

**A War on Terror or a War on Justice?
Terrorism, War and the Rule of Law
by Geoffrey Bindman**

Presented at London South Bank University, Tuesday 8 February

In recent years, and particularly since the attack on Washington and New York in September 2001 we have seen a steady erosion in the legal safeguards previously available to those suspected of crime. At the same time, the powers of the government and the executive to interfere arbitrarily with the lives of individual citizens have been increased. This has been done in the name of the greater protection of the public against the threat, which is labelled terrorism.

But the liberty of the subject has been a fundamental value in Britain for centuries. It stems from Magna Carta in 1215 and the remedy of habeas corpus first enshrined in the Habeas Corpus Act of 1679. Since 1950, when Britain took the lead in creating the European Human Rights Convention freedom from arbitrary arrest and detention has been the right of everyone present in the territory of Britain or any other state party to the Convention.

Magna Carta says "No freeman shall be taken or imprisoned or diseised or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgement of his peers or the law of the land." Here we see the origin of jury trial and indeed of the rule of law. G.M.Trevelyan said of Magna Carta: "a process had begun which was to end in putting the power of the Crown into the hands of the community at large." It is possible to be sceptical about it – after all it could also be seen as no more than a power struggle between the King and a handful of rich landowners – but, as Trevelyan also says: its historical importance lies not only in what the men of 1215 meant by its clauses, but in the effect it has had on the imagination of their descendants."

The belief by governments in threats of violence from an unseen enemy is not new. A useful illustration is the attitude of the government of William Pitt to the threat of revolution towards the end of the 18th century. It is hardly surprising that news of the French Revolution in 1789 caused consternation among the ruling elite in Britain. Nor should one be surprised that others were inspired by the overthrow of a monarchy to press for similar reforms in their own country. Crowds at public meetings demanded democratic reforms. The government panicked and several of the leaders of the reform movement were arrested and charged with treason.

The great treason trials of 1794 are a landmark in the history of civil liberties. The government claimed no power to detain without trial. They launched a prosecution for treason. The indictment asserted a plan to seize power and steps to carry it out. It was alleged that pikes and knives had been manufactured and gangs of men had been recruited and given military training. The evidence came from spies employed by the Home Office who had infiltrated the meetings of the London Corresponding Society, the organisation campaigning for electoral reform of which the main defendant, Thomas Hardy, was the secretary.

Unfortunately for the prosecution, its witnesses were unconvincing and their evidence collapsed under cross-examination from the great civil rights advocate Lord Erskine. The jury acquitted all the defendants. The threats to the security of the nation never materialised.

In the next century more protest gained some of the reforms of Parliament which had earlier been resisted, but not before Napoleon caused new fears of foreign invasion and new repression from government, leading to the suspension of habeas corpus in 1816 and more trials for sedition and treason.

Overriding habeas corpus legitimised executive detention. In 1871, a statute authorised detention for a limited period of those suspected of planning armed insurrection in pursuit of Irish independence. Then at the outbreak of the First World War the Defence of the Realm Act 1915 set the pattern with which we are familiar to-day. Broad powers were given to the executive to authorise internment on the instructions of the Home Secretary. The Bill was

rushed through Parliament in a single day under the pressure of war panic. As Professor Brian Simpson remarks,^{1[1]} the Act “radically altered the British constitution for the duration of the emergency, the executive became the legislature, and Parliament declined into a relatively unimportant sounding board for public opinion.”

An Order in Council authorised the Home Secretary to impose internment or restrictions on residence or movement on the recommendation of military or naval authorities but the main use of these powers was to detain British residents of German descent, who were deemed by the Home Secretary to be “of hostile origin or associations”. A large number of people were detained many of them Irishmen suspected of involvement in the Easter Rising of 1916.

These extraordinary powers were created without Parliamentary debate as delegated legislation and it was argued by some that Parliament could not have contemplated that so profound a constitutional change would be imposed. The argument that the relevant regulation was ultra vires was taken to the House of Lords in *ex p. Zadig* but then, as subsequently, the courts declined to interfere. Only one judge, Lord Shaw heroically dissented, asserting that “Parliament never sanctioned either in intention or by reason of the statutory words employed in the Defence of the Realm Acts, such a violent exercise of arbitrary power.”

It is impossible to say whether any of those detained posed any genuine threat to the security of the state but it seems highly unlikely. At least the power of arbitrary detention came to an end when the war ended in 1918 but when the second world war began in 1939 plans were already well advanced to reinstate it. An Emergency Powers (Defence) Act was passed a week before the war started. It gave rise to the notorious regulation 18B, which authorised the Home Secretary to lock up any person indefinitely merely by claiming reasonable cause to believe that he or she was “of hostile origin or associations”.

Within months, hundreds of people were detained. As early as April 1939 ^{2[2]}the Home Office had arranged accommodation for 18,000 detainees, though the number in fact never approached that figure. Obviously the intention was to disable known Nazis or their sympathisers. Of these Sir Oswald Mosley, leader of the British National Party and an avowed supporter of Hitler was the best known but internment embraced many of those who far from supporting the Nazi enemy were German Jews who had fled to Britain as refugees from persecution.

One Jewish detainee, Robert Liversidge, challenged his internment in the courts. The main legal issue was whether the decision of the Home Secretary was subject to review by the courts at all. Was the requirement of “reasonable cause to believe” justifiable? In other words could the courts assess the reasonableness of the cause and overrule the decision if they disagreed with the Home Secretary’s judgment or was the Home Secretary himself the sole judge of his own reasonableness?

In a shameful abdication of its constitutional role, the House of Lords again declared its impotence to intervene. The brave dissenter on this occasion was Lord Atkin, whose opinion is now famous as a brilliant piece of writing as well as heartfelt defence of the rule of law. He made the simple point that the condition on the exercise of the Home Secretary’s discretion, that he have reasonable cause, was an objective limitation which precedent and common sense required to be determinable by the court. But of lasting value is this vigorous declaration: “In this country amidst the clash of arms the laws are not silent... It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”

The effect of Liversidge and Anderson was to leave untouched the Home Secretary’s arbitrary power. We now know that he used it to detain thousands of innocent people on the basis of

rumour subsequently found to be false. The central myth was the claimed existence of a "Fifth Column" a secret organisation of Nazis planning sabotage within Britain. No such organisation ever existed. Many of these detained were eventually released while the war was still in progress.

Mosley was released in November 1943. It is thought that Winston Churchill himself made this decision. He had become increasingly uneasy about the detentions. He had a strong sense of history. He wrote to the Home Secretary: "The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement of his peers, is in the highest degree odious, and is the foundation of all totalitarian government whether Nazi or Communist."

Before the end of the war all detainees were released and 18B effectively abandoned. Professor Simpson concludes^{3[3]} that very many of those detained were in no sense significantly dangerous and that the war would not have lasted an extra day had the vast majority been left at liberty. He also comments, "You can never really trust security services, for they are in the business of constructing threats to security, and the weaker the evidence the more sinister the threat is thought to be."

These prophetic words bring us neatly to what is happening today. After 9/11 we were told by Mr. Bush, and our own leaders, that we were at war again. This time not against a nation state like Germany, but against an amorphous concept called terror. Of course 9/11 was not the beginning. The Prevention of Terrorism Act in 1984 banned membership of certain Irish organisations and allowed an extended period of arrest of certain suspects before they had to be brought before a court.

This originally temporary law became permanent and was expanded into the Terrorism Act 2000, which introduced a broad definition of terrorism and a number of new offences associated with it. It also widened the scope of the law beyond Ireland to cover the world at large. It proscribed a long list of organisations claimed to support terrorism abroad, though many of them disputed this claim.

Support for such organisations was made a criminal offence. Let me give you an example of the breadth of this law. My firm was asked to advise one of these organisations and at a conference with counsel in Matrix chambers we suddenly realised that we were committing the criminal offence of attending a meeting of more than 3 people to promote the interests of a banned organisation. We wrote confessing our crime to the Attorney-General who assured us we would not be prosecuted.

Before 2000 Britain was home to a number of liberation movements, people who sought political change abroad of which we might not approve but we were a free country. The Terrorism Act banned Al Qaida and few would complain about that, but it also established a principle of suppressing political freedom, which would have criminalised support for the ANC. We should not forget that Margaret Thatcher described Nelson Mandela as a terrorist. By the definition in the Terrorism Act he was. And of course the criminal law already provided comprehensive sanctions against violence within our domestic jurisdiction. So by 9/11 we already had in place a powerful armoury of legal weapons to meet any hostile action.

What 9/11 changed was not the reality of the danger, which our world has always faced from violent conflict but attitudes in the United States towards political violence which it had never experienced before within its own homeland. Internment was not new: thousands of Japanese citizens had been arbitrarily arrested and detained in the Western United States in World War II. What was new was the presence in Washington of a particularly xenophobic administration with scant regard for constitutional history and a public willing to see all restraint abandoned in the pursuit of its own safety and retribution against an unseen enemy.

The result was a massive assault on Afghanistan and Draconian legal measures at home attempting to deny all legal safeguards to all those deemed by the executive to pose a threat

to security. The so-called PATRIOT Act embodied these legal measures and soon in Britain it was mirrored by the Anti-Terrorism Crime and Security Act 2001.

The measures in Britain generally fall short of those in the United States in terms of their invasion of the rule of law and civil liberties. The extraordinary legal black hole created by the US government at Guantanamo has no counterpart in Britain in its flagrant violation of the safeguards in the Third Geneva Convention. For prisoners taken in armed conflict. Both the detention and the treatment of those prisoners, whether or not they have been subjected to torture as alleged, has no shadow of legal justification, as the US courts are now belatedly beginning to acknowledge. And it still seems that a large number of people are detained without charge in prisons on the US mainland under the executive detention powers granted to the President by Congress in the aftermath of 9/11.

The one parallel with Guantanamo is in part 4 of ATCSA, which empowers the Home Secretary to certify that he reasonably believes a non-citizen to be a suspected international terrorist, and to deport such a person or to detain him or her indefinitely without charge or trial. The power of the Home Secretary to remove from the UK those non-citizens whose presence he deems to threaten national security is a longstanding feature of immigration law. The power of the courts to review such decisions has always been a limited one.

Moreover, the power to remove was always accompanied by a power to detain pending removal. That power is specifically exempted in article 5 of the European Human Rights Convention from the general prohibition on detention without trial and conviction. The government's dilemma arose because sending the immigrant back to his own country would put him at risk of torture or other inhuman or degrading treatment. That would be a breach of article 3 of the Convention. Since removal was not possible, detention pending removal was not an option.

The solution chosen was to opt out of or derogate from article 5 of the Convention: but this can only be done under article 15 of the convention if there is a war or public emergency threatening the life of the nation, and then the measures taken must be limited to the extent strictly required by the exigencies of the situation.

Parliamentary unease at this proposal led to a number of compromises. Part 4 was to be reviewed annually and was to expire in 2006. Also, of course, the role of the Special Immigration Appeals Commission provided a form of appeal in every individual case. In addition, a committee of privy counsellors, under Lord Newton, was required to review the operation of part 4.

None of this of course meets the fundamental objection. For the first time since the Second World War the executive was given power to detain indefinitely without a charge being laid and crucially without the detainee having the opportunity of answering the evidence by which the detention is justified.

The former Home Secretary, David Blunkett, in a discussion paper issued in February 2004 [4] stressed the need to avoid unacceptable restrictions on our freedoms. The paper identifies certain rights as non-negotiable, where we cannot compromise on the principles, including the right to life and the right to a fair trial, but inexplicably omits the right to liberty and security of person. Surely this is equally non-negotiable.

The answer to the Government's dilemma is clear: to charge those believed to pose a threat to our security with the appropriate offence and bring them before a court. It is difficult to imagine that there is no suitable offence since the threat must arise from some connection with terrorism within the wide scope of the Terrorism Act. Lord Carlisle, who had also been appointed by the government to monitor the working of part 4, has suggested the creation of a new offence of acts preparatory to terrorism but neither the Newton Committee, which reported in the summer of 2004, nor the Parliamentary Joint Committee on Human Rights, which has also criticised part 4, considered that any new offence was needed.

The obstacle to prosecution is not the absence of an offence but that the evidence of it is inadmissible (because it has been obtained by telephone tapping) or the authorities do not wish to disclose the intelligence sources from which it has been obtained.

It has been argued that the supervisory role of SIAC is an adequate substitute for putting the accused on trial. It resembles a trial because a special advocate is present at closed hearings on behalf of the detainee and has access to all the evidence. But the special advocate is not allowed to talk to the detainee after seeing the closed evidence, so the detainee has no opportunity to challenge it. For this reason, two of the special advocates have now resigned.

An article in the London Review of Books on 5 August 2004 by Lucy Scott-Moncrieff, solicitor for detainee Mahmoud Abu Rideh, paints a very disturbing picture of the circumstances of his detention. She summarises the position as follows: "It is true that the SIAC was able to consider all the evidence against Abu Rideh, but it was not able to consider his own comments on that evidence because Abu Rideh was not allowed to know what that evidence was, and so the hearing could not be described as a fair one in accordance with 'our traditional view of the rule of law.'" Abu Rideh has now been released.

We are fortunate that in a magnificent decision, the House of Lords on 16 December 2004 upheld appeals by nine detainees against their detention. By a majority of 8 to 1, the Lords quashed the order derogating from article 5 of the Convention and declared the detention power in part 4 incompatible with articles 5 and 14 of the Convention. They held it to be disproportionate and discriminatory.

The effect of the decision was to render the detentions unlawful as a violation of the Convention. However, because of the structure of the Human Rights Act, which does not permit the courts to invalidate legislation but merely to make a declaration of its incompatibility with the convention, part 4 remains in force pending its repeal.

As a technical matter of law, therefore, the government can justify delaying the release of the detainees, but it is quite clear that they must take steps to comply with the Lords ruling either by fresh legislation or by using the powers in section 10 the Human Rights Act to amend the ATCS Act to remove the incompatibility. If they fail to do so promptly they are likely to face a challenge in the European Court of Human Rights.

Repeal is therefore urgent and it is striking that some detainees have already been released, without apparent damage to our security. To facilitate prosecutions of those who may pose a genuine threat, evidence obtained from telephone tapping should be made admissible. There is support for this change from the police and from Liberty. The one surviving argument against prosecution in the ordinary courts is that it would mean revealing the identity of secret service personnel or secret service methods, which would put lives in danger. In an extreme case a judge could be authorised to allow the identity of a witness to be concealed but this must be a matter for judicial decision rather than for the executive.

The government has so far shown reluctance to take this obvious course. They will seek encouragement to resist it from the reasoning of the House of Lords. Apart from Lord Hoffmann, the majority accepted the government's argument that there was a public emergency justifying derogation from article 5. Their objection to derogation was that part 4 was not a measure required to meet the demands of the emergency: it was a disproportionate response because it contained an inherent inconsistency.

Detainees who wanted to leave the country were free to do so and might then be as great a danger to our security as if at liberty in Britain. Moreover, the detention power applied only to non-citizens, yet British citizens could be equally dangerous. Discrimination on grounds of nationality undermined the credibility of the claim that detention was a necessary response to the alleged threat. The difficulty with this approach by the Lords is that detention without trial is not ruled out in all circumstances. Nor are measures that may be equally objectionable falling short of detention ruled out.

Instead of acknowledging that part 4 is a surrender of principle the government seems to be seeking ways of by-passing the Lords judgement by floating such proposals as house arrest, extending ASBOs, and curfews, all of which could like part 4 detention be imposed by executive decree denying independent adjudication or access for the accused person to the evidence against him.

Worst of all the charge of discrimination could be cynically met by subjecting British citizens to the same unprincipled treatment as part 4 currently applies to foreigners. Unfortunately, the view of the majority Lords may encourage the government to believe that it can defeat a further challenge in the courts.

Of the nine Law Lords only Lord Hoffmann rejected the derogation on the ground of constitutional principle. In his view, merely extending the power of detention to United Kingdom citizens could not cure the defect. Echoing Lord Atkin he identified the real threat to the traditional laws and political values of the nation as coming not from terrorism but from laws such as these.

In two world wars and now in the so-called war on terror the traditional openness and independence of our judicial system has been sacrificed to the dubious claims of secrecy by an increasingly powerful executive.

The Hutton and Butler inquiries have demonstrated the folly of relying on secret reports from the security services to justify the war in Iraq. Yet it is now clear that it was a gross violation of international law. There was no threat of imminent attack, which would justify self-defence; nor was the war unequivocally authorised by the Security Council. The United Nations Charter permits nations to go to war only if one of those two conditions is satisfied.

It is a disturbing feature of current governments in both Britain and the USA, – the nations which may have most to be proud of and to cherish in their legal traditions – that in the guise of protecting the public they are ready to abandon principles which are the hallmark of our democracies. These are the values that we seek to defend and to export to those countries that we see as less fortunate. We are entitled to expect our government to respect the rule of law and to understand the lessons of our history.