

## ARTICLE

## What's in a Name? The Calculated Divergence of Rhetoric, Reality and Text in New Zealand's *Foreign Fighter* Legislation

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This article provides a critical commentary on the Foreign Fighters legislation passed by the New Zealand Parliament in 2014. This raft of rights-intrusive legislation restricts and disrupts travel outside of New Zealand, and also provides for enhanced monitoring and investigative state power. The focus, however, is not on the impingement of rights, but on the confused and confusing public presentations of the legislation. It is argued that supporters of the legislation routinely misrepresented, in more or less overt ways, the actual provisions of the legislation. Moreover, the rhetoric also distorted the reality to which those provisions sought to respond, by exaggerating the risks posed by foreign terrorist fighters and terrorist returnees.

### I Introduction

A lover may say to her beloved:<sup>1</sup>

What's in a name? that which we call a rose,

By any other name would smell as sweet ...

The same cannot be said of law, especially counterterrorism law. In this context, names matter. So it is notable that in late 2014, Parliament debated a raft of significant

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1 William Shakespeare *Romeo and Juliet* (II, ii). See William Shakespeare "Romeo and Juliet" in *The Complete Works of William Shakespeare* (Gramercy Books, New York, 1997) 1010 at 1020.

counterterrorist measures under the “hyperbolic and overly emotive”<sup>2</sup> title, the Countering Terrorist Fighters Legislation Bill (“the Bill”).<sup>3</sup> At the eleventh hour, the omnibus Bill was divided into three Acts<sup>4</sup> with three pedestrian titles: the Passports Amendment Act 2014 (“Passports Amendment”), the Customs and Excise Amendment Act 2014 (“Customs Amendment”), and the New Zealand Security Intelligence Service Amendment Act 2014 (“NZSIS Amendment”).<sup>5</sup> Yet these safe and tidy names belie the reality that the statutes entered into—and remain in—the public consciousness under different names, evoking emotional connotations that are anything but pedestrian. Chief among these names is the Foreign Fighters Legislation (FF Legislation).<sup>6</sup>

This article contends that the story of names is symptomatic of a deeper problem with public presentations of the FF Legislation more generally. It argues that public presentations by supporters of the legislation distorted both the actual provisions and also the reality to which those provisions respond.<sup>7</sup> The analysis splits the legislation into two arms: the first restricts and disrupts travel; and the second enhances powers to monitor and investigate.<sup>8</sup>

Part II identifies key messages that are consistent throughout the legislation’s public presentation. It identifies these messages in various contexts—especially, but not exclusively, provided by National Party MPs. Taking each arm in turn, these messages are shown to distort both text (in Part III) and reality (in Part IV). As this distortion occurs to varying degrees, the argument delineates between strong and weak cases.<sup>9</sup> I conclude that the distortions in the rhetoric serve to over-dramatise the risks posed by foreign terrorist fighters and terrorist returnees.

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2 (25 November 2014) 702 NZPD [First Reading] 795 per Peter Dunne.

3 The legislation was passed by Parliament on 11 December 2014, with all the provisions coming into force the next day.

4 Supplementary Order Paper 2014 (39) Countering Terrorist Fighters Legislation Bill 2014 (1-2).

5 For completeness, their principal Acts are respectively the Passports Act 1992, the Customs and Excise Act 1996, and the New Zealand Security Intelligence Service Act 1969 [NZSIS Act].

6 I use FF Legislation in this article to refer to the legislation collectively.

7 By contrast, academic commentary on the legislation has largely focused on two areas. The first is substantive criticism of the legislation’s impact on fundamental rights. See Katharine Briar Guilford “Countering Foreign Terrorist Fighters: Warrantless Surveillance Powers of the New Zealand Security Intelligence Service” (2016) 47 VUWLR 95. Other writers raise concerns with the rushed legislative process. See John Ip “The Making of New Zealand’s Foreign Fighter Legislation: Timely Response or Undue Haste?” (2016) 27 PLR 181.

8 This distinction is made in Countering Terrorist Fighters Legislation Bill 2014 (1-1) (explanatory note) [Explanatory Note] at 2; and Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) [Select Committee Report] at 1.

9 All the provisions were subject to a sunset clause expiring on 1 April 2017. Since the writing of this article, an independent and comprehensive review of the legislation was reported to Parliament’s Intelligence and Security Committee on 29 February 2016. Michael Cullen and Patsy Reddy “Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand” (February 2016) at [8.1]–[8.41]. Following its recommendation, a new Bill has been introduced to Parliament and is currently at the Select Committee stage, which “continues, for an unlimited time, the provisions put in place by the Countering Terrorist Fighters Legislation Bill”. New Zealand Intelligence and Security Bill 2016 (158-1) (explanatory note) at 3. These changes do not affect the critique of this article, which focuses on some of the procedural (rather than substantive) implications of the legislative history.

## II Public Presentations: Key Messages

This Part focuses primarily on statements made by then Prime Minister, the Rt Hon John Key, in a public speech on 5 November 2014,<sup>10</sup> together with comments in the House from the Hon Christopher Finlayson MP, the Minister in charge of the New Zealand Security Intelligence Service (NZSIS). The phrase *public presentation* should be understood as encompassing any medium in which the purpose or effect of the FF Legislation was publicly communicated—or at least publicly accessible. Presentations of the FF Legislation—by Mr Key, Mr Finlayson and others—are consistently marked a few broad themes.

### A *Foreign, terrorists or fighters—or is it all three?*

The legislation has been described with reference to three names: terrorist fighters, foreign fighters (FFs) and foreign terrorist fighters (FTFs). Much has been written on the *proper* definitions of these terms, but I will highlight just three brief observations.<sup>11</sup> First, the term *foreign fighter* has a long history, stretching back well before its current fixation on Islamic jihad.<sup>12</sup> One of the leading scholars in this area, David Malet, draws on this history in defining FFs as “non-citizens of conflict states who join insurgencies during civil conflicts”.<sup>13</sup> But now *terrorism*, specifically *jihadist terrorism*, is all but read into the term. Popular use of the term FTFs can be traced to the United Nations Security Council Resolution 2178, which defines FTFs as:<sup>14</sup>

individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict ...

For Malet, this definition “blurred all analytic distinctions” and consequently “saw policymakers diverge from academics”.<sup>15</sup> Indeed, FFs are not—by definition, at least—terrorists. That is, there is no necessary link between terrorism and the technical requirement that FFs cannot be citizens of the nation in which the conflict is taking place.<sup>16</sup> But the Resolution knows nothing of this distinction. Nor, in fact, does it distinguish between *foreign-trained fighters*—individuals, such as London’s 7 July bombers,<sup>17</sup> who

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10 John Key, Prime Minister of New Zealand and Minister for National Security and Intelligence “Speech to NZ Institute of International Affairs” (5 November 2014).

11 For a comprehensive discussion see David Malet “Foreign Fighter Mobilization and Persistence in a Global Context” (2015) 27 *Terrorism and Political Violence* 454 at 455–456.

12 See generally David Malet *Foreign Fighters: Transnational Identity in Civil Conflict* (Oxford University Press, New York, 2013) at ch 2.

13 At 9 (emphasis removed).

14 SC Res 2178, S/RES/2178 (2014) at 2.

15 Malet, above n 11, at 458.

16 But on the limitations of this technical requirement, see Barak Mendelsohn “Foreign Fighters—Recent Trends” (2011) 55 *Orbis* 189 at 192–193. Mendelsohn argues that the legal binary of citizen and non-citizen fails to capture the reality that the extent to which a *fighter* identifies as, and is perceived as, *foreign* will depend on a complex array of factors.

17 Lucy Rodgers, Salim Qurashi and Steven Connor “7 July London Bombings: What happened that day?” (3 July 2015) BBC News <[www.bbc.com](http://www.bbc.com)>.

travel to receive training for terrorist attacks back home—and *foreign terrorists* who travel to commit terrorist attacks abroad.<sup>18</sup>

The definitional confusion of the term FTF combines with the conflation of the FF term with Islamic jihadism to create a linguistic context in which the terms are practically interchangeable. The Parliamentary debates confirm this. The terms are treated synonymously, without any explicit acknowledgement of their disparate connotations. This is not to suggest Parliament was unaware of the distinctions in practice. Many Members queried, for instance, whether the law would target a New Zealand-based Kurdish man wanting to travel to Syria to support his family against ISIL.<sup>19</sup> The House reached a relative consensus: the provisions targeted foreign terrorist (or would-be terrorist) fighters, regardless of whom they affiliated with. The Kurdish man would not be caught—nor, for the matter, would someone wanting to fight in the Spanish Civil War.<sup>20</sup> Yet practical differences were not tied with definitional ones. Furthermore, each side of the debate appeared comfortable using—and switching between—either term.

Also interesting to consider is the relative frequency with which public presentations used the terms. FTFs was mentioned 22 times and FFs was mentioned seven times during the first two readings. Mr Key's speech alone mentioned FTFs three times and FFs twice. The slight preference for the former is not surprising in light of Parliament's (eventual) understanding of the provision's focus on terrorism. What is surprising, however, is that the term *terrorist fighter* is not used once by Parliament or the Prime Minister, excepting references to the Bill itself.<sup>21</sup> In large measure, its absence likely relates to the term's novelty—as the new kid on the block, it lacks the rich cultural currency of the other two terms. Even so, the fact that the term enjoyed pride of place in the Bill's title calls for an explanation. This oddity is explored later in the article. It suffices for now to note that *terrorist fighter* is the one term that drops the *foreign* element.

This article uses the phrase *FF Legislation* because the term FFs is still the most familiar at a popular level. The term *foreign fighters* features more often in media coverage of the legislation.<sup>22</sup> It also matches with common practice internationally to refer to provisions such as these under this term,<sup>23</sup> evident not least in recent Australian legislation bearing the short-hand title, the "Foreign Fighters Act".<sup>24</sup>

## B *Jihadist terrorism (especially ISIL)*

Mr Finlayson describes the FF Legislation as a response to the "rapid evolution of the threat posed by those who want to commit terrorist acts, both overseas and in New Zealand".<sup>25</sup> The new measures are set against the backdrop of New Zealand's

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18 Malet, above n 11, at 459. Mendelsohn distinguishes more generically between FFs and foreign-trained fighters. See Mendelsohn, above n 16, at 193.

19 See generally (9 December 2014) 702 NZPD [Second Reading]. For academic commentary on legislative responses to these conceptual difficulties see Craig Forcese and Ani Mamikon "Neutrality Law, Anti-Terrorism and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies" (2015) 48 UBCLR 305 at 318.

20 Second Reading, above n 19, at 1207–1208 per Christopher Finlayson.

21 These figures include singular and plural usages.

22 See Jeremy Wilkinson "John Key Discusses Foreign Fighters Legislation" *Scoop* (online ed, Wellington, 1 December 2014).

23 "Treatment of Foreign Fighters in Selected Jurisdictions: Country Surveys" Library of Congress <www.loc.gov>.

24 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

25 Second Reading, above n 19, at 2107.

independently-assessed domestic threat level increasing from very low to low. This means “the threat of a terrorist attack ... is now assessed as possible but not expected”.<sup>26</sup> Yet this generic focus on terrorism is more typically filtered through two specific preoccupations.

#### (1) ISIL

The most obvious of these is the Islamic State of Iraq and the Levant (ISIL)<sup>27</sup>—more precisely the “rising threat ISIL presents locally, regionally and internationally”.<sup>28</sup> References to ISIL (or sometimes ISIS) littered the Parliamentary debates, collectively occurring 30 times throughout the first two readings.<sup>29</sup> This fixation presented ISIL as far more than merely the “most immediate and latest manifestation of the FTF issue”.<sup>30</sup>

#### (2) Islamic jihadism

Islamic jihadism exerts a subtler influence. Of course, talk of ISIL calls to mind fears about Islamic terrorism more generally. But overt references to *Islamic extremism* or *jihadism* are by and large restricted to media outlets rather than official, political statements.<sup>31</sup> Official statements tend to employ the putatively neutral language of “foreign terrorist fighters and other violent extremists in the West”.<sup>32</sup> But this category of *the West* may hint that neutrality is only surface deep. Qualifying the term *violent extremists* in this way impliedly excludes others from the ambit of the legislative interest and locates the source of concern in the non-Western *other*.<sup>33</sup>

To give one more example, Mr Key self-consciously distinguishes the majority of FTFs from the 3,000 who “hold Western passports”.<sup>34</sup> Again, this establishes a dichotomy between *the West* and, by implication, *the rest*. Ultimately, frequent allusion to ISIL helps to narrow this group down to the world of Islamic terrorism.

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26 Key, above n 10.

27 Although the group has been variously called ISIL, ISIS (Islamic State of Iraq and Syria) and IS (Islamic State), amongst other names, this article employs the nomenclature most popular throughout the FF Legislation’s public debates.

28 The New Zealand Government “Protecting national security and responding to ISIL” (press release, 5 November 2014).

29 First Reading, above n 2; and Second Reading, above n 19.

30 Department of the Prime Minister and Cabinet *Regulatory Impact Statement: Foreign Terrorist Fighters – Targeted review of relevant legislation* (12 November 2014) [*Regulatory Impact Statement*] at 2.

31 Two examples include Kurt Bayer “Kiwi jihadist wants to leave Syria” *The New Zealand Herald* (online ed, Auckland, 16 September 2014); and Lincoln Tan “Imam banned in ‘extreme Islam’ row” *The New Zealand Herald* (online ed, Auckland, 10 May 2014).

32 First Reading, above n 2, at 781 per Christopher Finlayson. See also *Regulatory Impact Statement*, above n 30, at 2.

33 Such classification may be an expected psychological response to the home-grown terrorist’s paradoxical status as both an insider and outsider. Angie Chuang and Robin Chin Roemer “The Immigrant Muslim American at the Boundary of Insider and Outsider: Representations of Faisal Shahzad as ‘Homegrown’ Terrorist” (2013) 90 *Journalism and Mass Communication Quarterly* 89.

34 Key, above n 10.

*C Two distinct groups—and two legislative responses*

## (1) The conflation

Two groups receive special attention in public presentations, namely “foreign terrorist fighters” and “other violent extremists”.<sup>35</sup> They are almost always paired together. There are also two distinct arms to the FF Legislation. As much is apparent in the Bill’s explanatory note, which states that the Bill’s purpose is to make “targeted amendments to [first] enhance powers to monitor and investigate, and [second] to restrict and disrupt travel”.<sup>36</sup> The first arm is covered by the Passports Amendment; the second by the Customs Amendment and NZSIS Amendment. Intuitively, the arms match to the groups. That is, the travel-obstructing provisions appear to target FTFs, while the surveillance and monitoring provisions address extremists operating locally. Yet public presentations repeatedly obfuscate this conceptual distinction. For instance, Mr Key states there are “between 30 and 40 people of concern in the *foreign fighter context*”.<sup>37</sup> This nebulous grouping is further identified as those “participating in extremist behaviour”, which, in turn, is unpacked into four groups, namely people: travelling to Syria; funding terrorism; radicalising others; and becoming radicalised themselves.<sup>38</sup> But only the first of this quartet can be coherently located within the *foreign fighter context*.

## (2) How the conflation happened

Aside from the ambiguous phraseology, the obfuscation takes place in numerous ways. I have already mentioned that the omnibus Bill’s name strips away any *foreign* element: the term *terrorist fighters* insinuates that the legislation targets terrorists irrespective of whether they fall inside or outside New Zealand’s borders. Also worth mentioning is the decision to introduce the legislative provisions under one omnibus Bill.

Two other ways deserve fuller attention. Perhaps the most powerful—and subtlest—way the conflation takes place is through the rhetorical emphasis on *returnees*. Public presentations often explicitly highlight the risk of FTFs returning “fully radicalised and skilled in fighting”.<sup>39</sup> Where it is not explicit, much the same is implied by the concept of the FTF’s *life-cycle*, typically described as the consecutive stages of: domestic radicalisation, travel, training and fighting overseas, and returning with terrorist intent.<sup>40</sup> Given that this life-cycle impacts on “origin, transit, and destination countries”, it appears, rhetorically at least, to justify the conflation.<sup>41</sup>

A second rhetorical device is the focus on individuals prevented from leaving to travel overseas. Their travel plans thwarted, Mr Key warned that these individual may “turn their minds to terrorist acts at home”.<sup>42</sup> While there is nothing implausible about his word of

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35 First Reading, above n 2, at 781 per Christopher Finlayson. See also *Regulatory Impact Statement*, above n 30, at 2.

36 Explanatory Note, above n 8, at 2.

37 Key, above n 10 (emphasis added).

38 Key, above n 10.

39 Key, above n 10.

40 See Daniel Byman and Jeremy Shapiro “Homeward Bound? Don’t Hype the Threat of Returning Jihadists” (2014) 93 *Foreign Affairs* 37 at 39–40.

41 “‘Foreign Terrorist Fighters’ (FTF) Initiative: The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon” Global Counterterrorism Forum <[www.thegctf.org](http://www.thegctf.org)> at 1.

42 Mr Key, above n 10.

caution, it seems far-fetched to imagine that obstructed would-be FTFs are the main—let alone only—source of local extremists.

#### D *Summary*

Taken together, these themes paint a vivid picture. In broad strokes, one is left with images of Westerners travelling to Syria or Iraq to join ISIL—or perhaps another Islamic terrorist entity—imbibing radical jihadism and then re-entering New Zealand neighbourhoods. This is the reality to which the text of the legislation responds—as one unified whole. Or so public presentations would suggest. The burden of Parts III and IV of this article is to show that public presentations distorted both the reality and the text.

### III Public Presentations and the Provisions

I start with the text, detailing the effect of the actual provisions and then pointing out the distortions. The second arm presents the stronger case.

#### A *Arm 2: the stronger case*

##### (1) The provisions

This second arm is comprised of two Acts: the Customs Amendment and the NZSIS Amendment. The Customs Amendment empowers specified persons from both the NZSIS and the Police to access Customs information stored on a database for “counter-terrorism investigation purposes”.<sup>43</sup> Section 280M(6) defines this to mean the “detection, investigation, and prevention of any actual, potential, or suspected—(a) terrorist act; or (b) facilitation of a terrorist act”. *Terrorist attack* is defined as within the meaning of s 5(1) of the Terrorism Suppression Act 2002 (TSA).

The NZSIS Amendment merits more attention because it provoked greater controversy and also received the bulk of public attention. It provides for two significant increases in the NZSIS’s surveillance powers. Both extensions are justified in part by an alleged *gap* between the powers of the NZSIS and other law enforcement agencies.<sup>44</sup>

The NZSIS are empowered, first, to undertake visual surveillance on private properties under warrant. To issue such a warrant, the Minister and the Commissioner<sup>45</sup> must both be satisfied on the evidence that, amongst other conditions,<sup>46</sup> the surveillance is necessary for the detection, investigation and prevention of any actual, potential or suspected terrorist act, or facilitation of a terrorist act.<sup>47</sup> They must be also be satisfied that there are reasonable grounds for believing that no New Zealand citizen or permanent resident will be subject to the warrant.<sup>48</sup> In addition to the existing oversight mechanisms under the Inspector-General of Intelligence and Security Act 1996, the Director is required as soon as

43 Customs and Excise Act 1996, s 280M.

44 *Regulatory Impact Statement*, above n 30, at [15]. But note that the analogy has been doubted by the New Zealand Law Society. See New Zealand Law Society “Submission on the Countering Terrorist Fighters Legislation Bill” (27 November 2014) at [22] and [28].

45 Namely, the Minister in charge of the New Zealand Security Intelligence Service and the Commission of Security Warrants holding office under s 5A of the NZSIS Act.

46 New Zealand Security Intelligence Service Amendment Act, s 4IB(2).

47 Section 4IB(3)(a).

48 Section 4IB(2)(b).

is practicable to provide the Inspector-General with a copy of any visual surveillance warrant issued.<sup>49</sup> Anyone who knowingly fails to destroy irrelevant records resulting from such surveillance is liable to a fine not exceeding \$10,000.<sup>50</sup>

The second amendment provides for surveillance activities without warrant for up to 24 hours for situations of “emergency or urgency”.<sup>51</sup> Again, the exercise of this power is limited to the detection, investigation and prevention of any actual, potential or suspected terrorist act, or facilitation of a terrorist act—except in this case only to the (subjective) satisfaction of the Director, or a person acting as the Director.<sup>52</sup> Further, it must be impracticable in the circumstances to obtain a warrant within the time the power will be exercised; and the delay must be likely to result in a loss of intelligence.<sup>53</sup>

The scope of these powers was initially considerably broader. Indeed, as introduced, both visual surveillance and surveillance without warrant were available for: the detection of activities prejudicial to security; or for the purpose of gathering foreign intelligence information essential to security.<sup>54</sup>

The New Zealand Security Intelligence Service Act 1969 defines security as:<sup>55</sup>

- (a) the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand:
- (b) the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand’s international well-being or economic well-being:
- (c) the protection of New Zealand from activities within or relating to New Zealand that—
  - (i) are influenced by any foreign organisation or any foreign person; and
  - (ii) are clandestine or deceptive, or threaten the safety of any person; and
  - (iii) impact adversely on New Zealand’s international well-being or economic well-being:
- (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

## (2) Public presentations falsely narrow the provision’s scope

Public presentations distorted the content of these provisions in two ways. First, they misrepresented the provision’s target. Even in its present form, the focus on *terrorist acts* is much broader than is suggested by the rhetorical preoccupation with ISIL and Islamic extremism. This point is even clearer regarding the Bill as introduced, where even generic talk of terrorism falsely delimits the much broader concern for *security*. It is, thus, hardly

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49 Section 4IB(9).

50 Section 4IB(11). This value was raised from \$1000 on the Select Committee’s recommendation. See Select Committee Report, above n 8, at 5.

51 Section 4ID.

52 Section 4ID(1).

53 Section 4ID(1)(c). The (alleged) analogy between this threshold and the Social Security Act 1964 is criticised in New Zealand Law Society, above n 44, at [28].

54 See Explanatory Note, above n 8, at cl 9.

55 Section 2.



surprising that Members voiced concerns about the prospect of surveillance powers operating well beyond the realm of counterterrorism. In particular, the Green Party decried the powers as “wrong, and unacceptable”,<sup>56</sup> because although:<sup>57</sup>

[t]he justification is ISIL terrorism in the Middle East ... those powers extend to “local extremists”, including those suspected of planning environmental or economic damage in New Zealand.

Admittedly, in its current form, the provisions do not obviously justify their concerns.<sup>58</sup> The phrase *local extremist* does not appear in the text and so the issue largely hangs on the definition of *terrorist act*. Finding satisfactory definitions for terrorism has proved notoriously difficult for all countries.<sup>59</sup> Yet s 5(5) of the TSA contains at least one essential element of any good definition, namely an exclusion in favour of advocacy, dissent and industrial action.<sup>60</sup> That said, a warrant issued under the TSA was used to justify the arrest of political activists and Maori nationalists in the 2007 Urewera raids.<sup>61</sup> Whatever one makes of the Green Party’s fears, the scope of the second arm—especially as introduced, but even in its current form—is quite clearly not well-represented by the narrower concerns in the public presentations.

### (3) Public presentations falsely conflate two distinct legislative targets

The provisions of the second arm apply domestically: of the two commonly mentioned groups, their natural target is domestic violent extremism. Yet public presentations repeatedly insist on conflating local extremists with FTFs. The Green Party articulate the problem well:<sup>62</sup>

Thus, in legislation designed to combat “foreign terrorist fighters”, the NZSIS will have power to access customs data and covertly plant cameras anywhere in NZ homes, including without warrant.

This is not to suggest the groups have no point of intersection. It is quite possible, plausible even, that the pool of local extremists includes individuals hoping to become FTFs and maybe even FTFs who have returned. As such, the second arm’s powers may well be used to detect a would-be FTF before he or she leaves—or to foil a returnee’s terrorist plot. Mr Finlayson highlighted the former scenario. He provided a “hypothetical example” where “new reporting” by the NZSIS reveals that a certain individual intends to “g[lo] on a jihad”.<sup>63</sup> As he continued:<sup>64</sup>

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56 Select Committee Report, above n 8, at 10.

57 At 10.

58 However, the political dynamics of “category creep” cannot be discounted. For example, the spread of control orders into the “war on bikies” is explored in Rebecca Ananian-Welsh and George Williams “The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia” (2014) 38 MULR 362.

59 See Ben Golder and George Williams “What is ‘Terrorism’? Problems of Legal Definition” (2004) 27 UNSWLJ 270 at 281–283.

60 At 283.

61 For more on the 2002 Act’s suppression of Maori activism see Mamari Stephens “The Tohunga Suppression Act” (2007) NZLJ 406.

62 Select Committee Report, above n 8, at 10.

63 First Reading, above n 2, at 782.

64 At 782.

In this hypothetical case, an emergency authorisation could enable the intercept of communications to take place so that an assessment could be made of the threat, and potentially support the cancellation of the individual's passport ...

The interception is authorised under the NZSIS Amendment;<sup>65</sup> the cancellation under the Passports Amendment.<sup>66</sup> The scenario thus links the legislation's two arms. Still, there is no *necessary* relationship between the two groups. Premeditating an individual's decisions to travel to Syria—or any other foreign insurgency—can hardly be considered the provision's main priority. Nor is the provision's application limited to this scenario: it applies, roughly, to *anyone* suspected of attempting or facilitating a terrorist act. But of this wider group, would-be FTFs and returnees are not the only—or even main—concern. To anticipate the argument of Part IV, the risk of returnees is more rhetoric than reality. But aside from this, the fact that local extremists have not travelled to Syria or engaged with ISIL does not make them less potentially dangerous. For these reasons, it is disingenuous for Mr Key to speak of new powers for “monitoring and investigating foreign terrorist fighters”.<sup>67</sup>

This distortion—together with the false narrowing of the provision's scope discussed earlier—provides ample grounds for agreeing with Kennedy Graham MP's diagnosis of a “cognitive dissonance between the excitable political narrative and the official judgement”.<sup>68</sup>

#### B *Arm 1: the weaker case*

##### (1) The provisions

Under the Passports Act 1992 the Minister of Internal Affairs already possessed powers to *deny* a range of *travel documents*, including passports.<sup>69</sup> To exercise these powers, the Minister had to believe, on reasonable grounds, that the person was a danger to the security of New Zealand because they intended to engage in, or facilitate, certain activities. These activities are laid out in s 4A(1)(a) as:

- (i) a terrorist act within the meaning of s 5 of the [TSA]; or
  - (ii) the proliferation of weapons of mass destruction; or
  - (iii) any unlawful activity designed or likely to cause devastating or serious economic damage to New Zealand, carried out for purposes of commercial or economic gain
- ...

The Minister could also apply to a Judge to extend the denial period for a further period not exceeding 12 months.<sup>70</sup>

To this scheme, the Passports Amendment introduced a number of modifications. Significantly, the denial powers are now triggered if an individual poses a danger to the

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65 Section 4ID(2)(a).

66 Passports Amendment Act 2014, sch, cl 2.

67 Key, above n 10.

68 Second Reading, above n 19, at 1216.

69 This article uses the catch-all terms “travel documents” to encompass passports, certificates of identity, emergency travel documents, and refugee travel documents; and “deny” to denote cancelling or refusing to issue.

70 Section 4A(3).

security of a country *other than* New Zealand. This, however, is limited to activities (i) and (ii) above—activity (iii) is only considered for security threats to New Zealand. Another obvious change is that travel documents can now be denied for an increased period not exceeding 3 years.<sup>71</sup> Moreover, the threshold for extending the denial period beyond 12 months is lower than for denials not exceeding 12 months. The Minister must only be satisfied that the person would continue to pose a danger to New Zealand or another country.<sup>72</sup> This threshold is “not constrained by any objective concept of reasonableness”.<sup>73</sup>

The increased powers of denial come with new procedural safeguards.<sup>74</sup> The person concerned has the right to make submissions to the Minister—though only within a 30 day window<sup>75</sup>—and to appeal or to seek judicial review of the Minister’s decision.<sup>76</sup> The Minister must also review their decision every 12 months.<sup>77</sup> But other safeguards are weakened: for instance, in certain circumstances the Minister can now defer notifying the person concerned for a period not exceeding 30 days.<sup>78</sup>

Here we must deal with some common misconceptions. First, denying an individual their travel documents has no effect on their nationality or citizenship, and, therefore, cannot “render a person ‘Stateless’”.<sup>79</sup> Secondly, the new measures cannot prevent passport-holding citizens<sup>80</sup> from exercising their right to re-enter the country.<sup>81</sup> The Minister must issue a journey-specific emergency travel document if this is necessary to enable them to return.<sup>82</sup>

## (2) Misrepresenting the provisions’ target and scope

For the most part, the rhetoric matches the text of the first arm well. The provisions introduce enhanced powers to respond to an increased risk, as well as an international element to match the rhetorical emphasis on the FTF life-cycle. But this article identifies two distortions. First, as with the second arm, the rhetorical preoccupation with jihad and ISIL grates somewhat against the provision’s more generic focus on terrorism. Secondly, the rhetorical emphasis on returnees conflicts with the right of entry explicitly preserved in the text for passport-holding citizens. Admittedly, immigrants are often targeted for recruitment by terrorist cells. Because they are less integrated into society, immigrants are especially susceptible to radicalisation.<sup>83</sup> Yet the explicit safe-guarding of the right to entry cannot be attributed to such considerations, if only because neither the text nor the

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71 Passports Amendment Act 2014, sch, s 1(6).

72 Schedule, s 1(6).

73 New Zealand Law Society, above n 44, at [10].

74 See the New Zealand Intelligence and Security Bill, at cl 253. It introduces one additional protection not covered in this analysis, the requirement that all decisions concerning New Zealand travel documents be subject to review by a Commissioner of Intelligence Warrants.

75 Passports Amendment Act 2014, sch, s 1(7)(a). The narrow window is criticised in New Zealand Law Society, above n 44, at [13].

76 Schedule, s 8.

77 Schedule, s (1)(7)(b).

78 Schedule, s (1)(5)(a).

79 Select Committee Report, above n 8, at 3.

80 This means those whose travel documents have been denied under sch, ss 1–3.

81 Select Committee Report, above n 8, at 3.

82 Passports Act, s 23(3).

83 Tandra K Cain “Temporary Assistance for Needy Families” in Sana Loue and Martha Sajatovic (eds) *Encyclopedia of Immigrant Health* (Springer, New York, 2002) at 1414.

parliamentary debates record any specific mention of *immigrants*. Contrary to all the political talk about returnees, the legislation would not have a right of entry provision if it was concerned—as the political rhetorical suggests—with stopping the phenomena of *returnees*. Accordingly, the right of entry provision indicates that the legislation aims to disrupt travel *out* of New Zealand rather than preventing people's return.

#### IV Public Presentations and Reality

Further to the distortions already discussed, public presentations also distorted reality by exaggerating and sensationalising the terrorist risk. Because the text responds to that distorted reality, the overestimated risk drags the text along with it, resulting in rights-intrusive powers that are unwarranted by a sober assessment of reality.

##### A *Arm 1: the strong case*

Accurate risk-assessment is always difficult,<sup>84</sup> yet the extent to which the rhetoric missed the mark was particularly striking in the case of the Passports Amendment provisions. Before analysing the risks borne by New Zealand, it is helpful consider FTFs' impact on the world generally.

##### (1) The FTF threat generally

Scholars have observed that the value of FFs for insurgencies “appears to be in decline”.<sup>85</sup> FFs with limited battlefield experience, language skills and ability to cope with the hard conditions may even require “the equivalent of babysitting” from local troops.<sup>86</sup> But commentators are much more divided on the terrorist risk posed to Western states by FTFs who leave their shores.

On one side of this divide, Daniel Byman and Jeremy Shapiro urge policymakers not to *hype the threat* of these jihadist returnees.<sup>87</sup> There are a number of reasons for questioning the (Western) world's alarmed response at FTFs in Syria and Iraq. First, the Arab and not Western world bears a disproportionate share of the risks posed by FTFs.<sup>88</sup> ISIL differs from Al Qaeda in their “main enemies, strategies [and] tactics”.<sup>89</sup> Al Qaeda self-consciously positioned itself as an international terrorist network targeted at the real enemy, the West—and especially the United States. By contrast, despite Mr Key's

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84 Thomas Hegghammer “Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting” (2013) 107 APSR 1 at 1.

85 Mendelsohn, above n 16, at 195.

86 At 195. Mendelsohn's finding challenges the view expressed by the UN Security Council that FTFs “increase the intensity, duration and intractability of conflicts”. *Statement by the President of the Security Council S/PRST/2015/11* (2015), 2.

87 Byman and Shapiro, above n 40, at 1.

88 Though the Muslim-West conceptual divide is widely recognised as problematic, the taxonomy is used here because public presentation do likewise. Manfred B Steger “Jihadist Globalism versus Imperial Globalism: The Great Ideological Struggle of the Twenty-First Century?” in *The Rise of the Global Imaginary: Political Ideologies from the French Revolution to the Global War on Terror* (Oxford University Press, New York, 2009) 213.

89 Daniel L Byman “Comparing Al Qaeda and ISIS: Different goals, different targets” (29 April 2015) Brookings <www.brookings.edu>.

description of it as a “globally-focused terrorist entity”,<sup>90</sup> ISIL has by and large followed a *near enemy* strategy of targeting apostate regimes in the Arab region. As such, ISIL presents more of a threat to the stability of the Middle East (and Western interests in the Middle East) than to the West directly.<sup>91</sup> Additionally, only a minority of FTFs in Iraq and Syria are from the West, while the majority leave from and (nearly always) return to the Arab World.<sup>92</sup> Although there is some indication that these returnees are more inclined to terrorism than Western returnees, their terrorism will be “locally and regionally focused, with international terrorism probably less of a priority”.<sup>93</sup> It follows then that the main FTF-related domestic threats for Western countries are FTFs leaving from and then returning to the West.

It matters then whether or not FTFs actually do return with the intention to commit or facilitate terrorist acts back home. But experts have questioned how likely this is.<sup>94</sup> Many FTFs die in combat, are taken by illness, or—increasingly—are deployed as human bombs. Others become *full-time* foreign jihadists, drifting from one jihadist insurgency to the next.<sup>95</sup> Of those that do return, Thomas Hegghammer argues that few will possess terrorist intent.<sup>96</sup>

Deconstructing the popular assumption that “jihadists all want to attack the West, and that those who leave do so for training”, Hegghammer points out that, between the years 1990 and 2010, FF numbers outstripped those of domestic fighters by a ratio of 3:1.<sup>97</sup> He dismisses the notion that jihadists travel to acquire terrorist training.<sup>98</sup> Surveying 107 biographies of “foreign-fighters-turned-domestic fighters” he concludes that the vast majority of FTFs view overseas activity as an end in itself.<sup>99</sup> He proposes an alternative explanation: jihadists *want* to travel. This owes partly to the so-called “Hemingway effect”—the sense of adventure that comes from travelling to a new country.<sup>100</sup>

But more important by far are theological norms. The Islamic tradition has preponderantly understood military jihad to mean one Muslim army fighting another non-Muslim army on a defined terrain. Political violence toward non-combatants is, with some notable exceptions, roundly condemned by Islamic theologians.<sup>101</sup> Views can change, of course.

Hegghammer concedes that some FFs—typically the young and inexperienced<sup>102</sup>—may be enlisted or (more likely) socialised into domestic terrorist intent.<sup>103</sup> Yet even then intention is matter of degree. Before being translated into terrorist action, intention must

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90 Key, above n 10.

91 Byman, above n 89.

92 Daniel Byman “The Homecomings: What Happens When Arab Foreign Fighters in Iraq and Syria Return?” (2015) 38 *Studies in Conflict & Terrorism* 581 at 582.

93 At 583.

94 See Edwin Bakker, Christoph Paulussen and Eva Entenmann “Returning Jihadist Foreign Fighters: Challenges Pertaining to Threat Assessment and Governance of this Pan-European Problem” (2014) 25 *Security and Human Rights* 11.

95 Mendelsohn, above n 16, at 197.

96 Hegghammer, above n 84, at 7–9.

97 At 5. Hegghammer describes his estimates as “conservative”.

98 At 7.

99 At 7.

100 At 6.

101 At 7.

102 Lorenzo Vidino “European foreign fighters in Syria: dynamics and responses” (2014) 13 *European View* 217 at 220.

103 Hegghammer, above n 84, at 10.

outweigh numerous countervailing factors, such as theological disillusionment or a disgust of violence.<sup>104</sup> More practically, returnees will often have friends and family to think of as well.<sup>105</sup>

A risk can be underplayed as easily as it can be overplayed. Indeed, there are a number of factors that push back against my analysis above. Most obviously, it appears that FTFs have played important roles in high-profile terrorist incidents, such as the Paris shootings in 2015 and the Brussels bombing four months later.<sup>106</sup>

On the other side of the divide, then, scholars observe that FTFs may exert a significant influence that is “often indirect and includes political, social and psychological elements that are not easily measurable”.<sup>107</sup> In particular, they perform key roles in conveying knowledge (especially bomb-making), recruitment, and media production.<sup>108</sup> Also relevant here is Hegghammer’s research on the “veteran effect”,<sup>109</sup> the observation that FTFs are much more effective and violent as terrorists after their return.<sup>110</sup> Indeed, some writers already speak of a “new phase in the development of *jihad*” combining the “strength of local *jihad*” with “global ideological aspirations”.<sup>111</sup> Even if the increase in risk attributable to FTFs is slight, terrorism always has been a low-probability and “small-number phenomenon”.<sup>112</sup> As Mr Finlayson reminded the House, “terrorists only have to be lucky once”.<sup>113</sup>

On balance, therefore, Byman and Shapiro seem to go too far in describing the threat of returning FFs as “more smoke than fire”.<sup>114</sup> The present argument does not require us to resolve the issue further. Instead, our concern is how this analysis translates into a New Zealand context. Whatever the risks presented by FTFs generally, a much stronger case can be made that in this context the risks have been significantly exaggerated.

## (2) The FTF threat for New Zealand

New Zealand is not dealing with large numbers of potential foreign fighters. In a press conference on April 20 2015, Mr Key suggested there “might be a little more ... but not a lot more” than five New Zealand FTFs who have travelled to join ISIL.<sup>115</sup> There have been no subsequent public statements modifying this number. Mr Key also stressed that “probably less than” a couple of dozen of the listed 30–40 have had proper discussions

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104 Byman and Shapiro, above n 40, at 38.

105 R Kim Cragin “Resisting Violent Extremism: A Conceptual Model for Non-Radicalization” (2014) 26 *Terrorism and Political Violence* 337 at 343–344.

106 “Paris, Brussels attacks ‘ordered by top ISIL leader’” (10 November 2016) Al Jazeera <[www.aljazeera.com](http://www.aljazeera.com)>.

107 Mendelsohn, above n 16, at 202.

108 At 197–199.

109 Hegghammer, above n 84, at 10–11.

110 But see Byman and Shapiro, above n 40, at 44. They argue that returnees pose limited concern for counterterrorism agencies, primarily because “they often lack the knowledge most useful for mounting successful terrorist attacks: how to conduct surveillance, avoid detection, and build a clandestine network”.

111 Marco Nilsson “Foreign Fighters and the Radicalisation of Local *Jihad*: Interview Evidence from Swedish *Jihadists*” (2015) 38 *Studies in Conflict & Terrorism* 343 at 355.

112 Byman and Shapiro, above n 40, at 38.

113 First Reading, above n 2, at 781.

114 Byman and Shapiro, above n 40, at 40.

115 John Key, Prime Minister of New Zealand “Post-Cabinet Press Conference: Monday, 20 April 2015” (Beehive Press Conference, Wellington, 20 April 2015).

with ISIL.<sup>116</sup> To the best of our knowledge only a handful intend to travel, and, of those, only a few actually have or likely will. In light of our analysis above, these vanishingly small numbers seem to demand the conclusion that public presentations significantly “over-egg the pudding on the risks to New Zealand”.<sup>117</sup> Mr Key seemed to recognise this when he suggested the reason for denying travel documents—rather than “just letting them go”—is because New Zealand does not want a “reputation for exporting foreign terrorist fighters to places which already have more than enough of them”.<sup>118</sup> His shift from the returnee risk faced by New Zealand to the country’s reputation and impact internationally does not change the picture. New Zealand’s FTF contributions internationally are still negligible.

### B *Arm 2: the weak case*

It is possible that the provisions of the second arm similarly overlap the terrorist threat of *local extremists*. Considering that public presentations focus so heavily on the risk of returnees, this conclusion might appear to follow from my more sober assessment of the threat of FTF blow-back. However, as already discussed, the conflation of returnees with local extremists is misleading—that broader group raises quite separate concerns. Mr Key has reportedly dismissed some of the 30–40 on the watch list as “juvenile fantasists” and, as mentioned earlier, downplayed the threat in a press conference.<sup>119</sup> Beyond this we have little to go on. For precisely this reason, the threat has not been demonstrably established as “qualitatively different” from before so as to require new and enhanced powers.<sup>120</sup>

## V Conclusion

This article began with a story of names. The burden of my argument, however, has been to reveal the complex realities which reside behind these names. Theorists have long recognised language’s “capacity of distortion”.<sup>121</sup> In the case of the FF Legislation, the distortions are many and varied. Specifically, this article identified four key discrepancies between the public presentations of the FF Legislation and the text of the legislation. The emphasis on returnees, for one, rests uncomfortably with the right of entry preserved in the Passports Amendment. The frequent references to ISIL—together with the insinuations of Islamic jihadism—also obfuscate the generic focus on *terrorist acts* found in both arms of the legislation. Third, with the surveillance provisions as originally introduced, even generic talk about terrorism misrepresents the broader focus on *security*. Finally, the conflation of FTFs with other violent extremists implies, quite falsely, that there is a necessary connection between the two groups—and, therefore, between the legislation’s two distinct responses to each group. The fifth distortion concerns a misrepresentation, not of the legislation, but of reality. The article argued that the rhetoric surrounding the FF Legislation over-dramatises the risks posed by FTFs and returnees.

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116 At 2.

117 Second Reading, above n 19, at 1212 per David Shearer.

118 Key, above n 10.

119 First Reading, above n 2, at 790 per Kennedy Graham.

120 Second Reading, above n 19, at 1215 per Kennedy Graham.

121 Vijay K Bhatia, Christoph A Hafner, Lindsay Miller and Anne Wager (eds) “Transparency, Power and Control in Legal Communication” in *Transparency, Power and Control: Perspectives in Legal Communication* (Ashgate, Surrey, 2012) 1 at 3.

Together, these five distortions should raise another red-flag, to add to an academic skyline already dotted with them, about the dangers of confused and confusing public presentations of rights-intrusive counterterrorist legislation.