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**NATIONAL SECURITY: PROPORTIONALITY, RESTRAINT &
COMMONSENSE***

The Hon Justice Michael Kirby AC CMG**

MAINTAINING OUR PERSPECTIVE

I start this conference on a somewhat discordant note. It is easy to gather a group of experts some of whom may have a view of the importance of their topic, and perhaps a professional and institutional commitment to its themes, and to run the risk of losing a sense of proportion and perspective. However, there is a strong commonsense streak in the Australian character. Normally, it tends to rescue us from overreaction. I have reason to know that fact. I learned of it when I was

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twelve years of age. It left an indelible imprint on my memory, as I shall show.

Terrorism, the main cause for contemporary concerns about national security law, is not new. The pirates (most of them English) who harassed the Iberian trade ships to the Americas, were international terrorists of a sort. The British certainly regarded George Washington and his confederates as terrorists who had risen in rebellion against the Crown. The twentieth century was filled with acts of terrorism. One at Sarajevo triggered the First World War. Another, shortly after in Dublin, renewed "the troubles". Acts of terrorism helped dismantle the great European empires until, by century's end, those empires were gone. And the communists were often regarded as terrorists. Their dedication to the destruction of capitalist society as it was organised led to legal responses that were sometimes unnecessary, excessive and unwise.

I knew about the communists because my grandmother remarried in 1944. Her new husband was a communist. He was a fine man and an idealist. But he was involved in a cause that was deeply distrusted. He was treasurer of the Australian Communist Party. That party had links to a country that possessed weapons of mass destruction. They had undoubted stockpiles of nuclear armaments and chemical weapons. Fear of the communists led to legal responses in Australia and elsewhere that we can now see as completely disproportionate. We were saved from these legislative excesses in 1951 by the decision of the High Court of Australia in *Australian Communist Party v The*

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*Commonwealth*¹. That case held that the *Communist Party Dissolution Act* 1950 (Cth) was beyond the powers of the Federal Parliament and constitutionally invalid. That decision, made by judges who had no resort to a Bill of Rights expressing guarantees of freedom of speech and freedom of assembly², offered a stark contrast to the decision of the United States Supreme Court a few weeks earlier in *Dennis v United States*³. That decision upheld similar legislation to outlaw communists in the United States under the Smith Act.

In retrospect most Australians, and not a few Americans, would regard our country's judicial resolution of that legal controversy as wise and the American resolution as unwise and excessive. The decision of the High Court majority was endorsed, later in 1951, by the rejection by the electors of Australia of a proposal to amend the Constitution to grant the Parliament the lawmaking powers denied by the High Court. The legislature and the executive government of the Commonwealth on that occasion went too far. The Court hauled them back to the rule of law and Australia's constitutional fundamentals.

These events tend to show that in such matters, in the past, the Australian people and their highest court have been more temperate and

¹ (1951) 83 CLR 1. See esp at 187-188, 193.

² cf United States Constitution, First Amendment.

³ 341 US 494 (1951), Black J and Douglas J dissenting.

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prudent than others in evaluating the real risks to national security and judging the needs for draconian laws to respond to those risks. The United States of America, great a nation as it is, sometimes gets swept up in tides of nationalistic passion that Australians tend to avoid or keep firmly under control. We should keep this story of our country before us as we embark upon responses to contemporary problems of terrorism and risks to our national security.

The times now are different. The risks have changed. The technology is new. The weapons are in some ways more perilous. Control over them is more disparate. But the need for prudence and care against over-reacting is as strong today as it was in 1951. If a world-wide danger supported by a mass movement of convinced ideologues, sustained by one of the world's super powers, armed with nuclear and other weapons, could not destroy our security in the twentieth century, we must keep in perspective the powers of those presently ranged against the Western democracies. This is not a reason for complacency over national security or indifference to violence and risks of violence. But it is a reason for keeping our feet firmly planted on the Australian ground. We should never forget that, to the extent that we exaggerate the risks to national security we fall into the hands of those who threaten our constitutionalism. To the extent that their threats propel us into demolishing the fundamentals of our liberal democracy, we reward the enemies of our form of government with success. To the extent that we over-react, we proffer the terrorists the greatest tribute.

Moreover, in terms of proportionality, terrorism and its dangers do not constitute the greatest peril for the world today. Every day on this planet more people die of AIDS than died on 11 September 2001. But most of them die anonymously, in poverty and in far-away developing countries. Their deaths are hidden in shame and suffering. They are not subject to vivid television images to frighten a proud and powerful nation. Lack of access to water, homelessness, poverty, malaria, ethnic violence. These are more potent dangers for more members of humanity than the terrorism of Al Qaeda. If a small proportion of the energy and capital that has been devoted to the dangers following 11 September 2001 had been lavished on the problem of AIDS, I feel sure that the world would be a better and probably a safer, certainly a kinder place. Not once have I been invited to speak at a high level Australian conference, such as this, of judges and senior officials focussed on the issues of HIV/AIDS and the way the law can contribute to reducing *its* dangers.

So my first message is one of proportion. We should found our policies and laws on national security upon sound data alone. We should maintain our prudence, as we have in the past. We should address the causes, and not simply the manifestations, of terrorism as a danger to Australia's national security. We should avoid the closed drawbridge mentality which, in any case, affords no ultimate security against fanatical individuals. We should not over-react. We should remember the events of 1951 concerning the communists. We should not necessarily follow American leadership in all of its responses in the

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current age for, as in the past, its responses may sometimes be misguided and prone to excess.

Our courts are the final guardians of the liberties of Australians. Their duty is to give effect to valid laws enacted by Parliament. But if those courts look around the world at this present time, they will find much food for thought on the subject of national security laws. This is the other point I wish to make. The decisions of final courts in many lands have lately spoken with considerable wisdom in recent cases involving terrorism and national security. In the balance of this contribution, I want to call attention to a few illustrations.

LEARNING FROM THE COURTS

South Africa: An early instance of the unwillingness of national courts to bend basic principles in the face of allegations of terrorism was the decision of the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa*⁴.

The case concerned Khalfan Mohamed who was wanted by the United States on a number of capital charges relating to the terrorist bombing of the United States Embassy in Dar es Salaam, Tanzania, in August 1998. The appellant had been indicted in the United States. A

⁴ 2001 (3) SA 893.

warrant for his arrest was issued by a federal District Court. He had entered South Africa unlawfully as an alien. He was detained there by the authorities, acting in cooperation with United States officials. In his interrogation, the detainee was not given the rights provided by South African law for such a case. The South African authorities offered him a choice of deportation to Tanzania or the United States. He preferred the latter; but applied to the courts for an order that the Government of the United States be obliged to undertake that the death penalty would not be sought, imposed or carried out on him. That order was refused at first instance. The appellant was promptly deported. This notwithstanding, an application to the Constitutional Court was pursued on his behalf on the footing that the appellant had been denied the protection of South African constitutional law under which it has been held that capital punishment is contrary to fundamental constitutional guarantees⁵.

The Constitutional Court of South Africa held that Mr Mohamed's *deportation* was unlawful and that *extradition*, not deportation, was the applicable law. Under South African law, that procedure was required to be negotiated with the requesting state under conditions obliging an assurance that the death penalty would not be imposed following a conviction⁶. In this respect, the court below, and the Government of

⁵ *S v Makwanyane* 1995 (3) SA 391; (1995) (2) SACR 1; 1995 (6) BCLR 665.

⁶ cf *Truong v The Queen* (2004) 78 ALJR 473.

South Africa, had failed to uphold a commitment implicit in the Constitution of South Africa. It was held that there had been no waiver by the accused in consenting to deportation or extradition.

Because, by the time of the Constitutional Court's orders, Mr Mohamed was under trial in the United States, he was outside the effective power of the Constitutional Court, by its orders, to afford him physical protection. Nevertheless, the decision of the primary judge was set aside. A declaration was made that the constitutional rights of the appellant in South Africa had been infringed. The Constitutional Court directed its chief officer, as a matter of urgency, to forward the text of its decision to the relevant United States Federal Court⁷. Following his trial in the United States, the appellant was convicted. However, he was not sentenced to death. Whether this was due in any way to the South African intervention is unknown. The South African court did what it could in the circumstances to uphold the accused's fundamental legal rights, notwithstanding the charge of terrorist offences. The government officials in South Africa had been less respectful of those rights.

In the course of argument, the court was reminded of the famous words of Justice Brandeis in *Olmstead v United States*⁸, later cited in *Mohamed*⁹:

⁷ 2001 (3) SA 893 at 923 [73].

⁸ 277 US 438 at 485 (1928).

⁹ 2000 (3) SA 893 at 921 [68].

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously ... Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example ... If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy".

These last words have a special resonance in South Africa as the Constitutional Court explained¹⁰:

"... [W]e saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully".

These reasons were written in May 2001, before the events of 11 September of that year. But they remain true today and not only in South Africa.

The United States: Probably the best known decision in this class of case is that of the Supreme Court of the United States in *Rasul v Bush*¹¹ concerning the availability of judicial scrutiny of the cases of non-

¹⁰ 2001 (3) SA 893 at 921 [68].

¹¹ 542 US 1 (2004); 72 USLW 4596 (2004).

citizens detained as terrorist suspects in Guantanamo Bay. That decision was delivered in June 2004. The Supreme Court was divided 6:3. The opinion of the Court was written by Justice Stevens. Justice Scalia wrote the opinion of the dissenting judges (Chief Justice Rehnquist, Justice Thomas and himself).

In the Court opinion, Justice Stevens cited the law authorising President George W Bush, after 11 September 2001, to use "all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks ... or harbored such organisations or persons"¹². In reliance upon this law, President Bush established the detention facility at the Naval Base at Guantanamo Bay, on land in Cuba leased by the United States from the Republic of Cuba. Two Australians (Mamdouh Habib and David Hicks), who were detained in the facility, together with others, filed petitions in United States federal courts for writs of *habeas corpus*. They sought release from custody, access to counsel, freedom from interrogation and other relief.

The United States District Court dismissed these petitions for want of jurisdiction. It relied on a decision of the United States Supreme Court of 1950¹³. That decision had held that "[a]liens detained outside

¹² *Authorisation for the Use of Military Force*, Public Law 107-40 ¶1-2, US Stat 224.

¹³ *Johnson v Eisentrager* 339 US 763 (1950).

the sovereign territory of the United States [may not] invoke a petition for a writ of *habeas corpus*". However, the Supreme Court reversed the federal court decision, granted *certiorari* and remitted the case to the federal courts. In effect, Justice Stevens followed what he had earlier written in the *Padilla* case where he said¹⁴:

"At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber ... for if this nation is to remain true to its ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny".

The decision of the majority of the Supreme Court in *Rasul v Bush* reflects these notions. It traces the restraint on Executive power in the United States to legal and constitutional "fundamentals". It does so through the history of the legal system which the United States shares with other common law countries¹⁵:

"As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm', there was 'no doubt' as to the court's

¹⁴ *Padilla v Rumsfeld* 124 SCt 2711 at 2735 (2004). In this case Stevens J was dissenting but on the availability of *habeas corpus* in the circumstances.

¹⁵ 542 US 1 at 14 (2004); 124 SCt 2686 at 2697 (2004).

power to issue writs of *habeas corpus* if the territory was under the subjection of the Crown"¹⁶.

Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown"¹⁷.

In *Rasul v Bush* the rule of law was upheld by the American judges. Even in the face of Executive demands for exemption from court scrutiny because of the suggested exigencies of acts of terrorism, the Supreme Court upheld the availability of judicial supervision and the duty of judges to perform their functions, including on the application of non-citizens. To say the least, the case is an extremely important one.

The United Kingdom: On 18 March 2004, the English Court of Appeal delivered its decision in *Secretary of State for the Home Department v M*¹⁸. The judgment of the English Court was delivered by Lord Chief Justice Woolf. The case involved an application by the Home Secretary for leave to appeal against a decision of the Special Immigration Appeals Commission. That body had been established by the United Kingdom Parliament in partial response to an earlier decision

¹⁶ *King v Cowle* (1759) 2 Burr 834 at 854-855; 97 ER 587 at 598-599 (KB).

¹⁷ *Ex parte Mwenya* [1960] 1 QB 241 at 303 (CA) per Lord Evershed MR.

¹⁸ [2004] EWCA Civ 324.

of the European Court of Human Rights¹⁹. The latter had criticised the procedures that existed in Britain under the legislation then in force to respond to terrorism in Northern Ireland.

The Special Commission is, by law, a superior court of record. Its members are appointed by the Lord Chancellor. One must be a judge who holds, or has held, high judicial office. This provision was in place when the events of 11 September 2001 occurred. Under the *Anti-Terrorism, Crime and Security Act 2001* (UK), the British Home-Secretary enjoys the power to issue a certificate in respect of a person whose presence in the United Kingdom is deemed a "risk to national security" or who is suspected to be a "terrorist"²⁰. The then Home-Secretary (Mr David Blunkett) granted such a certificate in the case of M, a Libyan national, present in the United Kingdom. M was thereupon taken into custody.

In 2004, the Commission, presided over by Justice Collins, allowed M's appeal against the Home Secretary's certificate. The Home-Secretary challenged this action which he saw as unwarranted judicial interference in an essentially political and ministerial judgment. He sought leave to appeal to the Court of Appeal. He complained that

¹⁹ *Chahal v United Kingdom* (1996) 23 ECHR 413. See Lord Lester of Herne Hill and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004), 182 [4.5.33]-[4.5.35].

²⁰ s 21(1) of the Act.

the Commission had reversed a decision for which he was accountable in Parliament and through the democratic process, to the British electorate.

The Court of Appeal rejected the Home-Secretary's application. That Court, like the Commission, conducted part of its hearing in closed session. Only a portion of the Court's reasons were given on the record. The Commission insisted that the suspicion of the Minister had to be a *reasonable* suspicion. It stated that the Minister had failed to demonstrate error on the part of the Commission. In his concluding observations, Lord Chief Justice Woolf, for the Court of Appeal, said²¹:

"Having read the transcripts we are impressed by the openness and fairness with which the issues in closed session were dealt with ... We feel the case has additional importance because it does clearly demonstrate that, while the procedures which [the Commission] have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to under-value the SIAC appeal process. ... While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the whether of whether the detention is lawful or not. If it is not lawful, then he has to be released".

Israel: At about the same time as the decision of the United States Supreme Court in *Rasul v Bush* was handed down, the Supreme

²¹ [2004] EWCA Civ 324 at [34].

Court of Israel, on 2 May 2004, delivered its decision upon a challenge brought on behalf of Palestinian complainants concerning the "separation fence" or "security fence" being constructed through Palestinian land²². This "fence" has been justified by the Government of Israel and the Israeli Defence Force as essential to repel the terrorist (specifically suicide) attacks against Israeli civilians and military personnel, carried out from adjoining Palestinian lands. The court was told that the issues raised by the challenge were non-justiciable.

However, from bitter experience, the Jewish people had learned about the great dangers of legal black-holes. Applying what common law judges would describe as principles of administrative law or of constitutional proportionality, it upheld the complaints of the excessive way in which the wall had been created in several areas. Justice Aharon Barak, President of the Court, said²³:

"Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction

²² Subsequently, the International Court of Justice, on a reference from the General Assembly of the United Nations, held that the construction of the wall or "fence" on Palestinian land was contrary to international law. See International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, unreported, 9 July 2004.

²³ *Beit Sourik Village Council v The Government of Israel*, unreported decision of the Supreme Court of Israel sitting as the Israeli High Court of Justice [HCJ 2056/04], 2 May 2004. (Barak P, Mazza VP and Cheshin J concurring), pp 44-45 [86].

wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. In *The Public Committee against Torture in Israel v The Government of Israel*, at 845 [I said]:

'We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy - she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.'

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for."

The Supreme Court accepted the petitions in a number of cases, holding that the injury to the petitioners was disproportionate to the security needs. It ordered relief and costs in favour of those petitioners.

Indonesia: On 24 July 2004, the Constitutional Court of Indonesia set aside the conviction imposed on Masykur Abdul Kadir, sentenced to fifteen years imprisonment for helping Imam Samudra in connection with the bombings in Bali on 13 October 2002. Those bombings killed 202 people, including 88 Australians.

The decision of the Indonesian Court was reached by a majority, five Justices to four. The problem arose out of the decision of the prosecutor to proceed against the accused not on conventional charges of homicide or crimes equivalent to arson, conspiracy, use of explosives etc. Instead, the accused were charged only under a special terrorism law introduced as a regulation six days *after* the bombings in Bali²⁴.

The amended Indonesian Constitution contains basic principles protecting human rights and fundamental freedoms. One of these principles, reflected in many statements of human rights²⁵, is the prohibition on criminal legislation having retroactive effect. Under international law an exception is sometimes allowed to permit trial or punishment "for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised countries"²⁶. This expression is drawn directly from the statute of the International Court of Justice²⁷.

²⁴ *Sydney Morning Herald*, 24 July 2004, 1.

²⁵ See eg *International Covenant on Civil and Political Rights*, Art 15; *European Convention on the Protection of Human Rights and Fundamental Freedoms*, Art 7(1). In Europe, the sub-article is not derogable. See Art 15(2).

²⁶ *European Convention on Human Rights*, Art 7(2).

²⁷ Art 38.

The rule of law is itself one of the fundamental principles which democrats, the world over, defend against terrorists²⁸. As Chief Justice Latham once said²⁹, it is easy for judges to accord basic rights to popular majorities. The real test comes when they are asked to accord the same rights to unpopular minorities and individuals. The Indonesian case of Masykur Abdul Kadir was such a test.

In a comment on the Indonesian court's decision, an Australian editorialist said³⁰:

"The Constitutional Court's decision should be seen for what it is - part of a proper legal process in which every person has the right to exhaust all avenues on appeal. This is a positive development for Indonesia. The ensuing legal uncertainty and the inevitable stress it will cause ... could and should have been avoided".

I agree with that comment.

The House of Lords: Finally, I would mention two recent developments in the British House of Lords - one judicial and the other political.

²⁸ See D Kerr, "Australia's legislative response to Terrorism" (2004) 29 *Alternative Law Journal* 131 at 134.

²⁹ *Adelaide Company of Jehovah's Witness Inc v The Commonwealth* (1943) 67 CLR 116 at 124.

³⁰ *Sydney Morning Herald*, July 27, 2004, 10.

In December 2004, the Law Lords handed down their decision in *A (FC) v Secretary of State for the Home Department*³¹. The case arose out of the arrest of nine persons under the United Kingdom Terrorism legislation, including the *Anti-Terrorism (Crime and Security) Act 2001* (UK). The detainees had been taken into custody in December 2001. They were all non-citizens. None had been charged with offences or brought to trial, still less convicted. They sought release. Their case came before the Special Commission previously mentioned. That Commission upheld their objection to the lawfulness of their detention. However, the Commission's order was set aside by the English Court of Appeal. That Court emphasised the importance of deference in such matters to the Minister.

By a decision of 8 to 1, the Law Lords reversed the Court of Appeal and restored the decision, obliging release of the detainees.

Lord Bingham, the Senior Law Lord, in his reasons, responded to the suggestion that interference by the courts in such matters would amount to "judicial activism". This has been an accusation levelled at the courts in the United States by the former Attorney-General John Ashcroft. Citing the reasons of Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*³² Lord Bingham said:

³¹ [2004] UKHL 56.

³² [2003] QB 728 at [27]. See [2004] UKHL 56 at [41].

"The Court's role under the [*Human Rights Act*] is as the guardian of human rights. It cannot abdicate this responsibility ... [J]udges nowadays have no alternative but to apply the *Human Rights Act* ... Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts".

Lord Nicholls opened his reasons with the following remarks³³:

"Indefinite imprisonment without charge or trial as an anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified. The government contends that these post-9/11 days are wholly exceptional. ... The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals".

Lord Hoffmann, in his reasons, said³⁴:

"This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not under-estimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. ... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community".

³³ [2004] UKHL 56 at [74].

³⁴ [2004] UKHL 56 at [96].

Baroness Hale, the only woman member of the House of Lords judicial board, observed³⁵:

"No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay' or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear".

Lord Walker dissented from the majority. However, the Law Lords' voice was clear. Unlimited detention of non-nationals was inconsistent with their view of the British Constitution, legal history and the provisions of the *Human Rights Act*.

This decision led to a flurry of political measures aimed at increasing ministerial powers. However, the Prevention of Terrorism Bill was held up, in late night sittings in March 2005, by the repeated insistence of the House of Lords upon amendments. In the end, on 11 March 2005, the British Government backed down. It continued to insist that decisions, permitting the Home Secretary the power to impose "control orders" should be made on the civil and not the criminal onus. But it agreed to insert an effective sunset clause of one year when the legislation must be reviewed. Most importantly, it agreed that the

³⁵ [2004] UKHL 56 at [237].

Ministerial power to impose "control orders" on terrorist suspects, restricting their liberties, could only be made with the approval of a judge³⁶.

The insistence of United States, British and other courts upon effective supervision of legislative and executive detention of persons, outside cases where punishment orders have been imposed by judges under pre-existing valid laws, must be compared and contrasted with recent decisions of the courts in Australia³⁷. Of course, the Constitution must be obeyed. Valid laws must be given effect. However, in reading our Constitution we should always remember the lessons of the wise decision of the High Court in the *Communist Party Case*, vindicated by the people and by history. And we should familiarise ourselves with the wisdom of other final courts approaching the new legal questions.

THE ULTIMATE FOUNDATION FOR NATIONAL SECURITY

If we hold in our minds the principle of proportionality, the dictates of Australian commonsense and the wise approach of courts in other lands with raised legal systems to which I have referred, it is likely that

³⁶ *The Scotsman*, 12 March 2005, p 1.

³⁷ See eg *Al-Kateb v Godwin* (2004) 78 ALJR 1099; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 78 ALJR 1156; *Re Woolley*; *Ex parte Applicants M276/2003* (2004) 79 ALJR 43; cf *Re Colonel Aird*; *Ex parte Alpert* (2004) 78 ALJR 1383; *Baker v The Queen* (2004) 78 ALJR 1483; *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519.

we in Australia will face our own tests, if and when they come, with restraint and a determination to uphold respect for fundamental human rights.

National security in a country like Australia ultimately rests not on fear or restrictive laws. It lies in the loyalty of the people, their love of the country and their respect for its institutions, including those that safeguard the rule of law, due process of law and equal justice under law for all.

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The Hon Justice Michael Kirby AC CMG