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**‘The separation of judicial and executive powers in Australia: detention decisions
and the Haneef case’**

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Abstract

The separation of powers is an important means of insuring against the arbitrary deprivation of liberty, requiring at least that detention is in accordance with valid laws and subject to independent judicial scrutiny. But in the realms of immigration and national security, the separation of powers is blurred by the phenomenon of executive detention for preventative or administrative purposes. Here we discuss the recent Australian history of aggressive executive action and relative judicial deference in the immigration arena; and even more recently, in the provisions of anti-terrorism legislation. In 2007 we saw the provisions of immigration and security legislation intersecting in the case of Dr Mohamed Haneef. We conclude by reviewing the details of the Haneef case, and how it was played out politically and in the media.

Introduction

The separation of powers is an important means of insuring against the arbitrary deprivation of liberty, requiring at the very least that detention is in accordance with valid laws and subject to independent judicial scrutiny. Most defensibly detention occurs as an exercise of judicial power, administered under and according to the constraints of the criminal law. These constraints include the assumption that detention is generally speaking permissible ‘only as a consequential step in the adjudication of criminal guilt...for past acts’ (*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 612 per Gummow J), and that it is for a determinate period. But in the realms of immigration and national security, the separation of powers is blurred by the phenomenon of executive detention for preventative or administrative purposes. We argue the separation of powers—and the rule of law which it preserves—is endangered by the judiciary’s traditional willingness to treat executive action within these realms as warranted by national security considerations, and largely immune from judicial interference. As Colin Harvey argues, it is exactly here, where fundamental rights are at stake, that judicial oversight should be exercised with greatest rigour (2005, 175; see also Dyzenhaus & Thwaites 2007, 10).

Australia’s immigration legislation establishes a mandatory detention regime in respect of any person who is inside Australia’s migration zone but who does not hold a valid visa. A range of legislative provisions directed at terrorism also now provide for detention—of both suspects and non-suspects—outside the scope of the ordinary criminal law. These provisions accord the executive extraordinary powers while at the same time limiting judicial oversight in respect of their exercise. This has dangerous implications for individual liberties and the rule of law—implications which surfaced tellingly in 2007 in the case of Dr Mohamed Haneef, an Indian national who was living on the Gold Coast and was arrested and detained in relation to a British terrorism investigation. Before discussing the facts of the Haneef case, and how it unfolded in the media and politically, we consider the role played by the separation of powers in Australia, and the impact of tension between the executive and the courts in the arena of migration law. We argue the separation of powers has been undermined since the late 1980s by executive action—and the support of a compliant legislature—in this arena, combined with the relative deference of Australia’s High Court. Disregard for the separation of powers can now also be seen in a range of anti-terrorism provisions. After outlining the specific detention provisions in Australia’s migration and anti-terrorism legislation, we discuss additional separation of powers issues to which they give rise. We consider the judicial response thus far to the detention provisions in the anti-terrorism legislation, before finally turning to an account of the Haneef case.

The separation of powers

Designed as a check on government power and reflecting more broadly ‘a political morality which seeks to promote individual rights and freedom’ (Ten 1995, 394), the separation of powers doctrine calls for the distribution of judicial, executive, and legislative functions between three distinct arms of government. According to the

doctrine, each discrete power should operate independently, with none ‘trespassing into another’s province’ nor ‘abdication of power’ to another (McHugh 2002). In some shape or form, the doctrine characterises all common law systems. It is constitutionally entrenched at the federal level in Australia through the vesting of judicial power in the High Court (and other designated federal courts); legislative power in the federal parliament; and executive power in the Governor-General as the representative of the British Monarch, ‘who by convention acts on the advice of Ministers’ (Chesterman 2007, 538). While the separation of powers is formally breached by the fact the executive is headed by the prime minister and cabinet ministers, who also lead the majority party in the House of Representatives (the more popular house in Australia), legislative and executive functions are still distinct because the executive’s responsibility is to implement laws that are duly made through the parliamentary process, as well as being open to judicial scrutiny and review.¹

Heated public debate concerning the function and role of the courts in the context of the separation of powers doctrine is not uncommon in Australia. The High Court attracted sustained criticism for its ‘activism’ in the 1990s, with its recognition of native title and implied rights characterised by many as an illicit foray into the executive realm of policy creation. In the same context, Deputy Prime Minister Tim Fischer courted controversy when, following the 1996 *Wik* decision, he called for the appointment to the High Court of a ‘capital C’ conservative (Chesterman, 538). Nor is it uncommon, however, to characterise at least some degree of tension between the executive and the judiciary as an ‘inevitable result’ of the separation of powers doctrine, and indeed, to ‘regard this tension...as indicating a healthy and well-oiled, working government.’ (McHugh 2002) As former High Court Judge Michael McHugh points out, the premise of the separation of powers doctrine ‘is not a harmonious relationship but a checking and balancing of power.’ (2002) He quotes Lord Woolf’s claim that tension between the arms of government is

no more than that created by the unseen chains which...hold the three spheres of government in position. If one chain slackens, then another needs to take the strain. However, so long as there is no danger of the chains breaking, the fact that this happens is not a manifestation of weakness but of strength.
(Woolf 1998, 580)

Executive Action in the Migration Arena

Lord Woolf’s relatively sanguine view of tension between the arms of government is not in fact shared by McHugh. In a speech in 2002 focusing on the ‘dramatic action’ taken by the then Government to limit judicial review in immigration matters, he suggested that while ‘occasional conflict may do no harm...if tension persists, as it has done in the migration area in recent years, it damages the public interest.’ He continued:

¹ Allowing detention to be imposed as a consequence of the exercise of executive discretion—an outcome allowed for by certain sections of the migration and anti-terror legislation which we consider later—doubly offends separation of powers principles by substituting executive discretion for proper legislative provision, and by restricting the role of courts.

If the Executive Government is continually criticising the Judiciary, the authority of the courts of justice is likely to be undermined and public confidence in the integrity and impartiality of the judges is likely to be diminished. Continuing conflict is also likely to induce the Executive Government to prevail on the legislature to take the extreme step of reducing or abolishing judicial review with the result that the rule of law is undermined.

Potentially, the damage sustained may be even deeper than McHugh indicates, influencing not only public perception but also the judiciary's and the executive's self-perception. The judiciary's willingness to scrutinise executive action and staunchly defend its power against executive encroachment may be undermined, while the executive's respect for the principle of the separation of powers, including the fact its own powers are constitutionally confined, may wear thin.

This has in fact occurred in the arena of migration law in Australia since the Hawke Labor government's introduction in 1989 of a policy of detaining asylum seekers (Brennan 2002, 13).² In conjunction with this policy the government began curtailing judicial review of refugee determination decisions and circumstances of detention (Brennan, 14). When the Howard government came to power, its challenge to the role of the courts in the sphere of immigration was particularly aggressive, but it was largely conducted with the support of the Opposition, and reflected a history of 'bipartisan governmental mistrust of the role performed by the courts in reviewing migration decisions' (Sackville 2000, 196). The fact the government's hostility was combined, at least for much of Howard's second term in power, with strident public support for its anti-asylum seeker policies, produced—with one or two notable exceptions—an increasingly triumphal and immoderate executive, and to some degree, a compliant High Court.

Thus we have seen a massive expansion in the discretionary powers of the Immigration minister—to the point that the current Minister for Immigration, Senator Chris Evans, has described his own powers as 'extraordinary' (2008, 5).³ At the same time, judicial review of visa-related matters has been restricted 'to all but exceptional circumstances' (Ruddock 2000: 8).⁴ 'Exceptional, even extraordinary' powers have been accorded to officers in the Department of Immigration, without those powers being subjected to

² Legislation introducing mandatory detention was enacted in 1992: *Migration Amendment Act 1992* (Cth), but did not come into effect until September 1994 (Phillips & Millbank 2005, 2).

³ Evans describes being 'told that part of the reason for the enormous expansion in ministerial interventions [in immigration matters] was the frustration of previous ministers with the decisions of the tribunals and the courts. In order to better meet the demands of the community and address the concerns of the alleged 'soft' attitude of the tribunals and courts, former ministers took decision making into their own hands.' (2008, 6) Manne claims the 'vast powers of Ministerial discretion...involve an unprecedented legal architecture comprising over 20 sets of powers in which the Immigration Minister is the only person in the country able to decide the fate of literally thousands of people each year.' (2008, 3)

⁴ See also UN 2002, 8: 'Lack of access to a court' & 15-16: 'The gross inadequacy of guarantees concerning the role of lawyers and of the judiciary'.

oversight or constraint (Palmer 2005, ix).⁵ It is hardly surprising that there is now a very substantial literature documenting wide-ranging abuses within the detention system (see for example, Briskman, Goddard & Latham 2008, Burnside 2007, Palmer 2005, UN 2002). In the meantime, the High Court has not only upheld the validity of Australia's mandatory detention regime, but has concluded (although only by a narrow majority) that it is within the power of the executive to detain a stateless person indefinitely, even in cases in which there is a high likelihood of the detention extending for the rest of the person's life (*Al-Kateb v Godwin* [2004] HCA 37; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38).

The mandatory detention provisions of Australia's *Migration Act 1958* (Cth) have been widely condemned by human rights and other civil sector organisations, and the United Nations Human Rights Committee has found that in certain circumstances they breach article 9 of the *International Covenant on Civil and Political Rights*, according everyone a right to liberty and security of person, and stating that no one shall be subject to arbitrary arrest or detention (*A v Australia*, CCPR/C/59/D/560/1993 (Apr 1997) and *C v Australia*, CCPR/C/76/D/900/1999 (Oct 2002)). Nevertheless, the government asserts that legislation providing for administrative detention of 'unlawful non-citizens' does not impinge on the separation of powers because it is a valid exercise of the powers accorded to parliament under the Constitution in respect of naturalisation and aliens (s 51(xix)) and immigration and emigration (s 51(xxvii)). The High Court has accepted that argument insofar as the legislation can be 'characterised as a law with respect to' aliens or immigration. In these circumstances the detention will not be considered punitive in character, and thus will not infringe on the High Court's exclusive jurisdiction under Chapter III of the Constitution. (*Chu Kheng Lim And Others v The Minister for Immigration, Local Government and Ethnic Affairs And Another* (1992) 176 CLR 1; *Al-Kateb*).

In *Lim*, Brennan, Deane and Dawson JJ. (30-31) found the Commonwealth's power to make laws with respect to aliens 'includes not only the power to make laws providing for' deportation, but also extends to authorising the executive to detain aliens 'to the extent necessary to make the deportation effective'. Thus detention would be valid if it could be characterised as reasonably necessary to allow for deportation. The test of 'reasonable necessity' was not, however, adopted by the majority of the High Court in the case of stateless asylum seekers *Al Kateb* and *Al Khafaji*. Instead, the majority applied McHugh's reasoning in *Lim* (at 64) that 'If a law can be characterised as a law with

⁵ Palmer (2005, ix) found this was particularly problematic given the 'self-protective and defensive culture' in the Immigration Department. The degree to which this culture was ingrained, despite claims it had been reformed, was evidenced by a case in October 2007 in which Justice Margaret Stone castigated the Minister and the Department for forcibly removing a man from Australia despite the fact he had lodged a Federal Court application to appeal the cancellation of his visa under s.501 of the *Migration Act*. Justice Stone said the clearly intended effect of removing the man, who did not have legal representation, was to deny his right to appeal. She said, 'It is truly disgraceful for the minister to behave in this way', and added she could think of nothing to 'excuse this sort of flagrant abuse of an individual's rights.' She was also reported to have described the deportation as 'all the more disgraceful because this court can do nothing about it.' (Topsfield: 2007)

respect to aliens, it is valid whatever its terms, provided that the law does not infringe any express or implied prohibition in the Constitution.’ (Prince 2004, 5-10)

The High Court’s willingness to characterise mandatory and indefinite detention as for a valid, non-punitive purpose ignores the repeated assertions of the executive which make it clear the mandatory detention regime is fundamentally punitive and was designed as a deterrent to prospective asylum claimants (Brennan, 14, 22-23; Ruddock 2000, 4, UN Working Group on Arbitrary Detention 2002, 7, para.15). It also ignores the cruel and oppressive nature of immigration detention and the grave physical and psychological consequences of long-term, indefinite detention (see, for example, Burnside 2007, 48-52). It is difficult indeed to accept a characterisation of a legislative regime under which people who are not accused of any crime are detained for years at a time as non-punitive. Despite reforms to Australia’s detention regime introduced in 2005, sixty one people currently in immigration detention have been imprisoned for more than two years (Bartlett 2008). The stateless asylum seeker Peter Qasim spent six years and ten months in detention before being released on a ‘removal pending’ bridging visa (Jackson 2008). Zifcak (2006, 104-5) points out that it was open to the court in *Al-Kateb* to characterise indefinite administrative detention as punitive, and thus in breach of the Constitution, which was effectively one of the conclusions arrived at by the minority. As Zifcak puts it:

The choice not to infringe Mr Al-Kateb’s fundamental rights was open. The majority chose not to exercise it. The Court adopted a formal, semantically founded interpretation of both statute and Constitution. This method embodies a degree of deference to the will of the Executive that is likely to narrow significantly its role as a guardian of individual rights and liberties and expand governmental power correspondingly.

Prince (2004, 2) also notes the High Court in *Al-Kateb* ‘was seriously divided over important constitutional issues.’ Prince suggests a variety of grounds on which the court could have impugned mandatory, indefinite detention, including through the use of a proportionality test, which he points out (11), citing Zines, has become increasingly important in cases outside the arena of immigration in which the purpose of the legislation under scrutiny is relevant. Prince’s analysis (17) also suggests the majority of the High Court in *Al-Kateb* were unnecessarily deferential to the executive insofar as they expressed the view that parliament’s clear intention in the Migration Act was that all unlawful non-citizens should be detained until they are either removed or granted a visa. But Prince argues that when the mandatory detention provisions were introduced in 1992, ‘there is no indication that...the then Federal Labor government took into account that it may not be practicable to deport particular individuals’, as in Mr Al-Kateb’s case.

By being prepared to accept the lawfulness of detention even where—in the instance of stateless people—there is little real prospect of deportation, the Australian High Court has demonstrated an excessive deference to the powers of the executive. This deference can in large part be explained by the assumption it is necessary in order to allow the executive to develop policy for the protection of ‘the Australian community’ and in the interests of ‘national security’.

‘Protecting the nation’—and challenging the separation of powers

Matters relating to immigration and national security—the two areas which we will see intersecting in the Haneef case, are traditionally characterised as of signal significance to the preservation and on-going character of a national community.⁶ This characterisation backgrounds the general tendency of the courts—not only in Australia—to display particular deference to the executive when issues relating to immigration and national security arise. This deference is unwarranted in any event. It is particularly problematic in the realm of refugee law because it provides implicit support for the idea that applicants for asylum are a threat to national security. This is the underlying basis on which the government claims the right to detain asylum seekers. ‘Border protection’ is treated as a key component of ‘national protection’—with the implication that the nation is threatened if its borders cannot be protected, even against individuals fleeing persecution.⁷ It has been common practice in Australia for the last couple of decades to characterise asylum seekers as opportunists at best, and criminals and potential terrorists at worst.⁸ While such characterisations have been challenged within parts of the Australian community by an increasing understanding of the refugee experience, they appear to have gained purchase internationally, especially in the aftermath of September 11, 2001.⁹ The implications of this for the institution of asylum are significant. Already a

⁶ For example, Dyzenhaus & Thwaites (2007, 11-12) point out that McHugh, Hayne, and Heydon JJ. based their decision in *Al-Kateb* partly ‘on grounds of community protection’.

⁷ For example, Philip Ruddock claimed strong action was required to prevent Australia being perceived as a ‘soft target’ for people smugglers. His rhetoric suggests a vulnerable community subject to violent external attack. (2000, 4) The UN’s Working Group on Arbitrary Detention (2002, 7) claims Australia’s mandatory detention regime ‘sets up a presumption whereby each unlawful non-citizen, if not detained, represents a danger to the community, even in cases when the implementation of this system results in the detention of children, elderly or sick people and others in a vulnerable situation’. Harvey says ‘Refugee lawyers have noted for some time the ‘security discourse’ being constructed around the treatment of forced migration.’ (2005, 152) He notes the widespread use of ‘border security’ rhetoric in association with asylum seekers in the UK (ibid.). Similar themes were evident in a leaked memo to staff from then Prime Minister Tony Blair, who said in 2000 that the issue of asylum provides opportunities for a political party to characterise itself as ‘tough’, and as ‘standing up for [the nation]’. He said that while ‘asylum...may appear unlinked to patriotism, [it is linked] partly because [it is] a toughness issue...’ (Memorandum from ‘TB’ of April 29, 2000, published in *The Times*, 27 July 2000, and quoted in Bhutta: 4)

⁸ For example, in his second reading speech for the *Border Protection Legislation Amendment Act 1999* (Cth) Philip Ruddock (then Minister for Immigration and Multicultural Affairs), said ‘These changes will maintain the integrity of Australia’s borders against attempted intrusions of the criminal elements behind most people smuggling activities...The people being smuggled are, in most cases, not genuine refugees seeking haven in the first available safe country. They are instead young migrants from less developed countries who are seeking work in developed countries.’ (quoted in *Minister for Immigration and Multicultural Affairs & Ors v Vadarlis* [2001] FCA 1329 at para.62, per Black CJ)

⁹ Following the September 11 attacks on the US, the UN Security Council called on countries to act to ensure refugee status is not ‘abused’ by ‘perpetrators, organizers or facilitators of terrorist acts’ (UN Security Council Resolution 1373 (2001), quoted in Harvey 2005, 153). The UK’s first major piece of anti-terrorism legislation enacted after September 11 (the *Anti-terrorism Crime and Security Act 2001*) had an entire section devoted to immigration and asylum. Part IV of the legislation, which was subsequently repealed following the House of Lords decision in the *Belmarsh prisoners’ case*, allowed for the indefinite detention pending deportation of asylum seekers suspected of an involvement in terrorism. Harvey argues that ‘National security may become relevant to the asylum process at different stages, but there is no necessary connection between the asylum system and national security.’ (159) See also UNHCR 2006, 5, 11, 32-3.

narrowly constrained form of protection for people forced to leave their country of origin as a result of persecution, it has been eroded, and will be further eroded, by the linking of refugee and asylum seeker policy with anti-terror measures, and by the argument that asylum seekers pose a threat to national security.

Nevertheless, the evidence in Australia and elsewhere suggests ‘that when national security, immigration and asylum collide...judges are likely to defer extensively to the views of the executive.’ (Harvey, 169) In a case concerning the right to remain in Britain of a man whose parents were both British citizens but who was a Pakistani national whom the British Home Secretary said had links with an Islamic terrorist organisation (Harvey, 169-170), Lord Steyn expressed a commonly held view when he said that ‘even democracies are entitled to protect themselves’ and ‘the executive is the best judge’ of the measures necessary to deal with terrorism (*Secretary of State for the Home Department v Rehman* [2001] UKHL 14, para.28, in Harvey, 170). While he accepted that courts have a role to play in the scrutiny of national security legislation, he also said it was ‘self-evidently right that national courts must give great weight to the views of the executive on [such] matters’ (para.31, in Harvey, 171).

Along similar lines, the English Court of Appeal recently suggested,

The elected Government has a special responsibility in what may be called strategic fields of policy, such as the conduct of foreign relations and matters of national security. (R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs [2007] 2WLR 1219, 1273, in White 2007, 124)

The Court went on to quote Lord Hoffman’s claim that, as White (125) paraphrases it,

not only [does] the Executive have access to special information and expertise but...those decisions which have serious potential results for the community require a legitimacy which can be conferred only by entrusting [them] to persons responsible to the community through the democratic process. (Secretary of State for the Home Department v Rehman [2003] 1 AC 153, 162)

This is a well known refrain in cases in which national security is invoked¹⁰—paradigmatically in times of war, but also in immigration cases and in the context of contemporary anti-terrorism legislation, where the executive has good reason to adopt the rubric of a ‘war on terrorism’. All such cases, it is said, involve policy and factual considerations (sometimes based on sensitive or secret material which cannot be made public), as well as matters of international diplomacy that take them outside the scope of traditional justiciability (see, for example, Harvey 2005: 153; Dyzenhaus & Thwaites 2007, 9; Lee, Hanks & Morabito 1995, 182). Furthermore, because the very existence of the community is said to be at stake, or in any event, its fundamental character, it is often argued that judicial deference is an appropriate recognition of the executive’s democratic

¹⁰ So much so that Dyzenhaus & Thwaites (2007, 9) suggest ‘The history of the judiciary in times of emergency and alleged emergency is a dismal one of judges deferring to executive claims.’

mandate, and the fact it alone is accountable to the electorate for its decisions (see, for example, Harvey 2005: 176).

But the executive may not have a ‘mandate’ for every policy it introduces, and where certain policies attract majority support, we are entitled to question exactly what this justifies. The democratic tradition is based on protection of individual rights as much as on majority representation. Furthermore, if public support for certain policies has been obtained through the cynical exploitation of fear and prejudice, and the public have been misinformed about the true nature of the threat posed by, for example, terrorists or asylum seekers, then we have further reason to question the authority of the executive’s supposed mandate.

Our obligation to do so should weigh particularly heavily in the arena of immigration and national security because in both these areas the executive claims a right to detain people; or, in the case of recent preventative detention provisions, empowers judges acting in a personal capacity to enforce an administrative detention regime. The right to personal liberty, and in particular, to freedom from arbitrary detention, is generally considered ‘the most elementary and important of all common law rights’ (Renwick 2007, 127, citing *Trobridge v Hardy* (1955) 94 CLR 147, 152, Fullagar J). Renwick cites Blackstone’s account of the ‘importance to the public’ of its protection, and his warning that if it is in the power of ‘the highest’ ‘to imprison arbitrarily whomever he or his officers [think] proper there [will] soon be an end of all other rights and immunities.’ (1765, 120-121, in Renwick, 127)

We have seen that Australia’s Migration Act imposes a mandatory detention regime. In the next section we detail the provisions of the Act relevant to our discussion here and set out the detention provisions introduced more recently by anti-terrorism legislation. We then consider the additional separation of powers issues to which these provisions give rise.

Detention provisions under current immigration and anti-terrorism legislation

Immigration Detention

Non-citizens within Australia’s migration zone who do not hold a valid visa (including individuals seeking asylum in accordance with article 14 of the *Universal Declaration of Human Rights*), are classified as ‘unlawful non-citizens’ and must be detained until they are either granted a visa or are removed or deported from Australia (*Migration Act* ss.13-17; 188-197AG).

Individuals who arrive in Australia with a valid visa and who subsequently lodge a refugee protection application are generally provided with bridging visas pending the determination of their application (Phillips & Millbank 2005, 2). Thus only asylum seekers who arrive in Australia without a valid visa (who are statistically more likely to be considered refugees within the terms of the United Nations *Refugees Convention*¹¹),

¹¹ Australian Democrats 2007, ‘Rationale for Detention’, para.1.

are detained pending the outcome of their application—a clear indication of the punitive intent of the detention regime.

Section 501(6) of the *Migration Act* also establishes a ‘character test’ on the basis of which the Minister or delegate may refuse to grant, or may cancel, a visa. It specifies that a person does not pass the character test if, among a range of other things, the person ‘has a substantial criminal record’ (s.501(6)(a)), or ‘has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct’ (s.501(6)(b)).¹²

A visa refusal or cancellation may also be made by the Minister (but not a delegate) on the basis of reasonable suspicion that a person does not pass the character test combined with the Minister being satisfied the refusal or cancellation is in the national interest (s.501(3)). The Act states that the rules of natural justice do not apply to the Minister’s visa decisions under s.501(3).

Preventative Detention where a terrorist act is imminent, or to preserve evidence related to a terrorist act which has occurred

A person can be detained without being charged with an offence for a maximum of 48 hours under federal preventative detention provisions (Div 105, *Criminal Code*), which were introduced in 2005 in order to ‘prevent an imminent terrorist act occurring’¹³ or ‘to preserve evidence’ relating to a terrorist act that occurred within the last 28 days. Complementary state and territory legislation provide for a maximum of 14 days preventative detention.¹⁴

Preventative detention orders for an initial 24 hours can be made under the federal legislation by a senior AFP member (superintendent or above). Subsequent extensions may only be made by a judge, magistrate or senior member of the Administrative Appeals Tribunal (AAT) acting in a personal capacity. McDonald (2007, 110) points out

¹² The power to cancel a residency visa and deport a person on character grounds was introduced by the Howard government in 1999; prior to this permanent residents who had lived in Australia for 10 years or more could not be deported (Burnside 2008, 7). Between June 2002 and June 2005, 233 permanent residents who had served a term of imprisonment of one year or more were deported from Australia as a consequence of the Minister’s exercise of this power (Burnside, 7). Burnside (8) also cites a case in which a man who has lived in Australia for 26 years was convicted of a criminal offence and served 4 years in prison. His residency visa was revoked on his release from prison and he has thus far spent 7 years in immigration detention, where he remains. He is challenging the order that he be deported.

As is clear from the example cited by Burnside, an effect of the power to revoke a residency visa and deport a person under s.501 of the *Migration Act* is that the person may be held in immigration detention for an indefinite period pending deportation.

¹³ The suspected act ‘must be one that is imminent; and must be one that that is expected to occur, in any event, at some time in the next 14 days’: s.105.4(5), CCA.

¹⁴ *Terrorism (Extraordinary Powers) Act 2006* (ACT) (‘T(ETP)Act’), *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW), *Terrorism (Preventative Detention) Act 2005* (Qld), *Terrorism (Preventative Detention) Act 2005* (SA), *Terrorism (Preventative Detention) Act 2005* (Tas), *Terrorism (Community Protection) Amendment Act 2006* (Vic), *Terrorism (Preventative Detention) Bill 2005* (WA).

that ‘the making of the order can be reviewed by the AAT which may order compensation if it finds the decision was not justified.’

Unlike comparable detention provisions in the UK, the purpose of Australia’s preventative detention regime is not investigative (Ruddock 2007, 4).

Control Orders

Australia’s federal legislation also allows for court ordered ‘control orders’ restricting the freedom of individuals where this will ‘substantially assist in preventing a terrorist act occurring’ or ‘where the person has provided training to or received training from a listed terrorist organization’ (Div.104, *Criminal Code*). Orders may extend for periods up to 12 months in the case of adults and up to 3 months in the case of 16-18 year olds, and can be renewed. In the United Kingdom, control orders are issued by a member of the executive rather than by the courts (Lynch 2007, 231).

Detention of terror suspects

The *Crimes Act 1914* (Cth) provides that a person suspected of involvement in terrorism can be detained for questioning for up to twenty-four hours (CA ss.23CA, 23DA(7)) (other crimes suspects can only be detained for a maximum of twelve hours). This ‘period of arrest’ does not, however, include breaks in the questioning. Breaks during which questioning is ‘reasonably suspended or delayed’, in order, for example, to allow the police to engage in further investigations, must be approved by a magistrate.

Lynch points out that when these provisions were introduced in 2004, ‘concerns were raised at the open-ended nature of the detention-period with calls for an absolute limit of 48 hours. In response’, he says, ‘Attorney-General’s Department staff assured the Senate inquiry into an earlier version of the law that such a limit was not necessary and it would be surprising if the powers were used to detain anybody for even a period of that duration.’ (Lynch 2007: 225, citing Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) para 3.25) As we will see, Haneef was detained under these provisions for a total of twelve days.

Detention by ASIO of non-suspects who may have information relating to terrorism

People can also be detained in Australia under provisions designed to enhance ASIO’s intelligence gathering capacities. These provisions allow ASIO to obtain a warrant requiring a person to attend and answer questions, not for the purposes of a possible prosecution, but where there are ‘reasonable grounds for believing that issuing the warrant...will substantially assist the collection of intelligence that is important in relation to a terrorism offence.’ (s.34C(3)(a), *Australian Security Intelligence Organisation Act 1979* (Cth)) A combined questioning and detention warrant may provide for up to seven days detention where the Minister has stated he is satisfied ‘there are reasonable grounds for believing that the person may alert someone involved in a

terrorism offence, may not appear before the prescribed authority, or may destroy or damage evidence.’ (ss.34F (request for warrant), 34G (issue of warrant), & 34S (time limit on detention)).

Implications of detention provisions for the separation of powers

We have argued that executive detention raises fundamental issues in respect of the separation of powers and the protection of individual rights and liberties. The manner in which those issues arise has different nuances depending on the form of detention involved.

For example, the preventative detention scheme in Australia’s anti-terrorism legislation raises separation of powers issues because preventative detention orders do not deal with matters of criminal responsibility: they are administrative in nature, but judges have been empowered to make these orders. The preventative detention regime attempts to preserve constitutionality by requiring judges when making the orders to act in a personal capacity. But the idea that judges can or should exercise two distinct roles, one juridical and one administrative, is antithetical to the separation of powers doctrine. Furthermore, the judiciary’s role in the making of preventative detention orders as well as the issuing of ASIO questioning and detention warrants is restricted by the terms of the legislation. When the preventative detention provisions were being debated, former chief justice of the Family Court, Alastair Nicholson derided the proposed judicial review process as ‘little more than a rubber stamp’ (Grattan, 2005). He said the judge or magistrate involved would have no opportunity to test the evidence produced by the authorities, and thus ‘the provision for judicial review [had been] included largely to create a false impression of due process.’ (Grattan) The motives behind the accord of power to judges in respect of preventative detention orders are clearly questionable, smacking of an attempt to ‘clothe the process of making preventative detention orders with a certain acceptability’ (White, 119). In his capacity as Attorney-General, Philip Ruddock argued, for example, that ‘the involvement of the courts [in the preventative detention regime] amounts to a protection of human rights, not an abrogation of them.’ (2007: 6)

The limitation of detention under the federal preventative detention legislation to 48 hours, with complementary state and territory legislation providing for detention beyond this up to 14 days, was another attempt to circumvent the possibility of a constitutional challenge. While state courts in Australia are not constrained by the constitutional separation of powers to the same degree as federal courts, there is support for the proposition that the doctrine applies to them as well in the High Court’s reasoning in *Kable v The Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (in White, 119). In *Fardon v Attorney-General (Qld)*, however, a state law allowing for the possibly indefinite detention of serious sex offenders who have served their sentence under the criminal law was upheld (Renwick 2007: 130-131). Renwick argues ‘*Fardon* is a strong indication that the State laws providing for detention without trial will be [found to be] valid’ (131). This is troubling given the same reasons for confining detention to cases in which there has been a judicial finding of criminal guilt apply equally at state and territory levels as at the federal level.

The judicial response to the anti-terrorism detention provisions

The courts have not yet directly considered the constitutionality of the *Criminal Code* preventative detention provisions. The majority of the High Court in *Thomas v Mowbray* ([2007] HCA 33) found, however, that the Commonwealth's defence power in s.51(vi) of the Constitution provided valid support for the enactment of an interim control order regime (Renwick, 131). The Court also said the principle that the state may not detain a person except as a 'step in the adjudication of criminal guilt' was not applicable because the imposition of a control order did not in this case amount to a deprivation of liberty comparable with '[d]etention in the custody of the State' (Dyzenhaus & Thwaites, 21). The majority judges deferred the question of the constitutionality of the rest of the Division (Dyzenhaus & Thwaites, 18). In dissent, Kirby and Hayne JJ found the whole of the Division invalid (Dyzenhaus & Thwaites, 18).

A number of former members of the bench have spoken out against Australia's anti-terror legislation, and the political rhetoric used to justify it. As well as criticising the proposals for the preventative detention and control order regime, Alastair Nicholson claimed it was incorrect to describe the Western world as engaged in a 'war' on terrorism. 'This is not a war', he said, 'and the threat to Australia is much less than it was in the Second World War or even the Cold War.' (Grattan, 2005)

Gerard Brennan has repeatedly spoken out against the laws (2007a,b,c), and describes 'the rhetoric surrounding the anti-terrorism legislation' as 'fanning...intolerance and suspicion' of 'peace-loving Muslim citizens' (2007b). He concludes, 'experience has shown that the due exercise of any form of executive power, particularly a power of detention, demands transparency of operation and accountability—legally and politically...A minimum safeguard should be an effective pathway to a court exercising habeas corpus jurisdiction, casting on the authorities the burden of justifying the warrant and action taken under it.' (2007b)

Sitting members of the bench have also both openly and implicitly criticised the anti-terror provisions and the political rhetoric which surrounds them. The most high profile and outspoken critic has been Justice Michael Kirby, who dissented strongly in *Al-Kateb* and *Thomas*, stating in *Al-Kateb* that 'indefinite detention at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements.' (at 615, in Dyzenhaus & Thwaites, 14) Kirby (2007, 9) describes such dissent 'as an appeal to the future', and characterises (10) his dissenting opinions in these and a number of other cases as reflecting, among other things, a different view to that shared by the majority 'about the meaning of liberty;...the use of the judiciary in controlling the executive; and the accountability of the executive to parliament.'

Victorian Supreme Court Justice Bernard Bongiorno has also warned against the dangers of sacrificing principle to 'political expediency', stating that where this occurs 'we risk the whole foundation of our criminal justice system'. (Robinson, 2007) Bongiorno's remarks were made in the context of a bail hearing in respect of two men alleged to be members of and to have provided support to the Liberation Tigers of Tamil Eelam (the

Tamil Tigers), which the prosecution claimed was a terrorist organisation. This was despite the fact it was not proscribed as such in Australia at the time the men were alleged to be members and ‘was no longer classified as such even in Sri Lanka’ (Robinson). Bongiorno said the men were ‘entitled to the full presumption of innocence’ (Robinson). His comments, which were made in July 2007, were reported as having been interpreted by those listening in the court room as ‘a thinly veiled attack on the federal Government’s decision to use immigration laws to detain Gold Coast doctor Mohamed Haneef after a Brisbane magistrate had freed him on bail’ (Robinson).

Despite these cautionary responses, however, even the most committed ‘rule of law’ theorists, on and off the bench, appear to agree that exceptional cases may arise in which it is appropriate to suspend the rule of law. Paradigmatically, such cases are those when the very existence of the nation or the state is said to be imperilled—either by an external threat or by internal disorder. Thus Harvey points out that A.V.Dicey, who was famous for his ‘distrust of discretionary power’ and his characterisation of the rule of law as based on ‘the supremacy of regular law as opposed to arbitrary power’, nevertheless ‘believed that arbitrary power was necessary in times of social disturbance or disorder’ (2005, 155). Furthermore, Harvey quotes Dicey’s claim that ‘order can hardly be maintained [in such times] unless the executive can expel aliens’ (at 155). Harvey himself, however, challenges ‘the assumption that there are exceptional areas where legal order must not go’ (155). Harvey is right to argue that the values which underpin the concept of the rule of law—values such as equality before the law and that the law must be administered by ordinary courts—are non negotiable. As he suggests, their derogation represents a particular threat in the immediate term to marginalised sectors of society or to outsiders (156), but ultimately, it represents a threat to us all.¹⁵

The Haneef Case

On 29 June 2007, a bomb was discovered in a car parked in Haymarket, London, and another in a car parked in Mayfair. Both bombs were successfully defused. The next day, a Jeep Cherokee was driven into the front doors of Terminal One at Glasgow airport and burst into flames. One of the two people found and arrested at the scene was Kafeel Ahmed. His brother, Sabeel Ahmed, was subsequently also arrested and eventually charged with failing to disclose information which could have prevented an act of terrorism. Although Sabeel Ahmed pleaded guilty to the charge, the court accepted he had no prior knowledge of either the London or the Glasgow incidents, or his brother’s involvement in them (McKenna 2008; Steketee 2008; Marr 2008).¹⁶

Soon after the Glasgow airport incident, British police contacted the Australian Federal Police (AFP) to advise that the Ahmed brothers’ second cousin, Dr Mohamed Haneef, an Indian national working at a Gold Coast hospital, was ‘a person of interest’ to their investigation. This was because of his alleged association with the Ahmed brothers, who

¹⁵ ‘The risk is that exceptional treatment of particular groups and particular legal subject areas will lead to further erosion of existing guarantees [for all]’ (175).

¹⁶ Justice Calvert-Smith also accepted there was ‘no sign’ of Sabeel Ahmed ‘being an extremist or party to extremist views’ (Marr 2008).

at that point were both suspects in relation to the London car bombs and the Glasgow incident. On 2 July 2007 Dr Haneef was arrested. He became the first person to be detained under the *Crimes Act* provisions—introduced in 2004—providing for an extended period of arrest prior to charge or release of terror suspects. He was detained for twelve days, then charged on 14 July with having provided resources, contrary to s.102.7(2) of the *Criminal Code Act 1955* (Cth), to ‘a group of persons including Sabeel Ahmed and Kafeel Ahmed, being reckless as to whether the organisation was a terrorist organisation.’

The subject of the ‘resources’ charge was a mobile phone SIM card with unused credit which Dr Haneef admitted having given to Sabeel Ahmed when Haneef left England in 2006. After he was charged, Dr Haneef was granted bail in a Brisbane Magistrates Court. Before he could be released, however, his long-stay working visa was revoked on character grounds under s.501(3) of the Migration Act by then Immigration Minister Kevin Andrews, on the basis of Haneef’s ‘association’ with the Ahmed brothers. The effect was to keep Haneef in detention, but the terrorism related charge against him was subsequently dropped. The Immigration Minister responded by announcing Dr Haneef was free to leave Australia. He returned to India on 28 July 2007, having spent a total of 26 days in detention.¹⁷

The cancellation of his visa was challenged in the Federal Court in his absence. Justice Spender, who at a listing hearing described the basis for the visa cancellation as ‘astounding’ (Gibson et.al. 2007¹⁸), subsequently ruled it was also unlawful (*Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273). That ruling was upheld by the full bench of the Federal Court (*Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203).

Politics at Play and the Case in the Media

The initial reporting of Haneef’s arrest was sensationalist and, for the most part, took Haneef’s involvement in some form of terrorist plot as a foregone conclusion (Dreher 2007, Thomas 2007b).¹⁹ Hedley Thomas, journalist with *The Australian*, says (2007b, 9) that when the story first broke, ‘most journalists working on the Haneef story, myself included, swallowed the official line.’ He argues, however, that the media were systematically misled by the AFP and the government, who ‘reckoned they had caught a

¹⁷ This was in the normal criminal justice system, although as a ‘terror suspect’ Haneef was subject to draconian conditions, including solitary confinement for 23 hours a day (Gibson, Nicholson & Amrit, 2007). Haneef was never transferred to immigration detention: he and his lawyers decided not to post bail after his visa was cancelled in order to prevent such a transfer (*Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203, para.18).

¹⁸ ‘A Federal Court judge has described as ‘astounding’ the Federal Government’s position that an association of any kind with criminals – ‘a cup of coffee, a picnic with the kids’ – is enough to fail the immigration character test. Justice Jeffrey Spender said that he, too, would fail the test according to the Government’s interpretation...’

¹⁹ Dreher points out that Haneef’s arrest ‘appeared under headlines such as ‘Those who cure you will kill you’, ‘Doctor member of sleeper cell’ and ‘Were these young Gold Coast doctors living sinister lives?’ (2007: 211)

real terrorist’ and for whom ‘the arrest was fortuitous timing in an election year’ (2007b, 9). Nevertheless, despite ‘the leaking of highly misleading titbits from the investigation [which] had the effect of making Haneef look like an abhorrent suicide-bomber’ (Thomas, 10), the case against him appeared increasingly flimsy. This appearance was reinforced when Haneef’s barrister, Stephen Keim SC, in frustration at the misleading reporting and investigation leaks (Thomas 2007b, 10; Wright 2007), himself leaked Haneef’s record of police interview to Hedley Thomas, with the result that it was published in full on *The Australian’s* website. It soon became clear that many of the allegations circulating in respect of Haneef were completely unfounded.²⁰

It was in this context, in which the nature of the evidence against Haneef was beginning to be questioned and challenged by the media, that he was charged with providing resources to a terrorist organisation, and on the morning of 16 July, granted bail. The grant of bail was significant in part because the relevant legislation (*Crimes Act 1914* (Cth) s15AA) directs that individuals charged with terrorism related offences should only be granted bail in ‘exceptional circumstances’.²¹ When, on the same day, Kevin Andrews called a media conference to announce he had cancelled Haneef’s visa—prior to informing Haneef or his lawyers of the fact—with the effect that Haneef could now be held in immigration detention, the media erupted. The visa cancellation was described as ‘effectively overturning’ the bail decision, demonstrating the extent to which the Government was prepared to go ‘to debauch the independent legal process’ (Steketee 2007) while ‘playing to national security’ (Grattan 2007).

At the time of announcing his decision Andrews said

This is unrelated to the question of proceedings in the criminal court in Brisbane... This is simply a matter of me looking at the responsibilities that I have under the migration legislation, acting upon the advice and information provided to me by the Australian Federal Police, and then making a decision both in the light of my responsibility and that information and advice. (Thomas 2007a)

²⁰ For example, Haneef was arrested at Brisbane International Airport where—as the Australian media trumpeted—he was attempting to board a one way flight to Bangalore, India with a ticket he had purchased that day. This looked bad for Haneef. But Haneef had sought and received leave from his employer, and claimed to be returning to India to visit his wife who had just given birth to their first child. Before leaving for the airport he had on four occasions attempted to contact a British counter-terrorism officer whose telephone number had been given to him by his aunt and whom she said wanted to talk to him in connection with the London investigations and ‘something about his SIM card’. Haneef stated this much in his police interview, and the substance of what he said was substantiated by police investigations, but it was not publicly disclosed until some time later. Throughout the affair, it was reported that the SIM card which was the subject of the charge against Haneef was found in the vehicle that was driven into Glasgow airport. This has now been shown to be incorrect: it was ‘found more than 300km away in Liverpool when British police arrested Sabeel some hours [after the incident]’ (Thomas 2007c).

²¹ Lynch also points out that the bail application ‘faced strong opposition from the Commonwealth, which asserted facts later shown to be incorrect – namely that the SIM card was recovered from the wreck of the jeep at Glasgow airport.’ (2007: 226)

His claims were met with deep scepticism. Commentators denounced the visa cancellation as an attack on the separation of powers doctrine and the rule of law (Thomas 2007a; Burnside 2007b). Former Liberal prime minister Malcolm Fraser issued a joint statement with former Labor minister Barry Jones ‘saying the ‘political’ revocation of Haneef’s visa was an attack on the fundamental rights of every Australian’ and calling ‘on every member of Federal Parliament to condemn this outrageous and destructive abuse of executive power’ (Gibson et.al. 2007). The Labor Opposition initially supported the Government’s actions, but when, some months later, *The Australian* published an email suggesting the AFP and the Department of Immigration had discussed ‘[c]ontingencies for containing Mr Haneef and detaining him under the Migration Act’ if was granted bail,²² it called for a full judicial inquiry. The AFP has since claimed the email ‘was part of normal...planning for operations’ (Nicholson and Breusch 2007), while Andrews denies involvement in any contingency plan. A Howard government source told *The Age* that while the police and Immigration department officials provided the Minister with ‘a list of options that included...cancelling Dr Haneef’s visa and placing him in immigration detention if it were decided that he was a security risk’, they expected all options to be given careful consideration, and ‘were caught unawares when Mr Andrews suddenly announced that he was cancelling Dr Haneef’s visa.’ (Nicholson 2008)

Despite the public furore in response to the visa cancellation, the Government maintained its position, suggesting the presumption against bail in terrorism cases might need to be strengthened (Grattan 2007; Steketee 2007). The Attorney-General issued a Criminal Justice Stay Certificate under the Migration Act, which meant Haneef—although facing deportation as a result of his visa cancellation—could continue to be detained in Australia pending trial.²³ Deputy Prime Minister (as he then was) Mark Vaile reportedly ‘admitted the revocation of Haneef’s visa was designed to keep the hospital registrar in Australia while his court case [was] under way’, while Prime Minister Howard acknowledged cabinet had discussed Haneef’s visa but said it had been ‘left to the [Immigration] minister to decide on a course of action.’ (AAP 2007). When, however, the Commonwealth DPP announced he would personally re-examine the basis for the charges against Haneef, and subsequently ‘admitted fundamental mistakes had been made in the investigation’ (Wright 2008) and the charges would be dropped,²⁴ the government quickly attempted to diffuse interest in the affair, although as we have seen, Andrews declined to reinstate Haneef’s visa.

Justice Spender in the Federal Court found the Minister made a jurisdictional error in his decision to cancel the visa. By misconstruing the meaning of ‘association’ in the ‘character test’ of the *Migration Act* to include even innocent associations, he had applied

²² The email was written on 14 July and forwarded on the morning of 16 July by a senior AFP member to a Department of Immigration advisor to the Minister. In the email the AFP said that ‘[c]ontingencies for containing Mr Haneef and detaining him under the Migration Act if it is the case he is granted bail on Monday, are in place as per arrangements today.’ (Thomas 2007a)

²³ *Migration Act 1958* (Cth) s147 (issue of criminal justice certificate staying removal or deportation); s150 (effect of issue of criminal justice certificate).

²⁴ The charge against Haneef was dismissed on 27 July 2007 when the DPP announced it would offer no evidence.

an incorrect test. Another of the grounds of Haneef's challenge—that the minister had cancelled his visa for an improper purpose—that is, in order to ensure he was held in detention after having been granted bail, was, however, rejected. Justice Spender said there was no proper basis in the material before him on which he could infer that the Minister did not intend to deport Haneef 'as soon as reasonably practicable' in accordance with the relevant provisions of the *Migration Act*. This was despite the fact it was clear the Minister expected the Attorney-General to issue a Criminal Justice Stay Certificate preventing deportation pending Haneef's trial.²⁵

Andrews appealed against the order quashing his decision. His appeal was dismissed by the Full Court of the Federal Court. The Full Court was also asked (by notices of motion filed on Haneef's behalf) to find that the Minister revoked Haneef's visa for an improper purpose. It declined, however, to deal with this ground saying there was 'no practical purpose to be served' by doing so, given Haneef was no longer in detention in Australia but had returned to India ([2007] FCAFC 203, para's80&140).

Haneef's visa has been reinstated and he has been informed he is free to return to Australia, but his lawyers have also been told he remains under investigation by the Australian federal police. The AFP recently told a Senate estimates committee that the cost of its inquiries into Haneef's links to the UK incidents are now more than \$7.5 million, and that it continues to have nine members working full time on the matter, with another five staff providing occasional assistance (Allard 2008). In the meantime, Australia has seen a change of federal government. But the Labor government retreated from its pre-election commitment to hold a full judicial inquiry into the Haneef affair. Former judge John Clarke QC was appointed to conduct an inquiry, but he was not empowered to compel witnesses to appear or to indemnify witnesses against defamation and self-incrimination. Haneef's lawyers were refused permission to cross-examine witnesses. The Clarke inquiry has been asked to provide its report by 30 September 2008.

Conclusion

The Haneef case was politicised to a degree almost unthinkable in a country supposedly committed to the rule of law. Dr Mohamed Haneef's life was irrevocably affected and his medical career placed in jeopardy by his arrest and detention in Australia, and by the publicity surrounding his case. But we may never know exactly what went on behind the scenes in the attempts to produce, in Dr Haneef, one of Australia's first convicted terrorists. The AFP appears not to have given up hope of pinning something on Haneef, although one can speculate that the continuing investigation has also been motivated by a desire to avoid scrutiny by the Clarke inquiry. The AFP may have sought to avoid

²⁵ 'A person challenging the exercise of a power on the basis of improper purpose has the onus of establishing that contention...Where the purpose of a decision has to be ascertained by inference from other facts, there is a presumption of regularity...' (Spender J., [2007] FCA 1273, para.278.) 'The Minister's press statement...indicates that either before, at the time of, or shortly after his decision to cancel the applicant's visa, the Minister expected that a Criminal Justice Stay Certificate would be issued by the Attorney-General. The consequence of that certificate is specified by the Migration Act, in particular, s.150. Where there is a Criminal Justice Stay Certificate in force, the non-citizen is not to be removed or deported.' (Spender J., para.298)

answering questions put to it by the inquiry on the basis those questions relate to sensitive and ongoing operational matters. We may never know whether Kevin Andrews, the former Minister for Immigration, consciously conspired or intended to thwart the operations of the criminal justice system by the use of his discretionary powers—although the inference that he did so appears compelling. Ultimately, however, there is a danger that the compulsion to uncover specific motivations will obscure the case’s real significance. This significance lies in the extraordinary provisions of the anti-terrorism and migration legislation under which Haneef was arrested, detained, and his visa revoked. It lies as well in the political context in which those provisions were passed with bipartisan support, and in which the courts have, in certain instances at least, upheld their validity.

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