

Judicial Independence in an Age of Terror

Rebecca Ananian-Welsh

I Introduction

Should courts be involved in overseeing liberty-intrusive legislative schemes, risking judicial independence but providing a crucial mechanism of independent oversight? Or, should courts refrain from involvement in these schemes, sacrificing a key avenue of oversight but preserving judicial independence? Alternatively, ought *judges* – not courts *per se* – be vested with these oversight roles?

In this chapter, I address these questions in the context of Australia's preventive anti-terrorism laws. My discussion focuses on the roles that courts play in anti-terrorism control orders, and that judges in their personal capacities (as *personae designatae*) play in preventive detention orders (PDOs) and Australian Security Intelligence Organisation (ASIO) terrorism warrants. Rather than engaging with the constitutional question of whether the judiciary *may* be involved in these schemes, I address the normative question of whether such involvement *should* occur in light of potential risks to judicial independence.

After outlining the ideas and assumptions that underpin this analysis, I turn to the benefits and challenges that arise from involving courts and judges *personae designatae*, respectively, in liberty-intrusive, preventive anti-terrorism schemes. I argue that the judicial branch should be involved in preventive anti-terrorism schemes only when it has the necessary tools to protect judicial independence and, relatedly, the fairness of the underlying process. Courts have such tools at their disposal, but judges do not.

II Judicial Independence and Executive Oversight after 9/11

Australia's anti-terrorism frameworks developed rapidly after 11 September 2001. The federal government responded to the threat of global terrorism with an approach that Kent Roach aptly labelled 'hyper-legislation'.¹ Within a decade, Australia had transitioned from having zero national anti-terrorism laws to boasting more such laws than any other Western democracy.² This trend has not slowed,

¹ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge, 2011) 309.

² *Ibid* 310; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1140-1146.

This is a preview. Not all pages are shown.