WILLIAM REECE SMITH, JR. DISTINGUISHED LECTURE IN LEGAL ETHICS

TAKING LIBERTIES WITH JUSTICE—THE LEGAL LANDSCAPE IN BRITAIN POST SEPTEMBER 11th*

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When I look back to when I was called to the Bar in 1973 by the Treasurer and Benchers of the Honourable Society of Gray's Inn, the world—and certainly the legal world—seemed a safer place. Stern portraits of richly robed and magnificently bewigged judges lined the panelled walls of the sixteenth-century hall. On a raised dais, a distinguished band of legal luminaries and assorted, bespectacled greybeards watched keenly as each of the fifty nervous student barristers, white tie and tailed like extras from a Fred Astaire movie, shook the Treasurer's hand and on being declared "utter barristers" received a slim volume entitled

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Duty and Art in Advocacy by Sir Malcolm Hilbery.[1] All this spoke of centuries of slowly evolving legal tradition, of the significance and dignity of the profession, and of the certainty of the role of judges and trial lawyers in the legal process.

For those of us in independent practice, who chose the path of criminal law and who are often called on to represent the indigent, there were bound up in our traditions certain unshakable articles of faith. The first was that all defendants were protected by inviolable rights forming the very bedrock of our criminal justice system. No democratically elected government, we thought, could or would remove them. Second was the belief that advocates and judges—as guardians of the rule of law—were essentially independent and should remain free from political attack.

We were wrong. Increasingly outrageous acts of international terrorism, culminating in the destruction of the World Trade Center on September 11th, and costly and controversial wars in Afghanistan and Iraq provided the backdrop—the justification—for draconian changes affecting the liberty of the subject in the United Kingdom. These reforms have transformed a once familiar and well-signposted legal landscape into an unrecognizable and uncharted terrain. Politicians have thought the unthinkable and put those thoughts into action. Lawyers and judges who naively believed that they could bring to bear a moderating influence on all-powerful government have been sadly disillusioned.

Guantanamo Bay, a place of torture and systematic injustice, has come to symbolize a general retreat from the humane and liberal values that enriched our domestic system of justice. Instead it has become justification for a steady encroachment of individual rights. Some of these measures have been in direct response to September 11th by a government warning of a similar al Qaeda attack in the United Kingdom, such as internment without trial for foreign nationals suspected of terrorist links and the use of evidence obtained by use of torture abroad.

But, there also has been a plethora of profound changes to our domestic criminal justice system in the United Kingdom, which have nothing to do with the terrorist outrages in New York or Washington. They make a grim reading list and include the

1. Sir Malcolm Hilbery, *Duty and Art in Advocacy* (Stevens & Sons Ltd. 1946).

erosion of the right to jury trial, the extension of the right of appeal to the prosecution, the end of the doctrine of double jeopardy, the undermining of the right to silence, and the slow reversal of the burden of proof.

Before I go into any further detail about these matters, it is important to say something about our ancient British parliamentary system, the mechanisms for introducing legislation, and the current political climate in which fear of crime—and in particular terrorist crime—is cited as the justification for criminal justice reform.

The United Kingdom Parliament consists of two assemblies. The first is the House of Commons, a chamber made up of Ministers of Parliament (MPs) elected by the public. The second is the House of Lords, the Upper House as it is known, comprising a smattering of hereditary peers and a much larger number of Lords who are merely appointed for life. This august institution has been famously but unfairly lampooned by some as the British Outer Mongolia for retired politicians, or by others as a perfect model of how to care for the elderly. It is presided over by the Queen, as titular Head of State.

Although there are numerous political parties who stand for election, we have essentially a three-party system. The Conservatives, or Tories, who in the eighteenth and nineteenth centuries represented the landowners; the Liberal Democrats; and New Labour—a scion of old Labour, a party whose history was rooted in socialism and the unions.

The party who secures the most votes and returns the largest number of MPs forms the government, and the party with the second largest number of MPs become the party of official opposition. Party members select their own leaders, and in the case of the winning party, that leader becomes Prime Minister. He or she is responsible for appointing ministers or Secretaries of State, who sit in Cabinet, the inner body of Government chaired by the Prime Minister. Policy is essentially formulated in Cabinet and enforced on rank and file party members by government officers, known as Whips. Versed in the art of gentle and not-so-gentle persuasion, the Whips ensure that dissent is kept to the minimum and that government MPs vote in favor of their party's policy. Once passed by a majority of MPs, a bill is considered by the unelected House of Lords, which is also divided along party lines.

Its composition has been historically largely Tory, but with a small body of independents, bishops, senior judges and an increasing number of New Labour peers. Opposition to a bill in the House of Lords can serve to moderate or delay its passage, but ultimately the Upper House cannot thwart the will of the elected chamber. Once this tortuous process has been completed, the bill receives Royal Assent and becomes law.

Increasingly, government policy neither originates from nor is discussed in Cabinet, where debate and compromise can thwart a prime minister's will. It evolves instead from a small, compliant, and often unelected clique of advisers and courtiers forming around the Prime Minister. This trend did not originate with Mr. Blair. Mrs. Thatcher was said to have celebrated her re-election by holding a formal dinner at the Ritz with cabinet members, a number of whom she despised.

> "And for your main course, Madam?" purred the maître d'.
>
> "I'll have the steak," said the Prime Minister.
>
> "And what about the vegetables?"
>
> "They'll have the same as me."

Just as Mrs. Thatcher shifted her party from its traditional aristocratic party affiliations, and wooed the entrepreneurial and aspiring middle classes, so Mr. Blair has wrested Labour from its traditional roots, in search of the same constituency. These realignments have had serious political consequences. First, the main parties attempt to present themselves as the national party, cynically espousing identical policies. Thus, as the ground between the New Labour and the Conservatives shrinks, there is no effective basis for opposition to Government within Parliament. Second, the electorate are being deprived of real choice. This, in turn, has led to weary inertia amongst the voting public and inflicted deep damage on the democratic process.

Our small world has become a frightening place. Post September 11th, members of the public have become increasingly apprehensive about the threat of terrorism. They are justified in seeking protection from terrorism, as well as from more mundane crimes such as murder, robbery, rape, and hooliganism. But politicians, when chasing votes, can and do exaggerate the true extent of the threat, and exploit that fear in a most calculating way.

Thus, in every election, our old friend "law and order" is presented by successive governments as a crucial issue. Whatever the status and accuracy of intelligence, politicians promise that anarchy is just around the corner. Whatever the truth of national statistics and trends, the Home Secretary and his opposite number talk alarmingly of the "war on crime" and "zero tolerance." Every sensational case results in calls by opportunist politicians for new and tougher measures. The result has become, in the words of my colleague Baroness Helena Kennedy, an "auction,"[2] in which it has become impossible for the Tories, traditionally the party of law and order, to find a set of sustainable policies more extreme than those of Tony Blair.

Public opinion is now identified and evaluated by polling and focus groups. If the hysterical opinions of the tabloid newspapers are regarded as the pulse of the nation, then government ministers see themselves as the nation's doctors, prescribing increasingly strong populist medicine. Complex issues are simplified into meaningless sound bites. The need for thorough research is bypassed by hasty and ill-conceived legislation, pushed through parliament, by a mighty and increasingly unrestrained government machine with an unassailable majority.

The culture created by the Guantanamo regime has certainly lowered the benchmark by which the United Kingdom measures the acceptable minimum level of human rights. This is true both for international and domestic legislation. It is now commonplace for the British government to question what that level should be. In 2001, a distinguished American constitutional expert from Harvard gave evidence to the United States Committee on the Judiciary, and suggested that while it might be right in more normal times to allow 100 guilty defendants to go free rather than to convict one innocent one, the arithmetic should be reconsidered when one of the guilty might have access to biological weapons.[3]

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2. Baroness Helena Kennedy, *Address in Reply to Her Majesty's Most Gracious Speech* (U.K. Parliament, Nov. 29, 2004) in Lord's Hansard, vol. 667 at col. 326 (available at http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo04-x.htm) (last accessed May 20, 2006).

3. Sen. Jud. Comm., *DOJ Oversight: Preserving Our Freedoms While Defending against Terrorism*, 107th Cong. (Dec. 4, 2001) (statement of Laurence Tribe, Tyler Prof. of Const. Law, Harvard Law School).

Announcing his proposed criminal justice reforms in 2002, the Prime Minister appeared to agree, confidently asserting that "It's perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished."[4] In a sentence, Mr. Blair and his erstwhile Home Secretary justified a series of populist measures that have tilted the delicate balance between the power of the state and the rights of the individual in a most alarming way.

So, when the right to trial by jury is eroded, or the burden of proof is lowered, or when the right to silence is undermined, the public is told that too many guilty defendants are wrongly acquitted and that there is a pressing need to rebalance the system in favor of victims. When foreign nationals suspected of terrorist links are interned without trial on secret evidence in closed hearings, we are assured that the security of the state is at risk. A combination of apocalyptic government threats of impending dangers and mind-numbing statistical data have rendered the public largely supportive of—or indifferent to—new and draconian measures. In such a climate, whenever basic liberal principles vie with easy populist applause, the government goes for the applause.

In this particular political climate, the role of our judges has never been more important. Judges are, of course, not elected in the United Kingdom and are not answerable to Parliament, to whom they are ultimately subordinate. Their function has always been, as best they can, to develop common law and interpret and apply statute law in a way that protects the citizen from the encroaching arm of the State. They are also called upon to review the administrative decisions of the executive to ensure that they comply with the law as laid down by Parliament.

Their role as guardians of our rights and liberties has been considerably enhanced by the coming into force of the Human Rights Act,[5] which, in 1998, incorporated into United Kingdom law the rights and freedoms set out in the European Convention on Human Rights.[6] Now all domestic legislation and common law

4. Nicholas Kralev, *Scotland Yard on a Recruiting Binge*, Wash. Times A10 (July 7, 2002).

5. *Human Rights Act*, 1998, c. 42 (Eng.).

6. *Convention for the Protection of Human Rights and Fundamental Freedoms*

must be interpreted so as to be compatible with the Convention, "so far as it is possible to do so."[7] When, applying this new rule of construction, a judge concludes that the legislation is incompatible with the Convention, he or she may make a "declaration of incompatibility."[8] Such a declaration does not affect the validity or continuing operation of the law, or in any way challenge parliamentary sovereignty, but it is intended to operate as a clear signal to Parliament that the law should be changed. It should also be pointed out that, in times of public emergency threatening the life of the nation, Parliament can, as we shall see when discussing the detention of foreign nationals suspected of terrorism, derogate from its obligations under the Convention.

Why, you may ask, if it is as illiberal as I have claimed, has Tony Blair's government introduced legislation that so enhances the power of the judiciary? The Government likes to disarm its critics by reminding them of its credentials in bringing the Human Rights Act onto the statute books. But, wrapping themselves in the clothing of human rights is disingenuous when, in reality, the rights of our citizens are being reduced.

First, the application of the Human Rights Act has not protected us from the gradual erosion of many of the rules that protect defendants within our domestic criminal justice system. Indeed, much of this new legislation has been carefully formulated to avoid the obstacles created by the Convention by conforming to its minimum requirements.

Secondly, I believe that the Government, when introducing this Act of Parliament, underestimated the strength and independence of the judiciary in using their new powers to resist some of the Government's more extreme measures. In this respect, the Prime Minister could be likened to the hapless Henry II who, having appointed Thomas a Becket Archbishop of Canterbury cried out for someone to rid him of "this troublesome priest."[9] Instead of the small group of armed assassins who came to Henry's aid, an army of spin doctors and ministers have been used to undermine

(Nov. 4, 1950) (available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf) [hereinafter *ECHR*].

7. *Human Rights Act*, § 3(1).

8. *Id*. at § 4.

9. Mary McGrory, *From Rome, A 'Limited Hangout'*, Wash. Post A29 (Apr. 25, 2002).

those judges who have made decisions against the Government. The judges have been stigmatized publicly as undemocratic, elitist, blinkered, and out of touch. "Frankly, I am personally fed up with having to deal with a situation where [P]arliament debates issues and the judges then overturn them," declared our recent Home Secretary.[10] He was referring to the decision of a High Court Judge, Mr. Justice Andrew Collins, who ruled that recent legislation curtailing the rights of asylum seekers to claim any form of social benefit and leaving them destitute, breached human rights principles.[11] *The Daily Mail*, a tabloid newspaper with a virulently anti-immigration strain, under the headline "Let Down by the Dictators in Wigs," ran an in-depth analysis of all the cases in which this judge had taken the government to task.[12] Some of the information could only have been found in official records, raising the question of government leaks. The Prime Minister joined the fray, claiming he was ready for a showdown with the judiciary and looking for ways to limit the role of judges in the interpretation of international human rights obligations, and "reassert the primacy of [P]arliament."[13] Certainly a new form of judicial activism in the United Kingdom has replaced the old tradition of judicial self-restraint. One reason for it, it could be argued, is the fact that a government that acquires too much executive power and has no effective opposition, requires judges to redress the balance.

Whatever the rights and wrongs of this argument, nothing justifies sustained political attacks on our judges such as the recent campaign on Lord Woolf, our distinguished Lord Chief Justice. Lord Woolf and other judges in the Court of Appeal, mindful of the explosion in the prison population, have consistently called for an end to legislation that limited or removed judicial discretion from criminal sentencing, and fettered the judges in passing

10. Alan Travis, *Blunkett to Fight Asylum Ruling: Plan to Have Refugee Intake in Doubt after Judge Outlaws Denial of Welfare Support in Late Claims Cases*, The Guardian (London) 2 (Feb. 20, 2003) (available at LEXIS, IN-MWP database).

11. Frances Gibb, *Blunkett v. the Bench: The Battle Has Begun*, Times (London) 3 (Mar. 4, 2003) (available at LEXIS, IN-MWP database).

12. *Let Down by the Dictators in Wigs*, Daily Mail (London) 12 (May 15, 2003) (available at LEXIS, IN-MWP database).

13. Hugo Young, *Irvine Was Power Hungry, but He Stood up for Judges: Tony Blair Can't Be Trusted to Respect the Independence of the Judiciary*, Guardian (London) 18 (June 17, 2003) (available at LEXIS, IN-MWP database).

just and appropriate sentences. An insidious campaign of vilification was led by the Home Secretary, who called Lord Woolf "a confused old codger."[14] This left the Lord Chief Justice seriously considering whether he should tender his resignation.[15]

Campaigns by politicians to target the judges who oppose them will not be unknown to you. It was your former Attorney General, John Ashcroft, who mounted an attack on judicial discretion, insisting that judges who sentenced below his statutory range should be named and shamed.[16] This led, I believe, to Chief Justice Rehnquist having to point out that justice requires discretion and that pressure on judges undermines the system.[17]

Since September 11th, constitutional lawyers and jurists on both sides of the Atlantic have justifiably asked whether our respective systems of criminal justice are adequate to deal effectively with international terrorism. Clearly, it is imperative to impose effective measures to prevent terrorist outrages, and to try those accused of committing them in a way that ensures the conviction and punishment of the guilty. But a number of important questions arise. The first is whether our criminal justice system is adequate to deal with the horrors of such crimes.

The State faces a dilemma. If it limits the means by which citizens are protected against the threat of terrorist outrage to the ordinary measures of the criminal law, it leaves a yawning gap. It exposes its people to the possibility of indiscriminate murder committed by extremists who, for want of better evidence, could not be brought to book in the criminal courts. But if it fills that gap by confining them without trial, or by reversing the burden of proof, or by relying on tainted evidence, it affronts some of our most fundamental rights.

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14. David Leppard, *Chief Justice to Quit in Blunkett Row*, Times (London) 1 (Oct. 31, 2004) (available at LEXIS, IN-MWP database).

15. *Id.*

16. CNN, *Sentencing Provisions and Ashcroft: An Assault against Federal Courts*, http://www.cnn.com/2003/LAW/08/15/findlaw.analysis.allenbaugh.sentencing (Aug. 15, 2003); Memo. from John Ashcroft, U.S. Atty. Gen., to All Fed. Prosecutors, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing* (Sept. 22, 2003) (available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm).

17. Linda Greenhouse, *Chief Justice Attacks a Law As Infringing on Judges*, N.Y. Times A14 (Jan. 1, 2004).

I readily acknowledge that our criminal justice system is a living organism that must respond to changing social conditions, but it is here that a second question must be asked: Does the process of adaptation require us to jettison our traditional notions of due process and fair trial? The answer to that is more complex. Must we abandon the very principles that distinguish our democratic legal systems from those of the tyrannies we oppose? And will the measures that replace them be effective in eliminating the predicted dangers?

I suggest that some of the changes being imposed in Britain, particularly measures to counter terrorism, are more in keeping with a totalitarian state, which—far from making our country safer—will create greater risks to its security. There is nothing like a grave injustice to alienate and radicalize members of a targeted community, such as young British Muslims.

More worrying still, once such measures have been introduced by our government in the context of combating terrorism, they tend, as we shall see, to be imported into the general criminal justice system.

For those suspected of terrorist offenses in the United Kingdom, special legislation was in force for some time before planes hit the twin towers. Our experiences of over thirty years of Anglo-Irish civil war had equipped the State with draconian powers, some of which have grown to become a common part of the legal landscape in all criminal domestic law.

During the conflict in Northern Ireland, jury trials were suspended in a large number of cases and replaced with judge-only "Diplock" courts, named after a senior judge who recommended them.[18] The rationale for this measure was that there were entrenched divisions between Catholics and Protestants, and many believed that a jury could never be impartial. Although this social phenomenon does not exist on the mainland, in April 2005 we will see for the first time the removal of juries in certain kinds of criminal trials across the country:

18. Lord Kenneth Diplock is widely credited with recommending creation of these courts.

(1) In cases where jury or witness tampering has taken place or where there is a real and present danger that it might take place;

(2) In fraud cases where the complexity or length is likely to make it so burdensome to the jury that the interests of justice require that serious consideration should be given to conducting the trial without a jury;

(3) In trials involving multiple offenders—when the prosecution proceeds on a sample count it will be tried in the conventional way with a jury; if convicted, the court may go on to try the other offenses without a jury before passing sentence;

(4) In terrorist cases, trials without jury are being proposed by the government.

The erosion has started. Although we in the United Kingdom lack the protection of a written constitution, the right of an accused to trial by a jury of his peers was enshrined in the Magna Carta, and considered worth preserving by the authors of your Constitution. It has rightly been regarded as a jewel in the crown of Anglo-American justice, an adversarial system in which citizens, and not the state, are regarded as the best protectors of the liberty of the subject. The great British jurist Lord Devlin maintained that the jury was the lamp by which we know that freedom lives.[19] It is, ideally, a true expression of democracy, providing a legally regulated forum for members of the public to sit in judgment on their fellow citizens, obliged to follow the law but free to do justice. Yet the Government has embarked on a course designed, so it is claimed, not to meet the dangers posed by terrorism, but to "rebalance the criminal justice system in favour of the victim"[20]—shorthand for increasing the rates of conviction and speeding up the system.

By taking a comparatively small number of cases out of the hands of juries, the Government may believe that abolishing the

19. Penny Darbyshire, *The Lamp That Shows That Freedom Lives—Is It Worth the Candle?* 1991 Crim. L. Rev. 740, 746 (1991).

20. Sec. of St. for the Home Dept. et al., *Justice for All (CM 5563)* 31 (Stationery Off. 2002) (available at http://www.tso.co.uk/bookshop).

right to trial by jury in all criminal cases is too much for the public to swallow in one go. So they have attacked jury trials from another angle. What about getting judges onto juries? This novel proposition has recently been introduced, no doubt hatched during a blue-skies session on social policy in a Home Office laboratory.

Not content with the inroads made into the right to trial by jury, the Government has taken active measures to manipulate the composition of the jury. In Britain, both jury selection by *voir dire* and the right to challenge jurors peremptorily have long since been abolished. The composition of juries has long determined the chances of acquittal. The Government believes that too many unemployed people find their way onto juries and not enough members of the professional classes, who use their work commitments to get out of their public duty. The Government has not only made it more difficult for such jurors to wriggle out, but extended eligibility to previously exempt groups including doctors, police officers, members of Parliament, lawyers, and judges. Those who believe that a jury consists of twelve persons chosen to decide who has the better lawyer must now face a new reality. A jury may now consist of twelve lawyers who are chosen to decide whether they are considerably better than you!

The right of silence has been a ripe area for government reform; qualifying measures that have previously been tried and tested in Northern Ireland. For many years, anti-terrorist legislation was devised that enabled the judge-only Diplock courts of Northern Ireland to draw an adverse inference from the silence of an accused either during interrogation or during trial. From 1994, it has been possible for a court to do so in relation to any trial of any adult on any charge in the United Kingdom. This has recently been extended so that it applies even when the accused is a child.

The erosion of the right of silence is only one manifestation of the Government's determination to tinker with the presumption of innocence. Legislation has recently been introduced that obliges those who face criminal charges in the higher courts to disclose their defenses in detail, and to notify the prosecution of the witnesses they intend to call, as well as the names of expert

witnesses who have been approached to give evidence, but whom the defense does not wish to call.[21]

The prosecution's hand has been further strengthened by a radical reappraisal of the rules governing the admissibility of hearsay evidence in criminal proceedings. We have moved from an exclusionary to an inclusionary approach. Much unreliable material that would formerly have been excluded is now to be included, but evaluated according to its weight.

More insidious still, the common law rules that permitted the prosecution adducing evidence of the general bad character of an accused person in limited circumstances have been abolished, making it possible for the State to introduce evidence, not merely of previous convictions, but also evidence of a disposition "towards reprehensible behaviour," whether unlawful or not.[22] In this way, prejudice and suspicion will provide a substitute for hard fact.

The prosecution has been given new rights of appeal for those defendants who are acquitted on the direction of a judge. Retrials may be ordered for those acquitted by a jury, and against whom there is fresh evidence, thus ending the ancient rule against double jeopardy.

In 2000, the Terrorism Act made it an offense to incite, plan, or support terrorism.[23] The Terrorism Act reversed the burden of proof, with accused persons having to show beyond reasonable doubt that they did not have items for terrorist purposes.[24] Numerous criminal offenses have since come onto the statute books, in which the burden of proof has been reversed, not the least of which are provisions in relation to offenses of money laundering and investigations into the proceeds of crime.[25]

Responding quickly to the events of September 11th, in December 2001, the Government enacted the Anti-Terrorism, Crime and Security Act,[26] which vested in the Home Secretary the power to detain indefinitely and without trial foreign nationals sus-

21. *Criminal Justice Act*, 2003, c. 44, § 5 (Eng.).

22. Roderick Munday, *What Constitutes "Other Reprehensible Behaviour" under the Bad Character Provisions of the Criminal Justice Act 2003*, 2005 Crim. L. Rev. 24, 40–41 (2005).

23. *Terrorism Act*, 2000, c. 11, § 12 (Eng.).

24. *Id.* at § 57.

25. *Id.* at § 18.

26. *Anti-Terrorism, Crime, and Security Act*, 2001, c. 24, § 4 (Eng.) (secs. 21–32 repealed 2005).

pected of terrorist acts who could not be deported. This applied, for example, where the government requesting extradition tolerated within its borders the practice of torture or capital punishment, both forbidden under the European Convention on Human Rights. British nationals suspected of being international terrorists, on the other hand, are entitled to the protection afforded by due process. They cannot be held indefinitely without charge, and must be tried within a reasonable period. This legislation clearly contravened rights enshrined in the European Convention on Human Rights, in particular Article 5, which guarantees the right to liberty of a person unless that person is to be deported.[27] Well aware that this legislation could be successfully challenged under the Human Rights Act, the Government utilized its right to derogate, claiming that it was a time of emergency threatening the life of the nation.

In December 2001, David Blunkett, the Home Secretary, employed this legislation to detain eight foreign, Muslim persons who were suspected of being connected with al Qaeda.[28] The detention was reviewed by the Special Immigration Appeals Commission, chaired by Mr. Justice Andrew Collins, to establish whether it was reasonable or not. To the chagrin of Mr. Blunkett, the Commission decided that their detention was not reasonable. The attempted derogation, it held, improperly discriminated between United Kingdom citizens and foreign nationals in the United Kingdom, thus failing the test of equality before the law—but also held that it was disproportionate. Mr. Blunkett appealed to the Court of Appeal—and succeeded. Just before Christmas 2004, however, nine judges from Britain's highest appellate body, the Judicial Committee of the House of Lords, reviewed the decision.[29] Eight of the nine judges recognized that whilst the heavy duty of protecting the security of the country lay on the shoulders of an elected government, the courts had been given the responsibility to check that legislation did not overlook the human rights of those adversely affected. They concluded that the most fundamental human right—the right of individual liberty—had here been negated, and could not accept the justification for a different

27. *ECHR*, *supra* n. 6, at art. 5.
28. Nick Drainey, *First Arrests under New Terror Law*, Scotsman 6 (Dec. 20, 2001).
29. *A v. Sec. of St. for the Home Dept.*, [2005] 2 A.C. 68 (H.L.).

statutory regime between nationals and non-nationals. They declared the legislation to be incompatible with the Convention. One of their Lordships, Lord Hoffman, went further, and questioned whether there was a public emergency threatening the life of the nation, so as to justify the Government's attempt to derogate from its Article 5 obligations, and what was actually meant by the expression "threatening the life of the nation."[30] He observed,

> The "nation" is a social organism, living in its territory . . . under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the "life" of a nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.
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> This, I think, is the idea which the European Court of Human Rights was attempting to convey when it said . . . that it must be a "threat to the organised life of the community of which the state is composed" . . . .[31]

Lord Hoffman was prepared to accept that the threat of atrocities to the United Kingdom of the kind witnessed in New York and Madrid was real, and that the Government had a duty to protect the lives and property of its citizens. But, he added, that duty had to be discharged without destroying our constitutional freedoms:

> There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the

30. *Id*. at 130 (Hoffmann, Lord, dissenting).
31. *Id*. at 130–131.

> United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: "Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours."
>
> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaeda.[32]

Some of the detainees found the physical and mental rigors of prison life too much for them. In the light of the judgment of the United Kingdom's highest court, the Government has now revoked the executive orders to detain these men, and they have been released, bowed, broken, and it would seem, incapable of posing any danger to the State.

In August 2004, in yet another appeal from the Special Immigration Appeals Commission, the Court of Appeal was asked to consider the lawfulness of a certificate issued by the Home Secretary in relation to a number of North African Muslims, suspected of links to al Qaeda, who were ordered to be detained indefinitely without trial.[33] They claimed that the Home Secretary's suspicions were based in part on evidence obtained in Guantanamo Bay from other individuals as a result of torture and ill treatment. The Court accepted that whilst the European Convention on Human Rights permits, in prescribed circumstances, a member state to derogate from Article 5 (right to liberty and security), it cannot derogate from Article 3, which prohibits torture. But here the detained men had not been tortured. The court therefore concluded (by a majority), that the Home Secretary was entitled in principle to found his suspicions on evidence that had or may have been obtained through torture of a third party by agencies of other States over which he had no power or direction. "If [the Home Secretary] has neither procured the torture nor connived at

32. *Id*. at 131–132.

33. *A v. Sec. of St. for the Home Dept.*, [2004] EWCA CIV 1123, ¶¶ 1, 63 (302–303) (App. Civ. Div.).

it," maintained one Court of Appeal judge, then "he has not offended [any] constitutional principle. . . ."[34] This decision is soon to be considered by the Judicial Committee of the House of Lords.

You have listened to me with great courtesy and patience over the last thirty-five minutes. Time, and an acute awareness of your rights under Article 3 of the Convention, does not allow me to deal with the Government's proposals for the introduction of National Identity cards, nor the compilation of a national DNA data base. Any discussion about new rules in relation to asylum and immigration or the eradication of safeguards in the extradition process must be postponed for another day.

Tomorrow, this university has organized a conference that asks the question: "In the age of terrorism, where should advocates stand?" May I be permitted to answer? Stand firm. Stand up for the constitutional rights and obligations that served our forefathers so well, and which, with careful adaptation, will also serve us. Stand up for judges who use their powers to temper the decisions of ideologues and vote-catching politicians. Stand up for decency and tolerance and justice—indeed for all the qualities of character possessed of the man in whose name this inaugural lecture series is dedicated: William Reece Smith.

I do not know what those great jurists whose portraits line the walls of Gray's Inn would have made of the startling transformation of our system of criminal justice. Nor do I know how they would have regarded the evolving constitutional battle between judges and ministers over who makes the law. Of one thing I am certain: If they were to hear the promises of presidents and prime ministers to take liberty to the darkest corners of the earth, they would be united in the view that liberty, like charity, begins at home.

34. *Id*. at ¶ 253.