

9-1-2007

Rule of Law Conference: Global Issues and the Rule of Law

Lord Chief Justice Nicholas Phillips of Worth Matravers
Lord Chief Justice of England and Wales

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [Constitutional Law Commons](#), [European Law Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Lord Chief Justice Nicholas Phillips o. Worth Matravers, *Rule of Law Conference: Global Issues and the Rule of Law*, 42 U. Rich. L. Rev. 37 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss1/4>

This Essay is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ADDRESSES

RULE OF LAW CONFERENCE: GLOBAL ISSUES AND THE RULE OF LAW

*Lord Chief Justice Nicholas Phillips of Worth Matravers **

About four months ago I was dining with many who are here this evening in my Inn in London, the Middle Temple. It was 400 years to the day that there had set sail from London three tiny ships, bound for Virginia to found a colony pursuant to a Charter granted by King James on 10 April 1606. They made landfall at Chesapeake Bay on 26 April 1607. The expedition was not an unequivocal success. Those who embarked on it hoped to find gold. Instead they found disease, and most of them died. The expedition was attributable in large measure to the enthusiasm of one of my predecessors as Chief Justice, Sir John Popham, and had the support of other distinguished members of my Inn. I do not know how many lawyers there were among the very first settlers, nor how concerned they were with the rule of law. One of them, a lawyer from the Middle Temple, George Percy, was to become a Governor of Virginia. Another member of my Inn, Sir Edwin Sandys, was responsible for the Virginia Charter of 1606.¹ This gave the first colonists “all the Liberties, Franchises and Immunities of English subjects,” but no political rights.² Much more sig-

* Lord Chief Justice of England and Wales. Educated at Bryanston School, Blandford, Dorset, and King's College, Cambridge. National service with the Royal Navy; Queen's Counsel, 1978; Recorder, 1982; Queen's Bench Division of the High Court, 1987; Court of Appeal, 1995; Lord of Appeal in Ordinary, 1999; Master of the Rolls, 2000.

1. CHARTER OF VIRGINIA (1606), *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3788 (Francis N. Thorpe ed., 1909).

2. *Id.*, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS,

nificant was the subsequent "Great Charter" of 1618,³ for which Sandys was also responsible. This entitled the settlers to institute a representative government under which they were assured freedom of speech, equality before the law, and trial by jury.⁴

This and the subsequent charters of the American colonies laid the ground for the Constitution of the United States. Lawyers trained at the Inns of Court in London (for it became common for the leading families in the colonies to send their sons across the Atlantic for this purpose) contributed greatly to these charters and, indeed, to the Constitution. Five members of my own Inn were signatories to the Declaration of Independence and no less than seven among those who signed the Constitution. It is that Constitution that embodies the rule of law in this country, and so we are celebrating this week the sowing of the seeds of the rule of law in the United States—seeds that were exported from my own country.

I first set foot on the eastern seaboard in time of war—when I landed in New York as an evacuee in 1940. In times of war, courts tend to be particularly diffident about questioning steps taken by the executive in the interests of national security. In the infamous case of *Liversidge v. Anderson*, the House of Lords held that the Home Secretary could not be required to provide any justification for his exercise of the right to detain a man without trial because the Home Secretary believed that this was necessary because of his hostile associations.⁵

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

AND OTHER ORGANIC LAWS 3783 (Francis N. Thorpe ed., 1909).

3. VIRGINIA COMPANY INSTRUCTIONS TO SIR GEORGE YEARDLEY (Nov. 18, 1618), available at <http://memory.loc.gov/cgi-bin/ampage?collId=mtj8&fileName=mtj8pagevc03.db&recNum=121.gif>.

4. *Id.*

5. [1942] A.C. 206 (H.L.) (appeal taken from Eng.) (U.K.).

There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive ministers have discharged their duties to the complete satisfaction of the people at large.⁶

Deference to the executive has not, I believe, been a notable feature of American jurisprudence. The difference between our two jurisdictions is, of course, that in this jurisdiction the rights of the individual are embodied in and protected by a written Constitution. And you have a Supreme Court with jurisdiction to protect those rights to the extent of striking down legislation that is unconstitutional.

In my jurisdiction the Constitution is largely unwritten. Parliament is supreme and the courts cannot refuse to give effect to legislation on the ground that it is unconstitutional.

Both our countries are now facing a new kind of conflict—that created by international terrorism. Yet despite the threat of terrorism, the United Kingdom courts are not showing the traditional deference to action taken by the executive in the interests of national security. The change in stance is largely attributable to the Human Rights Act 1998, which came into force in 2000.⁷ This Act was passed by the present Administration soon after it came into office. The Act allows individuals to invoke the provisions of the Human Rights Convention (“Convention”)⁸ in disputes with Government and requires judges to enforce Convention rights.

We cannot strike down legislation that conflicts with the Convention, but we can make a declaration that it is incompatible with the Convention. This is just about as good, because the Government up to now has always responded to a declaration of incompatibility by changing the offending law. More significantly, we now have to scrutinise executive action to ensure that it does

6. *R v. Sec’y of State, Ex parte Hosenball*, [1977] 1 W.L.R. 766 (C.A.) (Eng.).

7. Human Rights Act, 1998, c. 42 (Eng.).

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> [hereinafter Convention for Human Rights].

not infringe human rights. We can no longer hold that actions taken in the interests of national security by the executive are not justiciable if those actions are alleged to infringe individual human rights.

The consequence of this has been a series of decisions of the courts holding unlawful legislation, statutory regulations, and executive action designed to address the problem of terrorism. The Human Rights Convention, as interpreted by the European Court of Human Rights at Strasbourg, poses a problem for the Government.

The court has ruled in a case called *Chahal v. United Kingdom* that it is contrary to the Convention to deport an illegal immigrant if he will be at risk of torture or inhuman treatment if you send him home, however great a threat he may pose to your security.⁹ At the same time, it is contrary to the Convention to detain someone without trial simply because you have reasonable grounds to believe that he is involved in terrorism. The Convention permits a country to derogate from the latter obligation, but only “[i]n time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation.”¹⁰

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

It did so in respect of “foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism” or of being connected to terrorist groups and “who are a threat to the national security of the United Kingdom.”¹¹ Relying on this derogation, Parliament then passed an Anti-terrorism Act in 2001¹² that permitted an alien to be detained indefinitely if the Home Secretary reasonably suspected that he was a terrorist and believed that he was a threat to national security, but was unable

9. 23 Eur. Ct. H.R. 413 (1996).

10. Convention for Human Rights, *supra* note 8, art. 15.

11. Human Rights Act 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644 (U.K.), available at <http://www.opsi.gov.uk/si/si2001/20013644.htm>.

12. Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

to deport him because he would be at risk of inhuman treatment in his own country.

The Home Secretary immediately certified that a number of aliens fell within the scope of the new Act, and they were locked up.

It was made plain to them that if they wanted to go back to their own countries they were free to go. They did not do so. What they did was to exercise a right of appeal for which the Act made provision. The case is known simply by the initial of one of the appellants as A.¹³

The procedure governing this appeal was unusual, involving a special judicial tribunal, known as SIAC,¹⁴ with special powers. Evidence, disclosure of which would have adverse implications for security, can be put before SIAC as “closed” material.

This is not disclosed to the terrorist suspect. It is disclosed to a special advocate, whose duty it is to protect the suspect’s interests; but once he has seen the material, the special advocate is no longer permitted to communicate with the suspect.

This procedure was challenged in a subsequent case, which came before a division of the Court of Appeal over which I presided. It was argued that it infringed the suspect’s Convention right to a fair trial. We held that, in the particular circumstances, the procedure satisfied the test of fairness, but this is a point on which the House of Lords has yet to rule.

Let me return to the case of A. The appeal of the alien terrorist suspects detained under the 2001 Act went right up to the House of Lords—our most senior court. They sat nine strong, instead of the usual five. The appeals were allowed. The majority of the Lords accepted that derogation from the Convention was possible in that there existed a “public emergency threatening the life of the nation.”¹⁵ They held, however, that the terms of the derogation and of the Act were unlawful in that they went beyond what

13. *A v. Sec’y of State* [2004] UKHL 56, [2005] 2 W.L.R. 87 (appeal taken from Eng.) (U.K.).

14. “SIAC” stands for Special Immigration Appeals Commission. See Special Immigration Appeals Commission, <http://www.siac.tribunals.gov.uk/> (last visited Sept. 7, 2007).

15. *A*, [2004] UKHL 56, [16], [2005] 2 W.L.R. at 99 (quoting Convention for Human Rights, *supra* note 8, art. 15).

was “strictly required by the exigencies of the situation.”¹⁶ Three factors weighed particularly in their reasoning. The first was the importance that the United Kingdom has attached since at least Magna Carta, to the liberty of the subject. The second was that the measures only applied to aliens.

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

Lord Hoffmann alone did not consider that the terrorist threat amounted to “a public emergency threatening the life of the nation.” In a Churchillian dissent he said, “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.”¹⁷ This statement was received with enthusiasm by the liberal groups but not by ministers, who considered that it violated the rule that a judge should not descend into politics.

Parliament’s reaction to the Law Lords’ decision was to pass a new Act: the Prevention of Terrorism Act 2005.¹⁸ This, among other things, empowers the Secretary of State to place restrictions on terrorist suspects by making them subject to control orders. The restrictions must not, however, be so severe as to amount to deprivation of liberty. A number of procedural safeguards are imposed by the Act, including automatic review of control orders by the court.

The first batch of control orders imposed by the Home Secretary required the suspects to stay confined within small apartments for eighteen hours a day, and placed restrictions on where they could go and whom they could see in the remaining six

16. *Id.* at [44], [2005] 2 W.L.R. at 115.

17. *Id.* at [97], [2005] 2 W.L.R. at 135.

18. Prevention of Terrorism Act, 2005, c. 2 (Eng.).

hours. These orders were challenged and a Division of the Court of Appeal over which I presided upheld the finding of the judge of first instance that the orders were unlawful, in that the restrictions that they imposed amounted to deprivation of liberty.¹⁹

The Home Secretary immediately imposed modified control orders in place of the old ones. These are not nearly as restrictive, and are specifically tailored to meet the situation of the particular suspect. There are currently sixteen orders in force, of which seven relate to British subjects. On fifteen occasions modifications have been made at the request of the suspect. On four occasions such a request has been refused. The most significant difference between these and the previous control orders is that the curfew periods have been reduced to either fourteen, or in some cases twelve, hours a day.

There have been successful challenges to two of these new orders. The first was by a terrorist suspect known as *E*. He is one of the original detainees, and so has been subject to preventative measures for five years. In a very lengthy judgment Judge Beatson reached the conclusion that the cumulative effect of the restrictions imposed upon *E* amounted to deprivation of liberty, and so he quashed the order.²⁰ The day before I left for the States the same judge quashed a second control order on the ground that it amounted to inhuman and degrading treatment.²¹ I have not yet seen that judgment and, in any event, I cannot comment on these cases, for they may well come before me in the Court of Appeal.

What I can do is to recount a comment of Charles Clarke, who was the Home Secretary at the time of some of the events that I have been describing, when giving evidence to a Parliamentary Committee. He said: "The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decision for our society."²²

This added fuel to a picture that the media likes to paint of the judges being at war with the executive.

19. *Sec'y of State v. JJ*, [2006] EWCA (Civ) 1141, [2006] 3 W.L.R. 866 (Eng.).

20. *Sec'y of State v. E*, [2007] EWHC (Admin) 233, *rev'd*, [2007] EWCA (Civ) 459, [2007] 3 W.L.R. 1 (Eng.).

21. *Sec'y of State v. Rideh*, [2007] EWHC (Admin) 804 (Eng.).

22. Legal Opinion: Senior Judge Launches Attack on Former Home Secretary, INDEPENDENT (London), Feb. 28, 2007, <http://news.independent.co.uk/uk/legal/article2497265.ece>.

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

Debate about the justification for resorting to exceptional measures to deal with terrorism often focuses on the extreme case of the use of torture. What if a bomb has been placed that is likely to take countless lives and a terrorist has been caught who knows the location of the bomb? In such a situation cannot torture be justified in order to induce the terrorist to disclose where the bomb is hidden? The classic answer is that the law can never justify the use of torture, but in a situation such as that the executive might be forgiven for acting in a manner that was unlawful.

A more difficult issue arose in the second round of litigation that had led to the Lords' famous decision in *A*. The issue was whether a court can receive evidence that has, or may have, been obtained by the use of torture. The Court of Appeal held that, in the circumstances of that case at least, it could, provided that the United Kingdom authorities were not party to the torture.²³ On appeal to the House of Lords, sitting seven strong, the decision of the Court of Appeal was unanimously reversed.²⁴ Their Lordships held that evidence obtained by torture was not admissible in an English court, whoever had done the torturing. There was, however, a critical issue on burden of proof: Should evidence be shut out whenever there is a risk that it may have been obtained by torture, or only where the court is satisfied on balance of probabilities that it has been obtained by torture? By a slender majority of four to three, the Lords decided that the latter was the position. This means that the English courts will admit evidence where there is a possibility, but not where there is a probability, that it has been obtained by torture.

At the end of last year, two gentlemen called Ahmad and Aswat were resisting extradition from the United Kingdom to the United States on the ground, *inter alia*, that they might find themselves subjected to “extraordinary rendition”—that is transfer to a foreign state in circumstances where there was a substan-

23. *A v. Sec'y of State*, [2004] EWCA (Civ) 1123, [2005] 1 W.L.R. 414 (Eng.).

24. *A v. Sec'y of State*, [2005] UKHL 71, [2005] 3 W.L.R. 1249 (appeal taken from Eng.) (U.K.).

tial risk that they would be subjected to torture.²⁵ This submission required the English Court to consider evidence as to the alleged practice of the United States—an area where in the past the Court would have been reluctant to trespass.

The Court considered quite a body of evidence and was not reassured by a statement from a federal prosecutor that “the United States does not expel, return, or extradite individuals to countries where the United States believes that it is more likely than not that they will be tortured.”²⁶

The Court was, however, reassured by the fact that there was “no evidence whatsoever that any person extradited to the United States, from the United Kingdom or anywhere else, has been subsequently subjected to rendition, extraordinary or otherwise.”²⁷ The Court held that there was no reason why the two gentlemen should not be extradited.

This is not the only occasion on which the English Court has had to take the unusual step of considering the legitimacy of what has been taking place on this side of the Atlantic.

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

These submissions were upheld by the judge of first instance, who refused Mr. Abbasi’s application. He appealed and I presided on that appeal. We allowed the appeal. We held that, where human rights were engaged, the English Court could investigate the actions of a foreign sovereign state.²⁸

25. *Ahmad v. United States*, [2006] EWHC (Admin) 2927 (Eng.).

26. *Id.* at [86].

27. *Id.* at [90].

28. *R ex rel Abbasi v. Sec’y of State*, [2002] EWCA (Civ) 1598 (Eng.).

We heard the appeal at the time when the District Court for the District of Columbia had ruled that the United States courts had no jurisdiction over aliens detained at Guantanamo.²⁹

After reviewing both English and United States Authority, we commented:

[W]e do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a “legal black hole” What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter.³⁰

And, of course, the position did change when, by a majority of six to three, the Supreme Court in *Rasul v. Bush* ruled that foreign nationals held at Guantanamo could use the United States court system to challenge their detention.³¹

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

There are parallels between what has been happening in my jurisdiction and what has been happening over here. The Government can derogate from the Human Rights Convention if this is necessary to deal with a state of emergency threatening the life of the nation. After its first unsuccessful attempt to do so it has not tried again. The U.S. Constitution prohibits Congress from suspending the “privilege of the writ of habeas corpus” save where “in cases of rebellion or invasion public safety may require it.”³² Congress has not suspended the writ of habeas corpus.

In *Hamdi v. Rumsfeld*, Mr. Hamdi, a United States citizen, who had been declared an “illegal enemy combatant,” successfully invoked it.³³ The Supreme Court held that he could not be held indefinitely in a United States military prison without an oppor-

29. *Rasul v. Bush*, 215 F. Supp. 2d 55, 73 (D.D.C. 2002).

30. *R*, [2002] EWCA (Civ) 1598, at [64]–[66].

31. 542 U.S. 466 (2004).

32. U.S. CONST. art I, § 9.

33. 542 U.S. 507 (2004).

tunity to contest the allegations made against him by a neutral arbiter.

He had allegedly been captured fighting American forces in Afghanistan. Those forces were there pursuant to the resolution of congress after 9/11 authorising the President to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks’ or ‘harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.”³⁴

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

There are many who answer this description detained at Guantanamo; citizens of many different nations, many of them friendly to the United States, seized not only in Afghanistan, but in other countries where there are no current hostilities. Hundreds of detainees commenced applications for habeas corpus before or following the decision in *Rasul*. Congress responded by passing the Detainee Treatment Act, which removed the jurisdiction of the courts to entertain applications for habeas corpus by aliens detained at Guantanamo.³⁵

It gave the Court of Appeals for the D.C. Circuit exclusive jurisdiction in respect of judicial review challenges by such detainees. In *Hamdan v. Rumsfeld*, the Supreme Court held that this Act did not, on its true construction, apply to applications for habeas corpus made before the date that the Act came into effect—that is, the vast body of applications that had already been made by detainees at Guantanamo.³⁶ Hamdan, a Yemeni national, challenged the jurisdiction of the military commission before whom he

34. *Id.* at 510 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

35. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741–42 (to be codified at 28 U.S.C. § 2241).

36. 126 S. Ct. 2749, 2766 (2006).

was due to be tried for “conspiracy to commit . . . offenses triable by military commission.”³⁷

The Supreme Court, by a majority, upheld this challenge, holding that there was no basis for ousting the jurisdiction of the federal courts. It further found that the military commission, both in structure and in procedure, violated the provisions of both the Uniform Code of Military Justice and Article 3 of the Third Geneva Convention. Even if Hamdan were a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the executive was bound to comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.

The reaction to this decision was the Military Commissions Act of 2006,³⁸ signed into law by President Bush on 17 October 2006. This sets up military commissions to try terror suspects found to be “alien unlawful enemy combatants.” Section 7 of that statute amends section 2241 of title 28 of the United States Code to provide:

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

(2) [Subject to certain exceptions,] no court, justice or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.³⁹

Senator Cornyn commented of this section “it will finally get the lawyers out of Guantanamo Bay.”⁴⁰

On 20 February 2007, the U.S. Court of Appeals for the D.C. Circuit handed down a decision in relation to claims for habeas corpus filed by detainees at Guantanamo before the Military Commissions Act came into force. The majority held that the Act

37. *Id.* at 2759.

38. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., & 42 U.S.C.).

39. *Id.* § 7, 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2441(e)).

40. 152 CONG. REC. S10,403 (2006) (statement of Sen. Cornyn).

removed the jurisdiction of the court to entertain their claims.⁴¹ One of the primary purposes of the Act had been to overrule *Hamdan*, and it had done so.

The bone of contention between the majority, whose decision was given by Judge Randolph, and Judge Rogers, who dissented, related to the effect of the Suspension Clause of the Constitution. The majority held that this clause protected the right to habeas corpus as it existed in 1789. At that date aliens held outside the jurisdiction of the United States had no such right to claim habeas corpus. In a lengthy dissent Judge Rogers expressed the view that the Act fell foul of the Suspension Clause. I must confess that I found her dissent somewhat more powerful than did the majority, who described it as “filled with holes.”⁴²

On April 2, the Supreme Court denied petitions for certiorari by a number of Guantanamo detainees, who sought to challenge the constitutionality of the Military Commissions Act. But this was only on the procedural ground that the petitions were premature. The petitioners should first have sought relief from the Court of Appeals for the D.C. Circuit. We have not reached the end of the story.

What we have been seeing in each of our jurisdictions is a conflict between the desire of the executive to take certain preemptive measures against terrorist suspects and overriding legal principles—in our case the European Convention on Human Rights and in yours the Constitution of the United States.

In each case the courts have been called on to perform their duty of upholding the rule of law. Not everyone has appreciated this, giving that word each of its meanings.

The desirability of preventing terrorists from blowing up innocent citizens is one that we would all endorse. But terrorism is spawned by ideology. John Reid, our Home Secretary, in a recent speech said that we were living through what was at heart an ideological struggle: a struggle between democracies and “the core values of a free society” on the one hand and those who “would

41. *Boumediene v. Bush*, 476 F.3d 981, 986–88 (D.C. Cir. 2007).

42. *Id.* at 993.

want to create a society which would deny all of the basic individual rights which we now take for granted” on the other.⁴³

At a lecture given at the London School of Economics last year, Shami Chakrabarti, the Director of the human rights group Liberty, observed, “The philosophy of post [Second World] war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and . . . of Winston Churchill If our values are truly fundamental and enduring, they have to be relevant whatever the level of the threat.”⁴⁴

I share those sentiments, and would suggest that the legacy goes back further. It goes back to the day that the first settlers, whose arrival we are celebrating this week, landed in Chesapeake Bay.

Respect for human rights must, I suggest, be a key weapon in the ideological battle. Since the Second World War, we in Britain have welcomed to the United Kingdom millions of immigrants, many of them refugees from countries whose human rights were not respected. The prosperity of the United States is built on immigrants who have been welcomed from every corner of the globe. It is essential that they, and their children and grandchildren, should be confident that their adopted countries treat them, and those who are nationals of the countries from which they have come, without discrimination and with due respect for their human rights. If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively, are prepared to support the terrorists who are bent on destroying the fabric of our society. The British Human Rights Act and the United States Constitution are not merely their safeguards. They are foundations of our fight against terrorism.

43. John Reid, Sec’y of State for the Home Dep’t, Speech: Security, Freedom, and the Protection of Our Values (Aug. 9, 2006), *available at* http://www.demos.co.uk/files/john_reidsecurityandfreedom.pdf.

44. Shami Chakrabarti, Dir. of Liberty, Public Lecture at the 30th Anniversary Celebration of the Irish Council on Civil Liberties: Terrorism and the Rule of Law (May 11, 2006), *available at* http://www.iccl.ie/DB_Data/publications/Shami_speech.pdf.