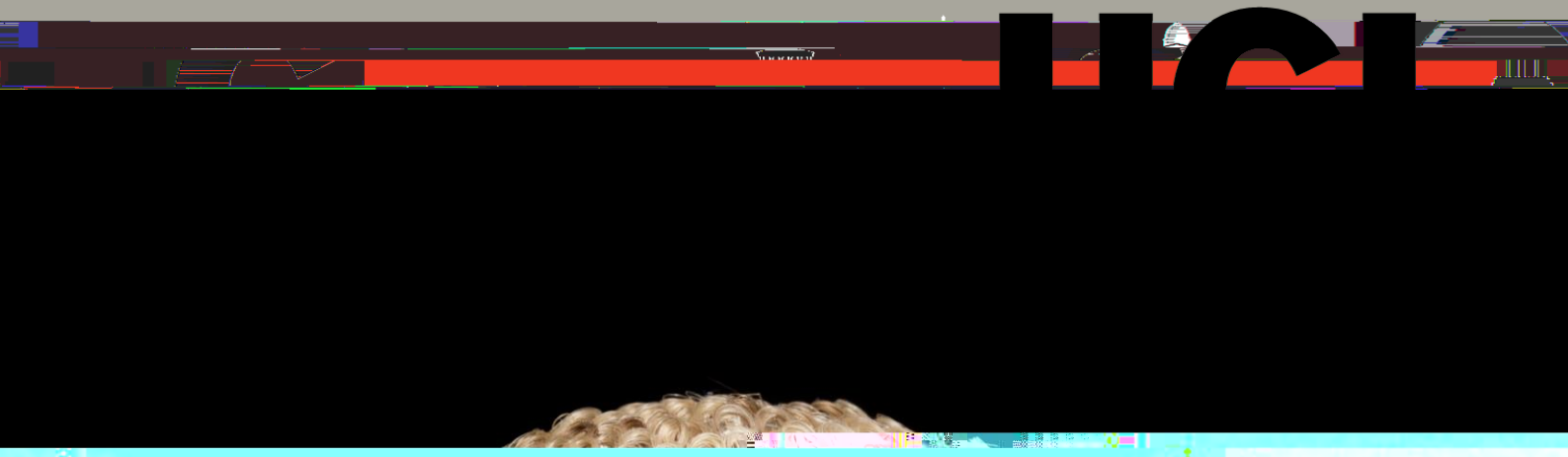
DEPARTMENT OF POLITICAL SCIENCE



JUDGES KEEP OUT

OFF-THE- % (1 & + , 1) / 8 (1 & (2 1 7 + (8 . ¶ 6 TERROR REGIME

ANISA KASSAMALI

The Constitution Unit

Judges Keep Out

Off-the-bench Influence on the UK's Anti-terror Regime

Anisa Kassamali

October 2016

Contents

Executive summary

x

was indeed experiencing ‘t
emergencies’.
The overall effect is the Home A

of judicial independence' and Frank Cross reg

much as it is relevant to the topic at hand.

ch: 'In order to be impartial a

the State'.

The Constitution Unit's

(CRA), which was intended by the government t
branches of government and put it on a mode

2. Methodology

x
x
x
x
x
x
x
x
x
x
x

s t i v e a n a l y s i s o f t h e U K ’ s a n t i

U n i t e d K i n g d o m ’ s a n t i

–

–

3. Extra-judicial statements on anti-terror policy

inconsistent with the principle of individual
given her Majesty's Commission for the discha
such matters for themselves'.

–‘ I t r i e d t o p e r s u a d e
o f A p p e a l t o b e b r i e f e d b y M i n i s t e r s a b o u t n a
r e f u s e d i n t h a t i n s t a n c e , t h e i n t e r v i e w e e w e n

I 6) a t M I 6 H Q f o r a b r i e f i n g ’ .

Informal gatherings

–

Anti-terror regime

–

–

i n t e r v i e w e e s , I a s s e s s e d w h i c h e l e m e n t s o f t h

Areas of interest

Lords debates

Figure 1: Number of judicial contributions to anti-terror legislation in relevant Lords debates

Policy	N/% of judicial contributions	Sub-topic	N/% of judicial contributions	Contributing judges (Lords)
Asset-freezing				
Attendance at a place used for terrorist training				
Closed Material Procedures – administration of justice				
Control orders				
Definition of terrorism				
Devolved issues				
Dissemination of information about the armed forces				
Dissemination of terrorist publications				
Glorification of terrorism				
Independent Reviewer of Terrorism legislation				
Overview of surveillance				
Parliamentary process				
Police power to seize documents				
Post-charge questioning				
Power ofentry without warrant				

Speeches

–

–

–

er Lord Neube
comments, particularly system and access

underscored by Neuberger’s ra ur th of in s s t e e
significant true exception’

Select committees

Evidence to committees

Judges' appearances before select committees
ion Unit

–

Figure 2: Breakdown of judicial contributions and terror regime in judicial evidence to committees

Policy	N/% of judicial contributions	Sub-topic	N/% of judicial contributions	Contributing judges (Lords)
Overview of Surveillance				

As one judicial interviewee told me, jud

Provision of intercept evidence for terrorism enquiries
Seizure of passports etc. from persons suspected of involvement in terrorism and Temporary Exclusion Orders (TEO)
Special Immigration Appeals Commission (SIAC)
Specific body of terror legislation
Stop and search powers
Terrorism as an offence
Terrorism Prevention and Investigation Measures (TPIMs)
University requirements to prevent radicalisation

year period under disc

–

new judiciary are ensuring that ‘truths are b
that past’.

Whilst this argument is compelling in Gearty’
the judiciary’s extra

Impact

Both the judiciary’s areas of interest and di
the UK’s anti

Donaldson’s proposed amendment. Under the rev

ough, as before, L
amendment itself was not carried, the subsequ

Lymington’.

Ibid

debates. The serving judges' academic speeche

reaching

that, barring select committee reports and re

the judiciary's views. Senior civil servant i

4. Administering the anti-terror regime

Extra-judicial oversight of surveillance

Overview

Surveillance has long been a feature in the

Extra-judicial impact

Judicial opinion

Judicial review

(making the judiciary's own aforementioned sa

Secondly, and by contrast, a lack of resource
the salaries, the Home Office sponsors

Individual factors

–

Inspection procedures

consisted of approximately 10 per cent of his

enforcement agencies' and public au

The next post holder Sir Anthony
number of changes to the inspection procedure

Overlapping structures

As mentioned, the commissioner system has de
that there ‘are areas

December 2015 that ‘under the present system,

commissioners are looking at the same exercis

Association of Chief Police Officers feel th
ordinate their inspection activit

Figure 7: Recent Commissioner post holders

Commissioner	Post Holders	Employment Status
Intelligence Services Commissioner	– –	
Chief Surveillance Commissioner		

ports constitute the judicial commissi
reception is indicative of the commissioners'

The issue of local authorities' requests for

was able to report that the 'Home Office
the local authorities to enable them to achie
he noted that 'the recommendations frloemmetnhteedp
and concluded in 2010 that '89% of the local
compliance with the Act and Code of Practice'

be overlooked, it is clear that judicial comm

Closed Material Procedures

Overview

–indefinite detention, control order
courts', the procedure allo

–

practice of 'gisting'. Suspects are provided

Special Advocate is responsible for formulat

–

The first element requires that they tes

noted the 'inabilityvistocesfufreecthiwetlyecgnavelemge

The Special Advocates' representation functio

of my interviewees told me, ‘terrorism is whe
framework in which we operate’, and this proc

Evolution of anti-terrorism and CMP legislation

–

Services)

The Investigatory Powers Tribunal

and the quality of state surveillance of thes

5. Conclusion and recommendations

Conclusion

judiciary's own role, or the administration o

making discrete and ad hoc contributions, they could perhaps come together in an advisory body made up of retired judges. The new Investigatory Powers Commission could fulfil this role, providing sustained evaluation and reflections on areas of the UK's anti-terror policy, offering commentary and occasional reports in the same manner as select committees.

within the executive to mon

remedied by an official point of information for extra-judicial (and likely also judicial) comments on anti-terrorism. An official within the Home Office's Office of Security and Counter-Terrorism could monitor judicial contributions and dispense them to those with an interest.

Administration of the anti-terror regime

important to highlight the importance of an independent source of funding.

Bibliography

Official publications

Commissioner reports

Annual Report of the Chief Surveillance Commissione

, ‘Oral Evidence’

–

Report: Draft Investigatory

Powers Bill –

Counter Terrorism Policy and Human Rights: 28 days,

Terrorist Asset-Freezing etc. Act 2010

– –
– –

Terrorism Prevention and Investigation Measures Act 2011

–
– – –
–

Justice and Security Act 2013

– –
– –
– – –

Counter-Terrorism and Security Act 2015

–
– – –
– –
–

Speeches

015), ‘Security and Justice

Lord Kerr (May 2013), “War on Terror”, Lord
Queen’s University Belfast

, ‘Where Angels Fear to Tread’, H

, ‘Justice and Security’, speech

, ‘Judicial Independence and Acco
Court’, speech at the C

‘Judicial Perspectives on Open

’ _____

_____

, ‘

7 K H 8 . ¶ V W H U R U H J X O D W R U \ U H J L P H has evolved rapidly over the last 15 years, and the judiciary have had to adjudicate on this body of legislation in the courts. Much has been written about these court decisions, with claims that the judiciary has increasingly overstepped the boundaries of their constitutional role. Far less attention has b H H Q S D L G W R M X G J H V ¶ influence beyond their decisions in court. This report explores the M X G L F L D O \ ¶ V R O H