

## GUANTANAMO BAY: THE LEGAL BLACK HOLE<sup>1</sup>

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The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals. This episode must be put in context. Democracies must defend themselves. Democracies are entitled to try officers and soldiers of enemy forces for war crimes. But it is a recurring theme in history that in times of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis. One tool at hand is detention without charge or trial, that is, executive detention. Ill-conceived rushed legislation is passed granting excessive powers to executive governments which compromise the rights and liberties of individuals beyond the exigencies of the situation. Often the loss of liberty is permanent. Executive branches of government, faced with a perceived emergency, often resort to excessive measures. The litany of grave abuses of power by liberal democratic governments is too long to recount, but in order to understand and to hold governments to account, we do well to take into account the circles of history.

Judicial branches of government, although charged with the duty of standing between the government and individuals, are often too deferential to the executive in time of peace. How then would the same judges act in a time of crisis? The role of the courts in time of crisis is less than glorious. On this side of the Atlantic *Liversidge v Anderson* (1942)<sup>2</sup> is revealing. The question before the House of Lords was a matter of the interpretation of Defence Regulation 18B which provided that the Home Secretary may order a person to be detained 'if he has reasonable cause to believe' the person to be of hostile origin or associations. A majority of four held that if the Home Secretary thinks he has good cause that is good enough. Lord Atkin chose the objective interpretation: the statute required the Home Secretary *to have* reasonable grounds for detention. Lord Atkin said: 'amid the clash of arms the laws are not silent' and warned against judges who 'when face to face with claims involving the liberty of the subject show themselves more executive minded

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<sup>1</sup> This is the text of the Twenty-Seventh FA Mann Lecture, organized by the British Institute of International and Comparative Law and Herbert Smith and held in Lincoln's Inn Old Hall, 25 November 2003 with Sir Lawrence Collins in the chair.

<sup>2</sup> [1942] AC 206.

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than the executive'. At the time the terms of Lord Atkin's dissent caused grave offence to his colleagues. But Lord Atkin's view on the interpretation of provisions such as Regulation 18B has prevailed: the Secretary of State's power to detain must be exercised on objectively reasonable grounds. To that extent *Liversidge v Anderson* no longer haunts the law.<sup>3</sup> I have referred to a case sketched on the memory of every lawyer because, despite its beguiling framework of a mere point of statutory interpretation, it is emblematic of the recurring clash of fundamentally different views about the role of courts in times of crisis. How far contemporary decisions match Lord Atkin's broader philosophy is far from clear. The theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view, namely that while courts must take into account the relative constitutional competence of branches of government to decide particular issues, they must never, on constitutional grounds, surrender the constitutional duties placed on them.<sup>4</sup>

Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination. In the context of a war on terrorism without any end in prospect this is a sombre scene for human rights. But there is the caution that unchecked abuse of power begets ever-greater abuse of power. And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.

Not every one will agree with the picture I have put before you. Let me therefore explain, with reference to Second World War experience, on both sides of the Atlantic, why I feel justified in what I have said. During the Second World War the United States placed more than 120,000 American citizens of Japanese descent in detention camps. There was no evidence to cast doubt on the loyalty of these people to the United States. The military authorities took the view, as a general put it, that 'a Jap is a Jap'. In due course it was recognized by the United States that a grave injustice was done. In 1988 Congress enacted legislation acknowledging that the 'actions were taken without adequate security reasons' and that they were largely motivated by 'racial prejudice, wartime hysteria and a failure of political leadership'.<sup>5</sup> Restitution was made to individuals who were interned. This is to the great credit of the United States. On the other hand, it must be remembered that an earlier opportunity arose in 1944 in *Korematsu v United States*<sup>6</sup> for the Supreme Court to redress the injustice. Korematsu was a Californian of Japanese ancestry. After

<sup>3</sup> *Nakkuda Ali v Jayaratne* [1951] AC 66.

<sup>4</sup> J Jowell, QC, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] PL 592. I deal with this point in my recent lecture *Dynamic Interpretation Amidst an Orgy of Statutes*, The Brian Dickson Memorial Lecture, Ottawa, 2 Oct 2003.

<sup>5</sup> The Civil Liberties Act 1988.

<sup>6</sup> 332 US 214.

the bombing of Pearl Harbor he volunteered for the army but was rejected on health grounds. He obtained a defence industry job. In June 1942 he was arrested for violation of the internment orders. He challenged the constitutionality of the orders. The issue was whether military necessity was established. The court was divided. Delivering the opinion of the majority of the Court, Justice Black stated: 'To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.' Demonstrating significant deference to the executive, he concluded:

the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were not justified.

Not many in the United States, in the moderate spectrum of views, would now defend this outcome, even viewed from the perspective of 1942. In any event, in 1984 a federal district court overturned Korematsu's conviction on the ground that the government had 'knowingly withheld information from the courts when they were considering the critical question of military necessity.'<sup>7</sup> In giving judgment Judge Patel observed that the case 'stands as a caution that in times of distress the shield of military necessity and natural security must not be used to protect governmental institutions from close scrutiny and accountability'.<sup>8</sup>

The second decision of the United States Supreme Court which I must mention is *Ex parte Quirin* (1942), the so-called 'Saboteurs case'.<sup>9</sup> It is a case of a very different kind and in many ways more understandable than *Korematsu*. It is cited by United States government spokesmen as authority for the detentions at Guantanamo Bay. In June 1942, when the United States was at war with Germany, eight Nazi agents, including one American citizen, arrived by submarine in the United States. They intended to commit acts of sabotage. Two among them revealed the plot. On 2 July 1942 President Roosevelt ordered the men to be tried by military commission for offences against the law of war and the Articles of War. The Proclamation also provided that they were to be denied access to the courts. On 8 July 1942 the trial commenced and proceeded in secret. Three weeks later the Supreme Court convened a special Summer session to consider petitions for habeas corpus made on behalf of the saboteurs. The saboteurs argued that they had a constitutional right of due process and that they were entitled to be tried before an ordinary civilian court. On 31 July 1942 the Supreme Court made a unanimous order that the military commission was legally constituted and the petitioners were lawfully detained. By 8 August 1942 all the saboteurs had been found guilty and six of the eight had been executed. The turncoats had their sentences commuted. Almost three months after the saboteurs were executed,

<sup>7</sup> *Korematsu v United States*, 584 F Supp (1984), at 1406 (ND Cal 1984).

<sup>8</sup> At 1420.

<sup>9</sup> 317 US 1.

the Supreme Court made public a unanimous decision holding that Congress had validly authorised military commissions to try violations of the laws of war. The court did, however, hold that the exclusion of judicial review did not apply to habeas corpus. Secret trials without the usual guarantees of fair trial were, however, constitutionally acceptable. In the context of the detentions at Guantanamo Bay it will be necessary to return to this case.

Between 1939 and 1945 almost 27,000 persons were detained in Britain without charge or trial and 7,000 were deported. The danger facing Britain was, of course, immeasurably greater than that of the United States. In the circumstances the total figure does not seem excessive. But most detentions were probably not justified. Not all cases of detention ended as happily as that of the German born Michael Kerr who was detained in 1940 for 6 months, released to fly for the RAF during the rest of the war, and rose to become a Lord Justice of Appeal.<sup>10</sup> In his book *In the Highest Degree Odious*<sup>11</sup> Professor AW Brian Simpson concluded that the courts washed their hands enthusiastically of responsibility for the legality of detentions. He said:

the courts did virtually nothing for the detainees, either to secure their liberty, to preserve what rights they did possess under the regulation, to scrutinize the legality of Home Office action, or to provide compensation when matters went wrong. The legal profession too, as a profession, did nothing; I am told that it was not easy to persuade lawyers to act for detainees at all. . . . So far as the government lawyers were concerned, the Treasury Solicitor's Department comes across as unattractive; its ethos was ruthless determination to win cases at the least possible cost. One cannot but be struck by the absence in the papers of any hint of sympathy to those who litigated, or any generosity of spirit to individuals none of whom had been charged or convicted of any crime. Of the Law Officers Somervell seems to have sailed very close to the wind, and both he and Jowitt changed their tune over the relationship between the courts and the regulation. I cannot but suspect that other examples of dubious conduct have been concealed by the accidental loss of Treasury Solicitor's files . . . (418–19).

The 'hands off' approach continued after the war. In *R v Secretary of State, Ex p Hosenball* from 1977, a deportation case, Lord Denning said:<sup>12</sup>

There is a conflict 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.

Exhibiting great deference to the executive Lord Denning added:

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.

<sup>10</sup> M Kerr *As Far As I Remember* (Oxford Hart 2002).

<sup>11</sup> Oxford Clarendon Press 1994. <sup>12</sup> [1977] 1 WLR 766, at 783.

Possibly we would now say that such instinctive trust in public servants, executive or judicial, has been replaced by a culture requiring in principle openness and accountability from all entrusted with public power.

During the Second World War a new idea took root. Previously there had been an assumption that however outrageously a government treated individuals, it was not properly the concern of other governments. The Third Reich and the Holocaust changed that perception. Out of the ashes of the war came the creation in 1945 of the United Nations, committed by its charter to uphold 'the dignity and worth of the human person'. The adoption on 10 December 1948 in Paris of the Universal Declaration of Human Rights—the legacy of Mrs Roosevelt—was a momentous event. It gave birth to the human rights movement and the rights revolution. Eighteen years later it became known together with the International Covenant on Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) as the International Bill of Rights. Central to these instruments is the dignity of the human person and the maintenance of the rule of law to protect that most fundamental of rights. A large number of treaties, regional and specific, the descendants of the Universal Declaration, enshrine the same principle. For present purposes the Convention Relative to the Treatment of Prisoners of War of 12 August 1947 (the Third Geneva Convention III) is relevant. It contained detailed provisions protecting prisoners of war. I am content to assume that the Taliban soldiers detained at Guantanamo Bay are on a literal interpretation not covered by the Third Geneva Convention because they did not wear uniforms on the battlefield. But Article 75 of the First Protocol Additional to the Geneva Conventions of 12 August 1949, dated 8 June 1977, contains more far-reaching provisions to protect prisoners captured during armed conflicts. Whatever their status, such prisoners are entitled to humane treatment. It is true that the United States has not ratified this Protocol. But it is generally accepted that Article 75 reflects customary international law.<sup>13</sup> Indeed when the United States government decided not to ratify the Protocol, it had before it expert advice that many Articles of the Protocol accurately reflect customary international law. Specifically it was advised that Article 75 was an Article which was already part of customary international law and therefore binding on the United States.<sup>14</sup> Many of the provisions of Article 75 are relevant. The use of torture and inhuman or degrading treatment is prohibited. The authorities are entitled to question a prisoner but there is no obligation on the prisoner to answer the questions put. Coercing a prisoner to confess is unlawful. Article 75(4) is particularly significant. It provides:

<sup>13</sup> C Greenwood, 'International Law and the "War Against Terrorism"', *International Affairs* 78, 2 (2002) 307, at 315.

<sup>14</sup> T Meron, *Human Rights and Humanitarian Norms of Customary Law* (Oxford Clarendon Press 1989), at 62–9.

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence relating to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . .

In the 1990s there were important developments. On 16 October 1998 Augusto Pinochet, the former President of Chile, was arrested in London in response to an arrest warrant issued by a Spanish court. Henry Kissinger has described him as ‘a fashionably reviled man of the right’. Given what we now know the verdict of history may be a little more severe. In any event, the warrant alleged crimes of murder, torture and ‘disappearances’. The final decision of the House of Lords was to the effect that crimes under international law, such as torture, could not be acts within the official capacity of a Head of State and that extradition proceedings could continue. Despite the fact that due to his mental state Pinochet could eventually not be tried, the decision of the House of Lords was an important breakthrough on immunities and universal jurisdiction.<sup>15</sup> Equally important was the creation of ad hoc international criminal tribunals in the case of Rwanda, Yugoslavia, and Milosevic to try defendants on war crimes.<sup>16</sup> Despite the negative role of the United States, the International Criminal Court was set up. To date 91 countries have ratified or acceded to the Treaty. The court is fully operational. Recently Madam Justice Arbour of the Canadian Supreme Court has eloquently summed up what this means. She said:

We have witnessed a maturation process from the declaratory era of some 50 years ago, through a monitoring and denunciatory phase, and now into the modern era of efficient enforcement through personal criminal responsibility. This culture carries with it the expectations of millions of human rights holders who until very recently did not perceive themselves as such. But globalization of the culture of rights, combined with the spread of democracy, has irreversibly changed their sense of entitlement . . .<sup>17</sup>

There was great progress on the humanitarian front between 1948 and 2001.

Then came the horror of 11 September 2001. Using civilian aircraft as missiles, Al-Qaeda terrorists attacked and attempted to attack the great symbols of the United States government and nation. A military response was inevitable. Three days later President Bush declared a national emergency.<sup>18</sup> Congress rushed through the Patriot Act<sup>19</sup> which gave to the executive vast

<sup>15</sup> *R v Bow Street Stipendiary Magistrate, Ex P Pinochet (No 3)* [2000] 1 AC 147.

<sup>16</sup> The International Criminal Tribunal for Rwanda was created by Security Council resolution 955 of 8 Nov 1994; The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was established by resolution 827 of 25 May 1993 and the case of Milosevic was transferred to the ICTY on 29 June 2001.

<sup>17</sup> ‘*Is The Growth of International Criminal Law A Threat to State Sovereignty?*’ Irving R. Segal Lecture, University of Pennsylvania, Philadelphia, PA, 24 Sept 2003.

<sup>18</sup> Proc 7463 ‘*Declaration of National Emergency by Reason of Certain Terrorist Attacks*’.

<sup>19</sup> USA PATRIOT Act 2001.

powers to override civil liberties. Congress promptly authorised the President to use all necessary force against, inter alia, those responsible for the terrorist attacks of 11 September to prevent further attacks.<sup>20</sup> On 7 October 2001 the air campaign against Afghanistan began. In military terms the action was successful. But now the region is left with a ravaged country which under its warlords has enormously increased its production of opium grown for the world market. Afghanistan was followed by the deeply controversial Iraqi war of 'shock and awe' which fractured the international legal order so carefully crafted in the crucible of Lake Success in 1945. It is easier to destroy than to develop international institutions. But tonight I must concentrate on Guantanamo Bay.

On 13 November 2001 the President issued an order providing for the trial by military commissions of persons accused of violations of the laws of war.<sup>21</sup> That order has been repeatedly amended.<sup>22</sup> Beginning in January 2002 some 660 prisoners have been transferred at first to Camp X-Ray and then Camp Delta at Guantanamo Bay. The number included children between the ages of 13 and 16 as well as the very elderly.<sup>23</sup> Virtually all the prisoners are foot soldiers of the Taliban. It has been reported that there are no 'big fish' among the prisoners.<sup>24</sup> Contemporaneous reports stated that the prisoners, who are Muslims, were compelled contrary to the tenets of their religion to shave off their beards.

By a blanket presidential decree all prisoners have been denied prisoners of war status. Before the armed conflict started, the Taliban government had been in effective control of Afghanistan. The vast majority of the prisoners were soldiers of the Taliban forces. Let me assume that at Guantanamo Bay there are also some prisoners who are Al-Qaeda terrorists. But if there are such prisoners, criminal outlaws as they may be, they are also in law entitled to the protection of humanitarian law.<sup>25</sup>

How prisoners at Guantanamo Bay have been treated we do not know. But what we do know is not reassuring. At Camp Delta the minute cells measure 1.8 m by 2.4 m. Detainees are held in these cells for up to 24 hours a day. Photographs of prisoners being returned to their cells on stretchers after interrogation have been published. The Red Cross described the camp as principally

<sup>20</sup> 'Authorization for Use of Military Force' Public Law 107-40, 115 Stat 224 18 Sept 2001.

<sup>21</sup> Military Order of 13 Nov 2001, 'Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism' 66 FR 57833 (16 Nov 2001) 'The Presidential Order'.

<sup>22</sup> *Trials Under Military Order: A Guide to the Final Rules for Military Commissions*, Lawyers Committee for Human Rights Briefing Paper, July 2003.

<sup>23</sup> United States of America, *The Threat of a Bad Example: Undermining international standards as 'war on terror' continues*, Amnesty International, 19 Aug 2003, at 21.

<sup>24</sup> *Call for release of 'low-level' Guantanamo inmates*, J Borger, *The Guardian*, 20 Aug 2002.

<sup>25</sup> George H Aldrich, *The Taliban, Al-Qaeda, and The Determination of Illegal Combatants*, 96 AJIL 891.

a centre of interrogation rather than detention.<sup>26</sup> The *Washington Post* suggested there has been a sweeping change in United States policy on torture since 11 September, despite public pronouncements against its use. It quotes Cofer Black, the former director of the CIA's counter-terrorist branch, as telling a congressional intelligence committee: 'All you need to know: there was a before 9/11, and there was an after 9/11 . . . After 9/11 the gloves came off'.<sup>27</sup> The United States website records thirty-two attempted suicides committed by twenty-seven prisoners.<sup>28</sup> A report of 16 March 2003 reported officials as saying that the techniques of interrogation are 'not quite torture, but as close as you can get'.<sup>29</sup> It appears likely that 'stress and duress' tactics of disrupting sleep and forcing prisoners to stand for extended periods, which have been used by United States interrogators in Afghanistan, are also employed at Guantanamo Bay.<sup>30</sup> The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors. The procedural rules do not prohibit the use of force to coerce prisoners to confess. On the contrary, the rules expressly provide that statements made by a prisoner under physical and mental duress are admissible 'if the evidence would have value to a reasonable person', ie, military officers trying enemy soldiers.<sup>31</sup> At present we are not meant to know what is happening at Guantanamo Bay. But history will not be neutered. What takes place there today in the name of the United States will assuredly, in due course, be judged at the bar of informed international opinion.

Having invoked a historical perspective, I must acknowledge that, despite the Magna Carta, in harsher times England resorted to the expedient of sending prisoners beyond the reach of the rule of law. One of the charges made against Edward Hyde, the First Earl of Clarendon, in his impeachment in 1667 was that he had attempted to preclude habeas corpus by sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law', that is by sending persons to places where the writ of habeas corpus would not be available. In 1679 this loophole was blocked by section 11 of the Habeas Corpus Amendment Act 1679.<sup>32</sup> For more than three centuries such stratagems to evade habeas corpus have been unlawful in England.

<sup>26</sup> C Girod quoted in *La Vigilance inquiète de la Croix-Rouge à Guantanamo*, P Jarreau, *Le Monde*, 18 Oct 2003.

<sup>27</sup> 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, D Priest and B Gellman, *Washington Post*, 26 Dec 2002.

<sup>28</sup> *Suicide Attempts at Guantanamo Reach 32*, Associated Press, 26 Aug 2003.

<sup>29</sup> *Interrogation or torture: Blurred line?*, D Van Natta Jr, *New York Times*, 8 Mar 2003.

<sup>30</sup> The Amnesty report cited above, at 23.

<sup>31</sup> Presidential Order s 4(3).

<sup>32</sup> I am indebted to Lord Bingham of Cornhill for this reference. See his Romanes Lecture given on 15 Oct 2002 in Oxford, 52 *ICLQ* 2003, at 841–58.



The regime applicable at Guantanamo Bay was created by a succession of presidential orders. It can be summarised quite briefly. The prisoners at Guantanamo Bay, as matters stand at present, will be tried by military tribunals. The prisoners have no access to the writ of habeas corpus to determine whether their detention is even arguably justified. The military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners. The trials will be held in secret. None of the basic guarantees for a fair trial need be observed. The jurisdiction of the United States courts is excluded. The military control everything. It is, however, in all respects subject to decisions of the President as Commander-in-Chief even in respect of guilt and innocence in individual cases as well as appropriate sentences. It is an awesome responsibility. The President has made public in advance his personal view of the prisoners as a group: he has described them all as ‘killers’.

At Guantanamo Bay arrangements for the trials are proceeding with great efficiency. A courtroom with an execution chamber nearby has apparently been constructed. But the British prisoners will not be liable to be executed. The Attorney General has negotiated a separate agreement with the Pentagon on the treatment of British prisoners. He has apparently received a promise that the British prisoners of war will not face the death penalty. This gives a new dimension to the concept of ‘most favoured nation’ treatment in international law. How could it be morally defensible to discriminate in this way between individual prisoners? It lifts the curtain a little on the arbitrariness of what is happening at Guantanamo Bay and in the corridors of power on both sides of the Atlantic.

The United States government seeks to justify its action by relying on the *Quirin* case. It is a case rooted in the circumstances of the Second World War. Humanitarian law was not yet developed. It is worth recalling that at Yalta, Churchill, a humane man, argued that the Nazi leaders should be shot after the war as soon as they were caught. Stalin, who knew a thing or two about trials, said that they should be tried before they were shot.<sup>33</sup> Roosevelt had no trouble with a trial as long as it was, in his words, ‘not too judicial’. That was a long time ago. In any event, the circumstances of the Nazi saboteurs were very different from the position at Guantanamo Bay. Now there has been no declared war. Congress has not authorised the military commissions. The Guantanamo Bay prisoners are subject to military prosecution for violations never before considered war crimes. They are deprived of the right of confidential communications with their lawyers, access to all relevant evidence, and judicial review—all of which were afforded to the German saboteurs. Most importantly, the status of the German saboteurs as enemy aliens was beyond dispute, whereas the 660 prisoners at Guantanamo Bay are not enemy aliens, ie, citizens of a State at war with the United States, and in any event,

<sup>33</sup> M Gilbert, *Winston S. Churchill*, Vol VII, *Road to Victory, 1941–1945*, at 1201–2.

are not a homogeneous group since some were captured on the battlefield in Afghanistan and some elsewhere. They are deprived of any right to test the legality of their detention. The *Quirin* case does not therefore support the action taken at Guantanamo Bay. In any event, today it is widely regarded as a sordid episode in United States history. Legal scholars are agreed, as Professor Bellknapp put it, 'that the court had fallen into step with the drums of war'.<sup>34</sup> Professor Danelski described *Quirin* as 'an embarrassing tale of . . . a prosecution designed to obtain the death penalty . . . a rush to judgment and agonising effort to justify a *fait accompli*.' He ended by saying that if there is a lesson to be learned, 'it is that the court should be wary of departing from its established rules and practices, even in times of national crisis, for at such times the court is especially susceptible to co-optation by the executive.'<sup>35</sup> The reliance of the United States Administration on this discredited precedent ignores more than half a century of progress of humanitarian law, notably in response to prisoners captured during armed conflict.

The Court of Appeals for the District of Columbia Circuit has recently in consolidated cases ruled that, despite the fact that the United States has had exclusive control over Guantanamo Bay since 1903, the courts have no jurisdiction to examine the legality of the detention of the prisoners. The Court of Appeals decided that it has no jurisdiction to consider the claims by nationals of Kuwait, Australia and Britain, captured by United States military forces in Afghanistan or Pakistan.<sup>36</sup> The applicants were not enemy aliens. Each of the applicants denied that he had engaged in hostilities against America, sought an explanation for the indefinite detention and complained of the refusal of access to legal counsel. Judge A Raymond Randolph (for the three-judge panel) concluded that the American courts had no jurisdiction because the claimants were aliens, were captured during military operations abroad, were now detained outside the United States, and had never been present in the United States. Even evidence of torture by the military authorities, however compelling, may not be examined. In other words, the court ruled that the United States government might legally evade the jurisdiction of the United States courts in the case of foreign nationals by its choice of a place of imprisonment beyond American soil. But on 10 November 2003 the United States Supreme Court granted *certiorari* for the case to proceed to a substantive hearing on the question whether the lower courts were right to conclude that they had no jurisdiction to entertain habeas corpus applications. This will be the only issue on which the Supreme Court will rule.<sup>37</sup> That hearing will take

<sup>34</sup> 'The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur case' *Military Law Review*, vol 89, 59, at 95.

<sup>35</sup> *The Saboteurs' case*, *Journal of Supreme Court History*, vol 1, 61–82.

<sup>36</sup> *Al Odah v US* 321 F 3d 1124 (2003).

<sup>37</sup> The order reads as follows: 'The petitions for writs of certiorari are granted limited to the following Question: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.' A powerful *amicus curiae* brief signed,

place in the Spring next year. When the matter is considered by the United States Supreme Court, it will have before it the considered view of our Court of Appeal. When an action was brought in British courts on behalf of a British citizen detained at Guantanamo, the Master of the Rolls, Lord Phillips of Worth Matravers, said:

We find surprising the proposition that the writ of the United States courts does not run in respect of individuals held by the United States government on territory that the United States holds . . . under a long-term treaty.

He called it 'objectionable' that a prisoner had no opportunity to challenge the legitimacy of his detention before a court or tribunal.<sup>38</sup>

It is now necessary to bring some of the threads together. In doing so a distinction must be drawn between two principal features. First, on the basis of the decision of the Court of Appeals for the District of Columbia Circuit, the prisoners have no right of recourse to any courts to determine on an individual basis their status or to rule on the lawfulness of their treatment. Secondly, there is the failure of the procedures and rules governing trials before military tribunals at Guantanamo Bay to measure up to minimum international standards. I turn to the first aspect.

The United States has a long and honourable commitment to the Magna Carta and allegiance to the rule of law. In recent times extraordinary deference of the United States courts to the executive has undermined those values and principles. As matters stand at present the United States courts would refuse to hear a prisoner at Guantanamo Bay who produces credible medical evidence that he has been and is being tortured. They would refuse to hear prisoners who assert that they were not combatants at all. They would refuse to hear prisoners who assert that they were simply soldiers in the Taliban army and knew nothing about Al-Qaeda. They would refuse to examine any complaints of any individuals. The blanket presidential order deprives them all of any rights whatever. As a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice.

In English law the writ of habeas corpus protects citizens and aliens alike. That is how it should be because foreign nationals must obey our laws and therefore deserve the protection of our laws. The writ is available whenever the detained person enters territory under the control of the Crown. That is consistent with human rights law. In *Cyprus v Turkey* (1982), the European Court of Human Rights held that States are: 'bound to secure the said rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad'.<sup>39</sup> Let

inter alia, by Sir Sydney Kentridge QC, Colin Nicholls QC, and Timothy Otty on the law of habeas corpus has been placed before the United States Supreme Court.

<sup>38</sup> *R (Abbasi) v The Secretary of State for Foreign Affairs* [2002] EWCA Civ 1598.

<sup>39</sup> 1982 4 EHRR 482, at 586, para 8.

me illustrate the point. Reports have been published in the media and by human rights groups of the detention of suspected Al-Qaeda suspects at the United States military facility at Diego Garcia.<sup>40</sup> The British government has denied this allegation. One must accept this categorical assurance. But if the allegation had been true, the writ of habeas corpus would have been available in respect of prisoners at the United States military facility because this small island is part of British Indian Ocean Territory and is leased to the United States. It would have been sufficient that the British government controls the territory. Until 11 September the understanding of the law of habeas corpus would have been the same in the United States. Deference to the executive has so far eroded the cardinal principles of habeas corpus. By denying the prisoners the right to raise challenges in a court about their alleged status and treatment, the United States government is in breach of the minimum standards of customary international law. The importance of this right is underlined by the experience of the Gulf war when the military held about 1,200 hearings to assess the status of captured prisoners, and about two-thirds were found not to be combatants.<sup>41</sup> It is surely likely that in the chaos of the Afghanistan war and its aftermath the United States military forces picked up a great many who were not even combatants.

While my focus is on the prisoners at Guantanamo Bay, denial of justice to foreigners was bound to erode the civil liberties of citizens in the United States. It was said that the Patriot Act is largely targeted at foreign nationals. The background is that 20 million non-citizens living in the United States cannot vote. In a book published in May this year David Cole, Professor at Georgetown University Law Centre, has shown how oppressive treatment of foreign nationals paves the way for similar measures against American citizens.<sup>42</sup> In recent times the United States government has imposed military custody on two United States citizens. In *Hamdi* the prisoner had been arrested on the battlefield in Afghanistan. In January 2002 he was transported to Guantanamo Bay. In April 2002 he was moved to military detention at a military base in Norfolk, Virginia. The Court of Appeals for the Fourth Circuit upheld the indefinite military detention of the prisoner as an unlawful combatant.<sup>43</sup> Padilla is an American citizen arrested on American soil. In June 2002 he was transferred to a military brig in South Carolina. He challenged the lawfulness of his detention. A District judge held that ‘the commission of a judge . . . does not run to deciding de novo whether Padilla is associated with

<sup>40</sup> *Questioning Terror Suspects in a Surreal World*, D Van Natta Jr, *New York Times*, 16 Mar 2003. *Wake-Up call to UK government on torture*, Amnesty International, 7 Mar 2003.

<sup>41</sup> D Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. 2003, at 42.

<sup>42</sup> (As n 37).

<sup>43</sup> *Hamdi v Rumsfeld* (ED Va 11 June 2002) (No 02 CV 439); (4th Cir 12 July 2002) (No 02-6895); (ED Va 16 Aug 2002) (No 2: 02 CV 439); (4th Cir 8 Jan 2003) (No 02-7338); (4th Cir 9 July 2003) (No 02-7228).

Al Qaeda and whether he should therefore be detained as an enemy combatant'.<sup>44</sup> Previously, there had been very little protest about the United States government's actions at Guantanamo Bay. But the action against United States citizens has caused a chorus of disapproval. Objectively these protests are justified but inherent in them are double standards which are deeply troubling. In a review of David Cole's book in the New York Review of Books Anthony Lewis commented:<sup>45</sup> 'We must respect the humanity of aliens lest we devalue our own. And because it is the right thing to do.' That observation is one that we, in the United Kingdom, ought also to heed.

Let me now turn to the second matter. The question is whether the quality of justice envisaged for the prisoners at Guantanamo Bay complies with minimum international standards for the conduct of fair trials. The answer can be given quite shortly: it is a resounding 'No'. The military commissions contemplated by the United States government have been described by Professor Ronald Dworkin as the type of trials one associates with utterly lawless totalitarian regimes.<sup>46</sup> David Pannick QC invoked Joseph Kafka's *The Trial* in which the great novelist describes how Kafka's advocate warns him of the difficulties of presenting a defence when 'the proceedings were not only kept secret from the general public, but from the accused as well.' But as David Pannick observed, Kafka could see his lawyer, however incompetent, and there was a court, however imperfect, making the decision.<sup>47</sup> The military commissions are not independent courts or tribunals. The term 'kangaroo court' springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice. Internationally military commissions at Guantanamo Bay will be so regarded. Trials of the type contemplated by the United States government would be a stain on United States justice. The only thing that could be worse is simply to leave the prisoners in their black hole indefinitely.

Does the United States Administration care about international opinion? In his dissenting opinion in *Atkins v Virginia*,<sup>48</sup> which was concurred in by the Chief Justice and Justice Thomas, Justice Scalia observed in a death penalty case: 'Equally irrelevant are the practices of the world "community", whose notions of justice are (thankfully) not always those of our people.' This isolationist approach may also be the response of the United States government to criticism about Guantanamo Bay. On the other hand, there may possibly be winds of change. On 26 June 2003 the Supreme Court by a majority decision in *Lawrence et al v Texas* overruled an earlier Supreme Court decision in

<sup>44</sup> *Padilla v Bush* (SDNY 4 Dec 2002) (No 01 Civ 4445 (MBM)).

<sup>45</sup> *Un-American Activities*, Anthony Lewis, New York Review of Books, Vol L, No 16, 23 Oct 2003, at 19.

<sup>46</sup> *The Threat to Patriotism*, New York Review of Books, 28 Nov 2002, 44.

<sup>47</sup> The Times, 25 Mar 2003, Law 4.

<sup>48</sup> 20 June 2002, 122 Supreme Ct 2242 (2002).

*Bowers v Hardwick*,<sup>49</sup> which had upheld Georgia's sodomy law as constitutional. For the first time in its history the court (as opposed to individual justices) relied on international human rights law and practice. Justice Kennedy observed:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. The central holding of *Bowers* has been brought into question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas agreed, said that the majority had signed up to what he called the homosexual agenda. He observed:

The court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta. Dangerous dicta, however, since this court . . . should not impose foreign moods, fads, or fashions on Americans.

The relevance of this ongoing debate about the place of United States law in a global world is, of course, that it may in time become possible in the United States to look at Guantanamo Bay in the context of human rights law and humanitarian law regarding the rights of captured prisoners. It is also just possible that the Supreme Court could be persuaded to rule that United States courts have jurisdiction to entertain habeas corpus applications from prisoners at Guantanamo Bay. That would be an important vindication of the rule of law, but it would leave the prisoners at Guantanamo Bay with a long struggle to attain (a) justice on the merits of their habeas corpus applications, and (b) fair trials before regular courts.

So far I have considered what is happening at Guantanamo Bay in largely legal terms. There is, however, a wider view. Looking at the hard realities of the situation, one wonders what effect it may have on the treatment of United States soldiers captured in future armed conflicts. It would have been prudent, for the sake of American soldiers, to respect humanitarian law. Secondly, what must authoritarian regimes, or countries with dubious human rights records, make of the example set by the most powerful of all democracies? In his recent John Galway Foster lecture, Professor Koh of Yale University has shown how many foreign governments, who want to free themselves of the restraints of human rights, have already directly invoked the United States policy in regard to the Guantanamo Bay prisoners as justification for their actions.<sup>50</sup> Thirdly, the type of justice meted out at Guantanamo Bay is likely to make martyrs of the prisoners in the moderate Muslim world with whom the West must work to ensure world peace and stability.

<sup>49</sup> 478 US 186 (1986).

<sup>50</sup> *The United States and Human Rights*, Oct 2003, London.

What other route could the United States have taken? The International Criminal Court could not be used to try the Guantanamo Bay prisoners because the Rome Treaty applies prospectively only, and the prisoners were captured before the Treaty came into force in July 2002. The United States courts could have assumed universal jurisdiction for war crimes. The prisoners would have received fair trials before ordinary United States courts. It would have been an acceptable solution. On the other hand, the Muslim world would probably not have accepted this as impartial justice. The best course would have been to set up through the Security Council an ad hoc international tribunal. That would have ensured that justice is done and seen to be done.

There is, of course, a dilemma facing democracies. Aharon Barak, President of the Supreme Court of Israel, presided in a case in which the court held that the violent interrogation of a suspected terrorist is not lawful even if doing so may save human life by preventing impending terrorist acts. He confronted the problem created for democracies by terrorism. He said:<sup>51</sup>

We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

Such restraint is at the very core of democratic values.

It may be appropriate to pose a question: ought our government to make plain publicly and unambiguously our condemnation of the utter lawlessness at Guantanamo Bay?<sup>52</sup> John Donne, who preached in the Chapel of Lincoln's Inn, gave the context of the question more than four centuries ago:

No man is an Island, entire of it self; every man is a piece of the Continent, a part of the main; . . . any man's death diminishes me, because I am involved in Mankind; And therefore never send to know for whom the bell tolls; it tolls for thee.

<sup>51</sup> The citation relies on the magisterial essay of President Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy', *Harvard LR* vol 116, no 1 Nov 2002, at 148.

<sup>52</sup> I have been greatly helped in preparing this lecture by my wife, Susan, by Laura Johnson, my judicial assistant, and by Alex Glassbrook, my son-in-law.

