# THE JAMESTOWN LECTURES 2006-2007

## *The Rule of Law*

combar

The Commercial Bar Association

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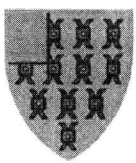



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# *Foreword*

'Jamestown' signifies so many things. The courage of those boarding tiny vessels at Blackwall Stairs on the River Thames, and the vision and ambition of those in the Inns of Court who supported the enterprise. The foundation of 'America' as we know it today. The start of almost inconceivable growth over as short a period as four hundred years. A sheet anchor for the bond that grew between the United Kingdom and the United States of America. The export of the common law and all it stands for.

With the 400th anniversary of the founding of Jamestown, the opportunity arose to pause and reflect on the importance of the rule of law in and to the world. To reflect on the things we have got right because of it and to notice the things we have got wrong where we have lost sight of it. And to celebrate the bond between those involved in the law on each side of the Atlantic.

That bond is in robust good health. A sign is the respect that The Inns of Court in England and Wales and the American Inns of Court have for each other, and their shared purpose in underpinning the practice of law with professionalism, ethics and a sense of responsibility. Another sign is the relationship between the commercial bar of England and Wales and that of North America, as shown by the role that COMBAR and the American Inns of Court have striven to play in marking the occasion of the 400th anniversary.

From April 2006 to April 2007 the 'Jamestown Lectures' organised jointly by COMBAR and the four Inns of Court of England and Wales, shadowed the journey taken from London to Jamestown 400 years ago. Then in April 2007, the University of Richmond and the American Inns of Court welcomed representatives of the United Kingdom's senior judiciary, of the Inns of Court of England & Wales and of COMBAR for a celebration of the arrival of the adventurers, and with it the founding of Jamestown, and in turn of modern America.

COMBAR has marshalled the 'Jamestown Lectures' into this volume. These examine the rule of law in the context of the criminal law (Lord Lloyd of Berwick), the judicial system (Sir David Williams QC) and property and commerce (Mr Keith Clark, of Morgan Stanley and formerly of Clifford Chance). The final lecture, delivered by the Senior Law Lord (Lord Bingham of Cornhill) examines the role of leadership in the rule of law. To the lectures in the series we have added the keynote speech delivered by the Lord Chief Justice (Lord Phillips of Worth Matravers) in Richmond on 11 April 2007, and excellent talks also given in Richmond by two

distinguished Judges of the London Commercial Court, Sir Anthony Colman and Sir David Steel, (each a former Chairman of COMBAR) which bring out much of the flavour of the occasion.

COMBAR has produced this volume in order that the insights gained are not lost, in order to add a permanent mark of the anniversary, in order to mark the spirit of collaboration that enabled the lecture series and then the celebrations, and in order to take the opportunity to say 'thank you' from the Commercial Bar of England & Wales to the other organisations involved and to colleagues on both sides of the Atlantic.

There are many who deserve our thanks for the success of the lecture series, and of the celebrations in Jamestown. Of course the lecturers themselves have pride of place in those thanks. We cannot name all others. But we believe all involved will support our decision to mention here Justice Don Lemons of the Supreme Court of Virginia, Justice Randy Holland and Chief Judge Deanell Tacha (respectively the immediate past and the current Presidents of the American Inns of Court), David Carey (Chief Executive of the American Inns of Court), John Hardin Young, the Treasurers, the Under Treasurers and the Benchers of Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn, David Akridge, Cindy Dennis, Michael Sullivan and Hannah Brown, Christopher Hancock QC (Chairman of COMBAR's North American Committee) and Veronica Kendall (Administrator of COMBAR).

COMBAR would like to dedicate this volume to its Honorary Members from around the world—past, present and future.

| | | |
|---|---|---|
| William Blair QC<br>Chairman of COMBAR<br>2003–2005 | Robin Knowles CBE, QC<br>Chairman of COMBAR<br>2005–2007 | Ali Malek QC<br>Chairman of COMBAR<br>2007– |

London 21 January 2008

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# *Due Process and the Rights of the Accused*

RT HON LORD LLOYD OF BERWICK

Delivered at the Hon Society of the Inner Temple on 8th May 2006

FOUR WEEKS AGO, on Monday 10 April, the US Ambassador unveiled a plaque in the Middle Temple. The Lord Chief Justice, the Master of the Rolls and many other members of the Middle Temple were present, so was the Lord Mayor. The plaque is worth a visit, for it commemorates an event of outstanding importance in the history of England as well as the United States ... the granting of the first charter by King James the First on 10 April 1606 to the Virginia Company of London.

Seven months later the first of the 'adventurers' set forth. There were 144 in all, sponsored, to use a modern term, by the Lord Mayor of the day, and by the 55 livery companies of the City of London. They endured fearful hardships during the crossing. Only about 100 survived the voyage. But it was these few who on 29 April 1607 sailed up the river they named the James, in Cheasapeake Bay, Virginia. On 14 May they founded a settlement they named Jamestown. By the end of 1608 there were only 53 of them left, under the leadership of the redoubtable Captain John Smith. But they had founded the first permanent settlement of English men and women in what is now the United States. There could hardly be a better cause for celebration on both sides of the Atlantic.

I feel honoured and privileged to be giving the first of four lectures that will take place during the next 12 months, one in each of the four Inns of Court. The last will be given by Lord Bingham in Gray's Inn in February 2007. They will all deal in one way or another with the rule of law. The scene will then shift to Virginia, where the final celebrations will take place in May 2007, to mark the 400th anniversary of the landing.

It may be asked why the Inns of Court should be playing a central role in all of this, and why in particular the Middle Temple. The answer is that it was a member of the Middle Temple, Sir Walter Raleigh, who in 1584 named what is now the East Coast of the United States 'Virginia' in honour of Queen Elizabeth. It was another member of the Middle Temple, Sir John Popham, Treasurer of the Middle Temple, and Lord Chief Justice, who

played the leading part in the formation of the Virginia Company. A third member of the Middle Temple, Sir Edwyn Sandys, was largely responsible for the drafting of the Virginia Charter. Sir Edwyn did well in life. He built himself a magnificent house at Northbourne Court in Kent, and is buried in Northbourne church. His tomb on the south wall is also well worth a visit. It is among the finest I have seen.

So many of those involved in the early days were members of the Middle Temple that I feel bound to put in a word for the Inner Temple. In a lecture given by Justice Randy J Holland on 28 November 2005, to which I am very much indebted, he claims that the greatest adventurer of them all—Sir Francis Drake—was also a member of the Middle Temple. But in this respect I believe he was mistaken. It is true that Sir Francis was feted by the Middle Temple in July 1586 on his return from America, where he rescued the remnants of Raleigh's unsuccessful colony at Roanoke. But he was already a member of the Inner Temple. He was admitted on 28 January 1582. It seems likely that he was proposed by Sir Christopher Hatton, the man Queen Elizabeth chose for the Lord Chancellor not for any knowledge of the law, but because of the shape of his calf and his skill in dancing. Whether the present Lord Chancellor would qualify under either of those heads, I am not sure. We know that Sir Francis was a friend and protégé of Sir Christopher Hatton because he named the vessel in which he sailed round the world after an emblem in Sir Christopher's coat of arms—the *Golden Hind*.

Since this is the first of four lectures spanning such a momentous year, I hope I may be forgiven for sketching in the historical background. It was, as Dickens would have said, the best of times, it was the worst of times. It was the age of wisdom. It was the age of foolishness. Not for nothing did the King of France call James I the 'wisest fool in Christendom.' Elizabeth, the last Queen of England, had seen off the might of Spain, in what must surely rank as England's finest hour. She had governed England for 45 years through the Privy Council and the prerogative courts and, in particular, the Star Chamber. The Star Chamber did not then have the bad name it afterwards acquired under her successors. Indeed it did much to secure the future of the common law and its judges. And it was the Star Chamber that proclaimed in words that have often been repeated that it were 'better to acquit twenty that are guilty than condemn one innocent.'

Lastly it was Elizabeth who laid the foundations of the Anglican settlement, celebrated and glorified by the poetry of George Herbert, and justified theologically by Richard Hooker—the 'judicious hooker', as he is described on his gravestone, perhaps the most illustrious and certainly the most influential of all Masters of the Temple. By a happy coincidence Hooker and Sandys were great friends. Hooker was his tutor at Oxford, and it was Sandys who paid for the publication of Hooker's great work, *The Laws of Ecclesiastical Polity*.

The reign of James I was something of an anti-climax. It was a time of peace, not war. For the first time English people could seek their fortunes abroad, and did so. It was a time when the Puritans were growing in strength and self-confidence. And they were also becoming increasingly restive under the restrictions imposed by the Anglican hierarchy. If they were going to achieve toleration—as GM Trevelyan put it in one of his essays—they could either go to America or stay at home and make a bid for power. The first of these movements founded the United States. The second founded English parliamentary government.

But there were other forces at work as well. Unlike the settlers in New England the original settlers in Virginia were not, by and large, Puritans or, if they were, their motive was not primarily religious. They were not exiles. Like others after them, they went to American to better themselves, and they remained loyal to the Crown throughout the Civil War and the Commonwealth.

And so I come to 1606 itself. It was the year in which *Macbeth* was first performed at the Globe Theatre in London. It was the year in which Monteverde was putting the finishing touches to his first and greatest opera, *Orfeo*. It was the year in which Caravaggio painted the *Supper at Emmaus*. It was the year in which the plantation of Ulster began in earnest. It was the year in which Guy Fawkes and his colleagues faced trial before the Star Chamber, after enduring horrific torture in the Tower. And it was the year in which King James I granted the London Company of Virginia its first charter.

The charter itself is a fascinating document. It expresses the hope that the settlers may in time bring the infidels and savages living in those parts to human civility and to a settled and quiet government.' Meanwhile the settlers and their children (the reference to children here is important) were to enjoy 'all the liberties franchises and immunities as if they had been abiding and born within this our realm of England.' This was in marked contrast to the colonies established at that time by France and Spain, who were accorded no such liberties. It was these 'liberties' that were re-stated and elaborated in subsequent Charters, and eventually in the Virginia Declaration of Rights of 1776. Since this is a lecture on due process, I cannot do better than read from Article 8:

> That in all capital or criminal prosecution a man has a right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses ... and to a speedy trial by an impartial jury and without whose unanimous consent he cannot be found guilty; nor can he be completed to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

It will be noticed that the Virginia Declaration of Rights does not refer in terms to 'due process.' But those words are to be found in the constitutions of many other states at that time and are, of course, enshrined in the Fifth

and Fourteenth Amendments of the Federal Constitution. I know of no better short definition of what is meant by due process.

What exactly were the 'liberties franchises and immunities' enjoyed by the English people in 1606 that have meant so much in American history? First and foremost there was the Magna Carta of 1215. By chapter 39 King John undertook that he would not proceed against any free man 'except by the lawful judgment of his peers and by the law of the land.' It has been held by the Supreme Court that due process of law in the Fifth Amendment was intended to have the same meaning as the words 'By the law of the land' in Magna Carta. In this the Supreme Court was following good early authority. For a statue of Edward III of 1354 provides that 'no man shall be ... taken or imprisoned ... to put to death without being brought to answer by due process of law.' So due process is an ancient concept in English law; and at the heart of due process lies trial by jury.

Nor was Magna Carta set in stone at Runnymede. The provision of Magna Carta were elaborated in subsequent reigns culminating, so far as England is concerned, in the Petition of Right of 1628 and the Bill of Rights of 1689.

Magna Carta was also the subject of numerous commentaries on both sides of the Atlantic. There were the *Institutes* of Sir Edward Coke in the 17th century and the *Commentaries* of Sir William Blackstone in the 18th. The views of Sir Edward Coke in particular were enormously influential in the United States. He became Chief Justice of the Common Pleas in 1606 and of the King's Bench in 1613.

It was Sir Edward Coke who presided in the great case brought by Dr Thomas Bonham against the College of Physicians in the City of London. The members of the College had the exclusive right to practise medicine in the City of London under an Act of Parliament passed in the time of Henry VIII. Dr Bonham was not a member of the College but he had a degree in medicine—or physic—from the University of Cambridge. When he set up to practise in London he was summoned by the College, and fined 100 shillings. That was in April 1606. In November he was summoned again. This time he was sent to prison where he was kept for seven days. So he brought an action against the College of Physicians of false imprisonment. The defendants relied on their statute, under which they had been given very extensive powers to enforce their rights. But Coke CJ held that the statute was void. He gave a number of reasons, one of which has a familiar ring—that the statute had made the defendants judge in their own cause. Another reason was that no man should be punished twice for the same offence. He encapsulated his views in the following famous sentence:

> And it appears in our books, that in many cases the common law will control Acts of Parliament, and sometimes judge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed the common law will control it and adjudge such act to be void.

In support of this view Chief Justice Coke cited numerous earlier authorities in which Acts of Parliament had been held to be void at common law.

The principle laid down by Chief Justice Coke was one by which he set great store. For he came back to it in his *Second Institute*, where he said that any statue passed by Parliament contrary to Magna Carta should be 'holden for none.'

But in England the principle did not survive for long. This is hardly surprising in view of the triumph of Parliament in the civil war. It is true that Dr Bonham's case was cited with approval by Chief Justice Holt, another great Chief Justice, at the beginning of the eighteenth century. But thereafter it disappears from the scene. It could not stand alongside the emerging constitutional principle know as the Supremacy of Parliament.

But if the seed sown in Dr Bonham's case fell on stony ground in England, it fell on good ground in the United States and bought forth fruit a hundred fold. Coke's *Institutes* and the *Commentaries* of Blackstone were widely read by the colonists, most of whom, then as now, appear to have been lawyers. It was Dr Bonham's case that James Otis cited in his celebrated attack on general search warrants in the Superior Court of Boston in February 1761. Although Otis lost the case, there can be no doubt that his speech—a speech that was said to have electrified the continent—made a lasting impression on the young John Adams, who was present in court to hear it. He would surely have had it in mind 20 years later when he was drafting the Massachusetts Declaration of Rights of 1780.

And so one comes to *Marbury v Madison*, decided by the Supreme Court in 1803. It was the turning point in American constitutional history. For it established the all-important principle that it is the Supreme Court that is the final arbiter of the meaning of the Constitution, a point about which there was nothing in the Constitution itself. This enabled Chief Justice Marshall to decide the case on the politically convenient ground that section 13 of the Judiciary Act, a statue passed by Congress in 1789, was unconstitutional and therefore invalid.

Dr Bonham's case was not cited in the judgment. But the Court would have known it well. Looking back one can see now that the principle stated by Chief Justice Coke lay at the parting of the ways. It was the point at which the two constitutions diverged with hugely important consequences for human rights on both sides of the Atlantic. In the United States due process is protected by the 5th and Fourteenth Amendments. If Congress or the states pass legislation that infringes either of these Amendments, the Supreme Court, following *Marbury v Madison*, can say so, and the legislation is 'holden for none.' But in the United Kingdom it is different. Our judges can do their best to construe legislation so as not to infringe due process. But that is all. Even if the legislation (I am referring to primary legislation) is incompatible with the European Convention of Human Rights, the House of Lords can do no more than make a declaration to that effect—a striking manifestation of the Supremacy of Parliament.

But it makes it all the more important that Parliament should ensure that due process is not infringed, that its legislation is compatible with the European Convention, and that suspects as well as those accused of crime should be adequately protected. In the last part of this lecture, therefore, I propose to consider the record of successive governments since the early 1990s, and compare that record with the record of the House of Lords as a judicial body during the same period. I am driven to the conclusion that Parliament does not come well out of the comparison.

I will leave to the end recent legislation against terrorism, a subject in which I have a particular interest. But there is much else that is cause for concern. When I became a judge in 1978 there were 42,000 men and women in prison. There are now nearly 77,000. Many people would regard that figure as a national disgrace. Nobody suggests, I think, that this increase in the prison population is due solely or even mainly to an increase in the crime rate. Nor it is it due to improved detection rates. A more likely cause, I would suggest, are the restless efforts of successive governments to legislate in the field of crime. In the 12 years since 1994 there have been 24 new Acts of Parliament in the criminal field—an average of two a year. Since May 1997 the Home Office alone has been responsible for the creation of 404 new criminal offences. Of course not all these new offences have resulted in prison sentences. But many have.

The creation of new offences is not the only cause for concern. There is also the constant pressure from the legislature for heavier sentences for existing offences. The best example of this is the statutory scheme set out in the Criminal Justice Act 2003 for setting the minimum term of imprisonment to be served by those convicted of murder. This was the Home Secretary's legislative response to the decision of the House of Lords in *R v Anderson*, in which it was held that the Home Secretary should no longer play any part in fixing, and in some cases increasing, the so-called tariff. For him to do so was incompatible with Article 6 of the European Convention on Human Rights.

But I want to give an example from my personal experience. When I first became a judge in 1978 most cases of causing death by dangerous driving were dealt with by a fine. For the more serious cases there might be a short sentence of six to 12 months' imprisonment. The guideline case was called *Guilfoyle*. I know this because the first case I tried at the Old Bailey was just such a case. Nowadays the starting point for the most serious cases would be six or even eight years. It may be said that the responsibility for this increase rests with the judges, not with Parliament. But that would be wrong. For the judges are obliged to have regard to the maximum sentence for any offence, since the maximum sentence fixed by Parliament represents Parliament's view of the appropriate sentence for the worst case of that offence. In 1977 the maximum sentence fixed by Parliament was two years. It was then increased to five years, then 10 years and now 12 years. Since

in the short space of a generation the maximum sentence (and this is only one example) has increased six fold, is it surprising that the prisons are full and overflowing? And now we have in addition the new offence of causing death by careless driving, carrying a sentence of five years' imprisonment.

Then there is the recent fashion for fixing minimum sentences. This started in the dying days of the Conservative Government in 1997, with automatic life sentences for those convicted of a serious, violent or sexual offence for the second time, and minimum sentences of seven and three years for repeat Class A drug offenders, and domestic burglars. The Labour Government followed suit in 2003 with a minimum sentence of five years for certain firearm offences. My own view is that Parliament should not be in the business of fixing minimum sentences, because they cannot know the circumstances of the individual case. That was certainly the view of the Chief Justice, Lord Taylor. I would like to quote from his last, unforgettable speech in the House of Lords when he was already gravely ill. 'Quite simply,' he said 'minimum sentences must involve a denial of justice': not, be it noted, the *appearance* of injustice but *actual* injustice. And that was also the view of his successor, Lord Bingham, who expressed his profound anxiety at this new trend.

Another cause for concern is the desire of successive governments to 'improve' (as they say) conviction rates. Take rape. The Government is persuaded that the conviction rate for rape is too low, though how governments can tell how many defendants have been wrongly acquitted I do not know. So what does the Government do? It makes a fundamental change in the substantive law. Under the Sexual Offences Act 2003 it is no longer necessary to prove beyond reasonable doubt that the defendant knew that the woman was not consenting. It is enough to prove that a reasonable person would have believed she was not consenting. So gone is the defence of honest belief. We now have rape by negligence. We have created an offence of utmost seriousness carrying a maximum sentence of life imprisonment, in which the defendant need not have had a guilty mind. Whether conviction rates will in fact be 'improved' remains to be seen. For myself I rather doubt it.

Last in this connection I should touch on procedure. One of the most hallowed rules of our criminal procedure is that a person cannot be compelled to be a witness against himself—the rule against self-incrimination. In the United States it is covered by the Fifth Amendment. In England it is usually referred to as the right to silence. Yet when it was found that terrorist organisations in Northern Ireland were using that right to such an extent that it was becoming difficult to secure convictions, the Conservative Government decided to modify the right to silence. By the Criminal Justice and Public Order Act 1994 it was to be permissible to draw an inference from the defendant's failure to mention a fact that he could reasonably have been expected to mention. The Labour Government has continued

down the same path. It has also abolished the ancient rule against double jeopardy, another right specifically protected by the Fifth Amendment in the United States.

In all these respects, whether in the field of procedure, sentencing or substantive law, Parliament has in recent years been tilting the balance more and more in favour of the victim. In doing so, it has inevitably restricted the rights of the criminally accused. I cannot think of any other such period in our recent history. The one shining exception is the incorporation of the ECHR into our domestic law, for which the Labour Government deserves full credit.

What is the reason for this ceaseless activity of successive governments in the field of crime? No doubt they wish to be tough on crime. There could be no quarrel with that. But they also wish to *appear* tough on crime; not only on crime in general, but also on particular crimes which happen to have hit the headlines. Urged on by the media they know that being tough on crime plays well with the electorate. The problem is that the opposition parties know this too. The result is a clog on constructive debate. Governments are always anxious to send out the right 'message.' I sometimes wonder whether the message ever reaches the criminals for whom it is intended. I suspect not; and, even when it does, I doubt whether it has much effect. But it certainly has an effect on the voters.

So far I have said nothing about terrorism. I remember well when I was writing my report on legislation against terrorism in 1995 I was under much pressure—especially from members of the Labour opposition—to recommend that terrorists should be treated as ordinary criminals. Otherwise, it was said, we would make terrorists into martyrs, and thereby serve their evil purpose. I did not altogether agree with this view. It seemed o me then—as it does now—that terrorists are a special case, partly due to the nature of the motivation and partly because their killing is indiscriminate. So I welcomed the Terrorism Act 2000. It gave the police all the additional weapons they needed. But it also preserved the essential rights of the suspect. I wish I could say the same for subsequent legislation. We have now had three new counter-terrorism Acts in five years. So far from treating terrorists like other criminals, we have now gone much too far in the other direction.

Take Part Four of the Anti-Terrorism Crime and Security Act 2001. It was passed in a great hurry in the immediate aftermath of 9/11. It enabled the Home Secretary to detain suspected terrorists (it did not apply to British citizens) pending their deportation. But as there was no prospect of them being deported to their own countries, they were in effect being detained indefinitely without trial. Such legislation is acceptable in wartime, when there is a threat to the life of the nation. But we were not at war in 2001. To talk of the war on terrorism is no more than a figure of speech, like the war on want. Yes, terrorism is a very serious threat. There can be no

doubt about that; and it is likely to remain so for many years to come. But I refuse to accept that there is a threat to the life of the nation. To deprive a man of his liberty, not because of what he has done but because of what he might do, is a grave step for any government to take in peacetime. The Labour Government could only take that step in 2001 by derogating from the European Convention on Human Rights. We were the only country to do so. In the event the House of Lords held in *A v Home Secretary* that Part Four of the 2001 Act infringed Article 5(1)(F) of the European Convention, and so the derogation order was quashed. It was a critical moment in the relationship between Parliament and the Judiciary. The Home Secretary looked like a man in agony. But he made the right choice. The Government decided to accept the decision. We all breathed again.

But the Belmarsh detainees who had been held for up to four years were not released. They were immediately made subject to control orders. In his first report on the operation of the Terrorism Act 2005 Lord Carlyle has described the obligations which are now imposed in what has become the standard form of control order. 'On any view' he says 'those obligations are extremely restrictive ... they fall not very far short of house arrest, and certainly inhibit normal life considerably.'

Whether such extreme restrictions amount to a deprivation of liberty is a matter for debate. But it may not matter here; for either way one would expect such restrictions to be imposed only as a result of criminal proceedings to the usual standard of proof. But proceedings under the Terrorism Act 2005 are not criminal proceedings. They are civil proceedings. They do not even require the Secretary of State to be satisfied on the balance of probabilities. It is enough that the Secretary of State has reasonable grounds for suspicion. During the debate in the House of Lords I asked whether there was any precedent for imposing what looks like, and must certainly feel like, a criminal sanction as the outcome of civil proceedings. I was told that the nearest precedent was an ASBO.

It is true that the Secretary of State must apply to the High Court for permission to make a control order. But the jurisdiction of the High Court is limited. It can only quash the control order if the Secretary of State's decision was 'flawed' on the material before him, applying the principles of judicial review; and in any event the proceedings in Court are of a most unusual kind. They replicate the procedure before the Special Immigration Appeals Commission. The suspect is not entitled to see all the relevant evidence; he is provided with a 'special representative' appointed by the Attorney-General for that purpose, and the hearing may take place in his absence. In his recent judgment in the High Court Mr Justice Sullivan held that the procedures under the 2005 Act were incompatible with the respondent's right to a fair hearing under Article 6 of the Convention. He described those procedures as providing only a 'thin veneer of legality.' I agree.

I find the control order regime almost as objectionable as Part Four of the 2001 Act, which it replaced. In his recent exchange of emails with Henry Porter in *The Observer*, the Prime Minister excuses, or perhaps I should say justifies, the legislation on the grounds that it has only been applied in a small number of cases. Currently there are only 12 control orders in place. I do not find this justification satisfactory. One might as well say that only 55 people were killed on 7 July.

Like its predecessor, the 2005 Act was rushed through Parliament. The 2001 Act was about to expire, and the Belmarsh detainees would have to be released. The House of Commons did not have time to debate the Bill because it only reached its final form on second reading in the House of Lords. The committee stage in the House of Commons was a farce. The House of Lords did not like the Bill at all. But after an all-night sitting, the House of Lords allowed the Bill to get through on the understanding that it would be brought back early in the next session. But this undertaking was broken. It was overtaken—so it was said—by the events of 7 July. Instead of improving existing legislation, the Government decided to introduce yet more legislation, again in a rush.

And so I come to the Counter Terrorism Act 2006. The two most controversial provisions in the Bill were, first, the so-called glorification offence and, secondly, the power for the police to hold terrorist suspects for up to 90 days without charge. The former goes to the right of free speech under Article 10 of the Convention; the latter goes to the heart of due process under Articles 5 and 6.

I still find it surprising that the Government should have believed that 90 days would be compatible with Article 5 of the Convention. I also find it surprising that they should have accepted so readily the evidence of ACPO that 90 days was what was required by the police. I say that for this reason: as recently as 2003 the police were asked how long they needed in terrorist cases. They answered 14 days. Bearing in mind that the maximum for all other offences, however serious and however complex, is only four days, 14 days seemed to be at the time to be more than enough. But be that as it may, the reasons which the police gave in 2005 for needing 90 days were exactly the same as the reasons which they had given in 2003 for needing 14 days. Yet nothing of relevance had changed in the meantime. When giving evidence to the House of Commons Home Affairs Select Committee neither the Metropolitan Police Commissioner nor ACPO could point to any case where 14 days had not been enough.

I must not leave the subject of terrorism without trying to be more constructive. As I have said there remains a very real threat of further terrorist activity in the United Kingdom. But in my view it is unlikely to be a repeat of the sort of highly sophisticated atrocity which destroyed the Twin Towers on 9/11. The activities of Al Quaeda were disrupted by the invasion of Afghanistan to a much greater extent than is often appreciated.

The threat is, I think, more likely to come from small groups of individuals working alone with homemade explosives, such as occurred in London on 7 July 2005. We must therefore face the fact that such individuals may indeed cause great loss of life, especially if they are prepared to blow themselves up in the process.

Now it goes without saying that it is the first duty of any government to protect its citizens—*salus populi suprema lex*. The questions is how that is best done. It is not, I think, best done by introducing further, ever more repressive legislation. Indeed I think that such legislation will be counter-productive. It will only serve to drive more individuals into the terrorist camp. In the course of many debates on terrorism in the House of Lords, there has been no more remarkable speech than that of Lord Condon, a former Metropolitan Police Commissioner, on an amendment to increase the detention period from 28 days to 90 days. Tactically, he said, it would serve a useful short-term purpose. But strategically it would be a great mistake. It would play into the hands of the propagandists. He said:

> This is not about putting a finite number of people behind bars. This is a philosophical struggle that will endure in my children's lifetime and my grandchildren's lifetime. I do not want us to do anything that will be counter-productive.

So he voted against the amendment. Coming from a former Metropolitan Police Commissioner, this is advice which we would do well to follow.

In his recent exchange of emails with Henry Porter of *The Observer*, the Prime Minister explained the problem as follows: 'we are trying' he said 'to fight twentieth first century crime with nineteenth century means. It hasn't worked—it won't work.' I agree that we should use all the modern methods at our disposal for detecting and convicting criminals. That is why I have long advocated the use of intercept evidence in court. But if by modern methods the Prime Minister means legislation which cuts cross the basic principles on which our criminal justice system is built—the presumption of innocence, the rule against self-incrimination, the right of an accused to hear the evidence against him and so on—then I profoundly disagree. These are not 19th century inventions. They do not change with the changing threat. They are inherent in our perception of justice and the rule of law.

The Prime Minister says he would impose restrictions on those suspected of being involved in organised crime. He would seize the cash of suspected drug dealers and the cars they drive round in, and require them to prove they came by them lawfully. This seems to envisage three classes of citizen—the innocent, the guilty, and suspects. But who decides who is a suspect? The police? And suspected of what? There was evidence in *A v Secretary of State* that upwards of a thousand individuals from the United Kingdom have attended terrorist training camps in Afghanistan in the last five years. Are they all to be treated as suspects?