

The Aftermath of Terrorism: Rule of Law Applies to Detainees in U.S. and U.K.

by Robert H. Wagstaff

On September 11, 2001, four jetliners were hijacked by nineteen non-Iraqi Middle Eastern terrorists, resulting in the deaths of almost three thousand innocent persons in New York City, Pennsylvania, and Arlington, Virginia. The ensuing panicked responses in the United States and the United Kingdom generated ill-conceived, discriminatory, and disproportionate legislative and executive actions that resulted in the detention of thousands without charge or trial. They were subjected to denial of habeas corpus, to secret evidence, to abuse, and to outright torture.

Since 2004, the U.S. Supreme Court and the U.K.'s highest court (the Appellate Committee of the House of Lords, or the "Law Lords") each issued four decisions to halt the illegal and unconstitutional actions taken by their respective legislative and executive branches of government, thereby both recognizing and enforcing the rule of law. The court decisions followed different but parallel paths to achieve the same results. The respective court rulings are consistent with the separation of powers, judicial competence, and the appropriate role of the courts in constitutional democracies.

Judicial Review

Since *Marbury v. Madison*¹ in 1803, the U.S. Supreme Court has had the authority to adjudicate the constitutionality of congressional acts and to say "what the law is." But in England, after the seventeenth century civil wars and the execution of King Charles I, parliamentary sovereignty became the touchstone of English law. The majority party in Parliament selects the prime minister, thus inextricably intertwining Parliament and the government. But a significant shift away from parliamentary sovereignty occurred when

Parliament enacted the Human Rights Act of 1998 (HRA), which directly adopted the European Convention on Human Rights (ECHR) as domestic law. The HRA gives British courts the power to declare acts of Parliament incompatible with the ECHR, but the courts cannot yet directly hold parliamentary legislation to be unconstitutional. It is then the prerogative of Parliament to modify the incompatible law, and Parliament has always made modifications after a finding of incompatibility. The HRA is considered to be constitutional. The U.K.'s unwritten constitution is based upon the Magna Carta, the common law, the post Glorious Revolution 1688 Declaration of Rights, and various acts and treaties of Parliament. It has been facetiously suggested that the British constitution is not worth the paper it is not written on.

Parliament subsequently enacted the Constitutional Reform Act (CRA) of 2005, legislation that accomplished a direct constitutional restructuring and created a new Supreme Court, thus overtly acknowledging and endorsing the reality of imminent U.S.-style judicial review. Since October 2009, the highest court in the U.K. is no longer part of Parliament. The Law Lords are now Supreme Court justices and have moved out of Parliament into their own building, the historic Guildhall, which was comprehensively redesigned for the new, separate, and distinct Supreme Court of the United Kingdom. The CRA recognizes both the importance of the Rule of Law and the independence of the judiciary. There has thus been a voluntary divestiture of absolute parliamentary sovereignty and recognition of the increased role of the judiciary.

The CRA said, "This Act does not adversely affect (a) the *existing* constitutional principle of the rule of law, or (b) the Lord Chancellor's *existing* constitutional role in relation to that principle."² The act further specifically guarantees continued judicial independence: "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the *continued* independence

of the judiciary.”³ (emphasis added). This change to the judiciary occurred after the Law Lords’ landmark decision in *A v. Secretary of State for the Home Department (Belmarsh I)*.⁴ British historian Anthony King said, “The divorce between the judicial branch and the other branches of government is thus now, or soon will be, total — or at least as total as is humanly possible.”⁵

Post-9/11 Decisions of the U.S. and U.K. Courts

In their December 2004 *Belmarsh I* ruling, the Law Lords declared that under Section 4 of the HRA, Section 23 of the post-9/11 Anti-terrorism, Crime and Security Act of 2001 (ATCSA) was incompatible with the equality provisions of the European Convention on Human Rights, to which the U.K. is a signatory. ATCSA provided for the indefinite detention of nondeportable aliens suspected of associating with suspicious persons or organizations. HM Belmarsh Prison, southeast of London, was the detention venue. The Law Lords held that it was impermissibly disproportionate to single out noncitizens for such disparate and discriminatory treatment. In June 2008, after a series of preliminary statutorily based decisions and in a parallel landmark decision, the U.S. Supreme Court ruled in *Boumediene v. Bush*⁶ that noncitizen detainees held by the U.S. at the Guantanamo Bay Naval Base, Cuba, were entitled to habeas corpus review as a matter of U.S. constitutional law. *Belmarsh I* and *Boumediene* represent a renaissance in both countries of the judicial recognition and enforcement of the rule of law. The *Belmarsh I* decision was based upon the requirements of the HRA, the ECHR, and the common law. *Boumediene* was based on the habeas corpus clause and the due process of law requirements of the Fifth Amendment to the United States Constitution.

Albeit emanating from different sources, these remarkably parallel decisions addressing post-9/11 U.S. and U.K. executive and legislative antiterrorism responses present a dramatic departure from the historical tradition of judicial non-intervention in matters of national security.⁷ Both decisions are positive and forceful examples of courts actively identifying and enforcing the rule of law upon the other branches of government. Since 2000, the effective date of the HRA, the Law Lords (now Supreme Court justices) have come to recognize that the U.K. is a rights-based democracy and, insofar as the right to a fair trial is concerned, have in effect adopted the appellate judicial philosophy and rule of the United States.

The rule of law is seen by both the U.S. and U.K. courts to emanate from the Magna Carta of 1215 (“No freeman shall be seized or imprisoned, or dispossessed, or disseized, or outlawed, or exiled . . . save by the lawful judgement of his peers or by the laws of the land.”) and to have matured through the common law so as to be specifically articulated and entrenched in the Human Rights Act of 1998, the first ten amendments to the U.S. Constitution, and the establishing and controlling documents of the European Union and the United Nations. It is correctly said that:

The “rule of law” refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁸

Guantanamo Bay, Cuba

Four post-9/11 United States Supreme Court cases (*Rasul*,⁹ *Hamdi*,¹⁰ *Hamdan*,¹¹ and *Boumediene*) address the issues of what rights the detainees at Guantanamo Bay possess and what actual constitutional detention authority the president has. Guantanamo Bay was selected by the Bush government as a de jure black hole where neither domestic nor international law, including the Geneva Conventions, applied. President George W. Bush maintained that the United States federal courts had no jurisdiction over the U.S. Naval Base at Guantanamo, and that international treaties prohibiting torture and mistreatment likewise had no application. Bush also declared that the Geneva Conventions did not apply to the detainees in Guantanamo inasmuch as they were not prisoners of war, but rather “unlawful combatants” — a term used by the U.S. Supreme Court in *Ex parte Quirin*¹² to describe German non-uniformed military saboteurs who landed by U-boats in New York and Florida during World War II.

Rasul established that the federal habeas corpus statute was applicable to Guantanamo, and *Hamdi* established that a U.S. citizen detained as

an unlawful combatant is constitutionally entitled to habeas corpus and must be given a meaningful opportunity to challenge any evidence against him. In response, Congress passed the Detainee Treatment Act of 2005¹³, seeking to nullify *Rasul*. *Hamdan* held that the Detainee Treatment Act did not apply to pending cases and that only Congress—not the executive branch—had the authority to create military tribunals and that such tribunals must be compatible with the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. Congress's response was to promulgate the Military Commissions Act of 2006¹⁴, which essentially endorsed the Bush executive tribunals and eliminated habeas corpus for pending cases. Finally, the court directly ruled in *Boumediene* that alien detainees in Guantanamo have a right under the U.S. Constitution to habeas corpus, and that detention in Guantanamo without habeas corpus or due process and the Military Commissions Act itself were unconstitutional.

The majority opinion in *Boumediene* holds that the case presents a distinct separation of powers issue and “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers ... [and] must not be subject to manipulation by those whose power it is designed to restrain”¹⁵. The majority was concerned that an unchecked executive could outsource detention to alien legal black holes and thereby avoid habeas corpus review and judicial oversight.

The determining quartet of decisions is quite reasoned and reasonable: federal courts have jurisdiction on a U.S. military base and aliens detained there are constitutional persons who have the benefit of habeas corpus. Before being found to be terrorists, the detainees are entitled to a due process fair trial. Given the reality of claimed unitary executive detention seasoned with abuse and torture, without charge or end, the justices of the Supreme Court acted to enforce the rule of law. If they had not, they would have allowed a lawless black hole to exist and would have become complicit in this constitutional terror.

While both the Law Lords and the U.S. Supreme Court have ultimately performed in similar fashion and share the same habeas corpus heritage and principles, the current U.S. Supreme Court differs significantly in its internal workings—a reality apparent in the high degree of contentiousness among the justices that is reflected in the Court's opinions. In contrast, in the U.K.

there is unanimity or near unanimity, and always mutual respect and collegiality amongst members of the judiciary.

HM Belmarsh Prison

In *Belmarsh I*, eight of the nine Law Lords were satisfied that the alien detentions were unlawful and found the detentions to be a disproportionate and discriminatory response to what was strictly required by the exigencies of the situation, in that citizens and noncitizens are treated differently without rational objective justification.

The Law Lords spoke broadly with strong language:

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.¹⁶ (Lord Hubert Hoffman)

The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.¹⁷ (Lord Thomas Henry Bingham)

Indefinite imprisonment ... on grounds that are not disclosed ... is the stuff of nightmares, associated whether accurately or inaccurately with ... Soviet Russia in the Stalinist era and now ... with the United Kingdom.¹⁸ (Lord Richard Rashleigh Folliott Scott)

It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely...Executive detention is the antithesis of the right to liberty and security of person.¹⁹ (Baroness Brenda Hale)

As with the U.S. Supreme Court, these comments went well beyond the narrow discrimination issue presented and, while arguably dicta, they demonstrate the strength and depth of British judicial hostility to the concept of indefinite detention without charge. The detentions were found to be disproportionately inconsistent with liberty and equality and to actively discriminate against aliens, because British terror suspects thought to pose a similar risk were not detained without trial.

Lord Hoffman held that there was no basis for determining that there was a public emergency. “Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.”²⁰ He emphasized that “noth-

ing could be more antithetical to the instincts and traditions of the United Kingdom” than indefinite detention without trial.²¹ For Lord Hoffman, “[f]reedom from arbitrary arrest and detention is a quintessentially British liberty.”²²

On December 8, 2005, the Law Lords issued their unanimous decision in *A v. Secretary of State for the Home Department (Belmarsh II)*.²³ At issue again was ATCSA, here focusing upon section 44(3) that permitted the trial court to consider evidence that was not admissible in a court of law. The question presented was whether this section of ATCSA permitted consideration of evidence from a third party obtained through torture in a foreign state. The trial court held that such evidence was now admissible and that the court should examine it to determine the weight that it should be accorded. The Court of Appeal agreed. The Law Lords reversed, ruling unanimously that such evidence was inadmissible as it was inherently unreliable, unfair, offensive to ordinary standards of humanity and decency, and incompatible with the principles on which courts should administer justice. Consequently, torture evidence cannot be used in the United Kingdom irrespective of where and by whom torture had been inflicted.

Lord Hoffmann commenced his speech with some British history:

On 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the judges whether Felton could be put to the rack to discover his accomplices. All the judges met in Serjeants’ Inn. Many years later Blackstone recorded their historic decision:

“The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England.”

That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it.

When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal “rendition” of suspects to countries where they would be tortured: see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House* 105 *Columbia Law Review* 1681-1750 (October, 2005).²⁴

The U.K. has thus determined that torture cannot be successfully outsourced. The decision draws from the common law, international law, the Torture Convention, the ECHR and the HRA.

In *Secretary of State for the Home Department v. MB and AF (Belmarsh III)*,²⁵ the Law Lords held that the compromise to due process associated with secret evidence is subject to the right to a fair trial. Lord Simon Denis Brown said:

I cannot accept that a suspect’s entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control.²⁶

On June 10, 2009, the Law Lords issued their opinion in *Secretary of State for the Home Department v. AF (Belmarsh IV)*²⁷ ruling that it was unlawful to use secret evidence to place any persons under the judicial restrictions of control orders inflicting house arrest. The ruling by a nine-Law Lord panel was unanimous in finding that it is a fundamental right to have disclosure of sufficient material to enable an answer to an accusation to effectively be made in defense. The ruling specifically held that unless a terror suspect was given “sufficient information about the allegations against him to enable him to give effective instructions to the special advocate,” the right to a fair trial would be breached.²⁸ As Lord James Arthur David Hope said, “The slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the

court must stand by principle. It must insist that the person affected be told what is alleged against him.”²⁹

Despite the resonating strength of the courts’ decisions, most detainees in both the U.S. and the U.K. remain detained without charge. However, the attorney general’s announcement of November 13, 2009, that five suspected 9/11 terrorists will be transferred from Guantanamo to New York City for charge and trial in civilian court is a positive first step towards a rule of law resolution of this problem created by the Bush administration. It was also announced that five other detainees alleged to be involved in the 2000 USS *Cole* attack will be charged and tried before an unspecified military tribunal. But despite the recognition that fair trial and due process is required by the rule of law, the government holds that some indefinite detentions will nonetheless continue to be administered through an as yet undisclosed process.³⁰

It has also been announced that no new legislation for the Guantanamo detainees will be sought, and post-*Boumediene* habeas corpus cases will be allowed to go forward. Of thirty persons whose release has been judicially ordered, twenty remain at Guantanamo in custody because no country has been found to take them. Congress objects to any release in the U.S. or to accepting any other responsibility, notwithstanding that the U.S. caused the detentions to occur. As for the other detainees who have been designated for prosecution, it remains undetermined whether these trials will be in front of military tribunals or in civilian courts, and what rules will apply.³¹ The Department of Defense has stated that a judicial finding of lack of proof of guilt does not necessarily mean that release will actually occur. The final words have not yet been spoken. The U.K. in turn continues for the moment to use renewable control orders. The home secretary has released two controlees from house arrest rather than disclose any secret evidence.³²

The battle to determine if the King is law or the Law is king continues.

Endnotes:

- 1 5 U.S. (Cranch 1) 137 (1803).
- 2 Constitutional Reform Act 2005 Chpt 4, Part 1(1).
- 3 Constitutional Reform Act 2005 Chpt 4, Part 3(1).
- 4 [2004] UKHL 56, [2005] 2 AC 68.
- 5 Anthony King, *The British Constitution* (Oxford University Press 2007) 148.
- 6 128 S.Ct. 2229 (2008).
- 7 *Korematsu v. United States*, 323 U.S. 214 (1944); *Liversidge v. Anderson* [1942] AC 206 (HL).
- 8 ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. Report of the Secretary-General’ UN doc. S/2004/616. 23 August 2004, para. 6.
- 9 *Rasul v. Bush*, 542 U.S. 466 (2004).
- 10 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- 11 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
- 12 317 U.S. 1 (1942).
- 13 Pub. L. 109-48, 119 Stat 2680 (Dec 30, 2005).
- 14 Pub. L. 109-366, 120 Stat 2600 (Oct 17, 2006).

- 15 *Boumediene* (n 6) 2259.
- 16 *Belmarsh I* (n 4) [97].
- 17 *Ibid* [42].
- 18 *Ibid* [155].
- 19 *Ibid* [222].
- 20 *Ibid* [96].
- 21 *Ibid* [86].
- 22 *Ibid* [88].
- 23 [2005] UKHL71, [2005] 2 AC 221
<http://www.bailii.org/uk/cases/UKHL/2004/56.html>
- 24 *Ibid* [81-82].
- 25 [2007] UKHL 46, [2008] AC 440
<http://www.bailii.org/uk/cases/UKHL/2007/46.html>
- 26 *Ibid* [91].
- 27 [2009] UKHL 28, [2009] 3 WLR 74
<http://www.bailii.org/uk/cases/UKHL/2009/28.html>
- 28 *Ibid* [80].
- 29 *Ibid* [84].
- 30 D Linzer and P Finn, “White House Weighs Order on Detention,” *Washington Post* (27 June 2009).
- 31 P Finn, “Administration Won’t Seek New Detention System,” *Washington Post* (24 September 2009); P Baker, “Obama to Use Current Law to Support Detentions,” *New York Times* (24 September 2009); R Bernstein, “A Detainee Freed, But Not Released,” *International Herald Tribune* (24 September 2009).
- 32 R Ford, “New Blow to Terror Control Orders as Second Suspect Released,” *TimesOnline* (25 September 2009).