

Courts and the Making of Public Policy

In Times of Crisis, Can We Trust the Courts?

REPORT AND ANALYSIS OF A WORKSHOP IN COLLABORATION WITH
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In the Highest Degree Odious: Detention without Trial in Wartime Britain

Keynote lecture by **Professor Brian Simpson**

Chair: **Alice Henkin**

Professor Simpson introduced the workshop by delivering a lecture which described the response of the United Kingdom courts to detention without trial. He noted that Britain had, over the years, confined a large number of people without trial, in, for example, India, Africa, Palestine, Kenya, Cyprus, Aden, and Malaya, as well as in the United Kingdom itself. His focus in the lecture, however, was on the detention of British citizens during the Second World War.

Why did the British government decide to lock up nearly two thousand of its own citizens during the war?

One may first ask why governments want to use this power. Its primary justification depends on the fact that regular criminal law waits until the horse has left the stable before it acts. In crisis conditions, government, it is argued, must anticipate future dangerous actions and prevent them occurring. In practice, however, executive detention is valued for a variety of other reasons. One is when such evidence as there is would not be sufficient to secure a conviction in a regular court, or could not be produced in court without revealing and compromising undercover sources of information. Another is that once a person is in detention the opportunity arises to subject him to severe or cruel forms of interrogation. Another is that a round-up of people under a power of executive detention may, even if the detainees are quite harmless, serve the political purpose of showing how vigilant and tough the government is in combating public danger.

Why, then, did the British government decide to lock up nearly two thousand of its own citizens during the war? The rationale for this policy, which was resisted both from within and without government, was the belief that German success on the continent had depended upon collaboration from a fifth column, and amongst the enemy aliens there might be fifth columnists. Although there was extremely limited evidence for such a fifth column, there appeared to be a belief that the government should stop at nothing in the face of the risk to Great Britain posed by Germany.

The power to make detention orders was in existence well before May 1940. In wartime, enemy aliens could be detained under the royal prerogative, without legislation. But there was no prerogative power of detention of citizens, whether in peace or war, except as a preliminary to putting them on trial. So at the outbreak of the war in 1939 legislation was passed in the form of the Emergency Powers (Defence) Act, under which the executive could make regulations 'for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of public safety or the defence of the realm'.¹ Regulations were introduced which held that the relevant government minister had to have reasonable cause to believe that a person was either of hostile origins or associations, or had been recently concerned in acts prejudicial to the public safety or defence of the realm, or in the preparation or instigation of such acts.

The regulations also established an advisory committee or committees and gave the detainee a right at the earliest practicable time to make representations to it; the detainee was to be given

¹ Section 1, Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. 6. c. 62)

by the chairman of the committee the grounds on which the order had been made and be given such particulars as the chairman thought would enable him to present his case. Parliament was to be told each month how many orders had been made. These changes quelled parliamentary opposition. They represented an attempt to compromise between the claims of public safety and those of civil liberty.

Quite what role the courts were now supposed to play was uncertain, but certainly some members of Parliament thought that the courts could now exercise some measure of review over the minister's decisions. And the regulation certainly left the right to challenge the legality of detention by habeas corpus wholly unaffected: it was not suspended. By the end of 1940 over a thousand detainees were in custody (as well as some 27,000 enemy aliens). By late 1941, and indeed earlier, it became apparent that the sinister fifth column was a myth, though there was of course a tiny handful of disloyal people, and once the system of review had recovered from initial chaos the detainees were progressively released; at the end of 1941 there were 647, and by April 1945 a mere eleven.

Was detention used to facilitate severe interrogation or torture? Conditions for many of the detainees were certainly initially bad, but this was a consequence of administrative failure or isolated acts of misconduct by police or prison guards. But in July 1940 MI5, at first with no legal right to do so, established an interrogation centre in western London. It was principally used for suspected spies who were not citizens, but in 1940 some citizens, probably around thirty-five in all, were sent there for interrogation, suspected of being members of the fifth column. Physical torture was not used there.

So what role did the courts play? There were numerous attempts by detainees to use the courts, but very little was actually achieved. Thus, in habeas corpus proceedings the court, in the first case of this type, was clear that it was entitled to review the legality of the order and its basis, but was prepared to accept a laconic affidavit to the effect that when the Home Secretary made the order he believed, on the basis of information

available to him (but not revealed to the court), that the detainee fell within the terms of the regulation and needed to be detained. It was asserted that the courts could inquire into the validity of a detention order and investigate whether the Home Secretary had reasonable grounds for his belief. But unless the court had access to the reports and information provided to the Home Secretary by the police or the security service, something which the executive, and in particular the security service, was bound to resist, it was unclear how the court could do this.

Professor Simpson outlined the particular case of Robert Liversidge, in *Liversidge v. Anderson*, a full account of which can be found in Simpson's book *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Clarendon Press: 1992). In *Liversidge v. Anderson* the English courts abandoned any significant role in the protection of civil liberty, so far as the detention regulation was concerned. But the existence of the courts, and fear of falling foul of them, with attendant bad publicity for the department (since in habeas corpus proceedings they sat in public), certainly caused much anxiety in the Home Office. The Lords' decision has been severely criticized, and the more or less received view in English legal circles today is that they were simply wrong.

Simpson suggested that this was over-simplistic: it is by no means clear that the courts, by insisting that the minister offered grounds for his having the required reasonable belief, could have exercised any real supervision over the merits of individual cases unless radical inroads were to be made into the secret nature of the security system. They might perhaps have insisted on more in the way of procedural due process, but even this possibility was limited, since the regulation itself specified in outline what procedures were to be followed. What was really involved in the decision was not a legalistic issue as to the proper interpretation of Regulation 18B concerning detention, though this is how the case was argued, but more broadly a basic conception of the proper role of courts in security related cases, and that is a constitutional issue. The position was to be most clearly stated in *Ex parte Hosenball*, in 1977, by Lord Denning:

There is a conflict between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task.

The case illustrates the point that the mere existence of a power of review may have little significance for the protection of civil liberty; what matters is its extent. It was the interaction of different groups and institutions both within and outside the executive which between them tended to restrain over-use of emergency powers, whilst not preventing their use entirely.

The European Convention on Human Rights [has] considerably altered the legal and political context in which decisions to use emergency law, and in particular executive detention, are now taken.

How would English courts conceive of their role today? Simpson speculatively suggested that the approach would be very different, for a number of reasons. The first is that the English constitution, which is not based on some basic authoritative text, but rather on accepted practice, has changed significantly in that the power of judicial review has been greatly enlarged. The courts today are very much more ready to hold actions of the executive unlawful. Such actions can be challenged either for illegality, for irrationality, or for procedural impropriety, and there is a considerable jurisprudence on these concepts. And the fact that national security issues are involved no longer serves as a near absolute 'Trespassers Keep Out' signal to the judiciary.

The second is that since those days British legal culture has been quite fundamentally changed by the development of a positive theory of individual

rights. Today, concepts of rights form the starting point for legal reasoning, and issues then turn on the extent of the right, the question of whether it has been violated, and then the question of whether this violation is nevertheless permissible in terms of recognized limitations to the scope of the right in question.

This development has been much encouraged by the partial incorporation into British domestic law of the *European Convention on Human Rights and Fundamental Freedoms* by the Human Rights Act 1998. But long before this, the Convention, which the United Kingdom ratified in 1951, had begun to exercise an influence on British legal culture. Once the United Kingdom accepted the jurisdiction of the European Court of Human Rights and, at least domestically, the right of individual petition in 1966, and long before this cultural diffusion of ideas became significant, the judges of the European Court of Human Rights in Strasbourg acquired a role in supervising the use of emergency powers, and in particular a role in relation to the use of detention without trial. The existence of the Convention, and the procedural mechanisms it has established, have very considerably altered the legal and political context in which decisions to use emergency law, and in particular executive detention, are now taken. Governments can be called on to justify what they have done before a tribunal, sitting in public, and acting like a regular domestic court, and one not staffed by its own national judges. This has, to some degree, shifted the balance away from state sovereignty and towards the protection of the individuals from abusive power.

One way of looking at the matter is to appreciate that the existence of the Convention may have a beneficial chilling effect on the government's response to supposed threats to security, so that what is important is not what happens over actions which government does take and which are challenged, but what actions are not taken because they would have no hope of surviving a trip to the European Court. By way of example, the regime established in Guantánamo Bay could not conceivably

pass muster, and if it was run by a state party to the Convention there is no question but that the protection of the Convention would apply there. Simpson left open the question of whether this unduly hampers the executive, but expressed sympathy with the recent view of Lord Hoffman, in *A v. The Secretary of State* (2004) in words which, though he was speaking of Britain, could equally be applied to the United States:

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but

there is no doubt that we will survive al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime that it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.. The real threat to the life of the nation is laws such as these. That is the true measure of what terrorism can achieve.

Certainly, Simpson suggested, the British experience in the critical times of 1940 suggests that we are wise to be sceptical when security services claim that draconian measures which gravely impinge on civil liberty are all that stand between us and utter disaster.

Workshop Introduction

Professor Edelman prefaced his remarks by noting that the critical issue that arose in a context of crisis was that of how we can best preserve our democracies. He proceeded to outline twelve questions which could be asked in relation to the role of the courts in such crises.

1. To what extent are questions of the role of the courts different from questions that we generally confront when we ask whether or not a court should be involved in an issue? Courts have generally given themselves, or have been given, the capacity to stay out of particular issues based on a lack of standing, justiciability, or a failure to grant certiorari, and possess the ability to write deliberately narrow decisions. The modern view of the US Supreme Court, for example, derives from *Baker v. Carr* (1962), and holds that the courts should not be involved in matters which are assigned by the Constitution to some other institutional actor; not least on the grounds that they lack the competence effectively to act in such cases. So one might ask whether the decision of the courts to decline to exercise the passive virtues is substantively different in cases of crisis than in other circumstances.
2. One might ask whether it is possible for the courts effectively to intervene in crisis situations, given their immediacy. Are the courts condemned, as in the case of the Second World War, to reach the right answer only once the issue has become politically moot? Should one see the current cases before the US Supreme Court in relation to Guantánamo Bay in such a light, or do they instead represent an unprecedented example of judicial courage?
3. Do the same principles apply in regular times and in times of crisis, but with different weight attached to the government interest in the latter case? Or do quite different principles apply in different contexts?
4. Are there actual dangers to the courts getting involved? Might the courts be corrupted by involving themselves in matters which are the primary responsibility of other institutional actors?
5. Should we differentiate between substantive issues and issues of due process? Is there a distinction to be made between reviewing the generality of executive action in response to crises, such as assessing the legality of declarations of war, and considering the position of individual citizens who are 'tangled in national nets'?
6. Do courts have workable mechanisms to deal with the need for secrecy at the same time as delving into details of particular cases? Can such mechanisms be developed by statute? When courts seek to balance individual interests against national security, how great must the threat to national security be to justify, for example, detention without trial? Is there what might be termed a 'Battle of Britain' standard which must be invoked? If so, is it right to say that the United States has never faced such a threat (the Civil War aside)?
7. What is the role of deference? Is it right for the courts to be involved in times of crisis, or should they stay out? Might their actions serve to legitimize and rubber stamp the actions of other political actors? Is there a danger that they are too easy to manipulate if they do get involved?
8. To what extent do the decisions of courts in such cases merely provide a cover for the underlying views of the judges involved?
9. How much of a role should international law play?
10. What is the appropriate role for outside advocates? Are they critical to the preservation of democracy, whether they act as lawyers in court or in other ways?
11. How are the issues raised by national security different from those which relate to communal or to political crises? Do the same issues arise when we consider communal crises in different jurisdictions, such as Northern Ireland and Israel? And are these issues similar to or different from those that arise when considering, for example, *Bush v. Gore* (2000)?
12. What do the experiences of other countries teach us about how courts should approach these matters?

SESSION ONE:

National Security Crises and the Courts

Clark Ervin, former *Inspector General*, Department of Homeland Security

The session began with a presentation by Clark Ervin, former Inspector General, US Department of Homeland Security. As a presidential appointee, the Inspector General shares politics and partisanship with the president, but is supposed to check this at the door when appointed. Ervin suggested that a full rendering of the session's question would ask whether we can trust the courts in national security crises to stand up for our civil rights and liberties, which form the bulwark of liberal democracy. There are reasons to think that, historically, this has not been the case.

One example, from the First World War, concerns the Espionage Act of 1917, which effectively made unlawful any speech critical of the government. Despite the very wide-ranging forms of speech which the Act treated as seditious, and what may be seen as an anti-semitic tone, it was upheld by the Supreme Court in *Schenck v. United States* (1919). The Act was supported at the time by intellectuals such as John Dewey, who defended it on grounds of pragmatism in response to crisis, but later repented, stating that it had taken an opinion which annoyed the majority as being an act of treason. One may also look at the internment of Japanese-Americans during the Second World War (a move, strikingly, opposed by FBI Director J. Edgar Hoover), upheld by the Supreme Court in *Korematsu v. United States* (1944). Ervin drew attention to Earl Warren's later thoughts on the matter in 1962, which observed that war is 'a pathological condition' for a nation, and that in such circumstances, 'military judgments sometimes breed action that, in more stable times, would be regarded as abhorrent'.² Warren later deeply regretted his own actions in relation to this matter.

Many would agree that the Supreme Court is right in relation to Guantánamo Bay. But it is an interesting and difficult question whether the Court would have reached the same conclusion if 9/11 had not been a one-off event. Would the same 5–4 majority have come to the same judgments in such a context? If the United States is subject to a terror attack early in the Obama administration, it remains an open question whether, in such a 'pathological' context, the Supreme Court will take the same line.

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Discussion and Comment

The general question of whether we can trust the courts during national security crises evidently turns upon what it is we want the courts to be doing at such times. It is a question, as one participant suggested, of whether we can trust them to do 'the right thing'. Determining what 'the right thing' is, however, is less than straightforward. Initially, it appeared that there was an unusual degree of agreement in relation to recent judicial interventions in the United States. A number of different participants articulated unease at the actions of the US executive and legislature in relation, for example, to the detention of terror suspects in Guantánamo Bay, and expressed support for the apparent willingness of the US judiciary in recent times to challenge said actions. It became clear in discussion, however, that this apparent agreement was the result of a range of rather different theoretical approaches to the role of courts in national security crises.

2. Stone, G. R. (2006) 'Civil Liberties v. National Security in the Law's Open Areas', *Boston University Law Review*, p. 1323

That the majority of participants were nonetheless able to reach a form of consensus (or, perhaps, what Cass Sunstein would call an 'incompletely theorized agreement')³ is striking, and may tell us something about how the actions of the Bush administration have been received in both legal and academic circles. But it does not follow that such agreement would always be reached in different circumstances, either in the United States or in other legal jurisdictions. It is necessary, therefore, to examine some of the theoretical underpinning of the different positions advanced.

The issue is complicated because two different questions are in play, and one's answer to one question does not depend on one's answer to the other. One issue is whether one believes that the courts should act differently in times of crisis than in more conventional circumstances. For some participants, it is quite wrong for the courts to apply different standards to the matters under their consideration at different times: they simply should fulfil their proper function. This is not, however, to settle the prior question of what their proper function is.

Take, for example, a position articulated by a number of participants: that the role of the courts is essentially that of championing and upholding civil liberties in the face of encroachment perpetrated or directed by other political actors; particularly, perhaps, the executive. If this is one's position, then the question we ask of the courts concerns the extent to which they are indeed willing and able to uphold individual rights and liberties. They do the right thing insofar as they uphold civil liberties, whether these are enshrined in a written constitution, or are taken to be an integral part of the rule of law. But why should the courts act in such a fashion? Two obvious answers suggest themselves: because it is the courts' constitutionally allotted task to uphold civil liberties; or because civil liberties are important, and it is right that they be

upheld. These two positions give us the same answer to the question of what the right course of action is, but for rather different reasons.

One way of articulating this difference is to note that the first position is broadly positivist, whilst the second makes reference to some account of natural right or justice. The second position is straightforward, in that it gives us a simple standard by which to assess the behaviour of judicial actors regardless of their institutional setting. It holds that the courts are typically the best placed body to look out for the interests of the individual, and so charges them with a responsibility so to act. The first position is, in a sense, more complicated, since it depends upon an empirical claim concerning the constitutionally allotted role of a particular judiciary in a particular legal system. So there is no contradiction, from such a perspective, in holding that the right way for courts to respond to national security crises will vary depending upon the particular constitutional model in question; holding, for example, that the role of the British courts within a parliamentary context is different from that of the US courts, who are charged with upholding the rights and liberties contained within the US Constitution.

It was observed that the question of detention limits for terror suspects has been seen in a British context as very much a matter for Parliament, which has conducted a heated debate on the issue. Evidently, adoption of the first position leaves one open to the claim that courts should adhere to the institutional separation of powers and respect their constitutionally enshrined limitations, a view which may actually leave rather limited scope for the courts to act to uphold civil liberties, if one maintains a restricted vision of their role within the political system. One participant, for example, claimed that Madison would be turning in his grave when confronted with the interventionist role which advocates of the civil liberties approach maintain the US Supreme Court should adopt, and that, within the American political order, it is Congress and not the courts, who should be deciding such matters.

3. Sunstein, C. R. (2007) 'Incompletely Theorized Agreements in Constitutional Law', *Social Research*, p. 74.

An alternative approach to the first question, then, sees the courts as actors who are rightly conscious of the need for a balance to be struck between national security and civil liberties. This opens the way for a consideration by the courts of the character of the security crisis in question, since it seems plausible that this balance will be struck in different ways at different times, depending on the urgency of the threat to national security. This clearly depends upon a belief that courts are capable of making such a judgment as to the pressing character of the circumstances of the time. Doing 'the right thing', then, even for those who generally hold that the function of the courts is to uphold individual rights, may not entail opposition to liberties-encroaching action if the action in question is justified by the contemporary security context. So, it follows that one might advocate deference to other political actors for two reasons: because one believes that the constitutionally allotted role of a given court is modest, and so the court should generally respect its positivist constraints; or because one believes that deference is appropriate in particular circumstances where a threat is posed to the security of the nation. As before, the former position will depend upon a close reading of the particular empirical grant of authority to the judiciary, whereas the latter lends itself more readily to generalizable claims relating to the proper roles of judiciaries in times of security crises.

A number of observations were made from these different theoretical viewpoints regarding the role of the courts in the United States following the terrorist attacks of 9/11. It was noted that the courts had acted rather differently at different times – initially granting much more leeway to the executive, but more recently seeking to rein in excesses. This shift in approach can be correlated to two related variables. The first of these is the perception of the degree of threat faced by the United States, which has been scaled back since the immediate aftermath of 9/11, when there was the sense that the country was under armed attack, and was operating on a war footing. The second relates to significant falls in public support for the actions of the

military and the executive, following, for example, revelations regarding interrogation techniques of detained suspects, and the abuse of inmates at Abu Ghraib prison in Iraq.

Whether one attributes the apparent shift of the Supreme Court since 2004 to either or both of these phenomena is a difficult but important issue. If one asks whether one can trust the Court to uphold civil liberties in the face of executive pressure and the force of public opinion, there is evidently a significant difference between the claim that the Court shifted in response to a change in its own perception of the security situation and the claim that it moved only when public opinion allowed it to do so. In general, it seems fair to say that participants were sceptical of the extent to which courts are able, in practical terms, to go against public opinion in such cases. Does this, then, mean that those who look to the courts to uphold civil liberties cannot, in fact, trust them? If not the courts, then whom can be trusted?

There was near consensus that the response of the US Congress to the actions of the executive had been (in the words of one participant) 'supine'. One response is to argue that it is, in fact, unrealistic to expect any political institution to be able to stand up to overwhelming popular pressure at a time of a threat to the nation's security. As one participant noted, there is considerable pressure to adopt a 'better safe than sorry' approach, given that lawmakers are less likely to be punished for false positives than for false negatives. The history of the United States contains numerous examples of failures of the judicial branch to safeguard civil liberties in times of conflict – the Espionage Act of 1917 and the internment of Japanese-Americans during the Second World War being just two obvious examples. This is not to say that civil liberties will necessarily be overridden in such contexts, but rather to maintain that there is no institutional safeguard which can be provided. Instead, the solution lies in public opinion itself. What is necessary is the development of a political culture which robustly promotes the rights of individuals. Once the battle for public opinion is lost, and the public is broadly behind

a given policy, it is unrealistic to expect political institutions to stand in its way, whether the institutions are directly elected, or depend upon public support for their ongoing legitimacy. It may be, then, that one should turn one's attention to opinion formers in civil society, such as interest groups and the media as well as to those political actors who are able to influence public opinion. More than one participant argued that the American press had been culpably quiet in relation to encroachments on civil liberties following 9/11. When one witnesses successful judicial intervention in the name of civil liberties – and participants cited a range of such instances, in the United Kingdom, Israel, and France amongst others in addition to the United States – it seems that this rarely occurs in the teeth of mass public opposition.

Guantánamo cases have created greater incentives to detain suspects elsewhere, such as in other countries, in what are likely to be less humane conditions

An important point made in the course of discussion is that there are additional roles that the courts can play, as opposed to seeking directly to intervene to alter ongoing policy. The first of these relates to the role of the courts in particular oversight of day-to-day governmental decision making. It was observed by one participant with experience of the workings of the Bush administration that agencies taking decisions in relation, for example, to wiretapping and detention orders act differently if they know that courts are checking their work and that they may be called upon to justify their actions, even if they know that the courts are, in fact, very likely to approve the decisions in question. The second relates to the role of the courts in ensuring a proper institutional balance between the executive and the legislature. In some cases, the role of the courts can be to encourage legislative, rather than executive, decision making on the proper balance between national security and civil liberties.

Two final questions remain. First, are there institutional reforms which could be made in order better to protect judges from public opinion in such circumstances, either by reforming existing institutions, or by creating new ones (along the lines, for example, of the United Nations Committee Against Torture)? There is clearly a deep issue here: the more that one looks to political culture to explain judicial action, the more sceptical one is likely to be that institutional engineering will bear fruit. Second, is it simply naïve to expect that judicial institutions will be able to bring about particular outcomes when it comes to the rights of those caught up in the maelstrom of national security crises, however well intentioned they may be, and however well insulated from public opinion?

One participant pointed to the very real threat that judicial action in such cases may have unintended consequences. If executive and military actors are determined to follow a certain course of action and believe that they are impelled to do so by some notion of military necessity, then it is possible that all that the courts' intervention will do is to create incentives for them further to conceal their actions, and perform them in such a way that they cannot be subject to judicial scrutiny. For example, it was suggested that the Guantánamo cases have created greater incentives to detain suspects elsewhere, such as in other countries, in what are likely to be less humane conditions. We may even, it was claimed, potentially see increases in the number of individuals killed on the battlefield if it is harder to arrest and detain suspects. It is very hard to assess such claims without detailed knowledge of the internal workings of executive and military institutions in times of crisis, but they certainly suggest good reasons as to why one should be cautious in believing that the recent activism of the Supreme Court is even close to resolving the substantive issues in play.

SESSION TWO:

Communal Crises and the Courts

Denis Galligan, *Professor of Socio-Legal Studies*,
University of Oxford

The second session was introduced by Professor Denis Galligan, who began by outlining some of the potential cases of communal crisis under consideration. Obvious examples where divisions between and within communities have led to communal crises include apartheid South Africa, Northern Ireland, and modern-day Israel. All three cases have witnessed attempts by particular groups to use the power of the state to maintain order, in all three cases the democratic character of the society has been called into question, and accordingly difficult issues have arisen concerning the proper role of the courts.

Other examples of communal crisis include the miners' strike in the United Kingdom from 1984–5, where the judiciary was called into the controversy over secondary picketing, and division between the white and Aboriginal populations of Australia, in which context the High Court broke deadlock at the political level in the 1988 *Mabo v. Queensland* case. In such cases, courts, who are typically invoked by the weaker party to the conflict, are faced with the prospect of balancing the overall public interest with more particular security, police, and military interests, often while being watched carefully by observers in the international community.

Outcomes such as that in Australia, where the Court intervened directly to grant land rights to the Aboriginal community, are unusual. It is more common for court intervention to be more indirect, and for them to seek to gain protection for members of the weaker community. Court actions in such cases fall into three broad categories. The first category relates to the criminal process, when courts

consider issues relating primarily to due process issues, involving, for example, habeas corpus, arrest of suspects, or the use of special courts and procedures. The second category involves scrutiny of the use of executive and administrative powers, and so involves issues such as freedom of speech, the granting of licenses, restriction of movement, and the destruction of property. Third, one may think of more positive types of action, where the weaker party uses the court to gain adjudication on a contentious issue.

How do the courts respond? In Israel, the Palestinian minority has managed to secure ready access to the Israeli High Court. The Court has taken a wide view of its own powers, has been willing to review administrative action, and has set up simple to use judicial procedures. The Israeli Government has generally been willing to accept the Court's rulings. One should not, however, overstate its impact: between 1967 and 1986, 560 petitions were brought by Palestinians; fifty-five of these were adjudicated by the Court, but only five were decided in favour of the plaintiffs. The Northern Ireland context saw the nationalist community use the courts to challenge preventive criminal measures involving the excessive use of force by the state and the use of detention without trial. Similar tactics were employed in South Africa during the apartheid era.

Looking across the range of cases, a number of patterns emerge. First, courts have generally accepted jurisdiction, and been willing to employ well established procedures to consider suits and petitions. This is significant since access to the courts in times of communal crisis can be an achievement in itself. Although courts will sometimes make positivist claims as to the misapplication of law or the misuse of discretionary powers, they will often go beyond such an approach and develop more general standards by looking at international law and

human rights conventions. It is striking, however, that decisions almost always go in favour of the government – this was generally the case, for example, in the United Kingdom during the miners' strike, in Northern Ireland, and in Israel. The Aboriginal land case in Australia thus emerges as a major exception. Some cases involve reasonably straightforward legal questions, as when the Israeli Court is faced with the question of determining whether a given settlement is temporary or permanent. Other cases are more complicated, however, as when the House of Lords was called upon to determine the appropriate meaning of 'reasonable force' in the particular circumstances of the conflict in Northern Ireland. Since the police had not been granted special powers, the court had to determine what constituted reasonable force in these particular circumstances, balancing social order against the rights of suspects.

Such cases reveal a deep tension between the application of normal law and the abnormal circumstances in which the law is being applied. One approach to the issue is to see the courts, a few exceptions aside, as generally acting as part of the machinery of government and refraining from acting in such a way as to undermine social order. Courts do have their own institutional interests apart from those of the rest of the government, and their legitimacy is deeply tied to their institutional role. The courts, as institutions, have developed particular roles in which they consider themselves to be very capable, but history shows that when their role is that of applying the normal law, they tend to rule in favour of the government. They can still be significant: it is important in times of crisis that the rule of law prevails, and so the courts can play an important symbolic function even when they have little apparent impact on government actions. This can, however, also be expressed in terms of the courts conferring legitimacy on the decisions and actions of the state. One might, for example, see the Israeli Court's occasional decisions in favour of Palestinian plaintiffs in this light. If so, then the role of the Court seems mixed: whilst it might be true that such decisions legitimate other governmental

action, they do also reinforce the principle that governments are answerable to the people and subject to the rule of law.

Finally, one may question the effectiveness of the courts in resolving particular communal crises. Courts are not able themselves to provide long-term solutions, though one can point to some degree of success. In Australia, judicial action did seem to act as a stimulus and trigger the political process into action. The focus on socio-economic rights by the Indian courts illustrates a parallel way in which it is possible to bring highly disadvantaged groups into the political process. In such cases, one might see the courts as providing a framework within which other political actors can revisit the issue and reassume responsibility.

Discussion and Comment

The discussion in the first session was centred around reasonably straightforward issues of the relation between national security and civil liberties. The civil liberties in question are widely held to form an important part of the rule of law, and include issues relating to habeas corpus, freedom of speech, the conduct of trials, the use of evidence, the regulation of state surveillance, and so on. For those who believe that the proper role of the courts is to uphold these civil liberties, the assessment of the court hinges upon the extent to which they are indeed able to protect spheres of private liberty from state encroachment.

Assessment of the courts in the range of cases discussed under the heading of 'communal crisis' is more difficult; indeed, the question of what it means for courts to be successful in such contexts lay at the heart of much of the discussion of this session. Crucially, it may not be enough for the courts to decide an issue the 'correct' way: there are wider issues relating to the wisdom of the courts getting involved in the first place. For example, and perhaps unsurprisingly, participants differed sharply as to the success of judicial intervention in two major post-war policy fields in the United States: in relation to desegregation, following *Brown v. Topeka Board of*

Education (1954), and in relation to reproductive rights in *Roe v. Wade* (1973).

The disagreement here is not related to the substantive decision of the court, but rather concerns over whether or not a given goal, such as desegregation, is best served by judicial involvement. The suggestion is that a victory in the courts may, in some contexts, prove to be Pyrrhic: one may win on the merits of the case, but find that one's overall political goals are set back. Such an outcome may come about, for example, if the court decision serves to mobilize one's political opponents, or if it has a demotivating effect on one's political supporters (if, for example, they incorrectly take the court decision to have settled the issue in question). Division was stark in relation to both *Brown* and *Roe*; whilst some held that, in both cases, matters would have been better left to the regular political process, others stressed the energizing and educative effects of *Brown* on the civil rights movement, and the fact that the *Roe* judgment meant that many women did not have to wait what would potentially have been a considerable period of time for the political process to grant abortion rights.

These issues of the wider effects of judicial actions lie at the heart of discussion of the courts' role in relation to communal crises. Part of the justification for judicial decision making in such cases stems from courts' supposedly nonmajoritarian character. The idea is that courts are able to transcend party politics, and consider issues fairly without favouring one side or other to an action. Participants in the workshop were struck, however, by the extent to which governments appeared regularly to win their cases in such circumstances.

The case of the Israeli Supreme Court is obviously arresting in this regard, not least since the Court does have the reputation as a bastion of minority rights. Thus, though a certain number of cases have been decided in favour of Palestinian plaintiffs, might it be the case that these are token victories, which put a figleaf over policy that would otherwise be more readily condemned internationally? Such a judgment may well be a little too precipitate. As before, it is important in such cases to look not

only at the specific judgments in question, but at their wider social impact. While it may appear as if success rates for Palestinian plaintiffs in the Israeli Supreme Court are very low, it may be that this actually masks the beneficial effects which bringing suits and publicly requiring the government to justify its actions can have. As Gal Dor and Menachem Hofnung have recently argued, although the Court does dismiss the majority of petitions presented to it, this may not be the critical issue, since those who bring petitions are characteristically motivated by a desire for publicity and a long-term effect on policy, rather than for a single judicial decision in their favour. They write:

...what appears to be significant is that the Court quite regularly does issue order nisi, forcing the government to present its case in response to a petition. Once such an order is granted, the petitioners achieve two goals: first, they become known as fighting for the public good (and thus gain the accompanying favorable publicity); second, they engage in a bargaining process with the public authority in an attempt to narrow the differences between the two litigating sides. In many cases such bargaining results in an out-of-court settlement, one that would probably not have been reached otherwise.⁴

Though a certain number of [Israeli Supreme Court] cases have been decided in favour of Palestinian plaintiffs, might it be the case that these are token victories, which put a figleaf over policy that would otherwise be more readily condemned internationally?

So whilst only 2.5 per cent of petitions end in a written decision in which the petitioner can claim complete victory, the success rate rises to a much

4. Dor, G. and Hofnung, M. (2006) 'Litigation as Political Participation', *Israel Studies* 11(2): 131-57 at p. 135.

more impressive 30 per cent if partial victories and settlements are taken into account. In this regard, it is surely noteworthy that the Court has encountered significant opposition from the Israeli political establishment, particularly following the Presidency of Aharon Barak from 1995 to 2006, and is currently facing a series of interventions spearheaded by Minister of Justice Daniel Friedmann that seek to amend the appointment process and limit the authority of the Court.

The labour movement in the United Kingdom has traditionally been extremely suspicious of the British courts, seeing them as being very much part of the British establishment, with a vested interest in the maintenance of the status quo.

In discussion, a number of participants sought to draw a contrast between two different types of cases in determining the appropriateness of judicial involvement. The question is whether a given case turns on a value conflict or a power conflict. It was suggested that when what is at stake is the allocation of political power, courts are precisely the kind of institutions we need to step into intracommunity conflicts. Such a view reflects the *Carolene Products* (1938) rationale, that the courts have a particular duty to assist 'discrete and insular minorities' who are not otherwise adequately represented within the political process. This is particularly important in circumstances when the political process is impotent or does not exist. If the court is to help to resolve conflict in such situations, it is essential that it possesses legitimacy in the eyes of both sides to the dispute. This has implications for the staffing of the judiciary, for example, since one may question the legitimacy of the courts if their members are drawn predominantly or exclusively from one side of the conflict.

Some participants called into question the extent to which the courts were seen as legitimate in times of crisis in Northern Ireland, since they were predominantly populated by unionists. Others doubted the importance of this to the ongoing resolution of the communal crisis in Northern Ireland. It was suggested that judges tend to exaggerate the importance of judicial decisions. Northern Ireland has a long history of communal conflict, and it is hard to think that there were any decisions that could have been taken which would have triggered a resolution to the conflict. It was argued, therefore, that the best that can be hoped for the courts is that they might impose restraint on the authorities to prevent matters getting even worse, and so make it less difficult to get different parties to the negotiating table. It was also suggested that the role of the courts had been overstated in other contexts. Thus, for example, attributing policy change to the courts in a number of prison reform cases overlooks the role played by the executive in interacting with the courts and proactively lobbying for the change in question.

The point relating to the staffing of the judiciary is particularly compelling if one looks at conflicts between different classes in society. The labour movement in the United Kingdom, for example, has traditionally been extremely suspicious of the British courts, seeing them as being very much part of the British establishment, with a vested interest in the maintenance of the status quo. The perception of many during the miners' strike was that the courts could not be trusted to stick up for working-class interests.

One may examine the background of judges in two different ways. First, one may look at the original social background of the judiciary, in terms, for example, of its class background, its ethnicity, and its gender. Different courts, of course, differ in terms of how their composition is assessed in response to such criteria. Even if a court does seem to be representative in these terms, however, there are limits to the extent to which they are truly able to be seen as apart from the ruling establishment,

given that judges will necessarily be highly educated professionals. In discussion, the recent decision of the Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) was cited as an example of how judges are often seen to be significantly out of touch with the interests of working people.

As the discussion over *Roe v. Wade* revealed, opinions over the role of courts in relation to value conflicts were divided. For some, the presence of extensive societal disagreement is not sufficient to bring the courts into play, even if other political actors appear unwilling or unable to resolve the dispute in question. From such a perspective, the courts should only step in when there is a violation of constitutional rights, such as those relating to privacy or equal treatment. The mere presence of communal disagreement, on such a view, does not license judicial intervention: the proper end for courts is protected rights, not desired social outcomes.

Others focused not on the legitimacy but the wisdom of judicial involvement in value conflicts, claiming

that it is a mistake to go to the courts to resolve a value dispute when running ahead of public opinion. Others held that it was not the involvement of the courts per se which was mistaken in such cases, but rather an over-emphasis on the judicial strategy at the expense of other, more direct forms of political activism. Judicial judgments do not resolve political controversy. As before, there was a genuine disagreement between participants as to the efficacy of the courts in such contexts. All courts operate under the same institutional constraints in facing a basic enforcement problem: in general, it is exceedingly difficult for judges to implement policy. In assessing the educative effects of judgments, and other intended or unintended side effects, one is faced with extremely complex questions of cause and effect. What does seem clear, however, is that even if one believes that courts can play an important role in communal conflicts, it is difficult to maintain that they can resolve matters on their own. Courts can have a positive role if there is incompetence or inertia in the bureaucracy, but if there is intransigence and overt opposition to the decisions of the judiciary, this is much harder.

SESSION THREE:

Political Crises and the Courts

Steven R. Shapiro, *Legal Director*, American Civil Liberties Union (ACLU)

Steven R. Shapiro's introductory remarks concerned the presidential election of 2000, which led to the intervention of the Supreme Court in *Bush v. Gore*. He began by noting that the events of 2000 were not, in fact, best seen as a political crisis, but as an electoral dispute. We may define a political crisis by example, such as a situation where the executive has suspended the constitution, cancelled elections, or disbanded the legislature. What role the courts should play in those more extreme circumstances is a different question.

In asking whether we can trust the courts to 'get it right', we may in fact be enquiring as to their institutional capacity: whether they either possess the knowledge to make informed decisions, or have the means to acquire the information in question. Or we may be asking whether they are legitimate and appropriate decision makers in inherently political contexts. When it comes to institutional disputes, the answer to the first question seems to be affirmative: courts do themselves seem to have the relevant institutional competence. The second question is a little more complicated. One can certainly argue that they are legitimate decision makers: they are theoretically nonpartisan, and so, in the words of Chief Justice Roberts, are appropriate 'umpires' of the electoral game.⁵ But the question of whether they have a legitimate constitutional role is different from the question of whether courts have

authority in a way that the public will accept as legitimate. There is a widely held view that the Supreme Court decided the 2000 election by halting the Florida recount, a decision which is commonly held to have been made on partisan grounds. That perception is very damaging to the court, and it is impossible properly to assess its long-term consequences. It has not translated into open defiance, since the Court's judgments are obeyed, but there is a much more broadly held cynicism that is not helpful to the Court, and not likely to be resolved by Justice Scalia's claim that people should 'get over it'.⁶

A number of points of interest may be noted concerning *Bush v. Gore*. The Supreme Court does not generally intervene in this kind of election counting dispute. Disputes relating to the validity of ballots arise all the time, but are invariably resolved at state level, even in relation to federal elections. So the decision to intervene marks a departure from general practice. The case was decided by a 5–4 split. This was not straightforwardly partisan, since only two members of the Court were nominated by a Democrat, but the Justices did divide over very familiar ideological lines.

The conservative majority that halted the recount is generally rhetorically deferential to state rights, so the decision to override the state courts on a matter that is normally left to the states has reinforced the impression that the Court was not applying a neutral principle across the board. The underlying equal protection principle employed, that every individual's

5. In the course of his confirmation hearing, Roberts told the Senate Judiciary Committee, 'Judges are not politicians who can promise to do certain things in exchange for votes... judges are like umpires. Umpires don't make the rules; they apply them.' Babington, C. and Becker, J. "'Judges Are Not Politicians,' Roberts Says", *Washington Post*, 13 November 2005

6. In an interview with CBS's *60 Minutes* programme on 27 April 2008, Justice Scalia, when asked about *Bush v. Gore*, replied, 'Get over it. It's so old by now'. Transcript available at: <<http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290.shtml>>

vote should be counted equally, is not a principle of law that the Court has ever applied in elections, and one it was not prepared to employ beyond the mechanism for a recount, not being moved, for example, by the fact that votes were counted unequally across Florida by different mechanisms. In refusing to send the matter back to Florida, the Court appeared to be rushing to a decision that it wanted to make.

One may further ask whether the Court should have become involved in the process at all, or whether the matter should have been resolved by Congress. This involves two questions: that of whether the Court possessed the constitutional authority to intervene, and, if we answer the first question affirmatively, whether it should have exercised its discretionary power so to act. Some have answered both questions negatively. Even if one accepts both the legitimacy of intervening and the wisdom of so acting, one can still interpret the nature of the decision, which many believe to have been written in a very unpersuasive fashion, as such that it exposes the Court to the charge that it was acting in a political, rather than a judicial, capacity.

There is thus the danger that in resolving one crisis, the Court has created a crisis of confidence in the judiciary. One need not accept the opinion of Justice Stevens, contained in his dissent, that the country will recover from the decision but that the Court will not, to think that the decision has been a serious self-inflicted wound.

Discussion and Comment

There was a common sentiment amongst participants in the workshop that the *Bush v. Gore* judgment had damaged the image of the Supreme Court in the eyes of the public. It was even suggested that the Court had been, to some extent, 'bailed out' by the events of 9/11, which had shifted attention away from the legitimacy of the 2000 presidential election, as well as providing a chance for the Court to gain some measure of redemption by opposing the executive on civil rights issues in cases such as *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006). Participants suggested that cynicism in relation to the Supreme

Court had affected the entire United States judicial system. One might note, for example, that in newspaper reports of court decisions, articles now routinely make reference to who appointed the judges on the relevant panel, suggesting that this fact is relevant to determining the judicial outcome. It is not only the Supreme Court whose image has been affected by the events of 2000 – we might also look at the role played by state courts. For example, it was suggested that there was a view on the Supreme Court that the Florida Supreme Court, a Democrat court in a Republican state, had not paid sufficient respect to the terms of the initial remand, and that it had not been as careful as it could and should have been in giving clear directions on how to manage the recount.

The Supreme Court had been, to some extent, 'bailed out' by the events of 9/11, which had shifted attention away from the legitimacy of the 2000 presidential election.

One issue which provoked a great deal of discussion was the Supreme Court's evident unwillingness to seek a compromise in response to the problem with which it was faced. The split decision was itself problematic; it being on such familiar ideological lines doubly so. There is an obvious advantage in the Court seeking to avoid such marginal verdicts in politically divisive times. One remembers, for example, the lengths to which Earl Warren went to secure a 9–0 verdict in relation to *Brown*, and also of the attempts of the Court to gain a 9–0 decision in *United States v. Nixon* (1974), which was eventually decided by an 8–0 ruling, with Justice Rehnquist recusing himself.

There appear to be two ways that a 9–0 decision could be reached in such circumstances: the majority five could modify their result or reasoning, or the minority four could agree to join the majority five for the good of the Court and/or the country. In discussion, the suggestion was made that from an

institutional perspective, Justice Stevens had made matters worse by decrying the decision as partisan, and that the minority four would have done better to be silent on the issue. Others opted to place the blame elsewhere; arguing, for example, that there was an available route to a 7-2 decision to send the issue back to the state courts with clear instructions, given that seven members said that there was an equal protections problem. Others disputed the claim that seven members believed that there genuinely was an equal protections issue, suggesting that Justices Breyer and Souter had adopted the position tactically in an attempt to form an alliance with Justice O'Connor.

Regardless of where one sites the blame for the 5-4 decision, the fact remains that in such a partisan dispute, it is clearly unfortunate that the Court appeared to divide in such a partisan fashion. On the one hand, one could seek to argue that if courts are to confer legitimacy on electoral outcomes, they must be seen to transcend the politics of party. On the other, one might note that the decision was, at least, accepted by all the major parties involved, and has not led to any serious move to reform the workings of the Supreme Court. This could be portrayed either as an indication of the exalted role of the Supreme Court in the American political order, or as the Court having used up a certain amount of its political capital. On the latter interpretation, the Court can ill afford to take another decision of a similar nature.

Were there other alternatives open to the Court?

One possibility that was discussed was whether the Court would have done better to have left the matter to the Florida courts, and refused to involve itself in what was, in one sense, at least, essentially a state matter. Whether this would have made a great deal of difference in practice was disputed: such a move might, for example, have led to the Florida legislature ratifying the earlier results in Bush's favour, a move that Congress would likely have accepted. Would the Court not have been criticized for refusing to hear the case, if this had resulted in the election of Gore?

It might be suggested that there are no straightforward solutions when electoral outcomes are so desperately tight as they were in 2000. The Court would likely have been attacked for whatever decision it made, whether this was a substantive decision for either side, or a refusal to itself take a decision. The Court was, as such, in a no-win situation. It was argued, however, that whilst it was indeed inevitable that the Court would face criticism from one side of the political divide whatever its decision, the *character* of the attack would not have been the same had it acted differently. Had the Court refused to intervene and left the matter to the Florida authorities to determine, it would doubtless have been attacked for cowardice, but not necessarily for partisanship. It is an open question which charge is more damaging, but there seem to be good reasons to believe that there is something particularly problematic for the legitimacy of the Court when its political independence is called into question.

Is it, then, inevitable that the courts will face this kind of extensive criticism when called in to settle such electoral conflicts? One might plausibly maintain that even though this was indeed the case for the Supreme Court in 2000, it is not a necessary truth concerning the role of courts in response to electoral crises. There might be something particular about the United States Supreme Court in the present day which gives credibility to charges of partisanship in such contexts. One might look here in particular at the way in which the judiciary is appointed. This question arises at both a federal and a state level. There are clearly different ways in which the appointments process can acquire a partisan nature, either when judges are selected by popular election, as is true for many state judges, or when they are appointed by an elected president, and subject to confirmation by an elected Senate, as with Supreme Court Justices. It is clear that the nomination process for Supreme Court Justices has become increasingly polarized in recent years; one may look in this regard at the increasingly public nature of the process, the role of interest groups, the use of televised hearings, the questioning by Department of Justice officials of prospective appointees, and so on.

One may well argue, therefore, that the role of the courts in response to political crises is intimately connected with the role that they otherwise play in the policy process. The politicization of American appointments has not happened by chance; rather, it is evidently a rational response on the part of political actors to the increased role that the judiciary plays in the modern world of public policy. Since judges are routinely taking decisions which have ramifications for the interests of political parties, it is not surprising that these same parties seek to exert influence over the composition of the judiciary. The extension of partisan political competition to the judicial branch has implications for the independence of the judiciary in general,

but particularly so when it is called upon to pass judgment in electoral contexts. Of course, it is too simplistic to maintain that the Supreme Court is straightforwardly partisan — as noted above, seven, not five, of its members were appointed by Republican presidents. Justices have the independence which lifetime tenure brings, and so are able, to some degree at least, to act as members of an independent institution, with both their own institutional interests and their own policy convictions. But it is perhaps unsurprising that there is a trade-off between the perceived independence of the judiciary as impartial electoral arbiter and as policymaker in its own right.

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