Keynote Address

The Rt Hon Malcolm Fraser AC CH

7 May 2004

"Conflict between the Rule of Law and National Security"
FUTURE SUMMIT 2004

"CONFLICTS BETWEEN THE RULE OF LAW AND NATIONAL SECURITY"

(7 May 2004)

Sir Oswald Moseley, leader of the Nazi party in Britain, and his wife Lady Diana Moseley were detained at the beginning of the Second World War without access to a lawyer, without being charged under Britain’s National Security Legislation.

Later, when the War was going a good deal better for the allies, Moseley became increasingly ill and Herbert Morrison, the Home Secretary, was preparing to release him.

Churchill, who was in Cairo at the time, had some suggestions to make concerning the nature of Herbert Morrison’s statement. He suggested that the great privilege “of habeas corpus and of trial by jury which are the supreme protection invented by the English people for ordinary individuals against the State, the power of the executive to send a man into prison without formulating any charge known to the law and particularly to deny him the judgment of his peers is, in the highest degree, odious and is the foundation of all totalitarian Governments …

“Extraordinary powers assumed by the Executive with the consent of Parliament in emergencies should be yielded up when and as the emergency declines. … This is really the test of civilisation …”

Churchill’s defence of the Rule of Law was well put. The Rule of Law is something which too many of us take for granted. The protections of the law are fragile and never more so when a nation is facing an emergency. To suggest how fragile, one only has to look at the criticism that Herbert Morrison received as a result of the release of the Moseleys.

Without a clear defence, the Rule of Law will often be under threat. It is critical for individual freedom. It is also essential for peaceful relationships between nations. One of the greatest advances in that search was the development and acceptance last year of the International Criminal Court.
President Bush has said we are at war. It is in some ways a disturbing description. The President spoke as though terrorism is something new. The scope, the horror and the tragedy of September 11 was new but terrorism is as old as the human race.

Nobody knows how the United States might define the end of the War on Terror. It may not be within the capacity of free peoples, to entirely abolish terror and therefore the need to oppose it.

We are also misled because today’s language has increasingly come to suggest that terrorism is the child of fundamentalist Islam. Too many people speak as though all terrorism has a common motive and a common cause, one that quite simply hates the West because of what it is.

I have no doubt some terrorists are motivated by such feelings but what of the IRA. How would the British have reacted if the IRA had succeeded in blowing up Prime Minister Thatcher and her entire Government? What of the people in Chechnya? Of the Basques in Spain? What of the Red Army Faction in Germany and the Red Brigades in Italy in the 1970s and early 1980s? What of Ananda Marga and the Hilton Bombing in 1978. There are the unresolved issues between Israel and Palestine. All these had different causes or objectives.

Terrorism has many faces. Unless we can understand that, President Bush’s War on Terror will never ever end.

In the democracies we try to stand for certain principles. The most important is the Rule of Law, the distinguishing feature between democracy and tyranny. The Rule of Law does not only apply to some people. It applies to all people within reach of that lawful authority.

We should condemn anyone who might say that the Rule of Law applies only to people who are British, or Australian, or American. We should indeed condemn those who suggest that there can be one law for the nationals of a country and another law for foreigners visiting or working in that country.

With no agreed definition of terrorism, it is also highly threatening to the Rule of Law to suggest that terrorism is so evil that people named as terrorists can be dealt with outside the law.

The Rule of Law must be universal. Any attempt to discriminate between groups of people on the basis of race, ethnicity or religion or on any other
ground, will drive a serious breach into the Rule of Law itself. If we are serious, the Rule of Law is absolute.

In recognising this, we must also accept that if a country is seriously threatened, as Britain was in the Second World War, there may be circumstances when people such as the Moseleys, should be held in detention. For that time, it was a proportionate response to the dangers to national security.

Does the War on Terror justify today’s breaches in the Rule of Law? As Owen Dixon stated in 1951 in the Communist Party case: “History and not only ancient history shows that in countries where democratic institutions have been constitutionally superseded, it has been done not seldom by those holding the Executive power.”

These concerns are especially important for Australia because, unlike other Western countries, we do not have a Bill of Rights as a domestic reference point. Australia has already shown that it has scant regard for, and will not be bound by, international reference points which we have earlier agreed or ratified.

Using the War on Terror as a reason, little by little, governments seek to diminish the Rule of Law. Australia should watch closely and question administrative actions which impinge on the liberty of individuals within Australia.

In the United States the President overturned fifty years’ search by successive American administrations, working multilaterally with other like-minded countries to establish a law-based world. He justified many of his decisions on the basis that the world was changing. Well, it had changed. America was the only super power and therefore had greater freedom to travel alone.

After September 11, the United States held many hundreds of people in detention for considerable periods on suspicion that they may know something about September 11. In virtually no cases was there any evidence of any kind. Such categories of people were not granted access to a lawyer and could not even tell relatives and friends where they might be.

The most notorious breaches of civilised behaviour, however, relate to Guantanamo Bay. President Bush has described such people as “unlawful combatants” and used that unilateral decision to avoid the
Geneva Conventions and to put anyone so categorised, not only beyond the reach of those conventions but also beyond the reach of American civil or military law.

Most people in Guantanamo Bay have now been there more than two years. Their interrogations continue. President Bush has called these people “bad people” iii. Secretary of Defence, Donald Rumsfeld, has labelled them “hard core, well trained terrorists”. iii

What about the presumption of innocence until proven guilty? What about avoiding statements designed to prejudice a trial, if a trial is to take place? But of course the trials cannot be prejudiced because they will be undertaken by a Military Tribunal, with a Military President chosen from the panel in charge of the trial.

We have two major authorities who have heavily criticised or condemned the functioning of the proposed military tribunals.

The Foreign Secretary of the United Kingdom, on 24 February this year said in a statement to the British Parliament:
“The view of the Attorney-General was that the military commissions as presently constituted would not provide the process which we would afford British nationals.” iv – a diplomatic way of saying the trials would not be fair or just.

On another level, Major Mori, the Marine Corps Legal Officer assigned to defend David Hicks, has said:
“The procedures have gutted the recognised criminal justice system, either in the civilian process or under the uniform code of military justice.” v

“The independent judge has been removed from the system and been replaced in the role by what they call the Presiding Officer on the actual Jury Panel themselves.”vi

Major Mori continues:
“At this point David Hicks has not received any charges. All I can say about David Hicks is that David Hicks has not injured any US serviceman or citizen.” vii

Question: “You are the lawyer and you don’t know what the charges are that have been filed against him?” “Correct. . .”
Why have these Tribunals not caused concern in Australia, as they have in Britain. Do not Australian citizens deserve the protection of Australian law? The Government has excused not asking for their repatriation to Australia by saying there was no crime on the Australian Statute Book under which they could be tried.

The Government has said it would not legislate retrospectively but it is prepared to accept the retrospective powers given to American Military Tribunals.

The Government, the President, the Secretary of State Rumsfeld, have indicated that evidence against the two Australians is serious. It may be, but the process of the Military Tribunal does not represent justice. The principle of a trial by jury, the principle of due process, the principle of confidentiality between lawyer and client and of full disclosure are overturned, as is the assumption of innocence until proven guilty.

The distinguishing feature between a democracy and a tyranny is a concern for the Rule of Law. The United States has breached that principle without apology, with the assertion that such people are evil, they don’t deserve any better. Such actions destroy the Rule of Law.

Despite the attitude of the American Government, the circumstances at Guantanamo Bay, in December last year, came before the Federal Appeals Court of San Francisco which ruled that the United States Courts do have jurisdiction. The United States Supreme Court will ultimately determine this question in the next few months but the Federal Court noted:

"Under the Government’s theory it is free to imprison (detainees) indefinitely, along with hundreds of other citizens of other countries, friendly nations among them and to do with ... these detainees as it will when it pleases without any compliance with any rule of law of any kind ... Indeed, at oral argument, the Government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees ... It is the first time that the Government has announced such an extraordinary set of principles... a position so extreme that it raises the gravest concerns under both American and International Law."

Leaders of many countries have taken comfort from American actions. Dissidents are branded terrorists and placed outside the law.
Subject to the June appeal, what does it say to the world when the greatest country so defiles the Rule of Law?

Australia is not immune.

Australia has sought to deny refugees access to the Rule of Law and we have been prepared in Australia and overseas to place people in what we call “detention”, sometimes for many years, without access to the law, without a charge being made against them.

The Parliamentary Joint Committee on ASIO, ASUS and DSD in May 2002 unanimously found the ASIO Bill “would undermine key legal rights and erode civil liberties that make Australia a leading democracy.”

The Bill, as originally introduced, was fundamentally flawed by permitting indefinite, secret detention of Australians, not suspected of any offence, but who it was believed may, even unknowingly, have information in relation to a terrorism offence. Even children as young as 10 years of age could be detained, incommunicado.

The legislation as later passed would still allow the detention, without trial, of Australian citizens who are not even suspected of committing an offence. People between the ages of 16 and 18 could only be detained if they were also suspects. Initial detention periods are for a week but on allegedly new information, further warrants can be issued.

The detained person is liable to a five year jail term for refusing to answer a question or to supply records. The onus is placed on the detainee to demonstrate that he or she does not have information relevant to terrorism. The onus of proof is not only reversed but the defendant is given the difficult task of proving a negative.

It is also an offence for any person who may have knowledge of a warrant to speak of that warrant to anyone. The penalty for so doing is up to five years in jail.

The detainee now has rights to a lawyer but only in the presence of an ASIO officer and the lawyer’s normal rights to protect a client are heavily restricted.

Fundamental rights under the Rule of Law are denied.
Greatly increased powers have been given to those charged with protecting Australian security. I find particularly distasteful the discrete detention of innocent Australians. New and wide-ranging non-disclosure offences were inserted by the ASIO Legislation Amendment Act 2004.

I am advised the powers of this legislation go further than even the powers of the Patriot Act or of recent legislation in the United Kingdom or Canada. Without a clearly defined benchmark embodied in a Bill of Rights, many will find it hard to know how much freedom they are giving up for how much security.

The breaches in the Rule of Law, justified by the War on Terror, are now serious. Parliamentary oversight should be established with at least the full powers exercised by the US Senate Select Committee on Intelligence. As Churchill noted: “It is only when extreme danger to the State can be pleaded, that this power may be temporarily assumed by the Executive, and even so its working must be interpreted with the utmost vigilance by a Free Parliament. …”

2299 words

1 “Diana Moseley”, Ann Decourcy p.276
2 United States Guantanamo Bay Two Years On, Jan 9 2004
3 United States Guantanamo Bay Two Years On, Jan 9 2004
4 Foreign Secretary statement on 24 February 2004
5 Fox News 26 January 2004 “Justice for Guantanamo Prisoners”, Major Mori