

NATIONAL SECURITY LAW SYMPOSIUM

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Dr. James Renwick¹

Introduction

Your Honours, Ladies and Gentlemen, may I add my welcome to that of Professor Weisbrot.

The title of this brief address is *Something new under the sun - Criminal Law & Terrorism – New concepts and procedures and how we got here*. The title, of course, comes from King Solomon as the author of the Book of Ecclesiastes where he wrote that: “*There is nothing new under the sun*”.²

This is a significant issue in the so called war on terror. I say so called, not to denigrate the importance of what is undoubtedly a concerted, international campaign, but to draw a distinction between a campaign against an idea whose manifestations are protean as opposed to an armed conflict following a declared war upon another nation state.

In my view there are 4 legal topics where you can argue that there is *something new* emerging:

¹ 12 Selborne Chambers – james.renwick@12thfloor.com.au
² Chapter 1, Verse 9

- a) First, there is the relatively recent trend to respond to terrorist action by armed force rather than police action – apart from the major military actions in Afghanistan and Iraq, there have been instances of targeted assassination of suspected terrorists – the US targeting of a taxi containing a suspected Al Qaeda operative in Yemen in 2002 comes to mind:- this fraught area has been well covered in the last session;
- b) Second, there is the question of treatment and classification of prisoners of war and enemy combatants;
- c) Third, and this is related to the last, there is the matter of detention without trial of suspected terrorists;
- d) Fourth, there is the issue of how fairly to try suspected terrorists, balancing the many aspects of the public interest involved, including those of the State, the accused and the press.

In each of these matters, the question remains, are we dealing with *something new under the sun*, that is, some new threat to democratic society which justifies new powers or revival of powers not used since a war of national survival at that, that is World War II.

Some say that the events of 11 September, while shocking for the world's only superpower, justify police but not military action, and certainly do not justify any, or at least any significant diminution of civil liberties.

That was not the response in the USA.

So it was that Judge Alberto Gonzales, then counsel to Mr. Bush, and now his Attorney-General, wrote to him on January 25, 2002, arguing (sucesssfully, but controversially) that the Geneva Convention On The

Treatment Of Prisoners Of War was inapplicable to every single member of Al Qaeda and the Taliban and that there was no occasion to hold hearings to determine applicability on a case by case instance.

He began by noting that the President had already called the conflict “*a new kind of war*”. He then went on as follows:-

*“It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for the (Convention). The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians and the need to try terrorists for war crimes ...In my judgment [he wrote] this new paradigm renders obsolete (the Convention’s) strict limitations on questioning of enemy prisoners”.*³

Later, this notion that the world was facing something quite new led US Government officials – and senior ones at that – to argue that:

- because Congress cannot (or more accurately, generally does not) direct the President on matters of military tactics, as that would be an unconstitutional interference with the President’s powers as Commander in Chief,
- it followed, so the argument went, that the general criminal law prohibiting torture by a government official, or the right to habeas corpus to question detention by the State, could not stand in the way of Presidential directives concerning interrogation and detention of enemy combatants.

³ The Torture Papers- The Road to Abu Ghraib – Cambridge University Press 2005 p119

In the result, there has been:

- a single conviction of a US citizen of a terrorist offence,
- at least 2 US citizens have been detained by presidential fiat, one, Mr hamdi, straight off the battlefield, the other Mr Padilla, picked up off the plane in the USA as a material witness and later transferred to Naval custody.
- The US Supreme Court ducked the habeas corpus application for Padilla, holding he had begun his federal action in the wrong district. Last week a federal judge said he should be released, but so far he has not been.
- Mr Hamdi's detention was said to be subject to a limited right of challenge – limited to whether he was an enemy combatant. His case was settled by him agreeing to loss of his citizenship in the US and to deportation.
- And of course there are the 500 or so non-US citizens who are in Guantanamo Bay, 4 of whom have been charged, but whose trials have been held up by a court challenge in the case of Hamdan (not to be confused with Hamdi) which is making its way steadily to the US Supreme Court. I will return to Guantanamo Bay and the Military Commissions later on.

Australia

Australia has not yet had to decide what to do with prisoners of war or enemy combatants. We did not capture and hold such people in either Afghanistan or Iraq.

We have had to face the issue of getting a suspected terrorist or their associate to talk – the 2003 ASIO Act amendments which permit

questioning warrants, and the as yet unused questioning and detention warrants, are a significant part of this response, one of nearly 30 new laws enacted in the last 3 1/2 years in this area.

The international law impetus for this significant legislative activity was United Nations Security Council resolution 1373, passed within three weeks of the events in New York and Washington, which had the threefold aim of

- requiring all nations states to specifically outlaw terrorist acts,
- to deny terrorist safe havens,
- and to suppress the availability of finances for terrorists.

In Australia some of the legislation has been controversial. I need only note three examples.

- First, there was the creation of new crimes centred around the notion of a terrorist act. The argument that terrorism is covered by existing crimes although respectable did not win the day.
- Secondly, there was the prescription of terrorist organisations and
- thirdly, there was the conferral of a new power upon ASIO, formally a purely information gathering and analysing and co-ordinating body of powers to require persons, the subject of a warrant to answer questions upon pain of committing a criminal offence. We know from the most recent ASIO public annual report, that such warrants were issued on three occasions in the last year and no doubt the annual report for this coming year will make interesting reading.

Then of course we have seen half a dozen individuals charged with offences under these new laws. It was thought that the doctrine of public

interest immunity might require some boosting and perhaps modification in these trials and as Professor Weiserbrot I think will explain, the Law Reform Commission was given the task of reporting on the protection of classified and security sensitive information and an important statute the National Security Information (Criminal Proceedings) Act has been passed largely as a result. I will say no more about that statute here.

It has to be acknowledged that governments have been placed in an invidious position since September 11 in finding the right balance between outlawing terrorist acts and ensuring so far as possible they do not occur, and protecting essential rights we take for granted in a democracy. I remember hearing Kim Beazley say shortly after the Bali bombing that one understood nothing about politics in Australia or anywhere else in a democracy if one did not understand that after an outrage like the Bali bombing, or the events of 11 September, it is essential for a government to be able to say if there was a further outrage, that there was nothing more they could reasonably have done to prevent it.

Detention without trial, which does have precedents during World War II in Australia, the UK and the USA although in Australia and the UK it was done pursuant to statute, has not been implemented in Australia, although in light of the decisions of the High Court in Fardon, and Baker last year, and in view of the very limited application of the Kable principle, could be implemented here, certainly by state governments which did not involve the Supreme Courts and almost certainly by analogy with immigration detention and detention of the mentally ill, by the Commonwealth Parliament as well.

If, and I emphasise if, there was a widespread view that it was impossible to convict terrorists I suspect that legislators will come under real pressure to authorise detention without trial.

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