HYPERLEGALITY

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In this essay, I offer a reading of recent antiterrorism legislation in the United Kingdom that draws away from a more traditional understanding of emergency as a response to a specific crisis, such as an attack or invasion, through the temporary suspension of rights for the sake of restoring public order. Instead, I draw attention to the structural shifts in governance that these laws represent, and to their intensely bureaucratic nature—to classifications and special commissions, to the inchoate determinations of danger and the large and precise powers that such determinations trigger. I illuminate these current legal developments in Britain by reaching back into Britain's own colonial past. The innovations and enduring legacies of a colonial governmentality, I suggest, offer a valuable resource for understanding the larger significance of specific antiterrorism legislations.

Today most emergency laws are neither temporary nor categorically distinct from a larger set of state practices. As Oren Gross puts it, "bright-line demarcations between normalcy and emergency are all too frequently untenable, and distinctions between the two made difficult, if not impossible. In fact, the exception is hardly an exception at all."[1] It is, in fact, empirically the case that what one witnesses in the contemporary global "emergency" is a proliferation of new laws and regulations, passed in an ad hoc or tactical manner, and diverse administrative procedures. At first glance, the current war on terror seems to be part of the traditional logic of emergency: there have, of course, been attacks in the U.S., UK and

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1. Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional, 112 Yale L.J. 1011, 1022 (2002–2003).

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elsewhere, and the law has responded by noticeably contracting traditional liberties (for example, by increasing the state's surveillance power). But a closer look at the mechanisms of antiterrorism legislation suggests a departure in important respects. Traditional concepts of emergency emphasize a reactive and temporary response. Antiterrorism legislation in the United Kingdom over the last decade, however, has introduced changes that are structural and permanent. Moreover, the definition of terrorism has itself taken on a more global emphasis, making terrorism in other parts of the world the equivalent of a domestic crime in Britain. This global focus has also meant that immigration law has become an important site in the consolidation of national and international security. In the UK there has been a great deal of legislative activity lately, with four new antiterrorism measures in a six-year period.[2] We should not, however, presume that all such changes are event driven. Although the events of September 11th, 2001, and July 7th, 2005, resulted in the Anti-Terrorism, Crime and Security Act 2001 and the Terrorism Act of 2006, respectively, some of the more important developments may be traced back to 1997–1998. In that period in the late nineties, the British government not only conducted an extensive inquiry into proposed changes but also issued a "Consultation Paper" that outlined the changes that would in the next few years become law.[3] Indeed, one of the important elements in the story I consider here is the Special Immigration Appeals Commission Act passed in 1997.[4] All of this points to the fact that not only were these measures contemplated and codified prior to the events they are often presumed to be a response to, but that they were introduced in a period of relative calm in Britain, especially with the initiation of the peace process in Northern Ireland. Given such a context, the legal developments we are considering are better understood not as emergency or special laws at all but rather as part of a larger methodology of governance.

2. Terrorism Act, 2000; Anti-Terrorism, Crime and Security Act, 2001; Prevention of Terrorism Act, 2005; Terrorism Act, 2006. All legislation available at http://www.opsi.gov.uk.

3. Secretary of State for the Home Department and the Secretary of State for Northern Ireland, Legislation Against Terrorism, 1998, Cm. 4178 [hereinafter Legislation Against Terrorism].

4. Special Immigration Appeals Commission Act, 1997, available at http://www.opsi.gov.uk/acts/acts1997/1997068.htm.

I suggest that what we are witnessing in current policy and programs is not a withdrawal of law but what I call a hyperlegality. One may reasonably and right away ask what distinguishes hyperlegality from ordinary legality? I argue that hyperlegality operates mainly through two mechanisms. The first is the increasing use of classifications of persons in the law, and the second is the use of special tribunals and commissions.

With regard to the first feature, of course, to some extent, all law is animated by certain distinct categories such as criminal, citizen, and immigrant. The process I am interested in here, however, goes further, creating new subcategories—enemy combatant, security threat immigrant—by combining different qualities and conditions. The process has a strong predictive quality, combining who people supposedly are with what they are likely to do, and, as with much predictive activity, invariably involves racial and cultural presumptions. Indeed, such classifications belie a deep racialism, a mode of what, borrowing a term from Hannah Arendt (although not using it exactly in her way) I call "race thinking" beyond race.[5] The reason for drawing such a distinction between race and race thinking stems from a desire to move my analysis away from understandings of race centered around bodies and presumptively stable identities, away even from understandings of racism as largely a question of personal animus, to a more discursive analysis that emphasizes the interplay between typology and ontology, between making distinctions and making claims of being based on those distinctions. My use of race thinking here is informed by the cultural critic Paul Gilroy's understanding of race. As Gilroy explains himself in *Postcolonial Melancholia*, "by 'race' I do not mean physical variations or differences commonsensically coded in, on, or around the body. For me, 'race' refers primarily to an impersonal, discursive arrangement, the brutal result of the raciological ordering of the world, not its cause. Tracking the term directs attention toward the manifold structures of a racial nomos—a legal, governmental, and spatial order."[6]

By now claims of a racial and cultural bias in antiterrorism efforts have become quite familiar. My intention in this essay is not to document these claims, but to show the role of a certain process of bureaucratic

5. Hannah Arendt, The Origins of Totalitarianism (new ed. 1976).

6. Paul Gilroy, Postcolonial Melancholia 39 (2005).

legalism. I will therefore concentrate here on the creation and use of classifications in antiterrorism law. It is a process similar to though not entirely identical with the well-known phenomenon of racial profiling. As I will explain in detail later, while the creation of new categories of threat borrows some of the mechanisms of racial profiling—for example, the statistically informed idea of class probability—these new categories actually further trigger specific powers. That is, in racial profiling an African-American driver may be targeted for a police traffic stop, either randomly or on a pretextual reason. If the search of his car reveals no contraband he is free to go, but if the search does locate illicit materials he is arrested and placed in the traditional criminal justice system where he will be indicted, prosecuted, and convicted or released. By contrast, the process I am describing involves an unspecific certification of someone into a classification (terrorist suspects), which then permits by legislation certain new powers, such as a reduced standard to obtain further warrants or to submit to electronic tagging, and the appeal of which is confined to special commissions. Indeed, the last element is particularly important and brings me to the second feature of the process I call hyperlegality.

The second mechanism of hyperlegality is the creation of special venues in the law. Two such important venues in the UK are the Special Immigration Appeals Commission and the Proscribed Organizations Appeals Commission. As Clive Walker accurately notes, in this respect, antiterrorism laws "represent an early example of the fragmentation of the criminal justice process, in which successive offences or anti social activities have been subjected to special regimes—whether serious frauds (as in the Criminal Justice Act 1987) or sex offenders (Sex Offenders Act 1997, as amended)."[7] The concept of fragmentation, I think, more accurately captures the tenor of legal responses to terrorism than does the trope of exception, and is one that informs my reading here.

The analysis that follows unfolds in three distinct parts: I first turn to colonial India, and having drawn out some key elements, I turn to current legislation in the United Kingdom; I then conclude by reading two significant recent decisions from the House of Lords.

7. Clive Walker, Blackstone's Guide to the Anti-Terrorism Legislation x (2002).

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As I take a historical detour through Britain's own colonial past, let me be clear at the outset that I am not offering a historical narrative, continuous and causal, that would link these two time frames. Rather, I proceed from a historicist juxtaposition of two moments. Of course, the decision to juxtapose colonialism and the war on terror does require some immediate explanation, as it does seem an overreaching historical claim.

There are, of course, some scholars who explicitly link the nineteenth century colonial project with the general phenomenon shorthanded as globalization, and the particular manifestation of the war on terror. Thus David Harvey calls, in a book of the same title, the current U.S. neoliberal economic project and the neoconservative military-hegemony project, both for him complementary aspects of a singular development, *The New Imperialism*.[8] And even in terms of the more daily operations of the war on terror, there are numerous aspects that recall a colonial past. In the United States, there has been the decision to use Guantanamo Bay, a site acquired in 1898 at the height of U.S. imperial ambitions, as a detention center.[9] In the UK after a House of Lords decision invalidating indefinite detention reserved solely for foreign born terrorist suspects, a range of options have been put forward that directly come from Britain's colonial past: administrative devices such as exclusion orders from India and Ireland, and banning orders from South Africa.[10] While I would agree with all of these specific connections, here I will confine myself to the workings of an administrative legality. What I am interested in is exploring how in a colonial governmentality a perception of difference or of threat (often the same) is administered. In short, I am interested in the elements of race and bureaucracy.

In *The Origins of Totalitarianism*, Hannah Arendt argues that two of the more defining elements of imperial rule, which were later to combine with such devastating results, were race and bureaucracy.[11] With regard to the

8. David Harvey, The New Imperialism (2003).

9. For the colonial history of Guantanamo and its influence on contemporary developments in the war on terror, see Amy Kaplan, Where Is Guantanamo, 57 Am. Q. 831 (2005).

10. Clive Walker, Prisoners of "War All the Time," 2005 Eur. Hum. Rts. L. Rev 50.

11. Arendt, supra note 5.

latter, Arendt is particularly interested in how the very nature of bureaucracy makes it so suitable a "device" in the means and ends of imperial rule. "Bureaucracy," she reminds us, "is always a government of experts, of an experienced minority."[12] Such an insight, of course, is not hers alone. It reiterates and reformulates Max Weber's famous analysis of the growth of bureaucracy as the rationalized production and reproduction of technical knowledge. The growth of bureaucracy for Weber answered the needs of the changing form and function of the modern state, from its advancement in technical modes of communication to its new "manifold tasks of social welfare."[13] In Arendt's analysis, however, while these functional attributes still hold true, their ideological labor is considerably less benign. The reason that bureaucracy by its very nature is so suited to the imperial project is because it prioritizes technical efficiency and security over political participation. Arendt tells us that not only is a bureaucracy an "experienced minority," but it must also "resist as well as it knows how the constant pressure from the 'inexperienced majority.' Each people is fundamentally an inexperienced majority and can therefore not be trusted with such a highly specialized matter as politics and public affairs."[14] Indeed, the significance of Arendt's analysis goes beyond its immediate focus on imperial rule to an understanding of modern government itself, for it reminds us that while we tend to associate antidemocratic politics with an excessive personal or executive discretion, we would do well to note how the technocratic structure of the modern state lends itself to such a politics.

The antidemocratic identification of the bureaucrat with a special knowledge, to which the masses can have no access and would not understand in any case, also perfectly reinforces the secrecy that marks the daily operations of imperial government and the hidden historical purpose of its civilizing mission. "At the basis of bureaucracy as a form of government," Arendt goes on to explain, "lies this superstition of a possible and magic identification of man with the forces of history."[15]

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12. Id. at 214.

13. 2 Max Weber, Economy and Society. An Outline of Interpretive Sociology 972 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978).

14. Arendt, supra note 5, at 214.

15. Id. at 216.

We shall return to the role of this secrecy shortly, but for now we need to revisit and critique Arendt's analysis, for in the chapter titled "Race and Bureaucracy" in *Origins*, the two features of race and bureaucracy remain oddly separate. While the analysis of race focuses on southern Africa, on the mythologies surrounding the "heart of darkness," the analysis of colonial bureaucracy concentrates on Egypt, and in particular the career of Lord Cromer. There is certainly race in Cairo, just as there is administration in Cape Town, but Arendt does not really tell us if or how these two elements connect. This has much to do, I think, with Arendt's understanding of the purposes of race and bureaucracy in the colonies. While for her the aim of bureaucracy was to replace the openness and stability of law with the ad hoc technicalities of administration, the aim of race was to account for the incomprehensible sense of difference that Europeans felt upon encountering Africans. This is, however, both a Manichean understanding of race and an idealist understanding of law. That is, while Arendt seems to associate race with a natural, given condition, she associates law more or less exclusively with constitutionalism and judicial rule and not with legislation, regulations, and administrative rules. This prevents her from noticing how law in fact puts race in place, how it utilizes a system of categories and rules, a general conception of types of people and of risk, to institute and maintain a conceptual and physical segregation.

To more fully understand this particular function of bureaucracy, we will need to turn to another line of thought: to the writings of Franz Fanon and one of his contemporary interlocutors, Paul Gilroy. Gilroy draws on Fanon to show the particular functioning of race in the colonies, and to show that central to such a functioning was a special sort of spatiality. White and black, colonizer and native, were to be kept rigorously apart and yet uncomfortably close: "they were separated spatially, but conceptually their common racialization ensured that they were bound to each other so tightly that each was unthinkable without the proximity of the other."[16]

Crucial to Fanon and Gilroy's analysis is the concept of the proximate—never fully commingling but always threatening to do so. Such an order and such an ordering requires a special sort of law—the juridified categories of humanity itself—and a special kind of administration—the rule of the passbook. And while some of the artifacts of such a system may have

16. Gilroy, supra note 6, at 51.

mutated in our time, such an architectural reasoning remains somewhat intact. It can attach itself to talk of sleeper cells and illegal immigration with remarkable ease.

In colonialism we see the increasing use of labeling, special laws, and corollary venues. To draw this out, I turn to two developments in the history of British India: the first is the infamous Criminal Tribes Act of 1871, by which millions of people were subject to compulsory reformatory resettlement; and the second is the antiterrorist measure of the 1920s and 1930s in Bengal, by which the British sought to counter an increasingly radical nationalism. Although the former is more alien to us in its vocabulary, while the latter inaugurates an idiom we still apply today, both constitute a historical formation, the examination of which will better help us understand the modality of current antiterror legislation.

The Criminal Tribes Act was the product of diverse motivations and discourses: an English folklore of highway robbers and the centralized state's general suspicion of nomadic movement, coupled with a newfound mid-century discovery of "dangerous classes" and the hereditary nature of criminality. But neither folklore nor eugenics can adequately convey the odd internal administrative workings of the act. That is, in focusing on the social and political causes of the legislation, we risk overlooking its considerable legal novelty. It is important, therefore, to subject its internal operations to closer scrutiny.

Act no. XXVII of 1871, An Act for the Registration of Criminal Tribes and Eunuchs, defines the object of its attention as a tribe, gang, or class of persons "addicted to the systematic commission of non-bailable offences."[17] This curious mixture of an idiom of pathology and a legal jargon reflects the Act's crude basis for the categorizations on the one hand, and the bureaucratic technicalities by which such categories are defined and enforced, on the other. Thus while Section III of the act gives us vague clues as to what the designation of a criminal tribe would entail, the bulk of the Act details the procedures and consequences of that act of declaration.

The Act directs local governments wishing to cover a section of people in the provisions of the Act to seek from the Governor-General in Council "permission to declare,"[18] which when granted authorizes them to "publish in the Local Gazette a notification declaring that such a tribe, gang, or

17. Criminal Tribes Act, 1871, India Office Records V/8/42.

18. Id. § 5, at 348.

class is a criminal tribe and thereupon the provisions of this Act shall become applicable to such tribe, gang, or class."[19] While one imagines such notifications appearing in the local paper alongside advertisements for properties and plowing equipment, its effects are considerably less benign. The announcement of the classification serves as notice and proof. The Act allows for what we would now call an administrative appeal by individuals to a magistrate but explicitly forbids any judicial inquiry: "no court of justice shall question the validity of any such notification . . . but every such notification shall be conclusive proof."[20]

It is not my intention to belabor the injustice of this system—I hope that is self-evident—but rather to draw attention to the role of legal classification in generating such a result. The classification of a people as a criminal tribe itself triggers a range of powers and consequences. The notorious Section 20 of the act stipulates an elaborate passbook system, criminalizing the presence without such passes of anyone "beyond the limits so prescribed for his residence," and provides additional powers for arrest without warrant for those in violation of this Byzantine system.

By the early twentieth century and the rise of a more radical nationalist response to colonial rule, the government of British India found itself resorting to a host of new special laws. While the language of dangerous types suffuses such laws, what is even more striking is their emphasis on special tribunals as the proper venue for dealing with these types.[21] Rather than examine the complex history of these pieces of legislation here, I will try to capture their workings by turning to a secret legal brief tucked away in the archives of the legal adviser to the colonial government in India.[22] The brief is the answer to a question posed by the colonial government with regard to the legality of a proposed new surveillance law and the corollary creation of a new court that would mix the powers of "ordinary magisterial courts with special ancillary powers independent of the jurisdiction of the high courts."[23] The answer given is very telling. The counsel

19. Id.

20. Id. § 6, at 349.

21. To give only two examples: The Bengal Criminal Law Amendment Act, 1925, India Office Records v/8/131; for legislation on special tribunals, Bengal Emergency Powers Ordinance, 1931, India Office Records L/PJ/7/91.

22. Legal Advisor's Records, June 15, 1914, India Office Records L/L/6/6, no. 319. See also Nasser Hussain, The Jurisprudence of Emergency 97 (2003).

23. Legal Advisor's Records, supra note 22, at 2.

argue that while the executive could set up such a court, the Indian High Courts would probably resist such an encroachment on their jurisdiction. A simpler and faster way to accomplish the government's objective, the brief continues, would be to disavow the judicial character of the new court and to maintain its power of action within the executive. The placing of people under such a condition of surveillance and detention would be effected through an executive order. But even more striking is the suggestion that the executive utilize experts in the process of determining who fills this classification: "our suggestion is that the proposed enactment should be framed in such a way that no order should be made until the Governor has had a report made to him by expert advisers."[24] The introduction of this step then fractures the process of action upon the classification, by creating a quasi-judicial inquiry of experts who take no action, and an executive that takes action but only after this secret inquiry. The legal advisers feel that this particular kind of process allows for the maximum of power while reassuring the "public" that such power is not being "used hastily."[25]

One could, of course, read this as a cynical effort to disguise the arbitrary use of power, but I think a more interesting and productive approach would be to concentrate on how such a moment exemplifies an emergent mechanism of governance that comprehends and confronts a threat through an administrative rationality. The elements that we can extrapolate as central to that rationality are the use of the classification, and the combustive combination of secrecy and expertise in determining who fills that classification. There is a very particular process of race thinking that animates and completes this process. After all, the reason one posits the classification is because one presumes there is a distinct type of people—criminal tribes, terrorists—out there. The presumption, however, is only made real through the process of a secret expertise.

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Keeping in mind some of these elements extrapolated from a colonial governmentality, let us return to considering contemporary antiterrorism legislation in the UK. As I mentioned earlier, there are a couple of striking

24. Id.
25. Id. at 3.

features here: the first is that the definition of terrorism is placed in an international system, so that support of any sort for a foreign organization pitted against a foreign government becomes a domestic crime—a thoroughgoing globalization—and second, the actual administration of the system takes place through a fracturing of the traditional criminal justice system, with the appearance of new specialized courts or commissions. We shall address both here in turn.

The older definition of terrorism in series of Prevention of Terrorism Acts was the use of violence for political ends and the use of violence for the purpose of putting the public in fear.[26] The government's 1998 Consultation Paper outlined changes to the definition, which were eventually incorporated in the 2000 Terrorism Act. Although the proposed new definition moves from an ad hoc to a permanent basis and contains greater policing powers and so on, what animates the change is clearly the fact that, as the report puts it, "terrorists are no respecters of borders."[27] This international focus has meant not only the power to proscribe international organizations but to do so even if an organization is not connected to, or has no intention of committing an act in the United Kingdom. Indeed, the definition adopted in the 2000 Terrorism Act makes clear that the definition "includes action outside the United Kingdom"; the reference to person or property can be "wherever situated"; and finally the reference to public and government can include "any public or government."[28] It is also interesting to note that while the new definition may seem so extensive as to lose any focus, it does have one clear distinguishing principle: it proscribes all violence directed at a state, indeed, any state. It is as if the definition recalls, and attempts to fortify on a global level, Max Weber's description of the state as the entity that holds the monopoly on violence. The role of immigration law and the executive power to proscribe foreign organizations both reflect and reinforce this internationalizing tendency.

The second feature is the use of special commissions for the administration of antiterrorist measures. In the United Kingdom the two main

26. There were a series of Prevention of Terrorism Acts in the UK from 1976 to 1996. All are available at http://www.opsi.gov.uk.

27. Legislation Against Terrorism, supra note 3, at v.

28. Terrorism Act, 2000, § 1(4)(a)–(d). For commentary, see Walker, supra note 7.

commissions, both of which deal with terrorism in an international frame, are the Special Immigration Appeal Commission (SIAC) and the Proscribed Organizations Appeals Commission (POAC). SIAC was established by the Special Immigration Appeals Commission Act of 1997, following a case that questioned the compatibility between the then existing deportation proceedings and the provisions of the European Convention on Human Rights.[29] The conflict arose when the Home Secretary acting under immigration procedures would seek to deport someone on security grounds involving classified information.

SIAC was set up initially to consider appeals involving closed or classified materials: to consider cases in which a nonnational would be deported form the UK, also known as the exclusion function. Part IV of the Anti-Terrorism, Crime, and Security Act 2001 grafted onto SIAC the power to consider cases of individuals detained without trial because they for whatever reason cannot be deported, also known as the detention function; and cases in which the government seeks to deprive nationals of their British citizenship, also known as the citizenship function. While a decision of the House of Lords in 2004 invalidated Part IV of the ATCSA and removed SIAC's detention function, it continues to exercise the exclusion and citizenship functions.

The 1997 SIAC Act's main innovation was the creation of Special Advocates (SA), lawyers with the requisite security clearance who would have access to secret materials used by the government in its case. The SA then acts as a go-between. This was certainly an improvement over the previous system by which a defendant or his representative had no involvement in either the charge or assessment of evidence against him. Even so, the SA is an odd hybrid, for during the proceedings he is only in some senses a representative of the defendant. Once he has received the closed materials, he is explicitly barred from sharing them or even their sum and substance with the defendant or his attorney, and further barred from taking instructions on how to proceed.[30] Once in the proceedings, however, the SA may cross examine witnesses and make written submissions

29. For a comprehensive overview of the history, operation, and future of SIAC, see House of Commons, Constitutional Affairs Committee, The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates, 2004–05, H.C. 323-I [hereinafter House of Commons, SIAC Report].

30. Id. at 22–23.

on the defendant's behalf. As has been noted by the courts, despite the meaningful response that such a system represents to human rights concerns, the use of the Special Advocate "does raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession."[31]

The Proscribed Organizations Appeals Commission was established by Part II of the Terrorism Act of 2000.[32] While the power to proscribe Irish organizations was available in earlier legislation, the 2000 act vastly increases the range and type of organizations covered. So for example, under Section 121, "organization" may refer to any association or combination of persons.[33] Section 5 of the act sets up POAC to appeal the classification by the Home Secretary.[34] POAC operates much like SIAC does, with the use of Special Advocates. More importantly, the process of proscribing like the action of classification of a security threat immigrant is organized around the ambiguous action of certification to be determined by the Home Secretary.

In order to draw out these various elements, in this concluding section of the essay, I turn to two important cases that have shaped the method and scope of SIAC's function. These cases, I would suggest, are a good illustration of the interface between immigration and an increasingly globalized understanding of terrorism. They show how immigration with its animating categories of persons, shapes and is in turn shaped by conceptions of national and international security, as well as how such conceptions are worked out through the increasingly complex procedures of the administrative state.

The judgment of the House of Lords in *Secretary of State for the Home Department v. Rehman* is an illustration not only of the internal operations of SIAC but also of the general issues involved in definitions and determinations of threats to national security.[35] Rehman, born and raised in

31. Id. at 25.
32. Terrorism Act, 2000, pt. II.
33. Id. § 121
34. Id. pt. II, § 5.
35. Secretary of State for the Home Department v. Rehman [2001] UKHL 47.

Pakistan, was given permission to enter the United Kingdom in 1993. Both his parents are British citizens and he married in the UK and has two children. Even so, his application for indefinite leave to remain was refused in 1998. He was informed at the time that he had the right to appeal to SIAC as the refusal of his application and subsequent deportation order was based on the fact that the Home Secretary had "personally certified . . . your departure from the United Kingdom to be conducive to the public good in the interests of national security."[36] The commission, in fact, ruled for Rehman, noting that the Home Secretary should have utilized a narrow rather than global definition of national security, but that in either case the evidence did not support the conclusion. The government appealed and the Court of Appeals reversed the decision, and in 2004 the Lords reaffirmed the Appeals Court ruling.

In the arguments before the Court of Appeals and the Lords, counsel for Rehman, Mr. Kadri, urged a definition of national security rooted in a more territorial understanding. Mr. Kadri argued that "national security" should be understood as analogous to "defense of the realm." The Lords reject that argument and substitute a language of indirect threat.[37] The court insists that the threat need not be direct or physical in order to be real. And, indeed, soon it becomes clear that what is being invoked here is a threat to international trade and the international system: "attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well being of the United Kingdom or its citizens."[38]

Perhaps unsurprisingly, this more diffuse conception of security finds its counterpart in the generalized discretion used by the Home Secretary in reaching his determination. SIAC had ruled that the Home Secretary must prove each individual allegation against the defendant to a civil "balance of probability" standard. The Lords for their part insist that it is not just a question whether that is the applicable standard, but also whether the individual allegations need to be proven in their entirety. And the answer is that they do not. It is, I think, important to dwell on the specificity of the argument here, as I do not mean to suggest that the court believes the decision process is entirely subjective. That would be both

36. Id. ¶ 1.
37. Id. ¶ 16.
38. Id.

simplistic and incorrect. Rather, the court's opinion reveals how and where discretion enters into the process. The Home Secretary, the Lords point out, is asked to determine not just if "the individual had endangered national security but is a danger to national security."[39] Such a shift in tense and the corresponding determination is a mixture of judicial fact finding and as the court puts it, "executive judgment or assessment."[40] To the extent that specific actions form part of the determination, the Home Secretary is required to prove them to a civil balance of probability. But the assessment of danger rests not on any single proven action, which by itself may not be enough to warrant the conclusion, but on a "cumulative" approach, by which the whole may add up to more than the sum of its parts. This process then "may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual action which would justify this conclusion."[41] What we have here then is not just a replacement but a mixing of the traditional judicial terms of evidence and guilt with military-espionage terms of intelligence and risk. What is clearer, however, is the role of classifications in both triggering specific powers and organizing the legal regime.

These issues of classifications and potential threats intersect and are ultimately undone in one of the more important recent decisions, the judgment of the House of Lords in *A (FC) v. Secretary of State for the Home Department* (more commonly referred to as the Belmarsh decision after the name of the prison where the detainees were held).[42] The case involved eleven detainees held under a derogation notice that put into effect Part 4 of the Anti-Terrorism, Crime, and Security Act 2001. The act provides for the Home Secretary to certify that someone is a "Suspected International Terrorist" and thereby subject him to deportation and removal. The more notorious Section 23 of Part 4 effectively allows for indefinite detention, as it permits the government to hold someone even if there is no chance, for either legal or practical reasons, of eventually being deported. On appeal, SIAC determined that such detention violated the prohibition on

39. Id. ¶ 21.

40. Id. ¶ 23.

41. Id. ¶ 21.

42. A (FC) and others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56.

discrimination in Article 14 of the European Convention of Human Rights. The Court of Appeals later reversed that finding, and ultimately the Lords reversed the Court of Appeals, finding that to the extent that the measure permits only the indefinite detention of non-UK nationals who are suspected terrorists but not of suspected terrorists who are UK nationals it is both disproportionate and discriminatory.

There is much in *A v. Home Secretary* that warrants close attention, including a detailed consideration of what fairly constitutes a true emergency. Here, however, I want to draw attention to the language of the opinion that deals with categories and so-called comparators. After all, the decision to find discrimination depends upon whether the appellants are to be categorized with other non-UK nationals who may be a security threat but can be effectively removed (in which case the indefinite detention of those who cannot be removed is but an extension and justifiable) versus if the appellants are to be considered alongside suspected terrorists who are UK nationals but to whom the provisions do not apply and hence are discriminatory. Here is the court's summary of these dizzying comparisons:

> The Attorney General submitted that the position of the appellants should be compared with that of non-UK nationals who represented a threat to the security of the UK but who could be removed to their own or to safe third countries. . . . By contrast, the appellants' chosen comparators were suspected international terrorists who were UK nationals. The appellants pointed out that they shared with this group the important characteristics (a) of being suspected international terrorists and (b) of being irremovable from the United Kingdom. Since these were the relevant characteristics for purposes of the comparison, it was unlawfully discriminatory to detain non-UK nationals while leaving UK nationals at large.[43]

The Lords agree with the appellants. While the court is willing to concede that there is a legal difference between immigrants and citizens as the latter have a right of abode and the former only have a right not to be removed, the problem arises, as Lord Bingham's opinion rapidly gets to, because the government is trying to use "an immigration measure to address a security problem."[44] The government argues that such a mixture is permissible since the measure was designed to target only a certain kind

43. Id. ¶ 52.
44. Id. ¶ 43.

of terrorist. It is certainly not a stretch to notice in this exclusive category the work of a certain kind of racialism. This becomes readily apparent when the court notes that even if the exclusive application of the law and hence the consequence of indefinite detention to al-qaeda was permissible, given the very broad statutory language of the 2001 Act, there was nothing to prevent it from being applied to European terrorists, such as Basque separatists, except for the Attorney General's assurance that it never would be.[45]

The opinion of the court undoes many of these invidious distinctions but its opinion does have some perhaps unwitting consequences: it both further globalizes the understanding of terrorism and creates a global class of people—suspected international terrorists—that are unmoored from all national status. The lack of persuasiveness of the government's position, for the court, has much to do with the fact that by tailoring the measure to non-deportable foreign nationals considered terror suspects, the measure leaves out terror suspects who are either UK nationals or those who may be deported. The court emphasizes that it is not clear "why a terrorist, if a serious threat to the UK, ceases to be so on the French side of the English Channel or elsewhere."[46]

I am not underestimating either the courage or significance of this decision. In a historical moment when immigration is becoming the site for the projection of inchoate anxieties about safety and identity, the decision applies a much needed brake. In declaring Part IV of the 2001 Act as incompatible with the Human Rights Act 1998 and the European Convention, the court reiterates the concerns numerous people and institutions have voiced that antiterrorism efforts are "ushering in a two-track justice" system, and that "the fight against terrorism should not become a pretext under which racial discrimination was allowed to flourish."[47]

The court, however, by insisting the provisions of the legislation apply to all relevant persons, perhaps unwittingly creates a new category of persons—suspected international terrorists—that cuts across all national boundaries. Whether or not such a classification will take on a self-evident and, indeed, self-fulfilling quality is not yet fully apparent. Since the House of Lords decision in 2004, there have been new measures introduced

45. Id. ¶ 33.
46. Id. ¶ 44.
47. Id. ¶ 57.

through another piece of legislation, the Prevention of Terrorism Act 2005.[48] The act provides for the making of a "control order," defined as "an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from the risk of terrorism."[49] An individuated assessment and the applicability of the orders to nationals and nonnationals alike, goes a great way towards undoing some of burden organized by class of people that the Lords found objectionable in the Belmarsh decision. The Control Orders are themselves, however, extremely draconian. The obligations they impose may include restrictions on the person's work, associations, and place of residence, movement, and so on.[50] They also include the wearing of surveillance apparatus such as electronic cuffs. In addition to being substantially onerous, the system has also come under scrutiny for effectively although not explicitly reintroducing the very disproportionality that the Belmarsh decision invalidated.[51]

It is, then, not yet clear if the Belmarsh decision can and has upset the classification process I have been dwelling on. Additionally, there have also been calls to limit the special commission system and to move some of the current cases back into the general criminal justice system.[52] Estimating if this process will be reversed or, indeed, is even reversible, is outside the scope of this essay. Instead, my effort here has been to describe in detail a process that invites us to think about the intersections of law and bureaucracy, security and otherness.

It is, of course, a truism by now that fears and concerns over foreigners and an otherness in general are heightened during periods of insecurity. My effort here, however, has been to show a more particular and dynamic exchange between political fears and an administrative legality. I am not arguing for a cause-and-effect relationship between what I have described as hyperlegality and race thinking, but I would suggest we be more attuned to their mutually reinforcing relationship.

48. Prevention of Terrorism Act, 2005.

49. Id. § 1.

50. Prevention of Terrorism Act, 2005, § 1, (4)(c)–(e), (g).

51. Nine Britons under House Arrest, Guardian, March 23, 2007, at xx; Judge Overturns Control Order on Suicidal Terror Suspect, Guardian, April 4, 2007, at xx.

52. House of Commons, SIAC Report, supra note 30, at 44.