and the *McGill University Law Journal*, retrieved from [http://lawjournal.mcgill.ca/en/issue/3134](http://lawjournal.mcgill.ca/en/issue/3134). The Government of Canada’s Open Government portal ([http://open.canada.ca/en](http://open.canada.ca/en)) states that its role is to provide “Open Data, Open Information, and Open Dialogue,” with a view to enhancing government transparency, accountability, and citizen engagement. This website is part of the Open Government Partnership (OGP) to provide citizens of the G8 countries with greater insight into the workings of their respective governments. The private oversight group, openparliament.ca ([https://openparliament.ca/](https://openparliament.ca/)), which has operated since 2010 provides data on voting patterns on legislation.

An important corroborating document, *R.C.M.P. Security Bulletins: The Early Years, 1919-1929* compiled by Gregory S. Kealey and Reg Whitaker (Eds.) (1994) was also consulted. This book contains intelligence bulletins; a list of “Chief Agitators in Canada;” “RCMP Personal Files Register, 1919-1929;” “RCMP Suspect Files Register, 1919-1929;” “RCMP Register of Subversive Publications, 1919-1929;” and “Register of Bolshevist and Agitator Investigations, 1920.” These formally secret documents were found in a second-hand bookstore in Digby, Nova Scotia run by two retired professors from Memorial University of Newfoundland.
Appendix J

U.S. Government Document Review Strategy


The primary source documents sought included the drafts bills, the acts themselves, Congressional debates, and subsequent amendments, and most being available on the FDsys site through basic key word searches. The Congressional Research Service (CRS), is a legislative branch agency located within the Library of Congress. CRS Reports may be retrieved from [http://www.loc.gov/crsinfo/](http://www.loc.gov/crsinfo/). CRS Reports provided non-partisan depth in policy and legal analysis of issues before Congress. Major policy statements and press releases were available on former President George W. Bush’s White House archive located at [http://georgewbush-whitehouse.archives.gov/](http://georgewbush-whitehouse.archives.gov/)

The Department of Justice Office of the Inspector General (OIG) provided over three dozen reports on intelligence oversight. Milestone U.S. Supreme Court cases were consulted at [https://supreme.justia.com/](https://supreme.justia.com/). The U.S. Department of the Treasury, Financial Crimes Enforcement Network (FinCEN), located at [https://www.fincen.gov/](https://www.fincen.gov/), was helpful in finding comparative statistics on the evolving use of anti-terrorist legislation.

The progress of bills through Congressional readings, committees, and votes was tracked through the private oversight body Civic Impulse LLC ([https://www.govtrack.us/congress/bills/](https://www.govtrack.us/congress/bills/)), overseen by Joshua Tauberer.² Additional targeted searches were conducted using legal search engines such as DRAGNET (New York Law School), HeinOnline, LexisNexis, Westlake, and university law school databases and journals in each nation to obtain peer-reviewed discussions

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¹ Formerly the Government Printing Office from 4 March 1861 to 17 December 2014.
² GovTrack.us, a project of Civic Impulse, LLC now in its 11th year (c. 2015), is one of the world’s most visited government transparency websites. The site helps ordinary citizens find and track bills in the U.S. Congress and understand their representatives’ legislative record. Mr. Tauberer is a leader within the open government movement, “which involves citizens, web developers, designers, researchers, writers, statisticians, government managers, and elected officials in a concerted effort to make data a national asset, to make government more transparent and effective, and to empower citizens to participate effectively in governance and in their communities” ([https://www.govtrack.us/about](https://www.govtrack.us/about)).
of the tension between security and civil rights. Numerous peer-reviewed articles in journals in the fields of education, history, intelligence, political, and strategic security studies were consulted to obtain context and add depth to the observations.

Specialized advocacy websites were consulted in each of the three nations. The advocacy websites were used in meta-data searches which facilitated identifying the civil rights weight allocated to specific concerns, e.g. arbitrary detention, electronic surveillance, free speech, immigrant rights, and privacy and technology. An alternative source for policy analysis to the Congressional Research Service (CRS) was the Council on Foreign Relations (CFR, http://www.cfr.org/), an independent, nonpartisan membership organization, think tank, and publisher. CFR has published the well-reputed journal *Foreign Affairs* since 1923.

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3 Founded in 1921, CFR takes no institutional position on policy matters. CFR’s membership of 4900 specialists in the field of international affairs includes top government officials, renowned scholars, business executives, acclaimed journalists, prominent lawyers, and distinguished non-profit professionals.