

# Liberty and Terror

## Lord Hoffmann

1. On 7 July 2005 four suicide bombers set off bombs on three London Underground trains and a bus, killing 52 people and injuring another 770. A fortnight later, on 21 July 2005, four more suicide bombers attempted to set off bombs on 3 Underground trains and a bus, but fortunately they failed to explode. On 5 August the then Prime Minister Mr Blair gave a press conference.<sup>1</sup> He announced a number of new measures proposed or under consideration to provide greater protection against terrorism. In the course of his statement he said “the rules of the game are changing.” This remark should be read in its context, although that is a courtesy which Mr Blair does not always extend to others, and the context was proposed changes in declared immigration policy to make it clear that acts such as fostering hatred or advocating violence to further one’s beliefs would be regarded by the Home Secretary as a reason for deporting an alien on the statutory ground that his removal would be, in the language of the Immigration Act, “conducive to the public good”. That was a perfectly legitimate statement of policy and although one of my more solemn

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<sup>1</sup> <http://www.number-10.gov.uk/output/Page8041.asp>

colleagues criticised Mr Blair for using the image of a game,<sup>2</sup> the occasion was after all a press conference and not a sermon or even a legal lecture.

2. Nevertheless, that particular sound bite has frequently been quoted as signalling a more general view on the part of the Prime Minister that the laws which protect civil liberties such as freedom of speech and imprisonment without charge should be modified in the interests of protecting the public against terrorist violence. I do not think that Mr Blair would have disavowed this opinion, which was shared by other members of his government and, I should have thought, a considerable majority of the public. The then Home Secretary, Mr Charles Clarke, frequently pointed out that the right to life was also an important civil liberty and that the Government had a duty to protect the lives of citizens. It was necessary to have what the Government described as a “rebalancing” of the claims of the people to security on the one hand and the claims of suspected terrorists to civil liberties on the other.

3. The main obstacle to this rebalancing was seen as the Human Rights Act 1998, which had been introduced by the government soon after coming to power in 1997 and came into force in October 2000. Its effect was to enact as part of UK domestic law the same civil rights as were contained in the European Convention on Human Rights, to which the United Kingdom had been a contracting party for 50 years but which had previously been enforceable only as a matter of international law by the European Court of Human Rights in Strasbourg. Under the 1998 Act, it became possible to argue in a domestic court that legislation was incompatible with a Convention right and obtain a declaration to that effect without going to Strasbourg.

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<sup>2</sup> Lord Steyn in the *Independent*, 10 October 2005 (<http://www.independent.co.uk/news/people/lord-steyn-judges-are-not-the-servants-of-the-government--our-duty-is-to-the-public-510311.html>)

However, by a uniquely British compromise, the effect of the declaration of incompatibility is not to invalidate the non-compliant legislation. The declaration is in theory merely advisory and it remains the prerogative of Parliament, as a sovereign legislature, to decide whether to amend or repeal the Act to remove the declared incompatibility.

4. But the practical effect of the 1998 Act was demonstrated in a case in December 2004 concerning the power given to the Home Secretary by Part IV of the Anti-Terrorism, Crime and Security Act 2001 to detain foreign nationals, whom he certified as suspected of terrorist connections, for an indefinite period without charge.<sup>3</sup>

The Bill which became the Act had been introduced into Parliament on 12 November 2001 and passed through all its stages with great rapidity to Royal Assent on 14 December 2001. On the application of nine persons detained under the Act in the high security Belmarsh Prison, a special sitting of an appellate committee of nine members of the House of Lords decided that the power of detention was incompatible with the Convention right to liberty.

5. The reaction of the Home Secretary Mr Clarke, who had been in office for only a day (after his predecessor Mr Blunkett had resigned for reasons to do with his private life), was to say that the applicants would remain in prison until the Government had decided what to do:

“It is ultimately for Parliament to decide whether and how we should amend the law. The Part 4 provisions will remain in force until Parliament agrees the future of the law. Accordingly I will not be revoking the certificates or releasing the detainees... We will be studying the judgment carefully to see whether it is possible to modify our legislation to address the concerns raised by the Law Lords.”<sup>4</sup>

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<sup>3</sup> *A v Secretary of State for the Home Department* [2005] 2 AC 68.

<sup>4</sup> *House of Commons Debates* 16 December 2004, col 151 WS.

6. The Foreign Secretary Mr Straw, who is now the Lord Chancellor and has a statutory duty to “uphold the continued independence of the judiciary”<sup>5</sup>, went rather further. He said that —

“The law lords are simply wrong to imply that this is a decision to detain these people on the whim or the certificate of the home secretary... [I]t was for Parliament, and not judges, to decide how best Britain could be defended against the threat of terrorism.”<sup>6</sup>

7. Over the next five weeks the Government considered what it should do. Eventually the Home Secretary announced on 26 January 2005 that the legislation would be repealed and replaced by what were called control orders, a form of modified house arrest which required suspects to live in designated places and restricted their movements to make it easier for the security services to keep them under surveillance. These had their own legal difficulties which I shall mention later, but the Government at any rate accepted that removing the declared incompatibility of the previous Act was the better part of valour.<sup>7</sup> No doubt it thought that the political cost of simply ignoring the decision of the House of Lords was too high, particularly since the applicants would be bound to take their case to Strasbourg and if that court took the same view as the House of Lords, the United Kingdom would be obliged as a matter of international law to remove the incompatibility. It was notable that no other European country, including Spain, which had suffered a bomb attack in Madrid on 11

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<sup>5</sup> Section 3(1) of the Constitutional Reform Act 2005

<sup>6</sup> BBC News 17 December 2004 ([http://news.bbc.co.uk/1/hi/uk\\_politics/4103987.stm](http://news.bbc.co.uk/1/hi/uk_politics/4103987.stm)).

<sup>7</sup> Mr Blair nevertheless insists that the Law Lords ‘struck down’ the 2001 detention powers: see his article in the *Sunday Times*, 27 May 2007 ([http://www.timesonline.co.uk/tol/comment/columnists/guest\\_contributors/article1845229.ece](http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article1845229.ece)).

March 2004 which killed 191 people and injured 1,755, had considered it necessary to introduce such powers of detention.

8. Nevertheless, the government plainly felt frustrated at being prevented from doing what they thought necessary to protect people from terrorism. They vented their irritation upon two targets. One was the Human Rights Act and the other was the unrealistic attitude of the judiciary – “out of touch” was the usual phrase. The Human Rights Act had been introduced by the government in 1998 with a certain amount of fanfare and self-congratulation, but Mr Blair made no secret of the fact that he thought it had been a mistake for which responsibility lay with Lord Irvine, his Lord Chancellor and former pupil master, whom he had dismissed on 12 June 2003. But there was not much to be done about the Human Rights Act. Repeal was politically difficult and in any case would have done the government little good, since the United Kingdom would still have been party to the European Convention. The effect of repeal would have meant that the application of the Convention to the United Kingdom was once again decided exclusively by the Strasbourg court, consisting almost entirely of foreign judges with little knowledge of our legal system, and without any guidance from decisions by our own courts. The inconvenience of that situation was the main reason for introducing the Bill which the government had given in its 1998 White Paper called *Bringing Rights Home*.

9. A more promising target was the judiciary. Mr Blunkett, who was Home Secretary from 2001 to the end of 2004, made a practice of denouncing judges who had decided cases against his department to the popular press in offensive and lurid language. His successor Mr Clarke was less abrasive. He thought that the judges could

be persuaded to make more practical and realistic decisions if he was able to explain to them the problems of dealing with terrorism. But when he proposed to Lord Bingham, the senior Law Lord, that a meeting with the Law Lords should be arranged, he was surprised and offended when Lord Bingham said that he did not think that would be appropriate. He was unimpressed with the argument that there was little he could say at such a meeting which he could not say on affidavit or through counsel in an individual case. Nor did he see any difficulty for the Law Lords in having to commit themselves in advance to the legality of his proposed anti-terrorist legislation or explain to a party to proceedings against the government that their view of his case had been influenced by a private conversation with the opposing party. Mr Clarke still adheres to this view and in 2007 told the House of Lords Select Committee on the Constitution that

“it is now time for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances”<sup>8</sup>

He described the notion that the independence of the judiciary might appear to be compromised by such discussions with the government as “risible”. The problem was, he said, that “the judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security”.

10. Government ministers obviously feel very strongly that, at any rate in the new world after 9/11, the courts should not meddle in matters of national security. That is perhaps not surprising, because the government is responsible for national security

and very conscious of the criticism which it may incur when something goes wrong. Ministers honestly believe that their acts and measures are essential in the national interest; they are responsible to Parliament and in the case of primary and most secondary legislation, they have secured the approval of Parliament. The judges, as Mr Clarke rightly said, are not responsible to anyone.

11. This state of affairs is frequently described, in a somewhat Panglossian way, as a healthy state of tension and of course it is true that if the government was invariably pleased with the outcome of its litigation, the judges would be unlikely to be performing their proper role. On the other hand, it might avoid unnecessary exasperation if their proper role was better understood, not only by government ministers but also by some judges and the more enthusiastic exponents of the judicial mission fearlessly to uphold freedom and rights of the individual.

12. In general terms, the judicial function in such cases is easy enough to explain. In the case of challenges to executive acts, it is to decide whether the executive has acted lawfully, within its powers under the prerogative or statute. In the case of primary legislation, it is to decide whether it can be interpreted compatibly with Convention rights. If it can, the duty of the court under section 3 of the Human Rights Act is to give it such an interpretation. If not, the duty of the court is to declare it incompatible.

13. In carrying out these functions, the first duty of the court is one of interpretation. It must interpret the law which confers power on the executive or the articles of the Convention which protect the individual. The judges approach this part of their task in the same way as they approach the interpretation of any other law,

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<sup>8</sup> Sixth Report (July 2007) paragraph 94.

document or indeed verbal communication of any kind. The question is always what, taking into account the context and background to the utterance, one would reasonably have understood the author or notional author to have used those words to mean.

14. Thus there are no special rules of interpretation which apply in cases of terrorism or state security. As Lord Atkin famously said in *Liversidge v Anderson*<sup>9</sup> during the Second World War:

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.”

15. The language Lord Atkin had in mind was English. The question is always the interpretation of English words. On the other hand, one must have regard not only to the meaning and syntax of the words, but also, as in the interpretation of any other utterance, to the background to the legislation and the purpose for which it was enacted. The *Liversidge* case was concerned with a question of construction, namely whether the words “the Secretary of State has reasonable cause to believe any person to be of hostile origins or associations” in regulation 18B of the Defence Regulations required the Secretary of State, if challenged, to satisfy a court that he had reasonable cause or whether he was himself the sole judge of this question. The majority, who decided the case in the latter sense, together with Humpty Dumpty, whom Lord Atkin said was the sole authority for their construction, have been treated with derision by posterity. In 1979 Lord Diplock said that “the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right”.

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<sup>9</sup> [1942] AC 206, 244.

Humpty Dumpty was, however, a better philosopher of language than Lord Atkin seems to have thought and the majority in *Liversidge* were applying what Lord Diplock would have called a purposive construction to a badly drafted Order in Council. Viscount Maugham said<sup>10</sup> that

“if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.

16. Whether one agrees with the outcome or not, that seems an entirely orthodox approach to construction and the *Liversidge* case raised no point of principle. Of course, not everyone is willing to accept that judges approach questions of construction in this way. Libertarians believe that the majority in *Liversidge* were, as Lord Atkin said, more executive minded than the executive and authoritarians like Mr Blunkett believe, as he said in a bad-tempered article written for the London *Evening Standard* when he was Home Secretary, that “Judges now routinely use judicial review to rewrite the effects of a law that Parliament has passed.”<sup>11</sup>

17. Two recent cases on the terrorism legislation in the United Kingdom have given rise to interesting questions on the interpretation of the Convention. The first was the *Belmarsh* case, in which the applicants were being held without charge or trial. That was admitted to be contrary to article 5(1) of the Convention, which says that no one shall be deprived of liberty except in certain specified cases such as being arrested on suspicion, charged or convicted of an offence. The government claimed to be entitled to derogate from article 5(1) on the ground that there was, in the words of

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<sup>10</sup> [1942] AC at p. 219.

<sup>11</sup> “*I Won’t Give in to the Judges*” by David Blunkett, Home Secretary, *Evening Standard* 12 May 2003 (<http://www.mensaid.com/community/viewtopic.php?f=47&t=2795>)

the Convention, a “public emergency threatening the life of the nation”. What did that mean? The Government said it meant that there was a serious threat of a terrorist attack. Everyone accepted the existence of such a threat, which was confirmed in gruesome reality in July 2005, six months after the case had been decided. But did such a threat amount to a threat “to the life of the nation”? The Convention was drafted immediately after the Second World War. In that context, I thought that the “life of the nation” meant the United Kingdom as an independent civil society; democratic, liberal, in communion with its history. In that sense, the life of the nation was threatened by Nazi Germany. Was it threatened by terrorists? The government did not suggest that it was. The British people are phlegmatic, resilient and proud. The last thing that would have occurred to them after the London bombings was that their national identity was under serious threat. But the government’s case was that a threat of a terrorist atrocity was enough. In my opinion (although the rest of my colleagues did not express a view on the point) this was an error of law, a mistake about the meaning of the Convention.

18. The other case raising a point of construction was the control orders case, in which the question was whether a person subject to a control order, which severely restricted his freedom of movement and private life, had been deprived of his liberty within the meaning of the Convention. What was meant by “deprived of his liberty”? Liberty is a word which can be given a broad or narrow meaning, according to context. The structure of the Convention is that a number of rights which might be regarded as liberties are contained in specific articles: for example, freedom of association, freedom to go to a church or mosque and practice one’s religion, freedom

from interference with private life and, in a Protocol which the United Kingdom has not ratified, freedom of movement. All these specific rights are qualified; the Convention says that they can be overridden by other public interests, especially national security. Only the right to liberty is an absolute right, which, in the absence of a derogation, trumps even national security. I therefore thought that the context required liberty to be given a very narrow meaning. To be deprived of your liberty means to be completely deprived of your liberty, to be in prison or kept in conditions equivalent to a prison. Because I had defined the circumstances in which the government could derogate from this right very narrowly in the *Belmarsh* case, it was all the more important not to give too wide a meaning to the concept of liberty in the control orders case. On the facts of our cases, when the control orders required the subjects to live at home but allowed them to go out and wander about at liberty for at least six hours a day, I did not think that they could be said to be in prison. A majority of my colleagues thought it had a somewhat wider meaning, although not much.

19. The reaction to these two judgments was such that it was sometimes difficult to believe that either their critics or their supporters had read them. Most of the critics thought that in the *Belmarsh* case I had dismissed the danger of a terrorist attack. When the bombing of July 2005 occurred, Mr Blair said that he doubted whether I would now say what I had said in December 2004. On the other hand, admirers of the judgment were disappointed when I said that I thought that the control orders were lawful. On the basis of the *Belmarsh* case I was taken to be a libertarian and therefore expected to hold any restriction on liberty in the broadest sense to be incompatible

with human rights. The fact that the issues in the two cases raised different, indeed antithetical, questions did not seem to matter.

20. Once one has decided what the law means, the next stage is to decide whether it applies to the facts of the case. The relevant problem here is the extent to which certain questions concerning, for example, international relations or defence and national security, are capable of being judicially reviewed. It used to be thought that they were entirely a matter for executive decision and a judge could not say anything about them. A good example is *Chandler v DPP*<sup>12</sup> in which some members of the Campaign for Nuclear Disarmament staged a demonstration at an airfield with a view to obstructing the use of the nuclear bombers. They were charged under the Official Secrets Act with having trespassed on the airfield for a “purpose prejudicial to the safety or interests of the State.” They wanted to call evidence that obstructing nuclear bombers was not prejudicial to the safety or interests of the State. On the contrary, the State would be much safer without them. But the judge ruled that evidence on this point was inadmissible. It was not a question which could be left to the jury. Viscount Radcliffe said<sup>13</sup>:

“If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's Ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different.”

21. That might suggest that there are certain areas of the prerogative powers of the Crown, like defence and foreign relations, from which the courts are simply excluded. But that, in my opinion, would be misleading. In *Chandler's* case Lord

Devlin put the matter rather differently. He agreed that the jury could not decide whether having nuclear weapons was in the interests of the State, but gave a slightly different explanation:<sup>14</sup>

“[T]he principle is not peculiar to the exercise of the prerogative power. It applies wherever discretionary powers of management and control are given by statute, whether to the Crown itself or to one of its Ministers or to any public body. ... When Lord Parker of Waddington in *The Zamora* said that ‘Those who are responsible for the national security must be the sole judges of what the national security requires,’ he was not, I think, laying down any special constitutional doctrine about the powers of the Crown in relation to national security. He was simply stating the reason why the court should declare those powers to be discretionary.”

22. This has been an influential remark, and although in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 Lord Diplock, for some obscure reason (which may have been based on animosities dating back to when he appeared before Devlin J as the Commercial Judge), went out of his way to say that he wished to —

“put on record that after reading and rereading Lord Devlin's speech in *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, I have gained no help from it”

the same was not true of Lord Scarman, whose analysis followed that of Lord Devlin and has been followed in later cases. In particular, Lord Scarman said:

“where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist: in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is

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<sup>12</sup> [1964] AC 763.

<sup>13</sup> At p. 798

<sup>14</sup> At [1964] AC, pp.809-810.

established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable.”

23. In other words, the court will apply to decisions which involve questions of national security the ordinary principle of judicial review. It will decide whether the government has acted within its powers. But it will, in a case in which a question arises as to what the interests of national security require, recognise that the discretion of the Crown is so wide that, unless plainly irrational, a court would be bound to accept its decision as within its powers. Plainly irrational might be thought an impossibly high hurdle, but the majority decision in the *Belmarsh* case was to prove that it could be surmounted.

24. These principles were applied by the House of Lords in the case of *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in which the Home Secretary decided to deport an alien Muslim priest to Pakistan on the ground that his presence in the United Kingdom was not conducive to the public interest because he was recruiting and raising money for a terrorist organisation in Kashmir. The special tribunal which hears appeals from public interest deportations allowed his appeal on the ground that we had no national interest in what happened in Kashmir. The terrorists there did not threaten the security of the United Kingdom. But the House of Lords upheld the Secretary of State’s appeal on the ground that the tribunal had no basis for questioning the government’s decision that the public interest required that

we should co-operate with the Indian government against terrorists in Kashmir. It was within the government's broad discretion in these matters. There was nothing irrational in considering that our public interest was advanced by co-operation with India. In *R v Jones (Margaret)* [2007] 1 AC 136 we said the same about the decision to go to war in Iraq. If I may quote what I said about the prerogative powers of the Crown:<sup>15</sup>

“It is of course open to the court to say that the act in question falls wholly outside the ambit of the discretionary power. But that is not the case here. The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs. To say that these matters are not justiciable may be simply another way of putting the same point.”

25. Why do the courts recognise that these decisions are properly made by the executive? The formal answer, of course, is that the law says so: statutory powers of decision-making are conferred upon ministers and officials and the prerogative is the power of the Crown. But underlying these rules, which lend themselves to interpretation as conferring broader or narrower discretions, is the principle of the separation of powers. This is what the Home Secretary rightly meant when he said that judges are not responsible for the security of the state. Constitutional propriety requires that in such matters the broadest possible discretion should be vested in the government because it is responsible to Parliament and through Parliament to the people. I wrote my speech in the *Rehman* case at the end of July 2001, but the judgments were not delivered until October. I was able to add a postscript:

“I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national

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<sup>15</sup> At p. 172

security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.”

26. That might be thought to be an uncontroversial statement. However, as in the case of my decision in the control orders case, it caused alarm and disappointment among the defenders of liberty. I was surprised to read in a recent edition of a text book on constitutional law<sup>16</sup> that my decision in the *Belmarsh* case, which I thought was about the meaning of the Convention, could not be reconciled with my decisions in the *Rehman* case and the *Iraq war* case, which I thought were about the breadth of the discretionary powers of the Crown. I had apparently undergone a “violent change of mind”. I could not see how I could be said to have changed my mind when the issues in the latter cases were quite different. I can only assume that the political views of the authors led them to expect me to decide all cases against the government, whatever the issues might be.

27. Some commentators also have difficulty with the notion that in certain areas such as defence, foreign relations, town and country planning and choices about the expenditure of public money, decisions by Ministers responsible to Parliament have a constitutional legitimacy which judicial decisions do not. They are willing to acknowledge that judges should show what they call deference to the expertise of the

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<sup>16</sup> Turpin and Tomkins, *British Government and the Constitution* (6<sup>th</sup> ed 2007) at p. 767.

executive in matters in which the government has more experience and access to more information than the judges. But they regard this as a matter of practical concession rather than constitutional principle.<sup>17</sup> The implication is that if the judge has access to the same information as the executive and happens to have the training and expertise to make the decision, he can take over running the country. I do not agree. I think that the separation of powers is not a matter of concession by the judiciary. It is a legal principle. Of course its application may involve questions of judgment and degree but that is true of many legal principles.

28. In practice I think that, even without the benefit of face-to-face briefings and advocacy from the Home Secretary, the judges have understood tolerably well the problems which face the government in dealing with terrorism and its ultimate responsibility for the security of the state. They recognise the breadth and legitimacy of the Crown's discretion in these matters. Nevertheless, it is the inescapable duty of the judges to give effect to the law. The discretion of the executive, even on questions of national security in time of terrorism, is not without limits. That was made clear by Lord Devlin and Lord Scarman nearly half a century ago and was demonstrated by the decision in the *Belmarsh* case. The majority decision in that case was that, allowing the broadest discretion in matters of national security to the Crown, it was plainly irrational to claim that it was necessary to detain aliens without charge or trial but unnecessary to have the same powers over United Kingdom citizens. The government's claim that aliens presented a greater danger was rejected by the majority as incredible and was of course refuted by events six months later, when all four of the

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<sup>17</sup> See Professor Jeffrey Jowell, *Judicial deference: servility, civility or institutional capacity?* In [2003] Public Law 592 and Lord Steyn, *Deference: A Tangled Story* [2005] Public Law 346.

London suicide bombers turned out to have been British. I should point out that as a matter of constitutional law, the reasoning of the majority in the *Belmarsh* case was much bolder than mine. I decided the case as a point of construction of the Convention, which everyone would concede to be a paradigm judicial function, while the majority took the unusual, possibly unique, step of rejecting an executive decision on national security on the ground that it was irrational.

29. *Belmarsh* was a case in which the discretion of the executive in matters of national security was limited by the Convention in the interests of the liberty of the individual. It is limited by other absolute and non-derogable rights, such as the right not to be tortured. And, around the periphery of state security, there may be cases raising other human rights in which the courts may question whether decisions allegedly made on security grounds are necessary and proportionate, such as the employment of homosexuals in the armed forces. Contrary to the opinion of the government when it decided to abolish the judicial functions of the House of Lords, the separation of powers is not a rigid rule creating an impermeable membrane between the different branches of government but a principle of practical application. I think that, applied in this spirit, it works well enough, in good times and in bad. The British constitution has, after all, shown remarkable continuity and endurance over many centuries. It has adapted to the needs of changing times but there has never been any particular moment at which it has undergone radical change. There has never been a year zero. The British people value this continuity, this sense of their past reaching down to them and touching their lives today. What I hope to have demonstrated is that dealing with terrorism does not require a new paradigm of constitutional powers. The

basic rules of the game stay the same. Indeed, one may say that if they are changed in response to terrorism, we shall ourselves have destroyed the values, the liberal society, the nation whose life which we are claiming to defend.