Impact of Terrorism on the Rule of Law†

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In times of war Courts tend to be particularly diffident about questioning steps taken by the Executive in the interests of national security. In the infamous case of *Liversidge v Anderson*[1] the House of Lords held that the Home Secretary could not be required to provide any justification for his exercise of the right to detain a man without trial because he believed that this was necessary because of the man's hostile associations. The diffidence persisted in England even after the war.

In 1977 the UK Home Secretary served a deportation notice on a Mr. Hosenball, a United States Citizen working as a journalist on the ground that he had sought and obtained for publication information harmful to the security of the United Kingdom. When the Home Secretary refused to provide any details of this allegation Mr. Hosenball sought judicial review of the decision. This was refused. This is what the great Lord Denning had to say:

> *There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after*

† This paper is based upon an Address which was originally given in Richmond, Virginia in April 2007 and which appeared in its original form in Volume 42 of the University of Richmond Law Review, 42 U.Rich.L.R. 37 (2007). Lord Phillips subsequently developed this paper when speaking at the Meeting of the Section of International Law of the American Bar Association in London in October 2007 and has now brought the paper up to date to reflect further developments in the law in the United Kingdom and the United States of America. In the exercise of bringing this paper up to date Lord Phillips expresses special thanks to Catherine M. Doll of Debevoise & Plimpton, LLP in New York and Lydia Carter of Littleton Chambers in London.

* Lord Phillips read law at King's College, Cambridge and was called to the Bar in 1962. He was appointed a Queen's Counsel in 1978 and became a High Court Judge in the Queen's Bench Division in 1987. He was a Lord Justice of Appeal from 1995 to 1999 when he was appointed to the House of Lords as a Lord of Appeal in Ordinary. In 2000 he became Master of the Rolls and Head of Civil Justice in England and Wales and in 2005 Lord Chief Justice for England and Wales. In 2008 he took over from Lord Bingham as Senior Law Lord in the Judicial House of Lords. He is now the President to be of the new Supreme Court of the United Kingdom.

1. [1942] 2 AC 206

them, successive Ministers have discharged their duties to the complete satisfaction of the people at large."

Deference to the Executive has not, I believe, been a notable feature of American jurisprudence.

The difference between the two jurisdictions is, of course, that in America the rights of the individual are embodied in and protected by a written Constitution. The U.S. Supreme Court has jurisdiction to protect those rights to the extent of striking down legislation that is unconstitutional.

In the United Kingdom the Constitution is largely unwritten. Parliament is supreme and the Courts cannot refuse to give effect to legislation on the ground that it is unconstitutional. Both countries are now facing a new kind of conflict—that created by international terrorism. Yet despite the threat of terrorism, the United Kingdom Courts are not showing the traditional deference to action taken by the Executive in the interests of national security. The change in stance is largely attributable to the Human Rights Act 1998, which came into force in 2000. This Act was passed by the present Administration soon after they came into office. The Act allows individuals to invoke the provisions of the Human Rights Convention in disputes with Government and requires Judges to enforce Convention rights.

We cannot strike down legislation that conflicts with the Convention, but we can make a declaration that it is incompatible with the Convention. This is just about as good, because the Government up to now has always responded to a declaration of incompatibility by changing the offending law. More significantly we now have to scrutinise executive action to ensure that it does not infringe human rights. We can no longer hold that actions taken in the interests of national security by the Executive are not justiciable if those actions are alleged to infringe individual human rights.

The consequence of this has been a series of decisions of the Courts holding unlawful legislation, statutory regulations and executive action designed to address the problem of terrorism.

The Human Rights Convention, as interpreted by the European Court at Strasbourg, poses a problem for the Government. The Court has ruled in a case called *Chahal v United Kingdom*[2] that it is contrary to the Convention to deport an illegal immigrant if he will be at risk of torture or inhuman treatment if you send him home, however great a threat he may pose to security in the United Kingdom. At the same time, it is contrary to the Convention to detain someone without trial simply because you have reasonable grounds to believe that he is involved in terrorism.

The British Government has repeatedly signaled that it is unhappy with the consequences of the decision in Chahal and has intervened in a series of cases before the European Court of Human Rights to try to persuade the Court to modify the prohibition on deportation. At the same time it was trying with mixed success to negotiate assurances from countries to which it wished to deport suspects that they would not be tortured on their return, and to persuade the Courts here that such assurances could be relied upon. I come later in this article to a very recent decision of the House of Lords when the weight that could be given to such an assurance from a foreign government was addressed.

2. (1996) 23 EHRR 413

The Convention permits a country to derogate from the prohibition of detention without trial but only 'to the extent strictly required by the exigencies of the situation. . .in time of war or other public emergency threatening the life of the nation'.

After 9/11 the British Government decided that the threat of terrorism in Britain was such as to amount to a public emergency threatening the life of the nation and purported, on that ground, to derogate from the Convention.

It did so in respect of 'foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism' or of being connected to terrorist groups and 'who are a threat to the security of the United Kingdom'. Relying on this derogation Parliament then passed the Anti- Terrorism, Crime and Security Act in 2001 that permitted an alien to be detained indefinitely if the Home Secretary reasonably suspected that he was a terrorist and believed that he was a threat to national security, but was unable to deport him because he would be at risk of inhuman treatment in his own country. The Home Secretary immediately certified that a number of aliens fell within the scope of the new Act, and they were locked up.

It was made plain to them that if they wanted to go back to their own countries they were free to go. They did not do so. What they did was to exercise a right of appeal for which the Act made provision. The case is known simply by the initial of one of the appellants as '*A*'[3].

The procedure governing this appeal was unusual, involving a novel judicial tribunal known as the Special Immigration Appeals Commission or by its initials 'SIAC' with special powers.

Evidence, disclosure of which would have adverse implications for security, can be put before SIAC as 'closed' material. This is not disclosed to the terrorist suspect. It is disclosed to a special advocate, whose duty it is to protect the suspect's interests, but once he has seen the material, the special advocate is no longer permitted to communicate with the suspect.

This procedure was challenged in a subsequent case-that of *MB*-which came before a division of the Court of Appeal[4], and over which I presided. It was argued that it infringed the suspect's Convention right to a fair trial. We held that, the procedure satisfied the test of fairness. On appeal the House of Lords[5] qualified our ruling; holding that the special advocate procedure is permissible provided only that in the particular case it is compatible with the right to a fair trial. However, Baroness Hale stated that this may require "*strenuous efforts*"[6] to provide the suspect with sufficient details to ensure that procedural fairness can be achieved. The House of Lords did not give a final ruling on the facts in *MB* but referred the matter back to the High Court permitting the Home Office to reassess the information supplied. I shall refer further to this decision in due course.

In *AF; AM; AN: AE*,[7] the Court of Appeal had some difficulty in identifying with precision the principles laid down by the House of Lords in *MB*. By a majority, they held that

3. [2004] UKHL 56

4. [2006] EWCA Civ 1140

5. [2007] UKHL 4. Which is in effect the final appeal Court for the United Kingdom and which is shortly to be replaced by a new Supreme Court of the United Kingdom.

6. Paragraph [66]

7. [2008] EWCA Civ 1148

MB did not establish the principle that an irreducible minimum of information had to be disclosed to an individual made the subject of a control order.

The conclusions of the Court of Appeal are set out in paragraph 64 of the judgment, which begins:

> *"In this context the question is whether, taken as a whole, the hearing is fundamentally unfair in the sense that there is significant injustice to the controlee or, put another way, that he is not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing is impaired."*

The Court of Appeal then set out a variety of other factors to be considered before concluding that: "*There are no rigid principles. What is fair is essentially a matter for the judge, with whose decision this court should very rarely interfere.*"

This chapter of the story is not at an end. The Court of Appeal gave permission for an appeal to the House of Lords. At the time of writing I am preparing to preside over that appeal. In it, we shall have to consider observations of the Strasbourg Court on the special advocate procedure made when deciding the claims in compensation by the Claimants in the case of *A*.

Let me return to that case. The appeal of the alien terrorist suspects detained under the 2001 Act went right up to the House of Lords[8], our most senior Court. They sat 9 strong, instead of the usual 5. The appeals were allowed. The majority of the Lords accepted that derogation from the Convention was possible in that there existed a 'public emergency threatening the life of the nation'.

They held, however, that the terms of the derogation and of the Act were unlawful in that they went beyond what was strictly required by the exigencies of the situation.

Three factors weighed particularly in their reasoning. The first was the importance that the United Kingdom has attached since at least Magna Carta, to the liberty of the subject. The second was that the measures only applied to aliens.

There were plenty of terrorist suspects who were British subjects. How could it be necessary to lock up the foreign suspects without trial if it was not necessary to lock up the British suspects? Finally, the measures permitted those detained to opt to leave the country. If they were so dangerous, this did not seem logical, for they would be free to continue their terrorist activities overseas. And so, the House of Lords quashed the Derogation Order and declared that the relevant provisions of the Act were incompatible with the Convention.

Lord Hoffmann alone did not consider that the terrorist threat amounted to 'a public emergency threatening the life of the nation'.

In a Churchillian dissent he said:

> *"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve."*

This statement was received with enthusiasm by the liberal groups but not by Ministers, who considered that it violated the rule that a Judge should not descend into politics.

8. [2004] UKHL 56

A and ten other claimants who had been held in detention appealed to the European Court of Human Rights in Strasbourg claiming against the United Kingdom damages for wrongful detention.[9] The United Kingdom Government took advantage of this hearing to challenge the decision of the House of Lords. The Strasbourg Court rejected that challenge. It also held that Lord Hoffmann had been wrong in his minority opinion to hold that the terrorist threat did not amount to a public emergency threatening the life of the nation. It awarded the applicants very modest damages. It approved the special advocate procedure subject to certain requirements on which, at this point in time, it would not be appropriate for me to comment.

Parliament's reaction to the Law Lords' decision was to pass a new Act; the Prevention of Terrorism Act 2005. This, among other things, empowers the Secretary of State to place restrictions on terrorist suspects by making them subject to Control Orders. The restrictions must not, however, be so severe as to amount to deprivation of liberty. A number of procedural safeguards are imposed by the Act, including automatic review of Control Orders by the Court.

The first batch of Control Orders imposed by the Home Secretary required the suspects to stay confined within small apartments for 18 hours a day, and placed restrictions on where they could go and whom they could see in the remaining 6 hours.

These orders were challenged in the case *JJ*[10], and a Division of the Court of Appeal over which I presided upheld the finding of the Judge of first instance that the orders were unlawful, in that the restrictions that they imposed amounted to deprivation of liberty.

The Home Secretary immediately imposed modified Control Orders in place of the old ones. These were not nearly as restrictive, and were specifically tailored to meet the situation of the particular suspect.

As at 10 December 2008, there were 15 Control Orders in place, of which 4 relate to British subjects, 96 modifications had been made in the previous three months, 23 requests for modification refused and 2 appeals lodged.[11]

The most significant difference between these and the previous control orders is that the curfew periods have been reduced to either 14, or in some cases 12, hours a day. There were initially successful challenges to two of these new orders. The first was by a terrorist suspect known as *E*. He is one of the original detainees, and so has been subject to preventative measures for 5 years. In a very lengthy judgment Beatson J[12] reached the conclusion that the cumulative effect of the restrictions imposed upon E amounted to deprivation of liberty, and so he quashed the Order.

His decision was overturned by the Court of Appeal[13] in May of 2007, that Court considering that the shorter period of curfew of 12 hours and the fact that E was living with his family in his own home meant the restrictions fell short of deprivation of liberty.

In the second case, Ouseley J quashed a Control Order in respect of a terrorist suspect known as *AF*[14] on the ground that the application for a control order amounted to a

9. Case of *A and Others v. United Kingdom* (Application no. 3455/05) decided 19/02/09
10. Secretary of State for the Home Department v JJ, Court of Appeal–[2006] All ER (D) 08
11. Home office control order statement 15.12.08
12. [2007] EWHC 233 (Admin)
13. [2007] EWCA Civ 459
14. [2007] EWHC 651

criminal charge, that the procedure for challenging the order breached the right to a fair trial and that the use of closed evidence was unfair. If this judgment was correct, Control Orders would have been effectively torpedoed. The Judge in that case gave permission for the Government to use the 'leapfrog' procedure to appeal directly to the House of Lords. That appeal was heard in July 2007 together with appeals from the decisions of the Court of Appeal in the cases I mentioned earlier.

In the combined appeals the House of Lords[15] addressed the following principal issues; did the orders in fact amount to a deprivation of liberty; did the control order amount to a criminal charge; and did the use of closed material breach the right to a fair trial?

In relation to the first issue the House of Lords rejected the argument in relation to *MB*, *E* and *AF* but accepted that the restrictions in *JJ* did amount to a deprivation of liberty. Lord Brown of Eaton-under-Heywood suggested that more than 16 hours of a curfew element in a Control Order would amount to a deprivation of liberty. In *JJ* the restriction was 18 hours which was simply too long. Lords Hoffmann and Carswell dissented on this question in relation to *JJ*.

The length of the curfew element was a clear focus in the judgment of the House of Lords with Lord Bingham stating that other restrictions *"were not irrelevant, but they could not of themselves affect a deprivation of liberty if the core element of confinement, to which other restrictions (important as they may be in some cases) are ancillary, is insufficiently stringent."*[16]

In relation to the second issue, the House of Lords held that Control Orders did not amount to a criminal charge so the enhanced protection of Article 6(3) did not apply but the core standards of Article 6(1) did apply.

As mentioned above in relation to *MB* the House of Lords did not declare the use of the special advocate procedure as incompatible but instead referred the matter back to the High Court.

Meanwhile no less than 7 of the 17 terrorist suspects who have been subjected to Control Orders have absconded. Mr. John Reid, when Home Secretary, described Control Orders as trying to 'hold soup in a sieve'.

His predecessor, Charles Clarke, had also been critical of the way in which judicial decisions have time and time again defeated the steps taken by Government to deal with terrorist suspects. When giving evidence to a Parliamentary Committee, he protested:

> *"The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decisions for our society".*

This added fuel to a picture that the media like to paint of the Judges being at war with the Executive.

It is a false picture. Relations are in fact good, and I think that Ministers understand-as perhaps the public does not-that Judges are simply doing their best to apply the laws that Parliament has enacted, which include the law that requires them to give effect to the Human Rights Convention.

Debate about the justification for resorting to exceptional measures to deal with terrorism often focuses on the extreme case of the use of torture. What if a bomb has been

15. [2007] UKHL 45
16. Paragraph [11]

placed that is likely to take countless lives and a terrorist has been caught who knows the location of the bomb?

In such a situation cannot torture be justified in order to induce the terrorist to disclose where the bomb is hidden? The classic answer is that the law can never justify the use of torture, but in a situation such as that the Executive might be forgiven for acting in a manner that was unlawful.

A more difficult issue arose in the second round of litigation that had led to the Lords' famous decision in *A*. The issue was whether a Court can receive evidence that has, or may have, been obtained by the use of torture. The Court of Appeal[17] held that, in the circumstances of that case at least, it could, provided that the United Kingdom authorities were not party to the torture. On appeal to the House of Lords[18], sitting seven strong, the decision of the Court of Appeal was unanimously reversed. Their Lordships held that evidence obtained by torture was not admissible in an English Court, whoever had done the torturing. There was, however, a critical issue on standard of proof.

Should evidence be shut out whenever there is a risk that it may have been obtained by torture or only where the Court is satisfied on balance of probabilities that it has been obtained by torture. By a slender majority of 4 to 3 the Lords decided that the latter was the position.

This means that the English Courts will admit evidence where there is a possibility, but not where there is a probability, that it has been obtained by torture.

At the end of 2006, two gentlemen called Ahmad and Aswat[19] were resisting extradition from the United Kingdom to the United States on the ground, inter alia, that they might find themselves subjected to 'extraordinary rendition', that is transfer to a foreign State in circumstances where there was a substantial risk that they would be subjected to torture. This submission required the English Court to consider evidence as to the alleged practice of the United States, an area where in the past the Court would have been reluctant to trespass. The Court considered quite a body of evidence and was not reassured by a statement from a federal prosecutor that "the United States does not expel, return, or extradite individuals to countries where the United States believes that it is more likely than not that they will be tortured".

The Court was, however, reassured by the fact that "*there was no evidence whatsoever that any person extradited to the United States from the United Kingdom or anywhere else, has been subsequently subjected to rendition, extraordinary or otherwise*". The Court held that there was no reason why the two gentlemen should not be extradited.

More recently, the House of Lords has approved reliance on assurances from foreign governments to permit the deportation of terrorist suspects. The House of Lords held that, it had been lawful to rely on the assurances from the Governments of Algeria and Jordan that if deported the individuals concerned would not be subject to torture or inhumane treatment and to order the deportation of a number of terrorist suspects.[20] The individuals have indicated that they will appeal to European Court of Human Rights.

17. [2004] EWCA Civ 1123
18. [2005] UKHL 71
19. [2006] EWHC 2927 (Admin)
20. [2009] UKHL 10

The case of Ahmad and Aswat is not the only occasion on which the English Court has had to take the unusual step of considering the legitimacy of what has been taking place on the far side of the Atlantic.

Detainees at Guantanamo Bay have included a number of British subjects. In 2002, one of these, Mr. Abbasi[21], instigated, with the aid of relatives, judicial review proceedings in the English Court. He alleged that he was being unlawfully detained contrary to his fundamental human rights and sought a mandatory order that the Foreign Secretary should intervene on his behalf. The Foreign Secretary objected that the case was not justiciable, as it called for a review of his conduct of foreign affairs and this fell outside the jurisdiction of the Court. He also contended that the English Court would not investigate the legitimacy of the actions of a foreign sovereign state.

These submissions were upheld by the Judge of first instance, who refused Mr. Abbasi's application.

He appealed and I presided on that appeal. We allowed the appeal. We held that, where human rights were engaged, the English Court could investigate the actions of a foreign sovereign state. We heard the appeal at the time when the District Court of Columbia had ruled that the United States Courts had no jurisdiction over aliens detained at Guantanamo.

After reviewing both English and U.S. Authority, we commented[22] :

". . .we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognised by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black hole'. . .What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.
It is important to record that the position may change when the appellate courts in the United States consider the matter."

The position did change when, by a majority of six to three, the U.S. Supreme Court in *Rasul v. Bush*[23] ruled that foreign nationals held at Guantanamo could use the US court system to challenge their detention.

I have described how in England the Courts have repeatedly upheld challenges of actions taken by Parliament and the Executive that are aimed at dealing with terrorist suspects.

There are parallels between what has been happening in England and what has been happening in America. The Government can derogate from the Human Rights Convention if this is necessary to deal with a state of emergency threatening the life of the nation. After its first unsuccessful attempt to do so it has not tried again. The U.S. Constitution prohibits Congress from suspending the Privilege of the Writ of Habeas Corpus save where "in Cases of Rebellion or Invasion public Safety may require it." Congress has not suspended the writ of habeas corpus.

21. [2002] EWCA Civ 1598
22. [2002] EWCA Civ 1598 at paragraphs 64 and 66
23. (2004) 542 US 466

In *Hamdi v. Rumsfeld*[24], Mr. Hamdi, a U.S. Citizen, who had been declared an "illegal enemy combatant," successfully invoked it. The U.S. Supreme Court held that he could not be held indefinitely in a U.S. military prison without an opportunity to contest the allegations made against him by a neutral arbiter. He had allegedly been captured fighting American forces in Afghanistan.

The exercise of those powers were pursuant to a Resolution of Congress (the Authorization for Use of Military Force resolution, 115 Stat. 224), passed one week after the 9/11 terrorist attacks in the United States, authorising the President to "*use all necessary and appropriate force against those nations, organisations or persons he determines planned, authorized, committed or aided the terrorist attacks. . .or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States. . . .*"

Significantly in Hamdi, the U.S. Supreme Court recognised that this resolution empowered the detention of an enemy combatant in Afghanistan, even if he was a U.S. citizen, pending the conclusion of hostilities there, but it left unanswered the question of whether terrorist suspects who were not engaged in open warfare against the United States, could lawfully be detained as "enemy combatants."

There are many who answer this description detained in Guantánamo; citizens of many different nations, many of them friendly to the United States, seized not only in Afghanistan, but in other countries where there are no current hostilities. A large number of detainees commenced applications for habeas corpus before or following the decision in *Rasul v. Bush*[25].

Congress responded by passing the Detainee Treatment Act of 2005 which removed the jurisdiction of the Courts to entertain applications for habeas corpus by aliens detained at Guantánamo. It gave the Court of Appeals for the D.C. Circuit exclusive jurisdiction in respect of judicial review challenges by such detainees. In *Hamdan v. Rumsfeld*[26], the U.S. Supreme Court held that this Act did not, on its true construction, apply to applications for habeas corpus made before the date that the Act came into effect—that is the vast body of applications that had already been made by detainees at Guantánamo. Hamdan, a Yemeni national, challenged the jurisdiction of the military commission before whom he was due to be tried for "*conspiracy to commit. . . offences triable by military commission.*"

The U.S. Supreme Court, by a majority, upheld this challenge, holding that there was no basis for ousting the jurisdiction of the Federal Courts. It further found that the military commission, both in structure and in procedure, violated the provisions of both the Uniform Code of Military Justice and Article 3 of the Third Geneva Convention.

Even if Hamdan was a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive was bound to comply with the prevailing Rule of Law in undertaking to try him and subject him to criminal punishment.

The reaction to this decision was the Military Commissions Act of 2006, signed into law by President Bush on 17 October 2006. This set up military commissions to try terror suspects found to be "alien unlawful enemy combatants." Section 7 of that Statute amended Section 2241 of Title 28 of the United States Code to provide:

24. 542 U.S. 507 (2004)
25. 542 U.S. 466 (2004)
26. 126 S. Ct. 2749 (2006)

"(1) No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) [subject to certain exceptions] no court, justice or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Senator Cornyn commented that this Section *"will finally get the lawyers out of Guantánamo Bay."*

On 20 February 2007, the U.S. Court of Appeals for the D.C. Circuit handed down a decision in *Boumediene v. Bush*[27], in relation to claims for habeas corpus filed by detainees at Guantánamo before the Military Commissions Act came into force. The majority held that the Act removed the jurisdiction of the Court to entertain their claims. One of the primary purposes of the Act had been to overrule Hamdan and it was found to have done so.

The bone of contention between the majority, whose decision was given by Judge Randolph, and Judge Rogers, who dissented, related to the effect of the Suspension Clause of the Constitution. The majority held that this clause protected the right to habeas corpus as it existed in 1789. At that date aliens held outside the jurisdiction of the United States had no such right to claim habeas corpus. In a lengthy dissent, Judge Rogers expressed the view that the Act fell foul of the Suspension Clause. I must confess that I found his dissent somewhat more powerful than did the majority, who described it as *"full of holes."*

At the same time, the proceedings before the Military Commissions set up by the Military Commissions Act 2006 had run into difficulties. In June 2007, two military judges dismissed the charges against Hamdan and Omar Khadr on the basis that the tribunal lacked jurisdiction to deal with detainees who were not classed as "unlawful enemy combatants." Most Guantánamo detainees have been classified merely as "enemy combatants," rather than "unlawful enemy combatants" by the earlier hearings of the Combatant Status Review Tribunal (which was a onetime administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantánamo met the criteria to be designated as an enemy combatant). Such rulings were dispositive under the Act and were thus insufficient to subject the detainees to the jurisdiction of the Commissions.

Hamdan and Khadr, however, were not released following the decisions. The Bush administration indicated that they might be held as prisoners until the end of hostilities in the *"war on international terrorism."* On 1 October 2007, the U.S. Supreme Court in *Hamdan v. Gates*[28] refused to hear Hamdan's petition seeking to challenge the legality of the military commission system.

As reported by the Trial Watch organization:

27. 375 U.S. App. D.C. 48

28. 128 S. Ct. 207 (2007)

"On 15 December 2007, a US military judge ruled that Hamdan is due a hearing to settle his alleged status as a prisoner of war under the Geneva Conventions and that the determination by a Combatant Status Review Tribunal that he was an "enemy combatant" was no substitute for that. In a POW [prisoner of war] hearing, a Military Commission Judge would consider whether Hamdan had been captured in connection with an international armed conflict as defined in Article 2 of the Third Geneva Convention. If Hamdan were found to be a POW, he would be unlikely to face trial under the Military Commissions Act of 2006. Article 102 of the Convention holds that a POW can only be punished for a crime if convicted under the same procedure that a US serviceman would face for a criminal military trial. A finding of POW status, however, would also establish the right of the US to detain Hamdan indefinitely until the resolution of the relevant conflict."

The same organisation further reported that:

"[Hamdan's] trial before a military commission began on 21 July 2008. Hamdan pleaded not guilty and asked for leniency after apologizing for the deaths caused by his counterparts. On 6 August 2008, Hamdan was found guilty of providing material support for terrorism through his association with Osama bin Laden and other al Qaeda leaders. A day later, he was sentenced to five and a half years in prison. Hamdan was given credit for the five years he had been detained since charges were first brought against him, meaning he could be released six months later. The verdict was the first rendered by a military commission trial at Guantánamo Bay."

While the proceedings in the Hamdan case were going on, the U.S. Supreme Court on 29 June 2007, agreed to hear the certiorari petitions in *Boumediene v. Bush* and *Al Odah v. United States* filed by a number of Guantánamo detainees who sought to challenge the constitutionality of the Military Commissions Act. The two cases were subsequently consolidated into one. Oral arguments were heard on 5 December 2007, and the decision, finding Section 7 of the Military Commissions Act to be unconstitutional, was handed down on 12 June 2008.

The U.S. Supreme Court ruled 5 to 4 that the Military Commissions Act of 2006 unconstitutionally limited detainee's access to judicial review, that the procedures under the Detainee Treatment Act were not an adequate and effective substitute for habeas corpus, and that the aliens detained at Guantánamo have the constitutional "privilege of habeas corpus." The Court further rejected the argument that, because the United States did not have de jure sovereignty over Guantánamo, the Suspension Clause did not protect the detainees. The Court instructed that the United States has de facto sovereignty and the government's advanced formalistic view would raise separation-of-powers concerns. In the words of the Court:

"Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"

Chief Justice Roberts and Justice Scalia filed dissenting opinions, each joined by the other and by Justice Thomas and Justice Alito. In doing so, Justice Scalia filed a stern dissenting opinion, suggesting that the majority's decision would bring on "*disastrous consequences.*" Justice Scalia opined that the majority's opinion was "*fundamental[ly]*" *problematic because "[t]he writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires.*" He suggested that the Court was being driven by an "*inflated notion of judicial supremacy*" and not by the meaning of the Suspension Clause or the principles of the precedents. Justice Scalia concluded his dissenting opinion with the statement that "*The Nation will live to regret what the Court has done today.*" The decision in Boumediene, nonetheless, has been cited by many observers as the step in the right direction.

I would like to quote also from the majority decision of the Fourth Circuit of the U.S. Court of Appeals, given on 11 June 2007, by Circuit Judge Diana Gribbon Motz, in *al-Marri v. Wright*[29]. The Court rejected the Government's contention that its jurisdiction to hear a habeas corpus petition of an alien, lawfully resident in the U.S., had been removed, after his detention, by the Military Commissions Act:

> *"For over two centuries of growth and struggle, peace and war, the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law. Yet more than five years ago, military authorities seized Ali Saleh Kahlah al-Marri, an alien lawfully residing here. He has been held by the military ever since—without criminal charge or process . . . .*
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> *He has been so held, although the Government has never alleged that he is a member of any nation's military, has fought alongside any nation's armed forces, or has borne arms against the United States anywhere in the world. And he has been so held, without acknowledgment of the protection afforded by the Constitution, solely because the Executive believes that his indefinite military detention—or even the indefinite military detention of a similarly situated American citizen—is proper."*

Subsequently, the Court vacated that judgment and considered the case *en banc.* The original opinion was replaced by *Al-Marri v. Pucciarelli*[30]. The Court of Appeals, in a highly divided opinion, held by a 5 to 4 vote that, if the Government's allegations about al-Marri were true, Congress had empowered the President in the Authorisation for Use of Military Force Resolution to detain him as an enemy combatant, and by a different 5 to 4 majority that, assuming Congress had empowered the President to detain al-Marri as an enemy combatant, he had not been afforded sufficient process to challenge his designation as an enemy combatant. The Court of Appeals also denied the U.S. Government's motion to dismiss the case for lack of jurisdiction based on the decision issued in Boumediene. On 5 December 2008, the U.S. Supreme Court granted certiorari in *Al-Marri v. Spagone* (formerly *Al-Marri v. Pucciarelli*)[31], with the oral argument expected to take place before the end of the U.S. Supreme Court's 2009 June term. The question now to be resolved by the U.S. Supreme Court is whether the Executive has legal authority to

29. 487 F.3d 160 (4th Cir. 2007)

30. 534 F.3d 213 (4th Cir. 2008)

31. 129 S. Ct. 680 (2008)

detain a legal resident arrested in the United States without charge by declaring him an "enemy combatant."

Before concluding these observations, it should be noted that, on 22 January 2009, President Obama issued an executive memorandum, directing an immediate review of Mr. Al-Marri's detention status.

Of high moment, President Obama by his Executive Order of 22 January 2009, has mandated a review, coordinated by the Attorney General, of the status of all individuals that the U.S. Department of Defense is currently detaining at the Guantánamo Bay Naval Base; directed that the detention facility be shut down within the year, and sought to suspend the proceedings of the Guantánamo military commission for 120 days. It remains to be seen how the new U.S. Administration will progress these issues.

What we have been seeing therefore is a conflict in the U.S. and the UK jurisdictions between the desire of the Executive to take certain pre-emptive measures against terrorist suspects and the wish of the Judiciary to adhere to overriding legal principles—in the UK case the European Convention on Human Rights and in the U.S. case the Constitution of the United States.

So it has been that in both jurisdictions the Courts have been called on to perform their duty of upholding the Rule of Law. Not everyone has appreciated this, giving that word each of its meanings.

The desirability of preventing terrorists from blowing up innocent citizens is one that we would all endorse. But terrorism is spawned by ideology.

Mr. John Reid, when Home Secretary in the UK, said that we were living through what was "*at heart an ideological struggle*"; a struggle between democracies and "*the core values of a free society*" on the one hand and "*those who would want to create a society which would deny all the basic individual rights that we now take for granted*" on the other.

At a lecture given at the London School of Economics in 2006, Shami Chakrabarti, the Director of the human rights group Liberty, observed

> *"the philosophy of post [Second World] war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and. . .of Winston Churchill. . .If our values are truly fundamental and enduring, they have to be relevant whatever the level of the threat".*

I share those sentiments, and would suggest that the legacy goes back further.

Respect for human rights must, I suggest, be a key weapon in the ideological battle. Since the Second World War Britain has welcomed to the United Kingdom millions of immigrants, many of them refugees from countries where human rights were not respected.

The prosperity of the United States is built on immigrants who have been welcomed from every corner of the globe. It is essential that they, and their children and grandchildren should be confident that their adopted countries treat them, and those who are nationals of the countries from which they have come, without discrimination and with due respect for their human rights. If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or pas-

sively, are prepared to support the terrorists who are bent on destroying the fabric of our society. The British Human Rights Act and the United States Constitution are not merely their safeguards. They are the foundations of the fight against terrorism.