
Internment of Terrorism Suspects and the Australian Constitution

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This article considers constitutional questions that arise in relation to recent calls for internment in Australia with respect to those suspected of engagement in terrorism activity. Internment has been practised in the past in Australia with respect to war or warlike conditions, though the extent to which Australia is currently “at war” is of course highly contested. Laws in various Australian States, and at federal level, also currently contemplate preventive detention, though this is in the context of individuals who have already been convicted and sentenced for crime. As such, the current proposal differs significantly from preventive detention as currently practised in Australia. The article considers whether the Commonwealth’s defence power would likely support such a scheme, whether it would be valid if the power were reposed in a member of the Executive, and whether it would be valid if reposed in a court. As a result, it considers whether such schemes are punitive in nature, and the essential character of such a power. The article is focused on the constitutionality of such a scheme, rather than its merits as public policy.

INTRODUCTION

In the aftermath of recent terrorist attacks in Manchester and London, and subsequent terrorism event in Melbourne, there have been calls for internment of those suspected of having been radicalised. Under this concept, a person thought to have been radicalised, and intent on violence, would be involuntarily detained by government for a period. Hopefully, during that period, authorities would de-radicalise the individual, such that they no longer pose a threat to others. This would be justified on the basis States have a legitimate, strong interest in protecting citizens. Indeed, some would argue the main reason for the existence of the State is to provide safety to those living within it.¹

Australian Major-General Jim Molan has recently called for internment of terrorism suspects.² He suggests the United Kingdom is considering such a proposal. Remarks from the United Kingdom (UK) Prime Minister, at least during an election campaign, indicated that if human rights “got in the way” of fighting terrorism, she would happily cede the former. The current and former leaders of the UK Independence Party³ have publicly called for the reintroduction of internment to deal with the seemingly intractable problem of radicalisation of some Muslim youth towards jihad against the West, as has Pauline Hanson. It should go without saying that the vast majority of followers of that religion are law-abiding, peaceful individuals, and the majority of victims of violent jihad are other Muslims.

Internment by the Executive has a long history in the common law. It was most famously (ab)used by King Charles I against alleged traitors to England. One case involved Charles’ attempt to imprison those who refused to contribute to a loan needed to fund a war against France and Spain.⁴ Public outrage fed a

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¹ Thomas Hobbes, *Leviathan* (1651) Ch 13; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP, 2014) 7–10.

² “We May Have to Accept Less Freedom to Combat Terrorism”, *Herald Sun*, 5 June 2017; “Internment May Be the Way”, *Courier Mail*, 6 June 2017; “Police often are ... limited on what action they can take ... because (a suspect) has come to their attention through ... intelligence that does not meet civil evidence standards ... such individuals might initially be warned ... if the person comes to the notice of the police again ... the case ... could be put before a security cleared tribunal consisting perhaps of a judge but also of non-jurists. This tribunal could authorise police to arrest and detain the individual for a period without further trial.”

³ Respectively, Paul Nuttall and Nigel Farage.

⁴ *Darnel’s Case* (1627) 3 How St Tr 1 (KB).



legal response to untrammelled executive detention of individuals; including the *Petition of Right 1628* (Eng), habeas corpus principle, and abolition of Star Chamber. These rights were extended to British colonies.⁵ Today habeas corpus is a revered principle of the common law.

Internment was practised in Australia during World War I and II. The National Archives of Australia reflect that in each of these wars, approximately 7,000 individuals were interned in Australian camps. This comprised mainly of foreign nationals, but included Australian-born individuals thought to represent a threat to Australia and the war effort. Internment was regularly practised elsewhere during those wars, including the infamous Japanese-American internment camps in the latter years of World War II, and in the United Kingdom.

Australian law continues to embrace concepts similar to internment. The current Commonwealth anti-terrorism legislation provides a system of preventive detention, under which those suspected of involvement in a future imminent terrorist attack can be detained briefly.⁶ Post-sentence continued incarceration was recently legislated.⁷ State legislation currently permits past sexual offenders to be detained for a further period following completion of the incarceration to which they were sentenced following conviction, if there is evidence the offender is likely to reoffend if released.⁸ However, at least two major differences between existing regimes, and proposals for internment, may be noted. First, the existing measures in the federal anti-terrorism legislation impose only short-term preventive detention. Second, the existing preventive detention regimes in relation to sex offenders, and the Commonwealth's Div 105A provisions, apply only to those already convicted of past offences. Current proposals for internment of terrorism suspects apparently contemplate longer-term involuntary detention, and do not apparently depend on whether the accused has prior convictions for similar offences.

This article will consider whether, if the Commonwealth Parliament were to legislate a policy of internment, or long-term "preventive detention", it would be constitutionally valid. The obvious head of power upon which the Federal Government would rely is defence, s 51(6) of the *Constitution*. It will consider whether the defence power would support a system of internment at this time. It will consider whether a preventive detention scheme of the kind apparently contemplated by ex-defence leaders and some political leaders would be constitutionally valid, where the power was reposed by the Executive, or alternatively in the courts, in terms of the separation of powers for which the *Constitution* provides. The power would not be reposed in a single judge or former judge, so the argument will not consider constitutional arguments in terms of the *personae designatae* exception.⁹

Since argument in the abstract can be difficult, the article will be written assuming that the new regime provided for potentially indefinite preventive detention, persisting while the decision-maker believed it necessary in furtherance of the "war effort". This is reasonable, since internment has traditionally been exercised in respect of an individual while the war threat continued. It will be written on the basis the legislation will apply to those suspected of involvement in future terrorist activity, and operation will not depend on the person detained being convicted. As indicated, in these respects, the legislation would significantly differ from current preventive detention regimes operative in Australia, the constitutionality of which has already been unsuccessfully challenged on Ch III grounds.¹⁰

While human rights instruments protect fundamental civil liberties, they recognise exceptions in wartime. The maxim *inter arma silent leges* (in war the law is mute) may not be entirely accurate; it is

⁵ Timothy Endicott, "Habeas Corpus and Guantanamo Bay: A View from Abroad" (2009) 54 *American Journal of Jurisprudence* 1, 17.

⁶ *Criminal Code Act 1995* (Cth) s 105.12 provides a general maximum detention period of 48 hours; see also *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34E, 34G.

⁷ *Criminal Code Act 1995* (Cth) s 105A.

⁸ *Crimes (High Risk Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Criminal Law (High Risk Offenders) Act 2015* (SA); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders Act 2013* (NT).

⁹ This was considered by a constitutional scholar: see Rebecca Ananian-Welsh, "Preventative Detention Orders and the Separation of Judicial Power" (2015) 38(2) *University of New South Wales Law Journal* 756.

¹⁰ *Fardon v A-G* (Qld) (2004) 223 CLR 575.

more accurate to say in wartime the law speaks with softer voice. For instance, Art 15 of the *European Convention on Human Rights* provides for possible suspension of (most of the) *Convention* during “war or other public emergency threatening the life of the nation”.¹¹ Article 1 s 9 cl 2 of the United States (US) *Constitution* provides habeas corpus shall not be suspended “unless when in cases of rebellion or invasion the public safety may require it”.¹² Article 29 of the *Universal Declaration of Human Rights* recognises a “public order” exception to human rights, and Art 4 of the *International Covenant on Civil and Political Rights* permits derogation “in times of public emergency which threatens the life of the nation”, provided such situation is publicly proclaimed. The *Fourth Geneva Convention* contemplates internment.¹³ Preventive detention may be consistent with international human rights law if non-arbitrary and proportional to the threat;¹⁴ this is disputed.¹⁵

While there is no direct equivalent in Australian law, the defence power expands and contracts given the world situation, so laws with a defence purpose which significantly impact civil liberties are more likely valid during war than peace. Thus indirectly Australian law, like elsewhere, contemplates suppression of human rights in wartime.

EXISTING AUSTRALIAN AUTHORITIES

A distinction must be made between cases decided before and after the landmark *R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers)* decision.¹⁶ Readers know this decision recognised separation of powers in the Australian *Constitution* among the legislative, executive and judicial arms. Broadly, a non-Ch III court could not exercise power that was judicial, and a Ch III court could only exercise power that was judicial, with limited exceptions. This doctrine placed significant weight on the meaning of “judicial power” and characteristics of “judicial process”. The potentially far-reaching consequences of this doctrine continue to play out. This will be discussed later; for now, separation of powers protects institutional integrity of Ch III courts. A law which offends the separation of powers for which the Australian *Constitution* provides will undermine the institutional integrity of a Ch III court, by requiring or authorising it to exercise a power in a non-judicial manner, or by removing from it powers inherently judicial. It will be constitutionally invalid. These constitutional concepts were developed in Australian law in the past quarter century; though they have their genesis in *Boilermakers*, they were not referred to there, much less cases decided prior. Earlier cases must be read in that light.

WHETHER INTERNMENT OF TERRORISM SUSPECTS WOULD BE SUPPORTED BY THE COMMONWEALTH’S DEFENCE POWER

Generally courts accord substantial deference to decisions of the Executive and legislature during “war” times.¹⁷ As will be seen, courts often believe other arms of government are better able to assess the threat

¹¹ This Article was used to save a preventive detention law otherwise contrary to *European Convention on Human Rights*, Art 5 in *Lawless v Ireland* [1961] ECHR 2 (preventive detention of IRA activist for five months).

¹² Tor Ekeland, “Suspending Habeas Corpus: Article I, Section 9, Clause 2 of the US *Constitution* and the War on Terror” (2006) 74 *Fordham Law Review* 1475.

¹³ *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (1949) Arts 41 and 42.

¹⁴ Douglass Cassel, “Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law” (2008) 98(3) *Journal of Criminal Law and Criminology* 811, 832.

¹⁵ “Even in extraordinary circumstances, when the indefinite detention of individuals, most of whom have not been charged, goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman and degrading treatment”: *Statement Issued by the Human Rights Council Working Group on Arbitrary Detention, the InterAmerican Commission of Human Rights and United Nations Rapporteurs on Human Rights and Counter-Terrorism, Torture and Health* (2013), cited in Diane Webber, *Preventive Detention of Terror Suspects: A New Legal Framework* (Routledge, 2016) 51–52.

¹⁶ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (Dixon CJ, McTiernan, Fullagar and Kitto JJ; Williams, Webb and Taylor JJ dissenting).

¹⁷ “[S]ince the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the

posed to the nation, and the measures deemed necessary to deal with it. Courts may not have sufficient information to make detailed assessment of the risk, and assess questions of the constitutionality of the government's actions in response. As a result, reticence to second guess the judgment of the Executive in this space is evident. This strengthens the likelihood an internment scheme applied to terrorism suspects would be held by the Court to be supported by a relevant head of power.

The High Court first considered preventive detention (internment) in *Lloyd and Wallach (Lloyd)*.¹⁸ The Commonwealth's *War Precautions Regulations 1915* permitted the Defence Minister to detain in "military custody" a person they believed "disaffected or disloyal". Such detention could continue for the duration of World War I. (As it turned out, this was for more than three years from when the Wallach was detained). Wallach challenged the validity of the legislation, acknowledging the legislation was supported by the defence power. The Court unanimously rejected his challenge.

Griffith CJ suggested exercise of the Ministerial power there was essentially not judicially reviewable. He said it was irrelevant others did not share the Minister's belief, as was the nature and sufficiency of material relied upon by the Minister. He said it would be contrary to public policy, given the nature of the power and the circumstances of its exercise, and inconsistent with the power, to allow judicial inquiry. The Minister was not required to answer questions as to the exercise of their discretion. Evidence could not be led to controvert the Minister's view.¹⁹

Higgins J, alluding to the extraordinary power reposed in the Minister, concluded:

[I]n all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority, in the supreme ordeal and grave peril of national war.²⁰

He pointed out in "times of excitement" the Executive had been armed with arbitrary powers, including suspending habeas corpus.²¹ Higgins J acknowledged Wallach's argument he was not in fact "disaffected", but held it irrelevant, because the material issue was not guilt or innocence, but the Minister's belief.²²

Similar World War II legislation was challenged in *Little v The Commonwealth (Little)*.²³ A regulation permitted the Minister to order detention of an individual where considered necessary to prevent them acting in a manner prejudicial to public safety or defence of the Commonwealth. The Minister ordered Little's detention. Little argued there was no factual basis upon which the Minister could be satisfied of the regulation's requirements with respect to him, and the Minister could not thus have formed a reasonable opinion that he met the requirements for detention. Dixon J solely decided the matter, dismissing Little's case.

Dixon J acknowledged Little had raised a "very strong presumption that the orders had been mistakenly made and had no real foundation in any acts, conduct or tendencies of the plaintiff".²⁴ He found nothing indicated Little was disloyal to the nation. However, this was beside the point.²⁵ The question was the legality of the Minister's detention decision. Dixon J found that decision was essentially unreviewable,

nature and extent of the threatened injury or danger and in the selection of the means for resisting it ... it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs": *Hirabayashi v United States*, 320 US 81, 93 (1943); *Ziglar v Abbasi*, [2017] Lexis 3874, 37 (Kennedy J, for the Court). Susan Kiefel, "The High Court Justices and the Weight of War" (Paper presented at Samuel Griffith Society Conference, 4 August 2018).

¹⁸ *Lloyd and Wallach* (1915) 20 CLR 299.

¹⁹ *Lloyd and Wallach* (1915) 20 CLR 299, 304–305; Isaacs J similar (309). Gavan Duffy, Rich and Powers JJ agreed with the Chief Justice, with the slight modification the first two judges left open whether accuracy of the Minister's statements in the warrant could be challenged.

²⁰ *Lloyd and Wallach* (1915) 20 CLR 299, 310.

²¹ *Lloyd and Wallach* (1915) 20 CLR 299, 311.

²² *Lloyd and Wallach* (1915) 20 CLR 299, 313.

²³ *Little v The Commonwealth* (1947) 75 CLR 94.

²⁴ *Little v The Commonwealth* (1947) 75 CLR 94, 103.

²⁵ *Little v The Commonwealth* (1947) 75 CLR 94, 103.

unless the argument was that the Minister had acted in bad faith. He cited *Lloyd* in support.²⁶ He relied on *Liversidge v Anderson*²⁷ validating regulations permitting the Secretary of State to detain persons believed to be of “hostile origin or associations”.²⁸ Members of the House had adopted utilitarian reasoning, holding exigencies of war might influence courts in its interpretation of provisions, explaining interpretations during wartime they would not reach during peace,²⁹ and that liberties, though important, were non-absolute.

In *Australian Communist Party v Commonwealth (Communist Party)*³⁰ the High Court considered legislation under which the Governor-General could declare an organisation/individual to be prejudicial to security of the Commonwealth. The legislation was arguably supported by the defence power. Such declaration would cause an organisation to be dissolved and assets confiscated, and would limit the extent to which a declared person could work. A majority of the Court³¹ declared the legislation invalid, not supported by the defence power. This was primarily because of the lack of criteria for exercise of the Governor-General’s discretion,³² making their decision essentially practically unreviewable,³³ and lack of evidence connecting the legislation with a defence purpose. The opinion of the lawmaker as to this was not sufficient for constitutionality.³⁴ It was important the legislation was passed in the aftermath of, not during, World War II. The extent of the defence power waxes and wanes as the threats confronting the Australian Government and its people change.³⁵

There was inconsistency between the Court’s finding here, frowning upon exercises of discretion by the Executive in near-war context that were essentially unreviewable and based on the mere opinion of the Executive, and *Lloyd* and *Little*. Some judges sought to confront the apparent inconsistency, drawing upon the war footing of the legislation in *Lloyd* and *Little*, compared with the *Communist Party* case in the shadows of war:

Common experience ... shows that, in time of war at all events, a provision made by or under statute is not regarded as necessarily outside power because a minister or an agency of the Executive is authorised according to his or her opinion of the relation of some act, matter or thing to defence or some aspect of defence to give directions or determinations in derogation of the freedom of action and the personal rights of men and of associations of men. For example ... when a country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes that it is necessary to detain with a view to preventing their acting in any way prejudicial to the public safety and the defence of the Commonwealth (citing *Lloyd* and *Little*). The reason is because administrative control of the liberty of the individual in

²⁶ *Little v The Commonwealth* (1947) 75 CLR 94, 103.

²⁷ *Liversidge v Anderson* [1942] AC 206. History vindicates dissentient Lord Atkin. He noted “in this country, amid the clash or arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges ... stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I ... a pillar of liberty is that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act”. Lord Atkin held the reasonableness of the Secretary of State’s belief a person was of hostile association as properly reviewable by a court.

²⁸ *Liversidge v Anderson* [1942] AC 206, 104.

²⁹ *Liversidge v Anderson* [1942] AC 206, 251 (Lord Macmillan): “it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peacetime measure”.

³⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

³¹ Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ; Latham CJ dissenting.

³² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 186 (Dixon J).

³³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 188 (Dixon J), 279 (Kitto J).

³⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J), 211 (McTiernan J), 225 (Williams J), 247 (Webb J), 258 (Fullagar J), 272 (Kitto J).

³⁵ “Hitherto, a marked distinction has been observed between the use of the power in war and in peace”: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 195 (Dixon J).

aspects considered material to the prosecution of the war is regarded as a necessary or proper incident of conducting the war.³⁶

Fullagar J wondered whether *Lloyd* should be recognised as an exception to the general rule that the constitutional validity of law or administrative act could not depend on the subjective opinion of the lawmaker or person exercising administrative power.³⁷ He noted such power had only ever been invoked in times of emergency³⁸ or “clear and great national danger”,³⁹ and it might involve “a degree of relaxation of a fundamental constitutional rule”.⁴⁰

Kitto J rejected the suggestion in *Lloyd* that exercise of a Ministerial discretion was essentially unreviewable, or the suggestion in *Little* it could only be overturned given lack of good faith. He suggested exercise of the discretion might be challengeable because the decision-maker did not, in fact, hold the required opinion, or exercised the power for improper purposes.⁴¹

While most uses of the defence power had involved World War I or II time, the nature of war itself has evolved substantially; specifically, terrorism. While terrorism has long existed, we live in a time where the threat of violent extremism is extremely high, as demonstrated yet again recently. Western nations are locked in a long-term struggle to defeat radical Islamist ideology. However, this “war on terror” does not fit traditional conceptions of war. Its commencement did not follow a formal declaration of war, as occurred in the two world wars. It is not against a nation or government, but an extremist, violent ideology that claims a religious basis. It is not the kind of “war” envisaged by the founding fathers.

However, the High Court was prepared to adapt its approach to s 51(6) in the context of terrorism. Six members in *Thomas v Mowbray* (*Thomas*)⁴² dismissed an argument that the Commonwealth’s control order regime within its anti-terrorism legislation was not supported by the defence power. Thomas had been the subject of control orders requiring him to be at his home for a designated five-hour period each evening, to report to police three times per week, prohibiting him from leaving Australia without police permission, from communicating with certain individuals, from acquiring or making explosives, and from using particular communications technologies. The order was preventive, given Thomas had trained with Al-Qa’ida, a terrorist organisation banned in Australia.

A majority of the Court took a broad, flexible view of the scope of the defence power. It could apply to support laws designed to prevent terrorism. It was not limited in scope to wars waged in a conventional manner.⁴³ It was not limited to threats external to the nation, or war between nations.⁴⁴ It was not confined to threats from nation-states.⁴⁵ It was not limited to threats to the body politic, as opposed to individuals living in that society.⁴⁶ Its scope extended to laws designed to prevent a terrorist act and thereby protect Australians.⁴⁷

³⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 194–195 (Dixon J); similarly McTiernan J (206–207); he also rejected argument that an executive decision as to the extent of the power was final and unreviewable (211); similarly Williams J (226–227). Webb J agreed that “in a preventive as distinct from a punitive state a rule of conduct is not required”, (citing *Lloyd and Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359) (247).

³⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258.

³⁸ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 259.

³⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 268.

⁴⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 268.

⁴¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 282; this is considered broader than “bad faith”.

⁴² *Thomas v Mowbray* (2007) 233 CLR 307 (Gleeson, Gummow, Crennan, Hayne, Callinan and Heydon JJ; Kirby J dissenting).

⁴³ *Thomas v Mowbray* (2007) 233 CLR 307, 324 (Gleeson CJ) ().

⁴⁴ *Thomas v Mowbray* (2007) 233 CLR 307, 324 (Gleeson CJ), 362 (Gummow and Crennan JJ) (with whom Heydon J agreed (511); Kirby J (395); Hayne J (451); Callinan J (503); compare Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 194 who found that “the central purpose of the legislative power in respect of defence is the protection of the Commonwealth from external enemies”.

⁴⁵ *Thomas v Mowbray* (2007) 233 CLR 307, 457 (Hayne J).

⁴⁶ *Thomas v Mowbray* (2007) 233 CLR 307, 362 (Gummow and Crennan JJ), 393 (Kirby J dissenting).

⁴⁷ *Thomas v Mowbray* (2007) 233 CLR 307, 325 (Gleeson CJ), 362 (Gummow and Crennan JJ).

Two other points are important. Callinan J doubted the traditional distinction defence cases drew between times of peace and war.⁴⁸ This has been orthodox – all judges did it in *Communist Party*. As discussed, it permitted them to distinguish previous cases, where exercise of broad administrative discretion had been validated under the defence power, with *Communist Party*. Callinan J did not elaborate, except suggesting the practical difficulty in drawing a clear line between peace and war. Acceptance of this position would require substantial change to the orthodox position on s 51(6). It might cause the Court to confront whether to accept either the *Lloyd* line of cases, or the *Communist Party* case line, on the extent to which the defence power supports broad administrative discretion without effective judicial review. Callinan J was the only one who criticised this distinction.

The other interesting point was Hayne J's. As indicated, the case concerned constitutional validity of control orders against suspected terrorists. The Court found it was supported by the defence power. The case did not concern the issue of preventive detention of suspected terrorists. However, in dicta, Hayne J had considered the matter:

Whether the point would come at which the defence power would 'sustain a law conferring upon a minister power to order the detention of persons whom he believes ... that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth' need not be decided. It is sufficient to note that the reason given by Dixon J in the *Communist Party* Case for the validity of such legislation in wartime was that administrative control of the liberty of the individual in this respect was a necessary or proper incident of conducting the war in which the nation was then engaged. These are not questions that arise in this matter.⁴⁹

ASSESSMENT

Fundamental to the ambit of the defence power, and possible application to authorise internment in present circumstances, is determination of the "current situation", in terms of the traditional classification system used by the Court, of profound peace, uneasy peace, war/war preparedness, and aftermath. There is much case law for the proposition that the extent of the power waxes and wanes according to the international situation. Given also clarification that the power is purposive in nature, it is logical that during war or warlike conditions, it will be easier for the Commonwealth to demonstrate particular legislation relates to a defence need, because the need will be greater. As a result, I accept the orthodox view that extent of the power will wax and wane, and measures supported by the defence power at some stages will not be supported at others. Criticism by Callinan J in *Thomas* of utility of the distinction is not supported. Having said that, part of his argument, that it is more difficult to determine whether nations are at war today, particularly in terms of terrorist threat, than it was in the past, involving wars more "conventionally" waged, is conceded.

Assuming the orthodox view is to be applied, it is necessary to reach a position on the stage in which Australia finds itself. It is not an understatement to say Australia is at war with fundamentalist Islamist terrorism. Australia and its Western Allies have been repeatedly targeted by terrorists, and named in dispatches from ISIS and affiliated organisations as being the enemy against whom violence is to be waged. A majority of the High Court in *Thomas* found terrorism could be a subject of the Commonwealth's defence power, in adapting the power to apply to modern warfare.

If Australia were to be considered at war, obviously the defence power is at its broadest. Precedents such as *Lloyd* and *Little*, decided during war time, would be directly on point validating the use of the defence power to intern those suspected of subversive criminal activity. This could serve to distinguish the *Communist Party* case, decided years after the end of World War II.

Obviously, in relation to possible use of the defence power to authorise ministerial detention of an individual, the Commonwealth would need strong evidence that such detention was conducive to a defence

⁴⁸ *Thomas v Mowbray* (2007) 233 CLR 307, 504–505.

⁴⁹ *Thomas v Mowbray* (2007) 233 CLR 307, 459; later he suggested in the case of a power of a Minister to detain an individual involuntarily due to fears of what they might do if free, "it is not to be supposed that such extraordinary measures would be supported by the defence power except in extraordinary circumstances" (476).

purpose. Clearly the power is purposive, and the *Communist Party* case is a warning to the Commonwealth that it must provide clear evidence of the relation between its legislation and a defence purpose. The Commonwealth would need to demonstrate how internment supported the cause of defending the nation.

It would have to be narrowly tailored to apply only to individuals thought to pose a serious risk to Australian security, supported by strong evidence. The onus of proof would remain on the Commonwealth to demonstrate this; the standard of proof high. The legislation should set out criteria applied by the decision-maker in reaching their decision, to meet the concerns expressed in the Australian *Communist Party* case regarding unbridled, essentially unreviewable executive power. It is not a *fait accompli* that internment is always conducive to the war effort; members of the House of Lords in *A v Secretary of State for the Home Department (A)* reflected on the questionable efficacy of internment used in previous “wars”.⁵⁰

Intelligence and/or evidence the person had been radicalised, was planning a terrorist attack, was an active ISIS sympathiser committed to action, or was urging others to commit terrorism, would have to be strong. They could only be detained while such evidence remained accurate for a particular person; detention beyond a time when it was reasonably necessary would not be constitutionally supported. Judicial review of the Minister’s decision would be available. It would involve more than whether the Minister was acting in good faith; the Court could assess reasonableness of the determination;⁵¹ that is, satisfaction of criteria for exercise of the power. Natural justice would apply – the person should be given notice of reasons for their proposed detention, and meaningful opportunity to respond to allegations against them.⁵²

Since *Little*, the High Court has become more concerned with availability of judicial review of administrative decision-making. Five members in *Plaintiff S157/2002 v Commonwealth* concluded “the parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction”.⁵³ Gleeson CJ denied the sufficiency of a “good faith” limit on executive power, as Dixon J had in *Little*:

Decision makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness.⁵⁴

The case accorded constitutional protection to the power of a court to correct the decision of a decision-maker tainted by jurisdictional error.

⁵⁰ *A v Secretary of State for the Home Department* [2005] 2 AC 68, 165: “experience during the first and second world wars had shown that large-scale internment produced many injustices (and in some cases, interfered with the war effort), with no obvious gain to national security” (Lord Walker); “experience in Northern Ireland showed that (in conditions of internal sectarian violence rather than international war) internment was also a major obstacle to political progress and reconciliation” (Lord Walker); “there have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government ... these powers were conferred with great misgivings and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised” (130, Lord Hoffmann).

⁵¹ This adopts the dissenting *Liversidge v Anderson* [1942] AC 206 and reflects criticism of the US internment: Eugene Rostrow, “The Japanese American Cases – A Disaster” (1945) 54 *Yale Law Journal* 489, 531: “the first and greatest anomaly of the *Hirabayashi*, *Korematsu* and *Endo* cases is that they seem to abandon the requirement of a judicial inquiry into the factual justification for General DeWitt’s decisions ... these cases treat the decisions of military officials, unlike those of other government officers, as almost immune from ordinary rules of public responsibility”.

⁵² The Canadian Supreme Court insisted on this in *Charkaoui v Canada* [2007] SCR 350, in validating long-term preventive detention on national security grounds, as did *Hamdi v Rumsfeld*, 542 US 507, 533 (2004) (O’Connor J, for Rehnquist CJ, Kennedy and Breyer JJ).

⁵³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); similarly *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

⁵⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 494; Gleeson CJ added clear words would be necessary to indicate Parliament’s intention fairness not apply to proceedings, and decisions binding notwithstanding lack of fairness; similarly Lord Rodger in *A v Secretary of State for the Home Department* [2005] 2 AC 68, 155–156: “there is always a danger that, by its very nature, concern for national security may bring forth measures that are not objectively justified ... it is accepted that the measures (here) were adopted in good faith. But good faith does not eliminate the risk that, because of an understandable concern for national security, a measure may be taken which, on examination, (goes) too far”.

The conclusion is that in today's times, the Commonwealth could use its defence power to implement an internment scheme against those suspected of terrorist activity. However, it would need to carefully craft the legislation so it was clearly linked to a defence purpose. One way of doing so would be to include criteria for use of the power. Further, the Commonwealth would have to make its case very strongly as to why a person needed to be detained pursuant to the legislation. Judicial review of the minister's decision, broader than a "good faith" check, is an essential check and balance on use of this power. The person would be given reasons for their detention, and meaningful opportunity to rebut.

For completeness it is noted, apart from s 51(6), the High Court has emphasised a range of heads of power might be utilised to protect the Commonwealth and its people, including the incidental power s 51(39),⁵⁵ the external affairs power,⁵⁶ and inherent nationhood power.⁵⁷ The Commonwealth might rely on its referral powers.

The likelihood a head of power exists for the legislation is separate to the question of whether such a scheme would comply with separation of powers principles. Such issues could arise whether the power was reposed in either the relevant minister, or the courts. It is to consideration of these matters that the article now turns.

WHETHER MINISTER-ORDERED INTERNMENT WOULD BE UNCONSTITUTIONAL DUE TO CH III

If legislation providing for internment could be supported by a head of power, another constitutional question is whether ministerially ordered detention could breach Ch III of the *Constitution*. Specifically, the question would be whether such a provision would amount to a member of the Executive (non-judicial figure) exercising power judicial in nature, contrary to *Boilermakers*. This issue could arise because involuntary detention of an individual is usually considered punitive, and punitive measures are typically administered by courts, rather than non-judicial bodies.

This orthodox position and exceptions were explained by the joint reasons in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)*:⁵⁸

There are some functions which ... have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function pertains exclusively to and could not be excluded from the judicial power of the Commonwealth. That being so, Chapter III of the *Constitution* precludes the enactment, in purported pursuance of any of the sub-sections of s51 of the *Constitution*, of any law purporting to vest any part of that function in the Commonwealth executive.⁵⁹

This passage would provide the basis for an argument Minister-ordered detention of an individual was constitutionally invalid, on the basis involuntary detention is punishment, and the Minister is part of the Commonwealth Executive. Their purported punishment of an individual would be unconstitutional due to incompatibility with Ch III.

The joint reasons appeared wary of possible attempts by governments to argue involuntary detention was for a purpose other than punishment. Specifically, it stated the Constitution's concern in the area of separation of powers involved substance, rather than form. This led them to conclude that:

[I]t would be ... beyond the legislative power of the parliament to invest the executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.⁶⁰

⁵⁵ *Burns v Ransley* (1949) 79 CLR 101, 110 (Latham CJ), 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121, 157 (McTiernan J), 163 (Webb J).

⁵⁶ *R v Sharkey* (1949) 79 CLR 121, 157 (McTiernan J), 163 (Webb J).

⁵⁷ *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J).

⁵⁸ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

⁵⁹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

⁶⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

In other words, they appeared alive to the possibility the government might claim involuntary detention of an individual by the Executive did not infringe the separation of powers principle because it was for a non-punitive purpose, and appeared ready to counter that position.⁶¹ Having said that, the joint reasons recognised exceptional cases where involuntary detention may be administered by executive bodies. They cited as examples police power to detain a person pending trial, detention of the mentally ill, those suffering from an infectious disease, parliament's power to punish contempt, and the position of military tribunals with respect to discipline. Otherwise, the joint reasons concluded:

The citizens of this country enjoy, *at least in times of peace*, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.⁶²

In a footnote after the italicised phrase, the joint reasons added:

[I]t is unnecessary to consider whether the defence power in times of war will support an executive power to make detention orders such as those considered in *Little v Commonwealth*.⁶³

The Commonwealth's strongest argument in defending the constitutionality of Minister-ordered internment against a Ch III challenge would be that the purpose of the detention was non-punitive, community protection. This argument appealed to the High Court in *Fardon v Attorney-General (Qld)* (*Fardon*).⁶⁴ Admittedly, the issue arose in a slightly different context. There the power to order detention was reposed *in a court*. However, the issue of the nature of the detention was relevant because those liable to detention under the legislation had already been sentenced and punished. Thus, the issue arose whether the power for the court to order further detention was judicial in nature, since involuntary detention is typically punishment, and the argument was those affected were not being punished, and could not be punished, since they had committed no new crime. Thus, although the different context of *Fardon* is admitted, what the court said there regarding the purpose of involuntary detention remains relevant to the current context of Ministerial ordering of involuntary detention.

It has been observed, apart from McHugh J,⁶⁵ no other justice in *Fardon* actually determined whether the nature of preventive detention was inherently judicial, or non-judicial, in nature. Further, two justices in *Fardon* suggested, if equivalent legislation were passed federally, it would infringe Ch III.⁶⁶

Callinan and Heydon JJ in *Fardon* accepted the purpose of the detention there was preventive, and not punitive, in nature.⁶⁷ They gave other examples in the law of non-punitive detention, including mental illness, public safety and chemical or biological emergencies, migration, indefinite sentencing, contagious diseases and drug treatment.⁶⁸ They quoted Gummow J in *Kruger v Commonwealth* who also spoke of the categories of punitive and non-punitive detention, noting categories of non-punitive detention were not closed.⁶⁹ Gleeson CJ agreed measures here imposed preventive, as opposed to punitive, detention,⁷⁰ as did McHugh J.⁷¹

⁶¹ Contrast *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 71 (McHugh J).

⁶² *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28–29.

⁶³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28.

⁶⁴ *Fardon v A-G (Qld)* (2004) 223 CLR 575.

⁶⁵ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 597.

⁶⁶ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 608, 614 (Gummow), 631 (Kirby J).

⁶⁷ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 654.

⁶⁸ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 654.

⁶⁹ *Kruger v Commonwealth* (1997) 190 CLR 1, 162, cited by Callinan and Heydon JJ, 653–654).

⁷⁰ *Kruger v Commonwealth* (1997) 190 CLR 1, 592.

⁷¹ *Kruger v Commonwealth* (1997) 190 CLR 1, 597: “the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment”; compare Scalia and Stevens JJ (dissenting) in *Hamdi v Rumsfeld* concluding it was “unthinkable that the executive could render otherwise criminal grounds for detention non-criminal merely by disclaiming an intention to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing” (*Hamdi v Rumsfeld*, 542 US 507, 556 (2004)).

Gummow J eschewed the distinction between punitive and non-punitive detention.⁷² He acknowledged the list of exceptions contained in the joint reasons in *Lim* (circumstances where the law accepted involuntary detention only after finding of criminal guilt) was not closed, and noted the law had a long tradition of preventive detention after conviction, but still noted that “detention by reason of apprehended conduct, even by judicial examination ... is of a different character (to detention pre-trial) and is at odds with the central constitutional conception of detention as a consequence of *judicial* determination of engagement in past conduct”.⁷³ Hayne J agreed, noting the line between preventive detention and punishment was difficult to draw.⁷⁴ He agreed with Gummow J’s observation about detention as a consequence of judicial determination of engagement in past conduct being a central constitutional conception. He reserved opinion on whether:

[L]egislation requiring a federal court to determine whether a person previously found guilty of an offence should be detained beyond the expiration of the sentence imposed, on the ground that the prisoner will or may offend again, would purport to confer a non-judicial function on that court.⁷⁵

The possible constitutional validity of administrative detention was also noted by the Court in *Al-Kateb v Godwin (Al-Kateb)*.⁷⁶ The case involved involuntary detention of an individual under the aliens power until they could be deported. Gleeson CJ (dissenting) canvassed the legality of administrative detention, deciding it would be “easier to discern a legislative intention” to confer a power of indefinite administrative detention where the power was coupled with discretion to relate it to considerations such as whether the person detained was thought to pose a danger to the community.⁷⁷ McHugh J again distinguished detention according to its purpose, finding detention “other than by a curial order” for preventive purposes, not punitive purposes, would not offend Ch III.⁷⁸ He specifically referred, without evident disapproval, to the decisions in *Lloyd, Ex parte Walsh (Walsh)* and *Little*. He noted in none of them was it found that the administrative detention breached Ch III.⁷⁹ Gummow J (dissenting on the Ch III challenge) again criticised the punitive and non-punitive detention distinction. He found administrative detention could be valid, provided it related to a purpose connected with a head of power. In so saying, he acknowledged the caveat expressed by the joint reasons in *Lim*, that it was unnecessary to consider whether the defence power during war time would permit administrative detention.⁸⁰ He also quoted with approval Scalia J (with whom Stevens J concurred) (dissenting) in *Hamdi v Rumsfeld (Hamdi)* that “the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive”.⁸¹

Kirby J (dissenting) confronted reference by McHugh J to the *Lloyd, Walsh* and *Little* trilogy, said to reflect acceptance of administrative detention during war. He said Australians should be “embarrassed” by them, analogous as they were to *Korematsu v United States (Korematsu)*,⁸² which rejected a constitutional challenge to Japanese-American internment in World War II. Kirby J said wartime required adaptation of the *Constitution*, including the defence power. However it, like other heads of power, was constrained by “subject to the *Constitution*”, including Ch III. Kirby J claimed the Australian trilogy were of doubtful authority, concluding the Court today would approach the matter differently.⁸³ He added the notion the

⁷² *Kruger v Commonwealth* (1997) 190 CLR 1, 612–613.

⁷³ *Kruger v Commonwealth* (1997) 190 CLR 1, 613 (emphasis added).

⁷⁴ *Kruger v Commonwealth* (1997) 190 CLR 1, 647.

⁷⁵ *Kruger v Commonwealth* (1997) 190 CLR 1, 648.

⁷⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁷⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562, 578.

⁷⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562, 584.

⁷⁹ *Al-Kateb v Godwin* (2004) 219 CLR 562, 588–589; this is not surprising, since the *Boilermakers* decision, which established a strict separation of powers at the federal level among the three arms of government, postdates each of them.

⁸⁰ *Al-Kateb v Godwin* (2004) 219 CLR 562, 614.

⁸¹ *Al-Kateb v Godwin* (2004) 219 CLR 562, 612.

⁸² *Korematsu v United States*, 323 US 214 (1944).

⁸³ *Al-Kateb v Godwin* (2004) 219 CLR 562, 621.

validity of a law/action depended on the opinion of Parliament or assertion by Executive was contrary to the *Communist Party* case.⁸⁴

Hayne J doubted that there were only limited cases in which executive detention was justified.⁸⁵ He dismissed the Ch III challenge to this executive detention on the basis that the detention was for a preventive and protective, rather than punitive, purpose. He emphasised the factual scenario there. The individuals were not being detained for an offence, because there was no offence of arriving in Australia as a “prohibited immigrant”.⁸⁶ This was in the context of citing HLA Hart’s explanation of punishment, one element of which was that punishment was “for an offence against legal rules” and another was “of an actual or supposed offender for their offence”. Further, since the law applied to non-residents arriving irregularly in Australia, it could not be said that their detention and segregation was punitive.⁸⁷ It is not clear from this whether Hayne J would view differently administrative detention of an Australian resident lawfully residing and at large in Australia.

Callinan J agreed detention here was for a non-punitive purpose, so no difficulty arose with Ch III. He opined administrative detention to deter irregular arrivals from coming to Australia “as a punishment or a deterrent” would be permissible, given “a penalty imposed as a deterrent or as a disciplinary measure is not always to be regarded as punishment imposable only by a court. Deterrence may be an end in itself unrelated to criminal sanction or punishment”.⁸⁸

Recently in *Northern Australia Aboriginal Justice Agency Ltd v Northern Territory*⁸⁹ the Court validated short-term administrative detention for the purpose of ensuring an accused was available for court hearing shortly thereafter. French CJ, Kiefel and Bell JJ indicated limits to administrative detention, suggesting if it were for much longer than the maximum period of administrative detention contemplated by the legislation (four hours), a question could arise whether the detention was punitive.⁹⁰ If so, Ch III issues would arise, because punitive powers typically associated with exercise of judicial power would be exercised by the Executive.⁹¹ Gageler J, dissenting, opined executive detention of an individual was punitive, unless duration of detention was reasonably necessary to achieve a stated legislative purpose, and duration of detention “capable of objective determination by a court at any time”.⁹²

INTERNATIONAL PERSPECTIVES

Internment schemes during wartime were unsuccessfully challenged in the House of Lords⁹³ and US Supreme Court. In the United States, curfew provisions directed against Japanese-Americans,⁹⁴ and subsequently internment provisions requiring attendance in designated camps,⁹⁵ were held valid exercises of Congress’ war power. In *Hirabayashi v United States* the Court affirmed Congress’ defence power was broad, permitting it to implement sweeping measures related to the conduct of war.⁹⁶ Congress had broad

⁸⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562, 618.

⁸⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562, 648.

⁸⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562, 650.

⁸⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562, 650.

⁸⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562, 659.

⁸⁹ *Northern Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

⁹⁰ *Northern Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593.

⁹¹ *Northern Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593.

⁹² *Northern Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 612 (Gleeson CJ, Gummow and Kirby JJ). This mirrors concern of dissentients in *Al-Kateb* that a person might be detained for an indefinite period because there was no country to which they might be deported.

⁹³ *Liversidge v Anderson* [1942] AC 206.

⁹⁴ *Hirabayashi v United States*, 320 US 81 (1943).

⁹⁵ *Korematsu v United States*, 323 US 214 (1944).

⁹⁶ *Hirabayashi v United States*, 320 US 81, 93 (Stone J, for the Court) (1943).

discretion in determining the nature and extent of the threat to the nation, and how to respond. It was not for a court to view the wisdom of Congress' actions or substitute its judgment. In *Korematsu* the Court found measures, involving internment of 120,000 people, were closely related to a defence purpose.⁹⁷ It found in wartime, the power of Congress to defend the nation was "commensurate" with the threat.⁹⁸ The dissenters found the measure overbroad, in requiring all Japanese-Americans be interned, when evidence of disloyalty to the United States was minimal, and applicable to a small number of affected individuals. This meant the measure could not be sufficiently connected with a defence purpose.⁹⁹ More recently Kennedy J, writing for the majority in *Boumediene v Bush* (*Boumediene*), cited Blackstone:

To bereave a man of life ... or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation, but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking and therefore a more dangerous engine of arbitrary government.¹⁰⁰

Alexander Hamilton, commenting on Blackstone's quote, noted:

[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable forms of tyranny ... and as a remedy for this fatal evil, he is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls the "bulwark of the British constitution".¹⁰¹

The post 9/11 era has involved a range of measures responding to the terrorism threat, including Guantanamo Bay for so-called enemy combatants. It is estimated that under post-9/11 laws, 5,000 individuals were involuntarily detained, though only a few were charged with terrorism.¹⁰² The constitutional validity of executive or legislative detention of "enemy combatants" was confirmed in *Hamdi*, subject to due process guarantees.¹⁰³ Elsewhere it has ruled proposed detention based on mere dangerousness unconstitutional.¹⁰⁴

The UK Supreme Court criticised a preventive detention scheme pursuant to which a Minister could order detention of someone believed to be a terrorist.¹⁰⁵ Lord Hoffmann claimed the legislation:

Calls into question the very existence of an ancient liberty of which this country until now has been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom ... freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers.¹⁰⁶

⁹⁷ *Korematsu v United States*, 323 US 214, 218 (Black J, for the Court) (1944).

⁹⁸ *Korematsu v United States*, 323 US 214, 220 (1944).

⁹⁹ *Korematsu v United States*, 323 US 214, 235 (Murphy J, dissenting) (1944). Jackson J was concerned meaningful judicial review of the defence chiefs' assessment would be difficult, and the court would accept their assessment (244–245).

¹⁰⁰ *Boumediene v Bush*, 553 US 723, 744 (2008) (Kennedy J, for Stevens Souter Ginsburg and Breyer JJ), quoting Sir William Blackstone, *Commentaries on the Laws of England 1765-1769* (Clarendon Press, 1769) 136.

¹⁰¹ Alexander Hamilton, *The Federalist*, No 84 (Palgrave Macmillan, 2009).

¹⁰² Natsu Taylor Saito, "Internments, Then and Now: Constitutional Accountability in Post 9/11 America" (2010) 2 *Duke Forum for Law and Social Change* 71, 76; David Cole, "Out of the Shadows: Preventive Detention, Suspected Terrorists, and War" (2009) 97 *California Law Review* 693, 718: "thousands of persons having nothing to do with terrorism were subject to preventive detention in the wake of 9/11."

¹⁰³ *Hamdi v Rumsfeld*, 542 US 507 (2004) (O'Connor J, for Rehnquist CJ, Kennedy and Breyer JJ, Thomas J agreeing that detention by the executive there was lawful). This finding was subject to some vigorous dissent – for example Scalia and Stevens JJ, who found that the "very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive" (555), adding it was "unthinkable that the Executive should render otherwise criminal grounds for detention non-criminal merely by disclaiming an intention to prosecute or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing" (556). An enemy combatant was a person who had engaged in armed conflict against the United States or its allies in Afghanistan; another example is *Ludecke v Watkins*, 335 US 160 (1948).

¹⁰⁴ *Fouche v Louisiana*, 504 US 71 (1992).

¹⁰⁵ *A v Secretary of State for the Home Department* [2005] 2 AC 68.

¹⁰⁶ *A v Secretary of State for the Home Department* [2005] 2 AC 68, 129–130.

Baroness Hale denied a member of the Executive could order the involuntary detention of a terrorism suspect:

Neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that (emphasis added); and except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.¹⁰⁷

The *Petition of Right 1628* (Eng), supplemented by the *Habeas Corpus Acts of 1641 and 1679* (Eng), precludes executive imprisonment without charge.¹⁰⁸ Though that legislation is applicable as part of the law of States,¹⁰⁹ it would be subject to statutory amendment by the Commonwealth.¹¹⁰ Perhaps it is most useful here as evidence of the general abhorrence by common law systems of arbitrary executive detention, and one way in which the common law (proudly) distinguished itself from the excesses of civil law systems.¹¹¹ The High Court can interpret the *Constitution* in light of these common law values.¹¹²

CONSIDERATION

The first question concerns the nature of the detention, and whether it is punitive. Gummow J has questioned the utility of this distinction. However, he has been alone in doing so, and the Court recently in *Northern Australia* referred to punitive, as opposed to non-punitive, detention. It is a distinction the law traditionally makes, approximating the distinction between the criminal and civil. If the Minister-ordered detention is punitive, it will be unconstitutional. The Court has declared punishment is an exclusively judicial function.¹¹³

Hart identified five elements of punishment: (a) must involve pain or other consequences normally considered unpleasant; (b) must be for offence against legal rules; (c) must be of an actual or supposed offender for offence; (d) must be intentionally administered by human beings other than offender; and (e) must be imposed and administered by an authority constituted by a legal system against which the offence is committed.¹¹⁴ Analogously, the European Court of Human Rights¹¹⁵ and US Supreme Court¹¹⁶ have provided factors to determine whether a particular proceeding is criminal or civil. Criminal proceeding is analogous to notions of punishment, and a civil proceeding analogous to non-punishment, though the analogies are not exact.

¹⁰⁷ *A v Secretary of State for the Home Department* [2005] 2 AC 68, [222].

¹⁰⁸ James Renwick, "The Constitutional Validity of Preventative Detention" in Andrew Lynch, Edwina Macdonald and George Williams (eds) *Law and Liberty in the War on Terror* (Federation Press, 2007) 129.

¹⁰⁹ For example, *Imperial Acts Application Act 1969* (NSW) s 6, Sch 2.

¹¹⁰ *Statute of Westminster Adoption Act 1942* (Cth) s 2(2).

¹¹¹ "The common law of Australia knows no letter de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action": *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J).

¹¹² Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ 240.

¹¹³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

¹¹⁴ HLA Hart, *Punishment and Responsibility* (OUP, 1968) 4–5, cited and applied by Hayne J in *Al-Kateb v Godwin* (2004) 219 CLR 562, 650; Ashworth and Zedner, n 1, 14, propose two elements to a definition of a punitive measure: (a) it is censure of an offender for an offence, and (b) it involves the intentional imposition of hard treatment on the offender for the offence.

¹¹⁵ *Engel v Netherlands* (1976) 1 EHRR 647, [82]: (a) the domestic classification; (b) the nature of the offence; and (c) the severity of the potential penalty which the defendant risks occurring. The third factor is the most important.

¹¹⁶ *Kennedy v Mendoza-Martinez*, 372 US 144 (1963): (a) whether the sanction involves an affirmative disability or restraint; (b) whether it has historically been regarded as punishment; (c) whether it comes into play only on a finding of scienter; (d) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (e) whether the behaviour to which it applies is already a crime; (f) whether an alternative purpose to which it may rationally be connected is assignable for it; and (g) whether it appears excessive in relation to the inquiry.

On Hart's factors, regarding (a), involuntary detention is unpleasant. However, in relation to (b) and (c), internment is not for an actual offence, not against an actual offender for offence. It is to prevent commission of an offence. Elements (d) and (e) are easily satisfied. It is concluded on Hart's model preventive detention is not punishment because it is administered for non-punitive purposes. It is to prevent future crime, not punish past crime. This is the conclusion that the Court has reached regarding preventive detention, though in the context of post-sentence detention, not "pre-crime" detention, particularly Callinan and Heydon JJ in *Fardon*. Further, the validity of executive detention for other non-punitive purposes, for example deportation of a non-citizen, was upheld in *Al-Kateb*.

It is difficult to apply the *Engel* factors, since the present situation does not involve an actual "offence". However, long-term detention would, according to *Engel*, place it more clearly in the criminal (punishment), rather than civil column. On the *Mendoza* factors, involuntary detention involves affirmative restraint, and traditionally regarded as punishment. Preventive detention would apply to those with a mind to committing terrorist acts. Regarding (d), the preventive detention would not directly promote objectives of retribution and deterrence – their primary aim being to prevent and protect, though clearly they could deter. They are not retributive. The laws can be argued to be preventive and protective in nature, not punishment. On balance, it is concluded involuntary detention of a person in order to prevent them committing an act of terrorism is preventive in substance, and not punitive. Contrary to how some might read the High Court decision in *Northern Australia*, the fact detention is for a long period does not, for that reason, mean the detention is inevitably punitive in nature. The Commonwealth law would not founder on the basis punishment was being inflicted by the Executive.¹¹⁷

However, the law might founder when the nature of the power is considered. An assessment must be made regarding whether the nature of the power is judicial, or non-judicial, in nature. Clearly, if the assessment is that it is judicial, exercise of it by a member of the Executive would be problematic. Consideration of whether a power to detain based on assessment of dangerousness is judicial or non-judicial is difficult. Judges in *Fardon* treated power to order preventive detention as judicial;¹¹⁸ in contrast, judges in *Kable v Director of Public Prosecutions (NSW) (Kable No 1)* treated power to order preventive detention as non-judicial.¹¹⁹ In *New South Wales v Kable (Kable No 2)* the Court unanimously found the preventive detention order was judicial.¹²⁰

This might seem an answer to the question whether a power of a Minister to order preventive detention is unconstitutional. The answer would be that it is judicial, so cannot be reposed in the Executive. Yet, one must be wary here. The mere fact, in one case, a power to preventively detain was held judicial in nature does not necessarily constitutionally preclude it from being reposed in the Executive. Recall the "chameleon doctrine", that a power takes its nature from the body in which it is reposed:

There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chapter III. It may be too that the manner in which they have been traditionally treated or in which the legislature deals with them in the particular case will be decisive.¹²¹

¹¹⁷ This argument would be strengthened if the person so detained was not kept with the broader "prison" population, and was the subject of a specific, individualised plan aimed at tackling their radicalisation and reducing their threat to society: *M v Germany* (2010) 51 EHRR 41.

¹¹⁸ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 597 (McHugh J), 656–658 (Callinan and Heydon JJ).

¹¹⁹ *Kable v DPP (NSW)* (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 122 (McHugh J).

¹²⁰ *New South Wales v Kable* (2013) 252 CLR 118, 132 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ): "the order made by Levine J was a judicial order," 146 (Gageler J).

¹²¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), citing *R v Davison* (1954) 90 CLR 353, 369–370 (Dixon CJ and McTiernan J), 376–378 (Fullagar J), 382–384 (Kitto J), 388–389 (Taylor J), cited by Gleeson CJ in *Thomas v Mowbray* (2007) 233 CLR 307, 327: "deciding whether a government power or function is best exercised administratively or judicially is a regular legislative exercise"; see also *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360 (Gaudron J); *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 305 (Kitto J).

The doctrine has been (justifiably) criticised.¹²² Assuming it continues to apply, we must consider whether a power of involuntary detention could be reposed in a Minister to prevent future terrorism. As explained, the fact the Court in *Kable No 2* found the preventive detention order there to be judicial power does not conclusively determine it. Some may argue the chameleon doctrine is highly pertinent to involuntary detention, since the Court has found both executive and judicial arms have power to involuntarily detain, at least sometimes.

One way to determine whether Minister-ordered involuntary preventive detention would be valid would be to compare it with other instances of executive-ordered detention found valid, to see whether there is any pattern involved in such detentions and, if so, whether preventive detention for the duration of the “war” fits.

One feature of at least some of this type of detention is its *short-term* nature. As the Court recently reflected in *Northern Australia*, short-term administrative detention, for example to ensure a person attends court for trial, is not considered judicial in nature. In contrast, *long-term* administrative detention while the “war on terror” continues would be for an indefinite time. This gives it a different character than other contexts where administrative detention was validated.

Subject to the “chameleon doctrine” noted above, and acknowledging possibly *some* overlap between executive and judicial functions, generally administrative detention cannot involve power that is essentially judicial in nature. Now the decision in *Huddart, Parker & Co Pty Ltd v Moorehead* characterised judicial power as resolving conflict and deciding a controversy. It was a final and authoritative decision about rights. Thus the administrative detention validated in *Al-Kateb* can be explained. The decision to detain him was not a final and authoritative decision. It did not resolve a conflict or decide a controversy. He applied in separate proceedings (to a Ch III tribunal) for a decision about his entitlement to stay here. This was the judicial aspect of the process, a final and decisive determination about a conflict – Al-Kateb wanting to stay, the government not permitting that, unless it was determined he was someone to whom convention obligations were owed. Similarly, holding someone involuntarily until their case is heard in court is not a final, binding and authoritative decision deciding a controversy. It decides nothing about their guilt or innocence.

On the other hand, a decision that a particular person is so dangerous and likely to commit future terrorism acts, and so needs to be locked up, involves a decision about controversy. The controversy is whether they are likely to commit future violence – the government claiming a particular person will, the person presumably denying this. If someone decides upon internment, they are making a final and binding decision. This suggests the power is judicial in nature.

It is often said that judicial power involves application of legal standards to resolve a dispute. It enquires into “the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined”. If a Minister were empowered to make an assessment that a particular person was likely to be dangerous in future and thus should be detained, they would be ascertaining facts, making a legal binding judgment as to whether a particular person fell within the law’s parameters. A majority in *Thomas* was satisfied that a criterion permitting exercise of a power based on whether making an order “would substantially assist in preventing a terrorist act” involved judicial power. These were suitably legal standards for a court to apply, not purely a policy or public interest discussion.¹²³

The existing categories of case where executive detention is permitted that are considered to present the closest analogy with internment relate to mental health, and quarantine.¹²⁴ There is a strong theme of community protection in these regimes. For instance, mental health legislation pursuant to which a person

¹²² *Thomas v Mowbray* (2007) 233 CLR 307, 425–429 (Kirby J).

¹²³ This might indicate non-judicial power is being exercised: *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

¹²⁴ These exceptional cases in which involuntary detention by the Executive was permitted were specifically referred to by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 and by Callinan and Heydon JJ in *Fardon v A-G (Qld)* (2004) 223 CLR 575, 654.

may be involuntarily detained refers to it being necessary for protection of others.¹²⁵ Commonwealth biosecurity legislation refers to a person being involuntarily detained because of the threat they may pose to others through contagion.¹²⁶ It can be conceptually difficult to argue, if the State has the power to detain under mental health and quarantine on the basis of community protection, it does not have the power to detain suspected terrorists on the same basis. Arguably community protection either justifies executive detention, or it does not.

On the other hand, common law systems have a general revulsion towards executive detention. The fear is that it could be used arbitrarily. It potentially undermines fundamental liberty interests, difficult to accept in a liberal democracy. This revulsion is apparent in judgments of Gummow J, referring to the “central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct” in *Fardon*, and in *Al-Kateb* quoting the US decision in *Hamdi* regarding the “very core of liberty protections” provided by the separation of powers being the avoidance of arbitrary executive detention. Executive detention was denounced, with reference to Blackstone, by the US Supreme Court in *Boumediene*, and by the UK Supreme Court in *A* as antithetical to British legal traditions, and an affront to quintessential British liberties.¹²⁷ Obviously these are relevant and applicable to interpretation of the Australian *Constitution*, our country having adopted an amalgam of British and American traditions. Further, excessive judicial deference to the Executive in times of war and warlike conditions has been criticised in scholarship.¹²⁸

There is a good argument that a power to detain based on an assessment of what a person may do in future is close to powers courts already exercise, whether in terms of bail, apprehended violence orders, and as a factor in sentencing. Gleeson CJ pointed this out in *Thomas*:

The power to restrict or interfere with a person’s liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances.¹²⁹

So, we have the proven ability of the Executive to detain for at least some community protection purposes (mental health, quarantine), which suggests involuntary detention by a minister for community protection purposes is valid as an exercise of power that is executive in nature. Against this, we have the analogies with other instances in which courts take into account assessments of the future in the exercise of their powers, as the High Court elaborated upon in *Thomas*. This suggests involuntary detention is valid as an exercise of judicial power, subject to what is said below. Does this make involuntary detention a “chameleon” power, able to be reposed in either the Executive or judiciary, and taking its nature from how it is provided for in a particular case?

In the end, the common law’s revulsion to executive involuntary detention, present in the common law for nearly four centuries, persuades me that such a power must be kept within carefully confined existing

¹²⁵ *Mental Health Act 2007* (NSW) ss 12, 14.

¹²⁶ *Biosecurity Act 2015* (Cth) ss 97, 103.

¹²⁷ “[A]t the centre of the judge’s department is the responsibility to prevent and to remedy the arbitrary detention of persons”: Endicott, n 5, 30.

¹²⁸ David Dyzenhaus and Rayner Thwaites, “Legality and Emergency – The Judiciary in a Time of Terror” in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 9: “the history of the judiciary in times of emergency and alleged emergency is a dismal one of judges deferring to executive claims.”

¹²⁹ *Thomas v Mowbray* (2007) 233 CLR 307, 328, see also 347–348 (Gummow and Crennan JJ): “the orders which may be made are a familiar part of judicial power to make orders restraining the liberty of the subject, for the purposes of keeping the peace or preserving property. Orders, which are not orders for punishment following conviction, but which involve restraints upon the person to whom they are directed, can be made after a judicial assessment of a future risk,” 507 (Callinan J): “the making of orders by courts to intercept, or prevent conduct of certain kinds is a familiar judicial exercise. Every injunction granted by a court is to that end ... orders to prevent apprehended violence, to bind people over to keep the peace, and ... to approve curially continued detention as a preventative purpose to protect the public are exercises undertaken and ... better so undertaken by the courts. Protection of the public is frequently an important ... consideration in the selection of an appropriate sentence of a criminal” (Heydon J agreed with Gleeson CJ, Gummow, Crennan and Callinan JJ on the Ch III issues) (526).

limits, and the categories should not be extended to cases where a member of the Executive wishes to preventively detain an individual based on a fear of what they may do.

WHETHER COURT-ORDERED INTERNMENT WOULD BE UNCONSTITUTIONAL DUE TO CH III OF THE AUSTRALIAN CONSTITUTION

Space restraints here necessitate an abridged version. Essentially laws which offend the institutional integrity of a Ch III court are constitutionally invalid. A law which offends the institutional integrity of a court will undermine public confidence in the integrity/independence of the judiciary. Essential characteristics of a court, and judicial power, must be identified. The court is reluctant to articulate what these characteristics are. An early definition of judicial power is not particularly helpful.¹³⁰ We can identify several essential characteristics of the exercise of judicial power, and which exemplify a judicial process: decisional independence,¹³¹ the requirement to give reasons,¹³² open courts,¹³³ the right of each party to see, hear and test the evidence of the other,¹³⁴ natural justice,¹³⁵ specificity of allegation,¹³⁶ procedural fairness more generally,¹³⁷ and ability to correct jurisdictional error of a lower court.¹³⁸

A law will be invalid if it authorises or requires a court to exercise powers non-judicial in nature. It will be invalid if it departs so substantially from the traditional essential characteristics of a court that it denies the court proceedings the character of a judicial process.¹³⁹ A law cannot use a court to cloak proceedings with the appearance of independent decision-making which does not accord with reality.¹⁴⁰

As noted above, the High Court has considered whether the involvement in courts of preventive detention schemes was consistent with the Ch III. However, these precedents are not as helpful as one might have wished. On one occasion, the Court held the scheme to be invalid;¹⁴¹ on the other, the Court validated the scheme.¹⁴² Further, even in these decisions, the Court did not clearly articulate a majority position as to whether preventive detention was a power that was judicial in nature,¹⁴³ was non-judicial in nature,¹⁴⁴ whether it was “sui generis”,¹⁴⁵ chameleon-like, taking its nature from the body in which it was reposed,¹⁴⁶ or of some other nature, though it was considered judicial in *Kable No 2*. And for some, this

¹³⁰ “[T]he words ‘judicial power’ ... in s71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power (is evident when) ... some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action”: *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330, 357 (Griffith CJ, with whom Barton J agreed (366)).

¹³¹ *South Australia v Totani* (2010) 242 CLR 1.

¹³² *Wainohu v New South Wales* (2011) 243 CLR 181.

¹³³ *International Finance Trust Co v New South Wales Crime Commission* (2009) 240 CLR 319.

¹³⁴ *Nicholas v The Queen* (1998) 193 CLR 173, 208–209, cited with approval by six members of the Court in *Bass v Permanent Trustee Group* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹³⁵ See n 134.

¹³⁶ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

¹³⁷ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 116–117 (French CJ and Crennan J), 139–140 (Hayne and Bell JJ).

¹³⁸ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

¹³⁹ *Bass v Permanent Trustee Group* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁴⁰ *Mistretta v United States*, 488 US 361, 407 (1989). Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016).

¹⁴¹ *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁴² *Fardon v A-G (Qld)* (2004) 223 CLR 575.

¹⁴³ In *Fardon v A-G (Qld)* (2004) 223 CLR 575, 597 McHugh J held preventive detention was judicial in nature; Callinan and Heydon JJ similar (656–658).

¹⁴⁴ *Kable v DPP (NSW)* (1996) 189 CLR 51, 98 Toohey J suggested the preventive detention power was non-judicial in nature, as did Gaudron J (107) and McHugh J (122).

¹⁴⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51, 619 (Gummow J).

¹⁴⁶ Members of the Court in *Kable* reflected on this doctrine, that in some cases, the nature of a power is determined by the body in which it is reposed (*Kable v DPP (NSW)* (1996) 189 CLR 51, 106 (Gaudron J), 136 (Gummow J)).

difficulty in classification is itself a reason for questioning the validity of such schemes.¹⁴⁷ This makes it difficult to accurately predict how the High Court might respond to constitutional argument over a law which permitted the government to apply to the Court for a preventive detention order.¹⁴⁸ Justice Gageler, while a practising barrister, had serious reservations about the constitutionality of a Commonwealth preventive detention scheme.¹⁴⁹ Others have argued the regime would likely survive a Ch III challenge.¹⁵⁰

Second, the legislation that has been considered was of the post-sentence detention kind. While they were in both instances preventive in nature, they only applied to those individuals who had been convicted of criminal activity. Now, of course, the post-sentence detention was not considered “punishment” – if it were, arguments about double punishment would have succeeded, but the Court had evidence of past guilt of those detained. The question would be whether preventive detention taken out of that context – applied to those not convicted of any crime but merely suspected of likely future (serious) wrongdoing, would be valid according to those precedents.

And third, the legislation the Court has considered on preventive detention has in both cases been State legislation. This is important, because of the High Court’s insistence that the principle of separation of powers applies more strictly at federal level, and that while it inheres in the structure of the Australian *Constitution*, it does not inhere in the structure of State constitutions and, while drawn down from the federal level, apparently has a more limited scope as applied to State legislation.¹⁵¹ Other scholars have challenged this orthodoxy, and it is not necessary for current purposes to revisit that debate here. However, if the High Court persists with this distinction, viewing separation of powers more strictly at federal level than State, again decisions affirming the validity of preventive detention at State level must be taken with a grain of salt, when considering a federal equivalent. This was important for at least Gummow J in *Fardon* who, while validating the State legislation there, agreed a federal equivalent would have failed constitutional challenge due to Ch III.¹⁵² So the statement of McHugh J, even if accepted, that “the parliament of New South Wales has the constitutional power to pass legislation providing for the imprisonment of a particular individual”¹⁵³ cannot automatically be translated to the federal level.

In *Thomas*,¹⁵⁴ the Court considered and rejected a challenge to a control order, rather than a preventive detention, regime. Part of the argument rejected was that the making of such order was a breach of Ch III. There are clearly similarities between a control order and a preventive detention order. Obviously both are designed to prevent wrongdoing, and both impact substantially on human rights, though the impact

¹⁴⁷ Andrew Lynch and Alexander Reilly, “The Constitutional Validity of Terrorism Orders of Control and Preventative Detention” (2007) 10 *Flinders Journal of Law Reform* 105, 142: “there is doubt about the constitutionality of the Commonwealth’s terrorism legislation regardless of whether the power to issue the orders is conferred on the judiciary of the executive. The objection to the orders ... is not simply an objection as to the correct allocation of the power to detain. The inability to fit the power to issue the orders comfortably within the hands of either the executive or judicial arms of government indicates that they transgress fundamental freedoms protected by the rule of law.”

¹⁴⁸ Lynch and Reilly, n 147, 116: “*Fardon* gives no clear answers as to whether the ability to detain on the basis of what a person might do rather than what she or he has done is judicial in nature.”

¹⁴⁹ “Opinion: In the Matter of Constitutional Issues Concerning Preventive Detention in the Australian Capital Territory” (2005) 9(1) *University of Western Sydney Law Review* 159, [15]: “there is a very real issue as to whether any form of preventative detention would now be accepted by a majority of the High Court as compatible with Chapter III of the *Constitution*”, [28]: “there is ... a substantial prospect that the proposed Division 105 (which deals with preventative detention orders) would be found wanting in authorising the making of a control (sic) order by a judge of a Chapter III court. The function of making a control (sic) order is one that is closely connected to the functioning of the Australian Federal Police ... the making of a control order results in the immediate deprivation of liberty.”

¹⁵⁰ Paul Fairall and Wendy Lacey, “Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights” (2007) 31 *Melbourne University Law Review* 1072, 1086.

¹⁵¹ *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (Gaudron J).

¹⁵² *Kable v DPP (NSW)* (1996) 189 CLR 51, 608, 614; Gleeson CJ said it was unnecessary to decide (591); Hayne J expressly reserved his position on the matter (647); Lynch and Reilly, n 147, 118: “the survival of state legislation in (*Fardon*) owes much to it only having to satisfy the lower standard of ‘incompatibility’ from *Kable*. A similar enactment at the federal level appears to offer far less certainty as to a positive outcome.”

¹⁵³ *Kable v DPP (NSW)* (1996) 189 CLR 51, 121.

¹⁵⁴ *Thomas v Mowbray* (2007) 233 CLR 307.

on civil liberties of a detention order is plainly more significant.¹⁵⁵ Again, the legislation considered there involved the court making the order, rather than a Minister. However, members of the Court again reflected on the fact that individuals could be detained for purposes other than punishment,¹⁵⁶ including for preventive reasons.¹⁵⁷

Gleeson CJ noted:

The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, a power that may be exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.¹⁵⁸

Similarly Gummow and Crennan JJ, with whose judgment on Ch III issues Heydon J agreed,¹⁵⁹ pointed out the traditional power of courts to issue binding over orders in relation to keeping of the peace and good behaviour more generally. Exercise of such powers did not depend on findings of guilt. This led Gummow and Crennan JJ to conclude that a power to detain due to fears of possible wrongdoing was not inherently incompatible with judicial power, though they acknowledged that the analogy between such orders, and the type of restraint challenged in *Thomas*, was not a complete one.¹⁶⁰ And Gummow and Crennan JJ made clear the provisions considered in *Thomas* were of a different order of magnitude than detention in State custody.¹⁶¹

On balance, and not without reservation, it is suggested the High Court would validate a scheme providing for a system of preventive detention of those suspected of future terrorism, provided it was the Court that ordered the detention. (And of course, "court" would mean a body comprised entirely of judges. Mr Molan's suggestion that the "tribunal" making this decision include non-jurists would be constitutionally invalid). This would be subject to the riders above, in terms of the need for strong evidence being led by the government of the likely future terrorist activity, in terms of probability. The person affected would have rights to hear and test this evidence, and right to reply. This finding might be over the dissent of at least Gageler J, given his earlier advice casting doubt on the validity of such a scheme. Such a scheme is considered somewhat analogous, though more invasive of human rights than, the control order scheme upheld against a Ch III challenge in *Thomas*. It relies on a finding by all members of the Court in *Kable No 2* that preventive detention was an exercise of judicial power, acknowledging different context. My conclusion that such a scheme is likely to be constitutionally valid does not reflect personal enthusiasm for the idea of locking a person up based on evidence of what they may do, but have not done.

CONCLUSION

This article has considered constitutional issues that would arise if the Federal Government responded to recent terrorism events, and public debate about appropriate legal responses to such events, by introducing an internment scheme of those suspected of future terrorism activity. Such schemes have been utilised in the past, including in Australia, to deal with supposed existential threats. It finds the Commonwealth Government can rely on at least the defence head of power. The Commonwealth would need to make its case clearly, showing how internment generally, and as applied to a particular individual, relates to a

¹⁵⁵ *Thomas v Mowbray* (2007) 233 CLR 307, 356 (Gummow and Crennan JJ), referring to the significant difference in "degree and quality" between a control order and preventive detention.

¹⁵⁶ *Thomas v Mowbray* (2007) 233 CLR 307, 330 (Gleeson CJ), 431 (Kirby J).

¹⁵⁷ *Thomas v Mowbray* (2007) 233 CLR 307, 328 (Gleeson CJ), 356–357 (Gummow and Crennan JJ), 507 (Callinan J).

¹⁵⁸ *Thomas v Mowbray* (2007) 233 CLR 307, 328.

¹⁵⁹ *Thomas v Mowbray* (2007) 233 CLR 307, 526.

¹⁶⁰ *Thomas v Mowbray* (2007) 233 CLR 307, 356–357.

¹⁶¹ *Thomas v Mowbray* (2007) 233 CLR 307, 356; Gleeson CJ emphasised *Thomas* did not call for consideration of the validity of measures involving detention by the State (330), as opposed to more minor restraints on liberty, like a control order.

defence purpose. The evidence in support of this assertion must be carefully considered by the court. The days of the court blindly accepting bald assertions by the Executive as to the need to detain a particular individual are over. The court should pay deference to assessments by the Executive as to an appropriate legal response to the problem of terrorism. However, it must be prepared to review the basis for the Executive's assessment, require the government to give the person affected reasons, and allow them meaningful opportunity for them to test the validity of such assessment in court.

While such legislation is supported by the defence power, legislation reposing such a power to detain in a member of the Executive would be constitutionally problematic. This is not free of difficulty, because the law already recognises narrow categories where executive detention of an individual is valid. Elsewhere, it has emphasised it is generally for the court to order a person's involuntary detention. The government can argue the purpose of the detention is preventive, rather than punitive, and analogies with the power of the Executive to detain mentally ill or those with contagious disease. It may engage the chameleon doctrine to argue a finding that a power is judicial in nature does not preclude it being reposed in the Executive. However, the power has more features of judicial than executive power. The abhorrence of the common law to arbitrary exercise of power, evident in the law for 400 years, persuades me that it is not constitutionally permissible for the Executive to order a person's detention based on fears they will commit terrorist activity.

On the other hand, there are also questions regarding whether reposing such a power in the courts would be constitutionally valid. Certainly, at least Gummow and Kirby JJ in *Fardon* would suggest that it was not, as would the *Kable No 1* decision. However, the majority position in *Fardon*, the High Court's validation of control orders in *Thomas* despite a Ch III challenge, analogies with other exercises of judicial power, and the finding in *Kable No 2* that preventive detention is judicial in nature persuade me, with hesitation, that a law reposing such a power in the judiciary is likely to survive constitutional challenge, over the dissent of at least Gageler J. As indicated, this reflects no personal enthusiasm for such a scheme; rather a realistic appraisal of authorities as they stand.