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Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I

Rachel Vorspan

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Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I

*Rachel Vorspan**

ABSTRACT

In this Article Professor Vorspan examines the role of the English courts during World War I, particularly the judicial response to executive infringements on individual liberty. Focusing on detention, deportation, conscription, and confiscation of property, the Author revises the conventional depiction of the English judiciary during World War I as passive and peripheral. She argues that in four ways the judges were activist and energetic, both in advancing the government's war effort and in promoting their own policies and powers. First, they were judicial warriors, developing innovative legal strategies to legitimize detention and other governmental restrictions on personal freedom. Second, they relentlessly preserved their own institutional power and authority, consistently affirming the right to review government conduct

* Associate Professor, Fordham University School of Law. A.B. 1967, U.C. Berkeley; M.A. 1968, Ph.D. 1975, Columbia University (English History); J.D. 1979, Harvard Law School. I would like to thank Edward A. Purcell Jr., Martin Flaherty, Bruce Green, Jacob Falk, Joseph Fleissner, and Nycole Thompson for their assistance. Fordham Law School supported this project with a summer research grant.

through the writ of habeas corpus. Third, in stark contrast to their treatment of individual liberty, they vigorously upheld property rights against executive power. Finally, they suffused their decisions with a particular wartime moral ideology based on both national origin and traditional concepts of individual “character.” Their success in achieving these priorities while failing to protect individual liberty offers the troubling contemporary lesson that maintaining jurisdiction to review governmental conduct will not safeguard rights during “wartime” without a staunch judicial commitment to the substantive value of personal freedom.

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I. INTRODUCTION

During World War I the English government imposed severe “emergency” limitations on individual freedom based on a presumed interest in national security, justifying them under both enabling legislation and as an exercise of inherent executive power. In particular, the government for the first time pursued a policy of wide-scale preventive detention not only of aliens but of citizens. To prosecute the wars against terrorism and Iraq, the government of the United States in recent years has adopted similarly restrictive domestic policies. The English experience during the first global war of the twentieth century thus resonates with our own, and it offers some deeply troubling lessons.

This Article suggests that maintaining a judicial process to determine the legality of executive conduct will not by itself guarantee the preservation of individual liberty. The English courts during World War I were adept at conserving their formal authority to establish limits on the executive. Indeed, they decided every significant wartime case pursuant to habeas petitions and found every issue presented to be justiciable. In similar fashion, last year the United States Supreme Court upheld the jurisdiction of the courts to review executive detention.¹ But asserting the principle of reviewability constitutes no more than an essential first step, since judicial power and process can be wielded to any substantive purpose. The decisions on the merits during World War I—especially those concerning internment, deportation, and conscription—were hardly

1. *Rumsfeld v. Padilla*, ___ U.S. ___, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633 (2004). Analogously, the House of Lords declared last December that indefinitely detaining foreign nationals suspected of terrorism without legal process was incompatible with the European Convention on Human Rights. *A. v. Sec’y of State*, [2004] U.K.H.L. 56 (H.L.).

reassuring in the balance they struck between state interests and individual liberty.

In addition to being instructive on current issues, the wartime cases point to the need for a reappraisal on historical grounds of the role of the English courts during World War I. The conventional understanding of the judiciary posits its total capitulation during that conflict to executive infringements on individual liberty. As historians of English civil liberties have contended, the judges' deference to the executive during the First World War constituted a "total abdication of their role."² A primary argument of this Article is that the depiction of a supine and passive judiciary, one that was largely peripheral to wartime developments, is inadequate and incomplete. An exhaustive examination of cases decided during the war suggests a more nuanced and indeed more unsettling view. Although the judges were hardly protective of personal freedom, they were not simply cowed and deferential, bowing to the will of an overbearing executive. Rather, they were active, energetic, and vigilant both in advancing the government's war effort and in promoting their own policies and powers.

First, even when the judges ruled on behalf of the government, they did so aggressively and creatively. In the areas of internment, deportation, and conscription, for example, they interpreted legislation audaciously, reshaping statutes to sanction executive detention and other favored wartime strategies. Further, the judges complemented their exercises in statutory analysis with a bold elaboration of common law principles, expanding prerogative powers in novel ways to enhance the government's legal authority. Deploying innovative and questionable legal devices, members of the bench during World War I were judicial warriors, enthusiastically advancing executive and military policies that went well beyond both parliamentary intent and common law precedent.

Second, the judges staunchly promoted their own institutional power, formally asserting their authority to establish the parameters of executive conduct. The traditional "individual rights" framework that scholars have applied to judicial behavior during World War I—that is, the emphasis on substantive results in conflicts involving civil liberties between individuals and the state—has obscured another important perspective. Viewing judicial opinions through the prism of institutional powers, it is apparent that in derogating from individual

2. R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 230 (1976); see, e.g., K.D. EWING & C.A. GEARTY, *THE STRUGGLE FOR CIVIL LIBERTIES: POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN, 1914-1945*, at 89 (2000) (observing that the "courts fell into line behind the administration"); A.W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* 6-7 (1992) (referring to the "strength of the British judicial tradition of faithfully supporting the executive in cases involving security"); see also sources cited *infra* note 69.

rights, the courts at the same time buttressed and amplified their own autonomy and authority. Contrary to the conventional wisdom, they did not view executive actions as “non-justiciable.” Indeed, perhaps the most salient characteristics of the judiciary during World War I were its eagerness to assert jurisdiction through the writ of habeas corpus and its reinforcement of the reviewability of all issues. Although substantive decisions in civil liberties cases uniformly favored the government, in rendering them the judges sustained and even accentuated their formal institutional powers.

Third, in stark contrast to their stance in liberty decisions, in property cases the judges were notably “activist,” moving beyond formal assertions of power to uphold individual property claims against the executive. They repeatedly invalidated governmental efforts to levy taxes, requisition land without paying adequate compensation, and interfere with litigation seeking to recover property. Again, they skillfully employed every available mechanism to attain their objectives, generally either finding the regulatory framework to be ultra vires the enabling legislation or adapting common law precedent to invalidate exercises of the royal prerogative.

Finally, the judges imposed on the law their own particular moral ideology, suffusing their decisions with a bellicose moralism that treated a litigant’s personal “worthiness” as an important factor in shaping their decisions. They created a new hierarchy of wartime respectability that blended patriotic criteria such as national origin and military service with more conventional Victorian determinants of “character.” Natural-born English citizens, naturalized British subjects, foreign allies, enemy aliens, and Irishmen existed on a moral continuum, with the “genuinely” English at the top of the hierarchy and the Irish—though ostensibly equal subjects of the Crown—at the bottom. Persons situated at different positions on the hierarchy received differential treatment from the courts, with the Irish faring even worse than enemy aliens.

The judges, therefore, were activist in four respects. They vigorously prosecuted the war, safeguarded their institutional power, protected private property, and promoted a particularized wartime morality. In other words, they were warrior judges with their own distinctive substantive and jurisdictional agenda.

Part II of this Article explores the legal background relevant to this inquiry into judicial conduct, investigating the legal bases for expanded executive authority during the war. It discusses both new enabling legislation, such as the Defense of the Realm Acts, and traditional common law sources of power, such as the royal prerogative. In Part III the Article examines aggressive legal strategies that the courts employed to assist the war effort in the spheres of internment, deportation, and conscription. Part IV demonstrates that despite the pro-government nature of the decisions

in personal freedom cases, the judges nevertheless preserved their formal control over the executive by maintaining the vitality of habeas review, establishing the justiciability of all wartime legal issues, imposing in certain instances a requirement of "reasonableness" on the government, and requiring adequate factual predicates to buttress administrative policy. Parts V and VI explore the two areas in which the judiciary most resolutely charted its own independent course. The former demonstrates that the courts adopted a wholly different approach to property rights than to personal liberty, invalidating governmental intrusion on individuals in the contexts of compensation, taxation, and judicial access. The latter examines the pervasive moralism that informed the courts' wartime decisions, identifying ways in which they ruled not according to principles of law but rather according to the moral status of the litigants before them.

Finally, the Conclusion emphasizes the need for historians to treat judicial behavior during World War I more comprehensively, moving beyond a narrow focus on personal liberty to examine issues of judicial strategy, institutional power, and public morality. It also suggests that even in a relatively open and democratic society, staunch judicial affirmation of powers of review may nonetheless fail to protect individuals from unnecessary infringements on their personal freedom.³

II. LEGAL SOURCES OF EXECUTIVE AUTHORITY IN WARTIME

During World War I the English government enjoyed unprecedented control over virtually every aspect of social, economic, and political life.⁴ This authority was based both on new emergency

3. This Article, which explores developments in substantive law and focuses particularly on the judicial response to executive infringements on personal freedom, is part of a larger study of the relationship between war and law in England during World War I. A second article will discuss the effect of the war on legal procedures and institutions, including the creation of new administrative tribunals and military courts, limitations on procedural rights in the traditional criminal justice system, and the evolution of common law rules regarding access to civil justice.

4. In the words of one commentator, the new powers made martial law "superfluous." David R. Lowry, *Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law*, 53 NOTRE DAME LAW. 49, 52 (1977); see, e.g., EWING & GEARTY, *supra* note 2, at 43-62 (describing restrictions on civil liberties during the war); SIMPSON, *supra* note 2, at 6-7 (characterizing war time changes to the British constitution as causing "a decline in the status of both Parliament and the courts"); CHARLES TOWNSHEND, MAKING THE PEACE: PUBLIC ORDER AND PUBLIC SECURITY IN MODERN BRITAIN 55-79 (1993) (describing the rise of executive authority in domestic affairs); JOHN WILLIAMS, THE OTHER BATTLEGROUND: THE HOME FRONTS, BRITAIN, FRANCE AND GERMANY, 1914-18, at 23 (1972) (noting that war legislation effectively put Britain under martial law).

legislation and the traditional power of the royal prerogative. The most significant source of executive power in wartime was the Defense of the Realm Acts (DORA), which delegated capacity to the government to promulgate regulations having the force of statute.⁵

The first iteration of DORA was introduced into the House of Commons on August 7, 1914, three days after war was declared, and it passed through all the required stages without debate and in a breathtaking five minutes. As a contemporary observer in the United States noted, it was passed with "lightening speed, without a word of protest."⁶ It empowered the government ("His Majesty in Council") to issue regulations "as to the powers and duties of the Admiralty and Army Council" for securing the "public safety and defence" of the realm.⁷ Moreover, it authorized the trial by court-martial of persons contravening specified regulations "as if such persons were subject to military law and had on active service committed an offence."⁸ The Home Secretary, Reginald McKenna, issued a statement in the House of Commons reflecting the government's relatively modest objectives in the early stages of the war. It would be "extremely desirable in cases of tapping wires or attempts to blow up bridges," he proclaimed, "that there should be an immediate Court to consider the offence of the offenders."⁹

During the following nine months DORA was amended by three major pieces of additional legislation, all of which dramatically expanded governmental powers. The second installment, enacted a mere three weeks later, extended trial by court-martial to anyone violating regulations designed to secure military areas or "prevent the spread of reports likely to cause disaffection or alarm."¹⁰ This amendment also authorized the executive to issue regulations suspending various legal restrictions on the acquisition or use of

5. Defense of the Realm Act, Aug. 8, 1914, 4 & 5 Geo. 5, c. 29; Defense of the Realm (No. 2) Act, Aug. 28, 1914, 4 & 5 Geo. 5, c. 63; Defense of the Realm Consolidation Act, Nov. 27, 1914, 5 Geo. 5, c. 8; Defense of the Realm (Amendment) Act, Mar. 16, 1915, 5 Geo. 5, c. 34; Defense of the Realm (Amendment) (No. 2) Act, Mar. 16, 1915, 5 & 6 Geo. 5, c. 37; Defense of the Realm (Amendment) (No. 3) Act, May 19, 1915, 5 & 6 Geo. 5, c. 42 (collectively known as DORA).

6. Harold Bowman, *Martial Law and the English Constitution*, 15 MICH. L. REV. 93, 93 (1916).

7. DORA, Aug. 8, 1914, § 1. There was no requirement that the regulations be approved by Parliament.

8. *Id.* The specified regulations were those designed (1) to prevent persons from communicating with the enemy or obtaining information for any purpose calculated to jeopardize the success of military operations; and (2) to secure the safety of any means of communication and of railways, docks, or harbors. *Id.* § 1(a), (b).

9. 65 PARL. DEB., H.C. (5th ser.) (Aug. 7, 1914) 2192.

10. DORA (No. 2) Act, Aug. 28, 1914, § 1(a).

land.¹¹ Like the original DORA, the House of Commons passed the revised statute in a single sitting and without a division.¹²

In November 1914 Parliament enacted an ostensibly consolidating measure, the Defense of the Realm Consolidation Act,¹³ which in fact contained new substantive provisions affording the government even wider regulatory powers. Whereas prior legislation had authorized regulations "as to the powers and duties of military authorities" for securing safety and defense, the new act allowed the government to regulate for safety and defense directly.¹⁴ In addition, unlike the earlier amendment prescribing trial by court-martial only for violators of certain specified regulations, this Act established a military trial for anyone offending against regulations of any type.¹⁵ Persons convicted by court-martial of an offense "committed with the intention of assisting the enemy" were subject to the death penalty.¹⁶

The courts-martial and death penalty proposals were vigorously resisted in the House of Lords by judges such as Lords Loreburn, Parmoor, and Halsbury. Lord Loreburn, for example, complained that the bill proposed "to place the life of the British subject at the mercy of a military Court-Martial, even though the Court of Assize may be sitting within fifty yards."¹⁷ Similarly, Lord Parmoor remarked: "This matter is one of extreme gravity and importance. I do not believe there is any precedent for taking away the rights of a British subject as regards ordinary trial by a jury directed by a skilled Judge."¹⁸ The bill, he continued, tampered with the "great root principles on which our justice has been established over centuries of time."¹⁹ According to the Earl of Halsbury, "the liberty of the subject was not so trifling

11. *Id.* § 1(c).

12. EWING & GEARTY, *supra* note 2, at 44. There was, however, some disquiet that authorizing the government to try persons by court-martial for spreading false reports would inhibit criticism of the government. *See, e.g.*, 66 PARL. DEB., H.C. (5th ser.) (Aug. 26, 1914) 88; EWING & GEARTY, *supra* note 2, at 44-45.

13. DORA Consolidation Act, Nov. 27, 1914, 5 Geo. 5, c. 8.

14. *Id.* § 1(1). This change was apparently intended to deal with the concern that the language of the first two Acts was inadequate to support the regulations promulgated under them. *See* EWING & GEARTY, *supra* note 2, at 46; SIMPSON, *supra* note 2, at 6 (stating that the Consolidation Act made clear that Parliament was expanding rather than clarifying executive powers).

15. DORA Consolidation Act, Nov. 27, 1914, § 1(1). The new Act also empowered courts of summary jurisdiction to hear minor offenses. *Id.*

16. *Id.* § 1(4).

17. 18 PARL. DEB., H.L. (5th ser.) (Nov. 27, 1914) 207; *see* EWING & GEARTY, *supra* note 2, at 48. This question, Lord Loreburn objected, "was never even ventilated in the House of Commons." 18 PARL. DEB., H.L. at 216. Lord Bryce commented that "while the Courts are available, surely some further reason should be given to us than has been given for such an extraordinary departure as this from all historical precedent." *Id.* at 209.

18. *Id.* at 210.

19. 18 PARL. DEB., H.L. (5th ser.) (Feb. 4, 1915) 451.

a matter that it can be swept away in a moment because some of us are in a panic."²⁰

In the face of this judicial determination, the government agreed to introduce legislation restoring jury trial, and it additionally conceded that in the interim it would not seek the death penalty.²¹ Fulfilling this commitment, a fourth major piece of DORA legislation enacted in March 1915 reinstated trial by jury for British subjects.²² A person charged with a non-summary offense was to be informed of the general nature of the charge "as soon as practicable after arrest" and had six days to request a civil court with a jury.²³ In the event of "invasion or other special military emergency," however, the King could suspend the jury trial provision by royal proclamation.²⁴ The Act retained the original scheme of courts-martial for non-British subjects, though the executive could at its option try an alien in civil court.²⁵ Additional amendments significantly augmented the executive's power in other respects, especially in regard to eminent domain and interference with private business.²⁶

DORA spawned a voluminous and comprehensive code of regulations. Although Regulation 1 promised that the "ordinary avocations of life and the enjoyment of property"²⁷ would be affected as little as possible, the proliferating regulations soon filled a manual of hundreds of pages and conferred on the authorities a formidable array of powers. One group of regulations, for example, authorized

20. 18 PARL. DEB., H.L. (5th ser.) (Nov. 27, 1914) 208.

21. *Id.* at 220-24.

22. DORA (Amendment) Act, Mar. 16, 1915, 5 Geo. 5, c. 34, § 1(1). For the debates in the House of Commons on restoring jury trial, see 70 PARL. DEB., H.C. (5th ser.) (Feb. 24, 1915) 287-332; 70 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1915) 670-759.

23. DORA (Amendment) Act, Mar. 16, 1915, § 1(2). Lord Bryce approvingly observed that the government was now "doing what they can to restore those ancient safeguards for the liberty of the subject which are one of the oldest and most treasured parts of our Constitution." 18 PARL. DEB., H.L. (5th ser.) (Mar. 11, 1915) 695.

24. DORA (Amendment) Act, Mar. 16, 1915, § 1(7). Such a proclamation was issued only in Ireland during the Easter Rebellion, and it was never revoked during the war. *See, e.g.*, *R. v. Governor of Wormwood Scrubs Prison ex parte Foy*, 36 T.L.R. 432 (K.B. 1920); SIMPSON, *supra* note 2, at 26. The government defeated an amendment that would allow courts-martial only when the civil courts were unavailable. *See Bowman, supra* note 6, at 100-01.

25. DORA (Amendment) Act, Mar. 16, 1915, § 1(1); *see Bowman, supra* note 6, at 103.

26. DORA (Amendment) (No. 2) Act, Mar. 16, 1915, 5 & 6 Geo. 5, c. 37. The government could "regulate or restrict the carrying on of work in any factory or workshop," *id.* § 1(1)(d), and "take possession of any unoccupied premises" to house workers producing war material. *Id.* § 1(1)(e). A further amendment allowed the government to take control of the sale and supply of intoxicating liquors. DORA (Amendment) (No. 3) Act, May 19, 1915, 5 & 6 Geo. 5, c. 42.

27. CONSOLIDATED REGULATIONS, DEFENCE OF THE REALM MANUAL Reg. 1 (5th ed. 1918) [hereinafter DORA CONSOL. REGS.].

the government to interfere with private ownership of property,²⁸ while others permitted it to close pubs,²⁹ clear areas,³⁰ and impose curfews.³¹ Further regulations created unprecedented powers to intern civilians. Most prominently, Regulation 14B permitted preventive detention even of British subjects whenever it appeared “expedient in view of the hostile origin or associations of any person.”³²

The government also implemented a variety of constraints on freedom of assembly, speech, and the press. One regulation empowered officials to prohibit assemblies and processions,³³ and another made it an offense “to cause mutiny, sedition, or disaffection among any of His Majesty’s forces or among the civilian population.”³⁴ Still others targeted the press, barring the unauthorized collection and communication of military information³⁵ as well as the dissemination of statements or reports likely to “cause disaffection” or to “prejudice the recruiting, training, discipline, or administration of any of His Majesty’s forces.”³⁶ An additional set of provisions allowed the police to stop and search vehicles, engage in surveillance of private meetings, and arrest without warrant persons who acted “in a manner prejudicial to the public safety.”³⁷

Many commentators, both at the time and subsequently, characterized DORA’s unprecedented delegation of legislative authority to the administration as a constitutional revolution. In 1915 the Tory leader Bonar Law declared the new governmental powers to be “revolutionary,”³⁸ and Lloyd George agreed that DORA certainly was “a very strong measure.”³⁹ According to the press baron Lord Riddell, in just “a few lines” DORA had eradicated Magna Charta and the Bill of Rights.⁴⁰ Toward the end of the war, Lord Scrutton, a judge on the Court of Appeal, commented ruefully on the novel use of government powers:

Before the war it would have been thought incredible that a British subject should be retained in custody for years without any public formulation of a

28. *Id.* at Reg. 2.

29. *Id.* at Reg. 10.

30. *Id.* at Reg. 9.

31. *Id.* at Reg. 13.

32. *Id.* at Reg. 14B.

33. *Id.* at Reg. 9A.

34. *Id.* at Reg. 42.

35. *Id.* at Reg. 18.

36. *Id.* at Reg. 27(b), (c). Other regulations directed at the press were Regulation 51A (providing for the seizure and destruction of prohibited documents on warrants issued by magistrates) and Regulation 56(13) (providing for the prosecution of press offenses with the approval of the Director of Public Prosecutions).

37. *Id.* at Regs. 51B, 52, 55.

38. 71 PARL. DEB., H.C. (5th ser.) (Apr. 29, 1915) 866.

39. *Id.*

40. LORD RIDDELL’S WAR DIARY, 1914-1918, at 41 (1933).

charge against him or public trial of his guilt. But Parliament thought it right in times of war and supreme national danger to give wide powers to the executive, who have exercised them in such a way that such results have followed.⁴¹

Modern historians have similarly treated the cascading regulatory waves as a “revolutionary” phenomenon. Not since the reign of George III, one observed, has there been anything “even remotely comparable to the extraordinary powers exercised by the government under these emergency regulations.”⁴² A.W.B. Simpson, author of the definitive study of executive detention in wartime, bluntly declared that during World War I the Defense of the Realm Acts “radically altered the British constitution.”⁴³

If DORA constituted a revolution, however, it was one that confronted little parliamentary or popular opposition. Most contemporaries viewed it as acceptable under prevailing emergency conditions. “England has herself been forced to be despotic,” declared a typical commentator in 1915.⁴⁴ “I state the inconsistency, but in no critical spirit; the situation is clearly abnormal.”⁴⁵ The justification for the temporary suspension of constitutional safeguards was an “overweening necessity, honestly proclaimed by the Government and patriotically acquiesced in by the people.”⁴⁶ Other observers insisted that the responsibility for stifling civil liberties lay with the Germans. As the *Times Literary Supplement* observed in 1917, “[w]e have not gagged our Press because we disliked our freedom, nor penalized conscience because we believed in persecution and felt no shame in oppression, but because to this extent the Prussian has triumphed.”⁴⁷ That is, German tactics had left the British no alternative but “to stoop to conquer, and to borrow his weapons in

41. T.E. Scrutton, *The War and the Law*, 34 L.Q. REV. 116, 129 (1918); see also T. BATY & J.H. MORGAN, *WAR, ITS CONDUCT AND LEGAL RESULTS* 73 (1915) (describing DORA as “unprecedented in character”); WILLIAMS, *supra* note 4, at 23 (commenting that “the traditional freedoms of Britons were signed away at the stroke of a pen”); Sidney W. Clarke, *The Rule of DORA*, 1 J. SOC’Y COM. LEGIS. & INT’L L. (3d ser.) 36, 36 (1919) (observing that a “bloodless revolution” had occurred).

42. See BARTON L. INGRAHAM, *POLITICAL CRIME IN EUROPE* 295 (1979).

43. SIMPSON, *supra* note 2, at 6.

44. Lindsay Rogers, *The War and the English Constitution*, [1915] THE FORUM 27, 30. John Simon, the former Home Secretary, recalled in 1920 that both public opinion and Parliament “generally recognized as inevitable the claim of the Authorities to interfere drastically in the interests of national defense with individual rights.” Sir John Simon, *Introduction* to LESLIE SCOTT & ALFRED HILDESLEY, *THE CASE OF REQUISITION* xv (1920); see Bowman, *supra* note 6, at 97 (“The people of Great Britain, it would seem, had put their seal of approval upon what was done by Parliament.”).

45. Rogers, *supra* note 44, at 1.

46. *Id.*

47. *A Parable of the War*, TIMES LITERARY SUPP., Aug. 2, 1917, at 1. The author was A.F. Pollard, Professor of Constitutional Law at the University of London. See SAMUEL HYNES, *A WAR IMAGINED: THE FIRST WORLD WAR AND ENGLISH CULTURE* 172 (1991).

order to beat him.”⁴⁸ Although there was some opposition to DORA, mainly from left-wing academics and the fledgling National Council for Civil Liberties,⁴⁹ critics were in a small minority.⁵⁰

While DORA underpinned most of the regulations promulgated during the war, other statutes also conferred regulatory authority. The Aliens Restriction Act (ARA),⁵¹ passed on the second day of the war, permitted the Home Secretary to issue regulations compelling aliens to register with the government,⁵² prohibiting them from landing or embarking in the United Kingdom,⁵³ and requiring or barring their residence in specified areas.⁵⁴ Further, ARA empowered the government to issue orders for the deportation of non-British citizens.⁵⁵ Subsequent regulations promulgated under ARA imposed surprisingly detailed limitations on the activities and free movement of resident aliens.⁵⁶

48. *A Parable of the War*, *supra* note 47, at 30.

49. The most outspoken academic commentary was provided by T. Baty and J.H. Morgan, who observed, for example, that “never in our history has the Executive assumed such arbitrary power over the life, liberty, and property of British subjects.” BATY & MORGAN, *supra* note 41, at 112. The National Council of Civil Liberties complained in 1917 of the widespread sacrifice of basic principles, including free press, free speech, freedom from surveillance, habeas corpus, trial by jury, and public trial. “NORTH BRITON” [JOHN CLIFFORD], BRITISH FREEDOM 1914-1917 (1917).

50. As one scholar remarked, the surprising thing was the “alacrity with which the English surrendered practically the totality of their cherished liberties to the discretion of Government officials during an emergency.” INGRAHAM, *supra* note 42, at 295; *see, e.g.*, RIDDELL, *supra* note 40, at 41 (“The drastic and unique provisions of [DORA] have not attracted the attention they deserve.”); TOWNSHEND, *supra* note 4, at 57 (observing that “whatever DORA may have done, it had popular sanction”); Clarke, *supra* note 41, at 36 (noting that “[o]f the phenomena exhibited during the four years of warfare, none is more remarkable than the docility with which the people of this country submitted to the abrogation of many of their most cherished rights”).

51. Aliens Restriction Act, 1914, 4 & 5 Geo. 5, c. 12 [hereinafter ARA].

52. *Id.* § 1(1)(f).

53. *Id.* § 1(1)(a), (b).

54. *Id.* § 1(1)(d), (e). The Act further authorized the government to take any other measure “necessary or expedient with a view to the safety of the realm,” *id.* § 1(1)(k), and it prescribed a penalty for violations of the regulations of a fine not exceeding £100 or imprisonment for up to six months. *Id.* § 1(2). In addition, the Act provided that the burden of proving that a person was not an alien should rest upon the person, *id.* § 1(4), thus reversing the old English rule that the burden of proof rested upon the person charging the disability. *See* Arnold D. McNair, *British Nationality and Alien Status in Time of War*, 35 L.Q. REV. 213, 229 (1919) (referring to the section as a “very drastic provision”).

55. ARA § 1(1)(c); *see* SHARPE, *supra* note 2, 117-20 (discussing deportation cases and the use of habeas corpus).

56. For example, an alien was required to obtain a permit to possess articles such as firearms, telephones, motorcycles, automobiles, photographic apparatus, maps, charts, or pigeons. Moreover, government consent was necessary to circulate any newspaper printed wholly or mainly in the language of an enemy state, and the Home Secretary could order a chief of police to close any club frequented by enemy aliens. An alien could not travel more than five miles from a registered place of residence without a permit, and travel was limited to twenty-four hours except in special circumstances.

Other legislation supplemented DORA in transforming British economic life. The Trading with the Enemy Acts⁵⁷ prohibited commercial or financial contact with the enemy, while the Munitions of War Act 1915⁵⁸ transferred war production to a single coordinated authority and suspended the right to strike. Finally, two new statutes dealt with military service. A 1915 act mandated a compulsory national register of all males between the ages of fifteen and sixty-five,⁵⁹ and another act the following year introduced military conscription for the first time in British history.⁶⁰

In addition to its broad statutory authority, the executive also enjoyed common law prerogative powers. Declaring war was a prerogative power, and apart from statute the Crown had inherent authority to intern prisoners of war and to deport enemy aliens.⁶¹ Further, the government claimed substantial prerogative rights to confiscate private property.⁶²

Such were the monumental powers that the government wielded during the war. For the fate of English civil liberties, the critical question was how judges would demarcate the legitimate boundaries of executive authority. As will be shown, in the area of personal freedom the courts extended state power not only beyond

As to curfew, in London in 1915 male enemy aliens were ordinarily restricted to their registered places of residence between 9 P.M. and 8 A.M. Offenders of "unsatisfactory character" and second offenders were interned. *See, e.g.*, J.C. BIRD, CONTROL OF ENEMY ALIEN CIVILIANS IN GREAT BRITAIN, 1914-1918, at 200-02, 227-28 (1986); 1 JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR 64-65 (1920) (discussing regulations promulgated to control enemy aliens); James W. Garner, *Treatment of Enemy Aliens*, 12 AM. J. INT'L L. 27, 29 (1918) (explaining the reasons behind the restrictive policy toward enemy aliens). A strictly enforced regulation promulgated in October 1914 prohibited enemy aliens from changing their names. BIRD, *supra*, at 231.

57. Trading with the Enemy Act, 1914, 4 & 5 Geo. 5, c. 87; Trading with the Enemy Amendment Act, 1914, 5 Geo. 5, c. 12; Trading with the Enemy (Extension of Powers) Act, 1915, 5 & 6 Geo. 5, c. 98; Trading with the Enemy Amendment Act, 1916, 5 & 6 Geo. 5, c. 105; Trading with the Enemy (Amendment) Act, 1918, 8 & 9 Geo. 5, c. 31. The provisions of the Acts were so stringent that they cast doubt on the propriety of a physician treating an enemy patient. *See Rogers, supra* note 44, at 29.

58. Munitions of War Act, 1915, 5 & 6 Geo. 5, c. 54; Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99.

59. National Registration Act, 1915, 5 & 6 Geo. 5, c. 60.

60. Military Service Act, 1916, 5 & 6 Geo. 5, c. 104; *see infra* Part III.A.2.

61. *See R. v. Superintendent of Vine Street Police Station ex parte Liebmann*, [1916] 1 K.B. 268 (examining the courts' authority to imprison an enemy alien civilian as a prisoner of war); *R. v. Commandant of Knockaloe Camp ex parte Forman*, 34 T.L.R. 4 (K.B. 1917) (articulating the Crown's power to hold enemy aliens as prisoners of war); *see also* LORD MCNAIR & A.D. WATTS, THE LEGAL EFFECTS OF WAR 95, 98 (1966) (discussing the royal prerogative in relation to a writ of habeas corpus sought by a prisoner of war); SHARPE, *supra* note 2, at 113; Lowry, *supra* note 4, at 52 n.35 ("the actual declaration of war is a prerogative power as are the powers to intern and deport aliens").

62. *See infra* Part V.

parliamentary intent but at times even beyond the wishes of the government itself.

III. JUDICIAL WARRIORS AND INDIVIDUAL LIBERTY

Despite the unavailability of constitutional judicial review,⁶³ the English courts enjoy formidable theoretical powers to circumscribe the executive. They can determine whether government regulations and orders—either on their face or as applied in individual cases—are beyond the scope of the enabling instruments.⁶⁴ Even in matters in which the government enjoys broad discretion, they can evaluate whether the executive has acted within lawful limits.⁶⁵ Judges can also exercise interpretive functions, construing statutes and regulations to establish the intent of the enacting bodies.⁶⁶ Finally, they can scrutinize whether actions taken pursuant to the royal prerogative are in line with judicial precedent and viable in light of arguably pre-emptive statutory developments.⁶⁷ These review

63. The English courts enjoy no authority to invalidate legislation or administrative action for violating positive individual constitutional rights. *See, e.g.*, A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 18, 96 (12th ed. 1997); Eric Barendt, *Fundamental Principles*, in *ENGLISH PUBLIC LAW* 3, 40 (David Feldman ed., 2004); Rachel Vorspan, “Freedom of Assembly” and the Right to Passage in Modern English Legal History, 34 *SAN DIEGO L. REV.* 921, 940 (1997) (noting the lack of a positive constitutional statutory right to freedom of assembly under British law).

64. *See, e.g.*, HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 1007, 1017 (3d ed. 2000); BRADLEY & EWING, *supra* note 63, at 94-95; O. HOOD PHILLIPS & PAUL JACKSON, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 595-99 (6th ed. 1978) (“The courts have jurisdiction at common law to determine . . . whether the purported exercise of a power is authorized by law.”); WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 39 (7th ed. 1994) (“If administrative action is in excess of power (*ultra vires*), the court has only to quash it or declare it unlawful”); Barendt, *supra* note 63, at 41.

65. *See, e.g.*, BRADLEY & EWING, *supra* note 63, at 773; PHILLIPS & JACKSON, *supra* note 64, at 599-601 (“Even where a discretion seems unfettered the courts will interfere where it has been exercised in a way which thwarts or frustrates the objects of the Act conferring the power.”); SHARPE, *supra* note 2, at 89 (observing that the judges “can control the exercise of executive discretion when they wish to do so by defining the lawful limits of the power granted”); WADE & FORSYTH, *supra* note 64, at 384 (stating that the courts can limit the executive’s exercise of its discretionary power); Paul Craig, *Fundamental Principles in Administrative Law*, in *ENGLISH PUBLIC LAW* 689, 708 (David Feldman ed., 2004).

66. *See, e.g.*, BRADLEY & EWING, *supra* note 63, at 18 (noting that judges “have the task of interpreting enacted law in cases where the correct meaning of the Act is disputed”); PHILLIPS & JACKSON, *supra* note 64, at 596; A.W. Bradley, *The Constitutional Position of the Judiciary*, in *ENGLISH PUBLIC LAW* 333, 345 (David Feldman ed., 2004).

67. *See, e.g.*, BRADLEY & EWING, *supra* note 63, at 280-82 (discussing the effect of statutes on prerogative powers); WADE & FORSYTH, *supra* note 64, at 384 (stating

functions afford the judiciary considerable flexibility in choosing whether and when to protect individuals from excessive intrusions on their individual liberties.

In domains of personal liberty such as internment, exclusion, deportation, and conscription,⁶⁸ the wartime courts not only failed to limit the government but enhanced executive powers in bold, creative, and occasionally self-contradictory ways. That the courts opted to support the state's war policies at the expense of individual liberties is hardly a new observation.⁶⁹ Scholars have not fully recognized, however, the assertiveness, vehemence, and doctrinal inventiveness with which the judges pursued this course. Indeed, the judiciary went well beyond the intention of Parliament—and occasionally even the policies of the government itself—in developing innovative and often questionable legal strategies to expand executive powers.

that it is “for the court to determine the legal limits of the prerogative”); Barendt, *supra* note 63, at 12-14, 41.

68. This Article focuses on physical deprivations of personal liberty and does not address restrictions on freedom of speech and the press. There were virtually no reported cases challenging government infringement on civil liberties during the war, doubtless because of the perceived unlikelihood of success, the fact that most such cases were disposed of summarily in magistrates' courts, and the unavailability of the writ of habeas corpus. The main reported civil liberties cases were *Ex parte Norman*, 114 L.T.R. 232 (K.B. 1916), upholding a DORA regulation authorizing in camera proceedings to determine whether materials seized in a press raid should be destroyed, and *Norman v. Matthews*, 32 T.L.R. 303 (K.B. 1916), rejecting the argument that DORA Regulation 27, which barred the dissemination of statements “likely to cause disaffection,” was ultra vires for preventing the expression of political opinions. In the latter case Mr. Justice Lush observed that the court “could not construe an Act passed for securing the safety of the Realm with the same scrupulous nicety as, for instance, a taxing Act.” *Id.* at 304.

69. The authors of a recent book on English civil liberties have complained that “the higher judiciary in Dublin and London were consistently loyal to the executive.” EWING & GEARTY, *supra* note 2, at 350. They also noted that the World War I judges “exploded the myth of an independent judiciary standing as a bulwark between the executive and the citizen.” *Id.* at 83; see, e.g., SIMPSON, *supra* note 2, at 25 (observing that “[f]rom 1917 onwards British judges have, with the rarest exceptions, consistently upheld the progressive erosion of British liberty in the name of good government”); TOWNSHEND, *supra* note 4, at 65, 78 (referring to the “paralysis” of judicial standards and the “wartime complaisance of the judiciary”); DAVID WILLIAMS, NOT IN THE PUBLIC INTEREST: THE PROBLEM OF SECURITY IN DEMOCRACY 187 (1965) (“In time of war considerable indulgence has been allowed to the executive.”); Lowry, *supra* note 4, at 53-55 (commenting on “judicial abnegation regarding the protection of civil liberty”); see also George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 H.R.L.J. 1, 28 (1984) (observing that in wartime the British courts “will not question the acts of the government”).

A. *Construing Emergency Statutes: Warmaking Beyond
Parliamentary Intent*

The courts interpreted wartime statutes audaciously and broadly, reversing the narrow canons of construction they had previously applied in civil liberties cases. They inferred massive governmental powers from legislative silence, purposefully selected certain statutory provisions to control others, facilitated governmental efforts to achieve indirectly what legislation prohibited, interpreted regulations to impose minimal standards of conduct on the administration, and manipulated a variety of technicalities to extend the scope of restrictive legislation to unanticipated factual situations.

1. Internment: Drawing Unprecedented Inferences from Silence

World War I was the first time in English history that the government adopted a policy of extensive internment of civilians.⁷⁰ During the first nine months of the war, even without announcing a formal internment policy, the government preventively detained almost twenty thousand of the seventy-five thousand enemy aliens present in the country.⁷¹ In the spring of 1915 an outbreak of "spy mania"⁷² and the sinking of the *Lusitania*⁷³ generated pressure to

70. Before World War I "[t]here were no instances of wholesale internment." GARNER, *supra* note 56, at 56. In 1920 Garner explained that the change in policy was due to the extreme bitterness between the antagonists and the presence of large numbers of enemy aliens in the territories of the various belligerents. *Id.* at 59.

71. See 76 PARL. DEB., H.C. (5th ser.) (Nov. 24, 1915) 313. According to the Home Secretary, Herbert Samuel, at the beginning of the war there were seventy-five thousand German and Austrians in Britain, not including ten or eleven thousand British-born wives of aliens. Of these, twenty-one thousand were repatriated and thirty-two thousand were interned; of the twenty-two thousand uninterned, ten thousand were women and 5,500 were friendly or elderly aliens, leaving only 6,500 able-bodied German and Austrian enemy aliens. 83 PARL. DEB., H.C. (5th ser.) (June 29, 1916) 1068-71.

72. See CHRISTOPHER ANDREW, *HER MAJESTY'S SECRET SERVICE: THE MAKING OF THE BRITISH INTELLIGENCE COMMUNITY* 177-81 (1987). Although the number of actual spies was very few, in the popular mind "many thousands of imaginary agents remained at liberty plotting imaginary acts of sabotage." *Id.* at 177.

73. More than a thousand people perished when the Germans torpedoed the *Lusitania* off the Irish coast in May 1915, fueling a wave of anti-German sentiment in England. See WILLIAMS, *supra* note 4, at 65-66. As an example of pro-internment hysteria, a resolution at a huge public demonstration in London after the sinking protested "any kith and kin of German mutilators, poisoners, and murderers of men, women, and children being any longer allowed to be at large in the English islands." *Quoted in* Garner, *supra* note 56, at 40. Fearing "riots, fires, and spread of disease germs and poisoned water," the demonstrators demanded "that the government take immediate steps to intern or deport all alien enemies, male or female, whatever their nationality, naturalized or otherwise." *Id.* Lloyd George, the Prime Minister, recalled in

detain all male aliens still at large.⁷⁴ On May 13, 1915, Prime Minister Herbert Asquith announced that all male enemy nationals of military age would be interned under the government's prerogative powers.⁷⁵ Eventually, more than thirty thousand male aliens were placed in detention camps.⁷⁶

In June 1915 the government invoked DORA to promulgate Regulation 14B, which extended the scope of detention to naturalized and natural-born British subjects. Regulation 14B permitted the internment of any person "of hostile origin or associations" whenever a competent military officer considered such action "expedient" for securing the public safety or defense.⁷⁷ John Simon, the Home Secretary, justified the regulation to the House of Commons on the ground that the state must have the power to deal with dangerous individuals, regardless of whether they were naturalized or even natural-born.⁷⁸ Under the DORA scheme, 216 people were interned and another forty were restricted in their movements.⁷⁹ Although the

his memoirs that in the spring of 1915 the Home Office was too indulgent to aliens. See 1 DAVID LLOYD GEORGE, *WAR MEMOIRS* 220-21 (1933); ANDREW, *supra* note 72, at 181.

74. See 83 PARL. DEB., H.C. (5th ser.) (July 29, 1916) 1049 (containing criticism of the Home Office for not interning a sufficient number of aliens).

75. 71 PARL. DEB., H.C. (5th ser.) (May 13, 1915) 1841-42.

76. John Simon reported in November 1915 on the success of the policy announced the previous May. The number interned had risen from 19,569 on May 13, 1915, to 32,440 on November 22, 1915. 76 PARL. DEB., H.C. (5th ser.) (Nov. 24, 1915) 313. In February 1918 twenty-nine thousand civilian aliens remained in detention. See 103 PARL. DEB., H.C. (5th ser.) (Feb. 19, 1918) 601.

77. DORA CONSOL. REGS., *supra* note 27, at Reg. 14B. The regulation was promulgated pursuant to the DORA (Consolidation) Act, Nov. 27, 1914, 5 Geo. 5, c. 8, § 1(1), which authorized the Home Secretary to issue regulations directly "for the public safety and defence of the realm." Regulation 14B provided that the minister could issue an order requiring an individual "either to remain in, or to proceed to and reside in, such place as may be specified in the order . . . or to be interned in such place as may be specified in the order." DORA CONSOL. REGS., *supra* note 27, at Reg. 14B. In the case of any person who was not an enemy alien, the order had to expressly provide for due consideration by an advisory committee of "any representations he may make against the order." *Id.* The advisory committees were to be "presided over by a person who holds or has held high judicial office." *Id.*

78. 72 PARL. DEB., H.C. (5th ser.) (June 17, 1915) 851-52. The reason for interning naturalized citizens, stated Herbert Samuel, Home Secretary the following year, was that it was impossible to draw any definite line between Germans who had been naturalized and those who had not. Although "a man may change his nation, he does not always thereby change his nature." 80 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1916) 1242.

79. See SIMPSON, *supra* note 2, at 5. Executive detention lasted until the formal end of the war on August 31, 1921. According to Simpson, very little is known about the administration of 14B since all records were subsequently destroyed. *Id.* at 16-17. Statements by ministers in the House of Commons indicated that in February 1916 there were 36 detainees in custody, 19 of whom were naturalized persons of "hostile origins" and 17 natural-born British subjects. See 80 PARL. DEB., H.C. (5th ser.) (Feb. 17, 1916) 220; 80 PARL. DEB., H.C. (5th ser.) (Feb. 21, 1916) 410. The following month the number had risen to 69: 8 of British origin, 7 natural-born British of German origin, 1 natural-born subject of uncertain origin, 6 German women who were British

number of Regulation 14B detainees was small, these internments provoked the sharpest legal controversy of the war.

In the test case of *R. v. Halliday ex parte Zadig*,⁸⁰ a naturalized British subject challenged Regulation 14B as ultra vires the Defense of the Realm Act. Arthur Zadig, the petitioner, was a railway contractor who had been born in Breslau of German parents but became a naturalized British subject in 1905.⁸¹ He was interned in October 1915 on the basis of "hostile origins and associations."⁸² After being detained in Islington for eighteen months, he petitioned the King's Bench for a writ of habeas corpus. A newly founded Habeas Corpus Defense Fund, organized by H.W. Massingham, editor of *The Nation*, invited subscriptions to finance Zadig's case.⁸³ As the petitioner's counsel later recounted, Zadig was considered suitable to bring a test case because he was in law a British citizen and in fact a "harmless person."⁸⁴

The lawsuit contended that Regulation 14B was on its face ultra vires because DORA did not authorize executive detention in express terms. Statutes affecting the liberty of the subject must be strictly construed, Zadig argued, and it was illegitimate to infer from silence that Parliament approved a scheme of preventive detention.⁸⁵ Zadig's

by marriage, 17 naturalized Germans, 2 naturalized Austrians, and 28 who were not British subjects. See 80 PARL. DEB., H.C. (5th ser.) (Feb. 21, 1916) 16; 80 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1916) 1245. In February 1917 there were 74 British internees, 31 of whom were British born, see 90 PARL. DEB., H.C. (5th ser.) (Feb. 27, 1917) 1845, and in October 1917 there were 123 detainees, see 98 PARL. DEB., H.C. (5th ser.) (Oct. 29, 1917) 1175. Eight months later, in June 1918, 67 British subjects were in detention, 49 of whom were of hostile origin. See 106 PARL. DEB., H.C. (5th ser.) (June 6, 1918) 1731. In April 1919 there remained still 66 detainees, of whom 41 were British, see 114 PARL. DEB., H.C. (5th ser.) (Apr. 14, 1919) 2555, and in March 1920 there remained 102 internees, see 127 PARL. DEB., H.C. (5th ser.) (Mar. 31, 1920) 1237. Regulation 14B was used more extensively in Ireland; the government detained 3,430 men and 79 women following the Easter Rebellion of 1916, eventually transferring 1,841 of them to England. See SIMPSON, *supra* note 2, at 17-18.

80. [1917] A.C. 260 (H.L.).

81. FRANCIS W. HIRST, *THE CONSEQUENCES OF THE WAR TO GREAT BRITAIN* 109 (1934).

82. *Halliday*, [1917] A.C. at 267.

83. HIRST, *supra* note 81, at 110.

84. *Id.* Indeed, Zadig's attorney reported that he was released from custody only two weeks after the decision. *Id.* at 115.

85. *Halliday*, [1917] A.C. at 261. Zadig further argued that since DORA expressly gave British subjects a right to jury trial for breach of the regulations, it was illogical to conclude that Parliament intended to nullify this provision by providing the executive with the option of indefinite preventive detention. *Id.* The government responded that the statute was preventive as well as punitive. *Id.* at 263-64. It pointed to the fact that the Act authorized punishment of persons committing offenses against regulations designed:

(a) to prevent persons communicating with the enemy or obtaining information for that purpose or . . . (c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His

theory was, in fact, well-grounded. Before the war the courts had often endorsed a canon of construction dictating that statutes implicating personal liberty should be narrowly interpreted,⁸⁶ and even during the war judges continued to affirm this rule. In *R. v. Secretary of State for Home Affairs ex parte Duke of Chateau Thierry*,⁸⁷ for example, Chief Justice Reading contended that courts “must not, particularly when dealing with personal liberty, strain the language, and must be careful only to interpret the law reasonably and naturally according to the language used.”⁸⁸ Similarly, in *In Re Boaler*⁸⁹ Lord Justice Kennedy stated that statutes encroaching on personal or property rights were “subject to a strict construction,” and he insisted that restrictions on such rights required more than “words of general import.”⁹⁰

There was also evidence that Parliament did not contemplate preventive detention, insofar as it intended anything specific at all.⁹¹

Majesty's forces . . . or (e) otherwise to *prevent* assistance being given to the enemy or the successful prosecution of the war being endangered.

DORA Consolidation Act, 1914, 5 Geo. 5, c. 8, § 1(1)(a), (c), (e) (emphasis added). That is, the government argued that the word “prevent” authorized executive detention, as only in that way could the preventive objectives of the statute be effectuated. The lower court, the Court of Appeal, and the House of Lords all accepted this argument, finding that the provisions for punishment did not restrict what the government could do by way of prevention. *R. v. Halliday ex parte Zadig*, [1916] 1 K.B. 738, 742, 744; *Halliday*, [1917] A.C. at 276, 307.

86. In an important pre-war statement, Lord Halsbury declared in *Cox v. Hakes*, 63 L.T.R. 392, 396-97 (H.L. 1890): “It is the right of personal freedom in this country which is in debate, and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed. . . .” Pre-*Halliday* legal commentators agreed that infringements on civil liberties could not be inferred from silence. Criticizing Regulation 14B when it was first promulgated, the *Solicitors' Journal* doubted “whether there is power to interfere with naturalized British subjects or neutrals unless it is expressly given by statute,” adding that as Parliament was sitting, “there would be no difficulty in getting statutory authority for the regulation, if it is really required.” *The New Defence of the Realm Regulations*, 59 SOLIC. J. & WKLY. REP. 555, 557 (June 19, 1915). The *Journal* again criticized the appropriateness of such a broad construction the following year. “It is a principle of construction with regard to taxing Acts that they must be construed strictly. It would seem to be *a fortiori* with regard to statutes interfering with personal liberty.” Comment, *The Internment of British Subjects*, 60 SOLIC. J. & WKLY. REP. 233, 233 (Jan. 29, 1916).

87. [1917] 1 K.B. 552.

88. *Id.* at 556. Applying that rule of construction, he concluded that there was no power to make the deportation order at issue. *Id.*

89. [1915] 1 K.B. 21.

90. *Id.* at 34-35; *see id.* at 37 (Lord Scrutton stating that “unless its language clearly convinces me that this was the intention of the Legislature I shall be slow to give effect to what is a most serious interference with the liberties of the subject”).

91. In the spring of 1916 an MP observed of DORA that few of his colleagues were “taking any interest” in the passage of the measure. 80 PARL. DEB., H.C. (5th Cir.) (Mar. 2, 1916) 1269. In the House of Lords, Lord Loreburn similarly noted with respect to the first two DORA Acts that they “were passed in August when nobody was here,

In March 1916, a member of Parliament objected to Regulation 14B on the ground that at the time of DORA's passage it was "commonly understood that all British subjects were to have legal access to the Courts"; the government therefore could not issue regulations that "make that resort in the end impossible."⁹² Another member agreed that the House of Commons "had no idea whatever" when it enacted the DORA Amendment Act that it was "surrendering an immemorial liberty."⁹³ Indeed, he contended, the internment regulations are "altogether apart from the intentions of Parliament."⁹⁴

Nonetheless, at no level of the judiciary did Zadig's argument persuade the court. In the King's Bench, where five judges heard the matter because of the importance of the case, the entire bench rejected the application summarily. The judges made it clear that they personally believed that internment was a necessary device for winning the war. Mr. Justice Rowlatt's attitude was typical. "It seems to me perfectly obvious," he observed, "that the control of the movements of persons of hostile origins or association, and, if necessary, the restriction of their liberty, is one of the most obvious measures which may have to be taken in time of war for the public safety."⁹⁵ The Court of Appeal rendered an equally cursory judgment, concluding implausibly that DORA's general language about "safety and defense" expressed Parliament's intention to allow internment with "irresistible clearness."⁹⁶

Zadig's advocacy fared no better in the House of Lords. Lord Wrenbury voiced the view that there was no ground to support the contention that express words were required when the liberty of the subject was affected.⁹⁷ Similarly, Lord Atkinson flatly rejected the established canon that "statutes invading the liberty of the subject should be construed after one manner, and statutes not invading it

and it was all done in a hurry." 18 PARL. DEB., H.L. (5th ser.) (Nov. 27, 1914) 216. Lord Riddell, the press baron, objected that the legislation had taken place so rapidly that "the measures have not been properly discussed." RIDDELL, *supra* note 40, at 41.

92. 80 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1916) 1256.

93. *Id.* at 1269.

94. *Id.*

95. *R. v. Halliday ex parte Zadig*, [1916] 1 K.B. 738, 742. The judge refused to infer any limitations on the general opening language referring to "public safety and defense":

It is said that the words of the section must be read with a limitation because they are followed by particular provisions authorizing regulations as to special modes of trial and special punishments. But I can see nothing in those provisions to restrict the broad generality of the opening part of the section.

Id.

96. *Id.* at 745.

97. *R. v. Halliday ex parte Zadig*, [1917] A.C. 260, 307.

after another."⁹⁸ The general words in the statute about public safety and defense, he observed, were "wide" and "new," and to construe them narrowly only because they implicated the liberty of the subject would be to "treat them as of none effect."⁹⁹ He then articulated the true basis of his decision: however "precious" the personal liberty of the subject might be, it must be "sacrificed to achieve national success in the war."¹⁰⁰ Announcing a novel and troubling canon of legislative construction in cases involving personal liberty, the House of Lords thus firmly upheld the internment scheme.

Lord Shaw, the lone dissenter, pointed to the strained and unprecedented character of the majority's analysis. To infer such sweeping powers from general words without specific statutory language, he declared, was tantamount to repealing the Magna Charta, the Habeas Corpus Act, and the Bill of Rights—"laws and liberties fundamental to British citizenship."¹⁰¹ Parliament would not have based such a "far-reaching subversion of our liberties"¹⁰² on mere implication, and the internment scheme was simply a "violent exercise of arbitrary power."¹⁰³ The majority's method of statutory construction, Lord Shaw charged, was a radical departure from longstanding practice and precedent:

[T]he expanded construction adopted by the Courts below appears to me in every one of these particulars to be inconsistent with those principles of interpretation which have long been recognized. It is, I humbly think, not simple, but strained. It is repugnant to the rest of the Act. It operates repeal of statutes on an important and vast scale. It leads to startling and absurd results and to an upheaval of constitutional right.¹⁰⁴

98. *Id.* at 274. Similarly, Lord Swinfen Eady stated in the Court of Appeal: "It is said that the general words of a statute ought not be construed so as to take away the rights of the subject. But in the present case the language of the statute is free from ambiguity and no assistance is to be obtained from any such rule." *Halliday*, [1916] 1 K.B. at 745.

99. *Halliday*, [1917] A.C. at 275.

100. *Id.* at 271.

101. *Id.* at 299.

102. *Id.* at 278. Moreover, he reasoned, since the jury trial provision in the statute paid "meticulous regard" to judicial procedures, it was improbable that Parliament had intended to allow the government to avoid such scrupulous protections by the simple expedient of internment. *Id.* at 283-85. Lord Shaw also noted that during the argument he had asked the Attorney General "why, on the same principle and in exercise of the same power, may [a person] not be shot out of hand," and the Attorney General had replied that "the graver result seemed to be perfectly logical." *Id.* at 291.

103. *Id.* at 277.

104. *Id.* at 303. He also observed that "[t]he construction I have ventured to propose appears to me to be not unreasonable, but to square with every familiar and accustomed canon. I think that the judgment of the Courts below is erroneous, and is fraught with grave legal and constitutional danger." *Id.* at 305.

Contemporary legal commentators agreed with Lord Shaw, insisting that internment was undoubtedly beyond the scope of DORA.¹⁰⁵ In the service of their pro-war activism, therefore, virtually every member of the judiciary was willing to disregard longstanding principles of statutory interpretation to authorize the detention of British subjects, even though DORA contained detailed provisions regarding trial by jury and did not specifically mention a right to detain.

Another telling—and even less credible—inference from silence appeared in a later detention case, *R. v. Inspector of Cannon Row Police Station ex parte Brady*.¹⁰⁶ In upholding an Irishman's detention in England under a variant of Regulation 14B, the court went beyond *Halliday's* finding that general statutory language could support a specific internment policy. The *Brady* court ruled that a statute's express authorization of detention in Ireland was equally applicable to England. It reasoned that the statute's silence on whether the term "Ireland" included England implied that "Ireland" must be read to mean England as well.

Brady involved the Restoration of Order in Ireland Act (ROIA),¹⁰⁷ enacted in 1920 to deal with developing civil unrest in

105. See, e.g., Note, *Lord Shaw's Judgment*, 61 SOLIC. J. & WKLY. REP. 454, 454 (May 12, 1917). The *Journal* further observed:

We do not know if we were the first to question the validity of Regulation 14B, under which a British subject can be imprisoned for an indefinite period without being brought to trial and without—so far as we are aware—having any charge formulated against him; but we took exception to the regulation immediately it was made, and we have never doubted that it was really outside the scope of the Defence of the Realm Acts.

Id. That it was technically *intra vires* had to be accepted as good law, "but a perusal of Lord SHAW'S judgment shews how strong is the case on the other side." *Id.*; see Note, *Imprisonment on Suspicion*, 61 SOLIC. J. 438 (1917) (criticizing the decisions in the Divisional Court and the Court of Appeal). Similarly, the *Law Quarterly Review* predicted that once the war was over, Lord Shaw's dissent would prove to be not "unfounded." Note, 33 L.Q. REV. 205, 206 (July 1917). Nonetheless, there was little popular disapproval of the decision. *Justice of the Peace* observed that although detention without trial in peacetime would have caused an uproar, in "present circumstances this decision will be greeted by the vast body of the British public with great satisfaction." Note, *The Internment of British Subjects*, 80 J.P. 61, 61 (Feb. 5, 1916).

106. 37 T.L.R. 854 (K.B. 1921).

107. Restoration of Order in Ireland Act, 1920, 10 & 11 Geo. 5, c. 31 [hereinafter ROIA]. ROIA provided:

(1) Where it appears to His Majesty in Council that, owing to the existence of a state of disorder in Ireland, the ordinary law is inadequate for the prevention and punishment of crime or the maintenance of order, His Majesty in Council may issue regulations under the Defence of the Realm Consolidation Act, 1914 . . . for securing the restoration and maintenance of order in Ireland. . . . (4) Any such regulations may apply . . . either generally to the whole of Ireland or to any part thereof. . . .

Ireland. The Act authorized the government to issue regulations under the DORA Consolidation Act 1914 that might “apply either generally to the whole of Ireland or to any part thereof.”¹⁰⁸ In short order the administration promulgated a regulation extending the scope of detention to persons acting in a manner “prejudicial to the restoration or maintenance of order in Ireland.”¹⁰⁹ The authorities used this new regulatory power extensively, interning three thousand detainees by June 1921.¹¹⁰ One widely used strategy was to arrest Irishmen in England and deport them to Ireland, where jury trial was not available because Ireland had been under martial law since the Easter Rebellion of 1916.¹¹¹

One such detainee was Edward Brady, who had resided in England for four years. A member of Sinn Fein, Brady was arrested in Cheshire in June 1921 for “acts prejudicial” and detained in London pending deportation to Ireland. Before his removal he sued in habeas, claiming that the ROIA was limited to Ireland and that any regulations authorizing detentions in England were ultra vires. The court disagreed, obviously perceiving an imperative need to effectuate governmental policy. As Mr. Justice Lawrence frankly stated, the true issue was not law but expediency:

The purpose of the Act is to secure the restoration and maintenance of order in Ireland, and for that purpose it has been thought necessary to take certain executive action, free from the trammels of the ordinary law, and, while one regrets that it should have been found necessary to resort to that form of action, one must not shut one's eyes to the necessities that arise for it.¹¹²

To ensure that the point did not pass unnoticed, he added that it was untenable that the “whole of England is open to persons acting in

Id. § 1(1), (4).

108. *Id.* § 1(4).

109. *Id.* § 1(1). Regulation 14B existed in Ireland in two forms, as it had also been extended in 1918 to cover persons in Ireland suspected of “acts prejudicial” against England in the war against Germany. *See infra* text accompanying notes 215-17.

110. SIMPSON, *supra* note 2, at 28. Most internees obtained their release after the creation of the Irish Free State on December 6, 1921. *Id.* at 29.

111. *Id.* at 18. During oral argument, Brady's counsel told the court that the question was not a matter of mere academic interest because at least once a week the Home Secretary arrested people in England and sent them to Ireland to be interned. He argued that the government, in sending persons to a place where the right to jury trial had been taken away by proclamation, had effected the “gravest invasion of individual liberty that had ever occurred.” *Brady*, 37 T.L.R. at 855.

112. *R. v. Inspector of Cannon Row Police Station ex parte Brady*, 125 L.T.R. 344, 346 (K.B. 1921).

support of the disorder in Ireland without there being any power to deal with them by executive action."¹¹³

To reach conspirators in England, however, the courts had to rewrite the statute. The difficulty arose, as one judge in the King's Bench acknowledged, from the "unfortunately phrased"¹¹⁴ section specifying that the government's regulatory power extended to "the whole of Ireland or to any part thereof." Conceding that the section by its terms applied only to Ireland, Lord Bankes in the Court of Appeal nonetheless reasoned that there was "nothing in that from which it could be inferred that, under the Act, England was excluded."¹¹⁵ Using similar logic, Lord Warrington stated simply that "if it were intended to restrict the effect of the statute to Ireland, such a provision would be made in express terms."¹¹⁶ Lord Scrutton, in a solitary dissent, helplessly made the obvious point. If silence meant inclusion, he protested, the Act might equally apply to Australia.¹¹⁷ The court thus again exploited silence—even more aggressively in the case of an Irishman than a naturalized German—to uphold what it viewed as an essential policy of Irish control. It was patently clear that the judges, not the legislature, were the source of the necessary administrative powers.

2. Conscription: Policymaking Through Selective Construction

Decisions under the Military Service Act similarly revealed how the courts manipulated statutory language to suit their strategic purposes, in this case by treating draft exemptions so narrowly that potential conscripts could not escape military service. To this end the courts selectively enforced certain legislative clauses and provisions

113. *Id.* The Court of Appeal assumed it was obvious that persons in England were actively plotting with people in Ireland. *Brady v. Gibb*, 37 T.L.R. 975, 976-77 (C.A. 1921).

114. *Brady*, 37 T.L.R. at 856 (per Lord Shearman).

115. *Brady*, 37 T.L.R. at 976.

116. *Id.* at 977.

117. *Id.* Lord Scrutton dissented because he employed the opposite presumption and could not find express language that the Act applied. He observed:

[B]efore the liberty of the subject could be infringed, one must find in the Act of Parliament dealing with the subject a clear expression of the Legislature to that effect. At the beginning of the year 1914 it was inconceivable that an officer of the Executive should be entitled to detain a British subject without making some definite legal charge against him. Any Court would say that clear words to that effect must of necessity appear in the statutes besides indicating the act of restraint which might be justifiable.

Id. He also remarked that criminal charges against the appellant had been heard and dismissed, which showed "how necessary it was that a British citizen, charged with an offence, should have an opportunity of meeting it in open Court." *Id.*

over others in evident disregard of parliamentary—and, indeed, even governmental—intent.

The Military Service Act 1916,¹¹⁸ introducing conscription to England for the first time in the nation's history, was presented to Parliament on January 5, 1916 and passed its third reading three weeks later.¹¹⁹ Every male British subject "ordinarily resident" in Great Britain between the ages of eighteen and forty-one was "deemed" to be enlisted for the period of the war.¹²⁰ The Act provided for exemptions if a conscript suffered from financial problems, domestic hardship, or ill-health; performed necessary war work; or held a "conscientious objection to the undertaking of combatant service."¹²¹ The term "conscientious objector" thus made its first linguistic appearance.¹²²

New administrative agencies known as military service tribunals awarded the certificates of exemption, which could be "absolute, conditional, or temporary."¹²³ A conscript whose application to the local tribunal was rejected had the right to appeal first to an Appeal Tribunal and then to a Central Tribunal.¹²⁴ If the draftee did not obtain a certificate, he was not subject to imprisonment; rather, when he failed to report for service he was arrested, charged before a magistrate, transferred to the military authorities, and enlisted as a soldier for the duration of the war.¹²⁵ During World War I two types

118. Military Service Act, 1916, 5 & 6 Geo. 5, c. 104.

119. Only thirty-eight MPs voted against the measure. *See, e.g.,* JO VELLACOTT, *BERTRAND RUSSELL AND THE PACIFISTS IN THE FIRST WORLD WAR* 32 (1980). Vellacott explained how potential opponents were brought on board: Labour was bought off by a commitment not to undertake industrial conscription, the Irish members by a provision exempting Ireland from the Act, and Liberals by the conscience clause. *Id.* at 31.

120. Military Service Act, § 1(1)(a).

121. *Id.* § 2(1)(a)-(d).

122. *See* ARTHUR MARWICK, *BRITAIN IN THE CENTURY OF TOTAL WAR: WAR, PEACE AND SOCIAL CHANGE, 1900-1967*, at 70 (1968).

123. Military Service Act § 2(1), (3).

124. *Id.* § 2(7). Most of the 16,000 objectors eventually accepted some kind of alternative service. *See, e.g.,* J.M. BOURNE, *BRITAIN AND THE GREAT WAR, 1914-1918*, at 212-13 (1989); JOHN W. GRAHAM, *CONSCRIPTION AND CONSCIENCE: A HISTORY, 1916-1919*, at 348 (1922). A leaflet of the Friends' Service Committee in 1919 claimed that 5,600 conscientious objectors had been court-martialed, 3,300 accepted non-combatant service, 3,000 were engaged in medical or similar work, and 4,000 undertook other work of national importance. *See* F.L. CARSTEN, *WAR AGAINST WAR: BRITISH AND GERMAN RADICAL MOVEMENTS IN THE FIRST WORLD WAR* 68-69 (1982). The 1,500 "absolutists" were treated very harshly, "being subjected to a dismal treadmill of arrest, court-martial, imprisonment (with hard labour), release, arrest, court-martial, imprisonment and so on." MARWICK, *supra* note 122, at 70.

125. During debate on the bill on January 18, 1916, the Prime Minister stated that persons who did not choose to go before the tribunal would not be subject to imprisonment. The scheme of the bill was "automatic enlistment of the unmarried for military service without the necessity of haling a man before a criminal tribunal." *THE PARLIAMENTARY HISTORY OF CONSCRIPTION IN GREAT BRITAIN* 135 (Richard C. Lambert ed., 1917) [hereinafter *PARL. HIST.*].

of conscripts challenged their denial of exemption in the courts: conscientious objectors, expressly excused by the Act, and persons claiming they did not meet the statutory criterion of being a "British subject."

a. Conscientious Objectors

Britain was the first major war power to adopt a conscience exemption, followed only by the United States later in the war.¹²⁶ When Prime Minister Asquith first brought up the matter in the House of Commons, he was greeted with contemptuous laughter.¹²⁷ Pacifist organizations, however, supported by a group of Liberal and Labour MPs, exerted sufficient pressure to secure the exemption in an amendment to the Act.¹²⁸

In carrying out their obligations to adjudicate exemption claims, the tribunals had difficulty in applying the conscience clause because of an ambiguity in its phrasing. The relevant clause provided: "Any certificate of exemption may be absolute, conditional, or temporary, as the authority by whom it was granted think best suited to the case, and also in the case of an application on conscientious grounds, may take the form of an exemption from combatant service only."¹²⁹ This wording was open to two interpretations: either exemption from combatant service was the sole exemption available to conscientious objectors, or it was an additional alternative to the options of "absolute, conditional, or temporary." The language led to inconsistencies, with many tribunals refusing to grant absolute exemption to those applying on conscience grounds.¹³⁰

126. See, e.g., Keith Robbins, *The British Experience of Conscientious Objection*, in *FACING ARMAGEDDON* 691, 693 (Hugh Cecil & Peter H. Liddle eds., 1990). On conscientious objection generally, see R.J.O. ADAMS & PHILIP P. POIRIER, *THE CONSCRIPTION CONTROVERSY IN GREAT BRITAIN, 1900-1918* (1987); CARSTEN, *supra* note 124; MARTIN CEADEL, *PACIFISM IN BRITAIN, 1914-1945: THE DEFINING OF A FAITH* (1980); GRAHAM, *supra* note 124; THOMAS C. KENNEDY, *THE HOUSE OF CONSCIENCE: A HISTORY OF THE NO-CONSCRIPTION FELLOWSHIP, 1914-1919* (1981); E. SYLVIA PANKHURST, *THE HOME FRONT* (1932); JOHN RAE, *CONSCIENCE AND POLITICS: THE BRITISH GOVERNMENT AND THE CONSCIENTIOUS OBJECTOR TO MILITARY SERVICE, 1916-1919* (1970); KEITH ROBBINS, *THE ABOLITION OF WAR: THE 'PEACE MOVEMENT' IN BRITAIN, 1914-1919* (1976); BERTRAND RUSSELL, *JUSTICE IN WAR TIME* (1917); *WE DID NOT FIGHT: 1914-18 EXPERIENCES OF WAR RESISTERS* (Julian Bell ed., 1935); Lois Bibbings, *State Reaction to Conscientious Objection*, in *FRONTIERS OF CRIMINALITY* 57 (Ian Loveland ed., 1995).

127. ROBBINS, *supra* note 126, at 78, 693. He replied, however, that the provision was in accordance with British traditions. *Id.* at 78.

128. See, e.g., MARWICK, *supra* note 122, at 70-71; ROBBINS, *supra* note 126, at 692-93.

129. Military Service Act, 1916, 5 & 6 Geo. 5, c. 104, § 2(3).

130. See *PARL. HIST.*, *supra* note 125, at 164; RAE, *supra* note 126, at 31; Bibbings, *supra* note 126, at 61-64.

Nonetheless, the latter interpretation was manifestly the more plausible one. That an exemption “may take” rather than “shall take” the form of an exemption from combatant service surely implied that the other alternatives—absolute, conditional, and temporary—remained open. Even more compelling, the government stated during debate on the bill that absolute exemption was available,¹³¹ and it subsequently made strenuous efforts to correct any confusion on this score. On March 23, 1916, the President of the Local Government Board wrote to all tribunals expressly to correct the misimpression that absolute exemption was not an option,¹³² and four days later he held a conference of tribunal chairmen to reiterate this official position.¹³³ The tribunals continued to act erratically, however, and it eventually fell to the King’s Bench to resolve the issue in April 1916.

Frank Parton, a law student, had applied to the Chertsey local tribunal for a conscience exemption.¹³⁴ When the tribunal exempted him from combatant service only, he invoked the two-tiered appellate review process.¹³⁵ The Croydon Appeal Tribunal affirmed the local tribunal on the ground that Parton remained dependent on his father, the managing director of a munitions works.¹³⁶ Tribunal members reasoned that since Parton’s income partly derived from the manufacture of munitions, he did not deserve an exemption from non-combatant service.¹³⁷ When the Central Tribunal denied Parton’s further appeal, insisting that his exemption from combat was conditional on his undertaking ambulance work, Parton applied to the High Court for writs of mandamus and certiorari.¹³⁸

At the oral argument, Mr. Justice Darling’s antagonism was apparent. He accused Parton of having “the same objection to saving life as to taking it,”¹³⁹ and further charged him with hypocrisy: “How does he reconcile it with his conscience to take advantage of the

131. Sir John Simon stated in the House of Commons in May 1916 that the power of local tribunals to grant absolute exemption “was most expressly stated by the Government when the Bill was carried.” *PARL. HIST.*, *supra* note 125, at 329. Although the Cabinet’s view at the time of drafting was ambiguous, the government subsequently made clear that it accepted absolute exemption. *See RAE*, *supra* note 126, at 31.

132. *See GRAHAM*, *supra* note 124, at 67, 83; *RAE*, *supra* note 126, at 119. Walter Long, president of the Local Government Board, stated in the House of Commons in February 1916 that instructions had been issued “which make the matter quite clear” that absolute exemption was available. 80 *PARL. DEB.*, H.C. (5th ser.) (Feb. 21, 1916) 412; *see also* 81 *PARL. DEB.*, H.C. (5th ser.) (Mar. 23, 1916) 353; *PARL. HIST.*, *supra* note 125, at 204.

133. *See RAE*, *supra* note 126, at 119.

134. *R. v. Central Tribunal ex parte Parton*, 32 T.L.R. 476, 476 (K.B. 1916).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

protection given to his life and property, which finally depends on force?"¹⁴⁰ Casting aside any pretense of partiality, he then declared: "He ought really to be an outlaw, ought he not?"¹⁴¹ Not surprisingly, the judge's ruling mirrored his hostility. Despite the government's unequivocal and well-publicized policy of allowing objectors to apply for absolute exemption, he announced that this category was open only to persons applying on the basis of occupation, hardship, and health. He offered no analysis, suggesting that the correct interpretation of the statute was perfectly obvious. Nor did he ever refer to the government's widely circulated contrary interpretation. "There was no right," the judge declared flatly, "to object on conscientious grounds to military service."¹⁴² Relying by his own admission on "common sense" rather than statutory language or ministerial construction, he concluded that "it was unreasonable to give a right to object to one form of service in order to obtain exemption from all other forms."¹⁴³

Parton was a warrior's decision out of line with the intentions of both Parliament and the government. Indeed, Parliament immediately rejected it, enacting a second Military Service Act in May 1916 providing unequivocally that objectors were eligible for all statutory forms of exemption.¹⁴⁴ Nonetheless, *Parton's* influence was pervasive, and many local tribunals continued to rule that objectors were eligible only for exemption from combatant duties.¹⁴⁵ The King's Bench thus played a significant role in the recruitment campaign.

b. Dual Nationals

The courts deprived dual nationals of relief from military service as well, disregarding an explicit statutory provision recognizing their right to declare alienage upon becoming adults. The Military Service Act 1916 provided that every "male British subject" of a certain age

140. *Id.*

141. *Id.*

142. *Id.* at 477.

143. *Id.* Another judge agreed, but the third judge, while concurring in the result, said he was not prepared to hold that the tribunal had no power to grant absolute exemption in the case of the conscientious objector. *Id.* Mr. Justice Darling, although perhaps the most virulently anti-German member of the judiciary, see ANDREW, *supra* note 72, at 189, was not alone in his attitude toward conscientious objectors. Even Lord Scrutton, one of the judges most sympathetic to civil liberties, was antagonistic. See Scrutton, *supra* note 41, at 131 (suggesting that conscientious objectors were anarchistic).

144. Military Service Act (Sess. 2), 1916, 6 & 7 Geo. 5, c. 15. The new language stated: "It is hereby declared that the power to grant special certificates of exemption in the case of an application on conscientious grounds . . . is additional to and not in derogation of the general power conferred by that Act to grant an absolute, conditional, or temporary certificate in such cases." *Id.* § 4(3); see GRAHAM, *supra* note 124, at 73.

145. GRAHAM, *supra* note 124, at 300; Bibbings, *supra* note 126, at 65.

was deemed to have enlisted for the duration of the war.¹⁴⁶ The question was how this provision interrelated with the British Nationality and Status of Aliens Act 1914¹⁴⁷—passed, significantly, after war broke out—which enabled any natural-born subject, who at his birth or during his minority became also the subject of a foreign state, to make a declaration of alienage upon attaining his majority and in so doing “cease to be a British subject.”¹⁴⁸

In the course of the war, the courts eviscerated the option supposedly available to dual nationals to declare alienage and thereby become ineligible for British military service. Successively, they blocked the escape route for a minor drafted before he had the opportunity to declare alienage, a conscript who reached adulthood while serving in the army and attempted to declare alienage at that time, an adult soldier who had successfully declared himself the national of a neutral country, and a draftee who was concededly an enemy alien. In reaching these decisions, the courts applied provisions of the Military Service Act selectively while arbitrarily dismissing relevant provisions of the British Nationality Act. The consequence was that anyone who was a dual citizen when drafted was required to serve in the army for the duration of the war, regardless of any change or attempted change in his citizenship.

Sawyer v. Kropp,¹⁴⁹ the first case to reach the courts, concerned a minor of German parentage who was born in London and “ordinarily resident” in Great Britain. At the time of the litigation, Kropp’s father was serving in the German army.¹⁵⁰ A metropolitan police magistrate refused to convict the young man for failing to appear for military service, concluding that army service would preclude him from making a declaration of alienage upon coming of age.¹⁵¹ In the magistrate’s view, it would be “contrary to all principles of law and equity” to take advantage of his infancy before he had the opportunity to make an alienage declaration.¹⁵² Kropp’s lawyer pointed out to the court that since his client was a German national under German law, if he served in the British army he would be guilty of high treason in Germany.¹⁵³

The Divisional Court showed little sympathy. Acknowledging that Kropp had the right to cease being a British subject upon coming of age, it applied a literal interpretation of the clause in the Military

146. Military Service Act, 1916, 5 & 6 Geo. 5, c. 104, § 1(1).

147. British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17.

148. *Id.* § 14(1).

149. 85 L.J.K.B. 1446 (1916).

150. *Id.* at 1446.

151. *Id.* at 1446-47.

152. *Id.* at 1447.

153. *Id.*

Service Act that "British subjects were deemed to have enlisted."¹⁵⁴ It found that since Kropp had not yet attained his majority, he was still a British subject when drafted and therefore validly conscripted: "The respondent is a British subject, and is liable to serve, and we cannot enter into the consequent inconveniences."¹⁵⁵ The court thus reduced taking up arms against one's father and committing treason against one's country to mere "inconveniences" of no legal consequence.¹⁵⁶

In *R. v. Commanding Officer of 30th Battalion ex parte Freyberger*,¹⁵⁷ the judiciary went one step further, denying the right to declare alienage not to a soldier who might declare foreign citizenship in the future but to one whose right had already matured. Freyberger was a dual subject of Britain and Austria who was called up in 1916. Upon turning twenty-one in 1917, he made a declaration of alienage and claimed a discharge from the army. When the military refused, he applied for a writ of habeas corpus, arguing in the King's Bench that he had become a British soldier only subject to his right to declare alienage upon attaining his majority. The words and meaning of section 14 of the British Nationality Act, he contended, were "quite plain and unambiguous."¹⁵⁸

Revealingly, Lord Reading agreed that, "taken literally,"¹⁵⁹ section 14 of the British Nationality Act gave the applicant a right to cease being a British subject after he came of age, and he acknowledged that he reached his conclusion "notwithstanding section 14 of the Act of 1914."¹⁶⁰ Stymied by the express statutory language, the judge based his decision on a surprising alternate source—"general" principles of British and international law. The British Nationality Act, he insisted, rather than being interpreted by its own express terms, should be read "subject to the general principle of British law, which is also a rule recognized in international law, that a subject cannot divest himself of his allegiance to the Crown by becoming a naturalized subject of an enemy State during a period of war."¹⁶¹ Despite the court's attribution of such a "general principle" to British law, there was no credible authority for it. Indeed, the only case the court cited in support of the proposition was *R. v. Lynch*,¹⁶² a 1903 decision holding that a wholly British subject could not adopt enemy nationality in the

154. Military Service Act, 1916, 5 & 6 Geo. 5, c. 104, § 4(3).

155. *Kropp*, 85 L.J.K.B. at 1447-48.

156. Indeed, Mr. Justice Atkin stated somewhat illogically that there was "no inconvenience at all" because "until he has made [his] declaration . . . he remains a British subject." *Id.* at 1448.

157. [1917] 2 K.B. 129 (C.A.).

158. *Id.* at 131.

159. *Id.* at 132.

160. *Id.* at 133.

161. *Id.* at 132.

162. [1903] 1 K.B. 444.

middle of the Boer War. The situation in *Lynch* was not remotely analogous to that of a person already a citizen of an enemy state who had an express statutory right to “cease being a British subject” and embrace only his enemy status.

The Court of Appeal denied Freyberger the right to declare alienage under a different but equally unconvincing analysis. It found that even if he could divest himself of British nationality and become an alien, he was still statutorily obligated to serve in the British army.¹⁶³ Rather than relying on international law, Lord Swinfen Eady pointed to the language in the Military Service Act that specified that British subjects were deemed enlisted “for the period of the war.”¹⁶⁴ Even assuming that the petitioner could become an alien, that did not mean that he was entitled to a discharge from the army, as “[t]he Act does not so provide.”¹⁶⁵ Thus, in contrast to *Halliday* and *Brady*, the court interpreted a statute’s silence about a particular option—the right to a discharge based on alienage—to mean that the option was *not* available. Freyberger, the court concluded, was a British subject when the Military Service Act was passed and was required to remain in the army until the war was over.¹⁶⁶ The decision ignored the fact that Parliament, in declaring only “British subjects” eligible for conscription, had obviously not intended aliens—certainly not enemy aliens—to serve in the British army. The Court of Appeal thus advanced the war as it saw fit, even if it meant disregarding parliamentary intent in two separate statutes.¹⁶⁷

The far-reaching implications of *Freyberger* were spelled out in a case involving a Swiss dual national, *Dawson v. Meuli*,¹⁶⁸ in which the court ruled that even a valid declaration of alienage—that is, one officially accepted by the British government—would not relieve a

163. *Freyberger*, [1917] 2 K.B. at 135.

164. *Id.* at 139.

165. *Id.*

166. *Id.*

167. A question left open in *Freyberger* was whether in wartime a person of dual nationality could become a subject of a neutral if not enemy state. *Id.* at 136. In 1917 this issue came before the High Court in *Vecht v. Taylor*, 116 L.T.R. 446 (K.B. 1917), but the court managed to avoid deciding it directly. Moses Vecht, a British subject, registered as a Dutch national in 1915. He intended his registration to be a declaration of alienage, but he failed to do it in the correct statutory form. On November 8, 1916, he was arrested for draft evasion, and a magistrate adjourned his case to November 15. On November 9, apparently alerted to the formal problem with his earlier registration, Vecht made a correct declaration of alienage. The High Court simply stated that nothing the appellant had done after November 8 could be an answer to the charge; in other words, he had been already been drafted and that was the end of the matter. Although the court did not reach the question whether a person could become a citizen of a friendly state in wartime, Lord Reading implied that *Freyberger* had decided the question in the negative. *Id.* at 447. The issue was finally resolved in favor of the military in *Gschwind v. Huntington*, [1918] 2 K.B. 420. See *infra* text accompanying notes 174-80.

168. *Dawson v. Meuli*, 118 L.T.R. 357 (K.B. 1918).

person from military service. Meuli had made his declaration of alienage while serving in the reserves before being called up to active service, and the court was forced to acknowledge that the Home Office had registered him as an alien.¹⁶⁹ At the time of the litigation, therefore, everyone accepted that Meuli held the status of a Swiss national only.¹⁷⁰ Nonetheless, adopting the reasoning in *Freyberger*, the King's Bench ruled that a person who legally became a citizen of another country could still not avoid the army.¹⁷¹ According to Mr. Justice Darling, the mere fact that a dual national ceased to be a British subject did not mean that he had ceased to be a British soldier: "A man may serve as a soldier in the army of a State to which he owes no allegiance."¹⁷² The judge analogized Meuli's situation to that of mercenaries, who were soldiers of the country that employed them "although they were not subjects of it and owed no allegiance to it."¹⁷³

In *Gschwind v. Huntington*,¹⁷⁴ another case involving an adult who had successfully registered as a Swiss subject, the court took the final step. Unlike Meuli, however, Gschwind had not changed his status while in the armed services; rather, he had made his successful declaration of alienage in April 1917, a full seven months before he received his call-up orders.¹⁷⁵ His attorney argued that he was not liable for service since he was not a British subject when conscripted.¹⁷⁶ The court, however, found that the applicable date was not the date of Gschwind's conscription but rather that of the passage of the Military Service Act.¹⁷⁷ In the view of the court, nothing made any difference—neither the Home Office's acceptance of the declaration of alienage nor the nationality that the person

169. *Id.* at 359. Meuli had been born in England in 1892, the son of Swiss parents. He had offered himself for enlistment twice in 1915 and on each occasion had been rejected on medical grounds. He was called up for military service and placed in the reserve as of October 1, 1916. On October 13 he made a declaration of alienage, which was returned to him by the Home Office as registered on January 16, 1917. Upon being called up for permanent service in October 1917, he failed to present himself. He was in fact a member of the Swiss army and had paid 140 francs for a temporary exemption expiring in 1918. The magistrates were of the opinion that he was not liable for military service. *Id.* at 358.

170. *Id.* at 357-58.

171. *Id.* at 359.

172. *Id.*

173. *Id.*

174. [1918] 2 K.B. 420.

175. *Id.* at 421.

176. *Id.* at 422. Gschwind's attorney distinguished *Freyberger* on the ground that the petitioner in that case was an enemy and the declaration had never been accepted by the Home Office, *Vecht* on the basis that the appellant had not made the declaration until after he had been charged by a magistrate, and *Meuli* on the ground that the respondent had not made his declaration until after he had been called up. *Id.* at 422-23. The court rejected all these distinctions. *Id.* at 424-25.

177. *Id.* at 424.

elected.¹⁷⁸ The Act, the judges pointed out, did not contain any exceptions.¹⁷⁹ Thus, the courts progressed through a series of increasingly ambitious rulings, eventually concluding that dual nationals of every conceivable type were “British subjects” for purposes of military service. Although the Home Secretary had explicitly declared to Parliament in 1916 that “the Military Service Act does not apply to aliens,”¹⁸⁰ the position of the courts was that even a person whom the government had officially recognized as an enemy alien before being conscripted was required to serve in the British army.

The military service cases, therefore, whether dealing with conscientious objectors or dual nationals, disclosed the judiciary’s selective and quite purposeful use of statutory construction. To reach their goals, the judges chose the least plausible interpretation of the conscience clause and selected a provision of one statute (the Military Service Act) to control another (the British Nationality Act). Moreover, they applied varying and inconsistent canons of construction, in some cases inferring additional powers from silence while in others adopting narrow and literal interpretations of textual language. On certain occasions they followed the parliamentary language with a rigid exactitude, while at other times they looked beyond express provisions to adopt constructions based on “general principles” and “international norms.” Although the Military Service Act sought to fill the army with “British subjects” and the British Nationality Act allowed dual nationals to shed that status, the courts disregarded parliamentary intent to further their own independent policy of channeling all available manpower into the military.

3. Deportation: Circumventing Parliamentary Restraints

In a third sphere implicating personal liberty—deportation—the judges adopted yet another tactic to circumvent parliamentary intent. Here, they enabled the government to accomplish an avowed political objective despite ruling in the very same case that the applicable statute proscribed it. *R. v. Secretary of State for Home Affairs ex parte Duke of Chateau Thierry*¹⁸¹ quite unabashedly allowed the Home

178. *Id.* at 423.

179. *Id.* The government, however, had stated something quite different in the House of Commons. The Secretary of State for War declared in 1916 that a dual citizen of neutral nationality would not be called up during his minority if he intended to adopt the alien nationality exclusively, and that after reaching age twenty-one such a man could avoid service by submitting within two months a declaration of alienage to the Home Office. 86 PARL. DEB., H.C. (5th ser.) (Oct. 25, 1916) 1141-42.

180. 85 PARL. DEB., H.C. (5th ser.) (Aug. 23, 1916) 2673.

181. [1917] 1 K.B. 922 (C.A.).

Secretary to do indirectly what the judges themselves declared was impermissible for him to do directly.

Deportation orders, which emanated from the Home Office and applied only to aliens, were based on section 1 of ARA.¹⁸² Neither the statute nor its implementing regulations imposed any particular requirements on the government. The Act simply authorized the Home Secretary to issue an order "for the deportation of aliens,"¹⁸³ and the regulation stated merely that the Home Secretary "may order the deportation of any alien."¹⁸⁴ Both, obviously, concerned removal from the United Kingdom.

Chateau Thierry dealt with a French citizen seeking to avoid service in the French army. The government had no particular interest simply in removing him from England, since he was not undesirable except for his attempt to skirt the draft of an allied nation.¹⁸⁵ As the Divisional Court noted, he was not a person "unfit" to remain in the country "for any other reason than that he was required to attend in France."¹⁸⁶ Indeed, he seems to have been a gentleman well known in social circles in London.¹⁸⁷ There was, however, another factor. The government desired to effectuate a treaty with France whereby each country would return subjects of the other who were liable to military service. *Chateau Thierry* was a test case; the Home Secretary wanted a legal opinion on whether, given that the statute and regulation only allowed the minister to deport "out" of the United Kingdom, a deportation order could lawfully

182. 4 & 5 Geo. 5, c. 12, § 1(1)(c).

183. ARA section 1(1) provided that in time of war or imminent national danger His Majesty could "by Order in Council impose restrictions on aliens, and provision may be made by the Order . . . (c) for the deportation of aliens from the United Kingdom . . . [or] (k) for any other matters which appear necessary or expedient with a view to the safety of the realm." *Id.* § 1(1)(c), (k).

184. Article 12 stated:

A Secretary of State may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the United Kingdom. . . . Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, be detained in such a manner as the Secretary of State directs, and, whilst so detained, shall be deemed to be in legal custody.

Aliens Restriction (Consolidation) Order, 1914, art. 12, cl. 1-2.

185. *R. v. Sec'y of State for Home Affairs ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 552, 552-53 (C.A.).

186. *Id.* at 556.

187. 90 PARL. DEB., H.C. (5th ser.) (Feb. 7, 1917) 53.

specify a particular port of arrival.¹⁸⁸ The Divisional Court, looking behind the order, found that its object was to deport Thierry to France, and it quashed the direction as beyond the Home Secretary's powers.¹⁸⁹

The Court of Appeal agreed that deportation to a particular country to implement a treaty with France was impermissible under ARA,¹⁹⁰ but it refused to allow such a statutory prohibition to obstruct the government from accomplishing its objective. Although ARA did not authorize the Home Secretary to deport an alien to France, the court reasoned, it did permit him to choose the ship on which he would sail.¹⁹¹ The result, the court pointed out with satisfaction, might be that an alien would have to "disembark in the country to which it was desired that he should go."¹⁹² On its face the order was "perfectly good,"¹⁹³ since it only directed Chateau Thierry's deportation; the fact that he would disembark in France was not an "absolutely necessary consequence of the deportation order."¹⁹⁴ One can imagine Lord Scrutton caustically observing, along the lines of his dissent in *Brady*, that presumably the deportee could jump overboard and swim to Australia. Thus, the Court of Appeal declined to look behind a formal order obviously intended to effectuate precisely what the court itself had ruled impermissible. As in their exemption decisions, the judges ardently promoted the mobilization effort.

4. Exclusion: Setting Minimal Standards

The exclusion cases revealed another judicial technique for expanding executive powers—namely, manipulating legal standards of review and burdens of proof. In excluding persons from certain geographical areas, the courts held, the military authority need have only a subjective belief that a person was dangerous. Further, the

188. [1917] 1 K.B. at 933 (C.A.) (Lord Pickford observing that the Attorney General had asked the court to decide whether the Home Secretary had the power to deport an alien to a specified destination).

189. *Chateau Thierry*, [1917] 1 K.B. at 556-57. The Divisional Court noted that in form the order was correct, "but this Court must look behind the mere form" to determine whether the intention was to deport the alien to a particular country. *Id.* at 555.

190. *Chateau Thierry*, [1917] 1 K.B. at 936-37. It is not clear why the court felt itself unable to interpret the Act to encompass this objective, given the broad deportation provisions of ARA and the courts' general ease in construing wartime statutes affecting liberty in a manner that expanded governmental powers. Regardless, the important point is that the courts concluded that deportation to a particular place was unlawful under the statute but effectuated it anyway.

191. *Id.* at 937.

192. *Id.*

193. *Id.* at 932, 934.

194. *Id.* at 934.

burden of proving that the officer did not have such an honest belief rested on the person affected—a burden almost impossible to carry.

In the exclusion context, the courts interpreted not a statute but a regulation, thus showing themselves eager to tell the government what it properly meant to say. Based on DORA Regulation 14, the exclusion power derived from the government's general competency to regulate for the safety and defense of the realm. Applicable both to aliens and British subjects, the regulation provided that if a person "is suspected of acting, or of having acted, or of being about to act in a manner prejudicial to the public safety or the defence of the Realm," the person might be prohibited from "residing in or entering any locality."¹⁹⁵ Exclusion orders issued from the local military authority rather than the Home Secretary, and between 1914 and 1918 the army removed or excluded a total of 612 people from particular areas.¹⁹⁶

Rejecting even a general "reasonableness" standard, two principal cases interpreted the regulation to require that the military authority's suspicion of prejudicial acts be merely "honest." In *R. v. Denison*¹⁹⁷ Herman Nagele, a dealer in human hair, sought to quash an order removing him from the district where he resided. He had been born in Germany but had settled in England at the age of sixteen and married an Englishwoman in 1908.¹⁹⁸ Twice he was convicted and fined for failing to cover the roof area of his factory, thereby breaching the DORA lighting regulations.¹⁹⁹ When the military authority ordered him to leave his district and reside in one of four other specified areas, Nagele challenged the order on the ground that the regulation required a "reasonable" as well as "honest" suspicion.²⁰⁰ He contended that the court could not give effect to the "startling" proposition that the legislature "had handed over to a single man without appeal a power of this kind."²⁰¹

The King's Bench thought otherwise, interpreting the regulation to require only a subjective belief on the part of the military authority. In reaching this conclusion, it invoked the exigencies of the military situation: "It was well to bear in mind that these regulations

195. DORA CONSOL. REGS., *supra* note 27, at Reg. 14. Once the military authority suspected prejudicial acts, it must merely appear "desirable" that such person be barred from a locality. *Id.*

196. See EWING & GEARTY, *supra* note 2, at 55 n.78. It was used in particular to exclude persons from Ireland, see 74 PARL. DEB., H.C. (5th ser.) (Oct. 13, 1915) 1283; 90 PARL. DEB., H.C. (5th ser.) (Feb. 26, 1917) 1796, and to remove trade union leaders from areas of active union activity such as Clydeside. See EWING & GEARTY, *supra* note 2, at 71; MARWICK, *supra* note 122, at 100.

197. 32 T.L.R. 528 (K.B. 1916).

198. *Id.* at 528.

199. *Id.*

200. *Id.* at 529.

201. *Id.*

were made in pursuance of an emergency statute, passed for the purposes of war, and designed to confer extraordinary powers during the war.”²⁰² The court also noted without comment that it was the applicant’s burden to prove that the respondent did not honestly suspect him.²⁰³ Dubious about this construction of the regulation, the *Solicitors’ Journal* quickly responded that it “clearly places individual liberty too much at the mercy of military authority.”²⁰⁴

The test established in *Denison* was approved by the Court of Appeal in *Ronnfeldt v. Phillips*.²⁰⁵ Ronnfeldt, a Welsh coal exporter of German parentage, was ordered to leave the Cardiff area within four days because of suspected pro-German sympathies.²⁰⁶ Ronnfeldt’s father had expressed satisfaction at a dinner about the sinking of the *Lusitania*, and Ronnfeldt himself was rumored to have predicted that “the Kaiser’s head would soon be on the coinage of this country.”²⁰⁷ Although the trial judge thought that the military authority had “very, very little ground for suspecting,”²⁰⁸ and the Court of Appeal sympathized with Ronnfeldt for being displaced from his home and business for four years,²⁰⁹ both courts nonetheless concluded that he had not met his burden of showing that the military authority did not “honestly suspect.”²¹⁰ In assigning the burden of proof, the lower court simply observed that the burden “must be cast on the plaintiff.”²¹¹ Lord Bankes in the Court of Appeal endorsed this approach on the ground that “we are not living in ordinary times.”²¹² In a period of national peril, he explained, “[h]onest mistakes may be made, and must be endured as one of the many misfortunes of this lamentable war.”²¹³

5. The Irish Rebellion: Manipulating Technicalities

Judicial decisions dealing with unrest in Ireland illustrated yet another calculated technique employed by the courts to promote their political agenda. To enhance the government’s powers in Ireland, a year after the Armistice the King’s Bench linked the suppression of

202. *Id.*

203. *Id.*

204. Note, *Removal by Military Authorities Under Suspicion*, 60 SOLIC. J. & WKLY. REP. 505, 506 (May 27, 1916). It also commented that the *Denison* case well illustrated the “growing tendency of the Executive Government towards the despotic user of its regulation-making powers.” *Id.*

205. [1918] W.N. 328 (C.A.).

206. *Ronnfeldt v. Phillips*, 34 T.L.R. 556 (K.B. 1918).

207. *Id.* at 557.

208. *Id.*

209. *Ronnfeldt*, [1918] W.N. at 329.

210. *Id.*; *Ronnfeldt*, 34 T.L.R. at 557.

211. *Ronnfeldt*, 34 T.L.R. at 557.

212. *Ronnfeldt*, [1918] W.N. at 329.

213. *Id.*

domestic turmoil to success in a war already won. Relying on the technicality that the war was not officially over, the court authorized executive detention of an Irish rebel in 1920 on the ground that his conduct might weaken England in its fight against Germany.²¹⁴

In January 1920 the Chief Secretary for Ireland arrested Patrick Foy, a twenty-year-old Dublin shop assistant, and interned him in Wormwood Scrubs Prison in England on suspicion of "acts prejudicial" under an amended Regulation 14B.²¹⁵ The regulation had been expanded in April 1918 to permit the internment of persons suspected of acting "in a manner prejudicial to the public safety or the defence of the Realm."²¹⁶ This criterion, broader than "hostile origins or associations," applied only where the operation of jury trial had been suspended because of an "invasion or other special emergency arising out of the present war"—that is, in Ireland.²¹⁷ The peace treaty with Germany had been signed on January 10, but treaties with three other enemy states were incomplete and thus the war technically continued.²¹⁸ Foy's counsel, Sir John Simon, former Home Secretary and architect of DORA, argued that Regulation 14B was directed only at protecting the country from foreign foes during wartime. It was, he contended, ultra vires to use it to suppress internal rebellion during the war and a fortiori after it had been won.²¹⁹

214. *R. v. Governor of Wormwood Scrubs Prison ex parte Foy*, 36 T.L.R. 432 (K.B. 1920).

215. *Id.* at 432-33.

216. The amended Regulation 14B provided:

In any area in respect of which the operation of section 1 of the Defence of the Realm (Amendment) Act, 1915, is for the time being suspended, this regulation shall apply in relation to any person who is suspected of acting, or having acted, or of being about to act in a manner prejudicial to the public safety or the defence of the Realm, as it applies in relation to persons of hostile origin or association.

DORA CONSOL. REGS., *supra* note 27, at Reg. 14B(1)(6); *see Foy*, 36 T.L.R. at 433.

217. In April 1916, after the Easter rebellion, the King invoked the following clause in the DORA Amendment Act: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by Proclamation forthwith suspend the operation of this section [allowing for jury trial], either generally or as respects any area specified in the proclamation." DORA (Amendment) Act, Mar. 16, 1915, § 1(7). The Crown issued a proclamation reciting that "the present state of affairs in Ireland is such as to constitute a special military emergency," and suspended the operation of section 1 until it "sees fit to revoke" its proclamation." *See Foy*, 36 T.L.R. at 433. The court in *Foy* held that the proclamation would remain in force until the end of the war and was not limited to the duration of the actual military emergency. *Id.* at 434.

218. The Termination of the Present War (Definition) Act, 1918, 8 & 9 Geo. 5, c. 59, had provided that the government could decide on what date the war ended. As of Foy's internment, no such declaration had been made. The war officially ended on August 31, 1921. *See SIMPSON*, *supra* note 2, at 31.

219. *Foy*, 36 T.L.R. at 433.

Viscount Reading, Chief Justice of the King's Bench, rejected Simon's position as too constricted. In his view DORA, which empowered the government to defend the country against foreign enemies, inevitably encompassed domestic disorder as well.²²⁰ Acts of rebellion, he declared, "have a tendency to weaken the forces of this country."²²¹ Invoking the war in a palpably false premise, he asked rhetorically: "As the war still continues, how can we say that internal disorder does not affect the realm in connexion with the foreign foe?"²²² Moreover, he observed, the 1916 proclamation of martial law in Ireland had never been rescinded.²²³ Since there was thus both a state of war and a state of special military emergency "connected with the original German acts," it would be untenable to hold that either the martial law proclamation or the use of 14B was invalid.²²⁴ In evaluating whether Foy's detention promoted national safety in wartime, therefore, the court went beyond parliamentary intent to find DORA applicable to an entirely unrelated emergency, and it did so by disingenuously exploiting the technicality that England was still at war.²²⁵

B. *Stretching the Boundaries of the Royal Prerogative*

In addition to construing statutes beyond legislative intent, the warrior judges also demonstrated their activism by creatively expanding the government's prerogative powers over aliens. Freed from the trammels of controlling legislation, they augmented the amorphous and historically contentious common law prerogative powers of the Crown.²²⁶ In particular, they assisted the government

220. *Id.* at 433-34.

221. *Id.* at 434.

222. *Id.* at 433.

223. *Id.* at 434.

224. *Id.*

225. See SHARPE, *supra* note 2, at 95. Another example of use of a technicality occurred in *R. v. Secretary of State for Home Affairs ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922 (C.A.), in which the court allowed the government to do something impermissible—send a draft dodger to France—on the technical ground that the formal order merely directed that the deportee be placed on board a ship. The courts were not always sensitive to technicalities, however. In *R. v. Governor of Brixton Prison ex parte Sarno*, for example, the court noted that although Sarno's case was not properly before the court, "we do not think that we are bound to apply the rules with strict regard to technicality." [1916] 2 K.B. 742, 749. The courts thus exploited or ignored technicalities as their priorities dictated.

226. The prerogative was considered part of the common law. See, e.g., *In re Petition of Right*, [1915] 3 K.B. 649, 659; Barendt, *supra* note 63, at 12. Judicial suspicions of the prerogative in situations not involving aliens, deriving largely from the use of the prerogative by the Stuarts in the seventeenth century, were pervasive even in the twentieth. For example, in his very brief opinion in *Halliday*, Lord Dunedin emphasized that the prerogative was not the basis of the decision. [1917] A.C. 260, 270 (H.L.). In dissent, Lord Shaw agreed:

in implementing its alien internment policies. As noted, in 1914 the government classified approximately seventy-five thousand persons in Britain over the age of fourteen as enemy aliens, and it eventually placed thirty-two thousand of them in detention camps.²²⁷ These detentions were largely accomplished by means of the royal prerogative.²²⁸

Judicial rulings on the prerogative provided legal validation for the state's alien internment policy. Before *Halliday* there was concern that ARA did not confer sufficient power to authorize detentions because it lacked an express provision permitting internment of aliens not deemed a danger to the state.²²⁹ This perceived weakness in statutory authority forced the government to turn to the prerogative, but there it seemed to confront problems as well. As the government's counsel conceded, "there is no authority in the books for the proposition that the Crown by virtue of its prerogative has the right to control the liberty of aliens, the reason being that the necessity of so controlling them has never before arisen."²³⁰ To sustain the detentions, it was necessary for the courts to find both that royal powers had not been pre-empted by ARA and that the prerogative extended to alien civilians.

The courts rose to the challenge, rehabilitating and expanding the prerogative in two cases involving alien internees, *R. v. Superintendent of Vine Street Police Station ex parte Liebmann*²³¹ and *R. v. Commandant of Knockaloe Camp ex parte Forman*.²³²

If once again, and ever so slightly, that prerogative gets into association with executive acts done apart from clear parliamentary authority, it will be an evil day: that way lies revolution. Do not let the thing which has been done—in my opinion a violent thing—be associated for one moment with, or at any point be said to be supported by, Royal prerogative.

Id. at 286; *see, e.g.*, V. St. Clair MacKenzie, *The Royal Prerogative in Wartime*, 34 L.Q. REV. 152 (1918) (expressing academic distrust of prerogative claims).

227. *See supra* note 7; *see also* ANDREW, *supra* note 72, at 181-82; BIRD, *supra* note 56, at 6, 9. Aliens exempted from internment were women, older men, subjects of friendly nations such as Poles and Czechs, long-term residents with strong British family ties, and the infirm or mentally ill. *See id.* at 8-9.

228. During oral argument in *Halliday*, the attorneys for the Crown observed that with one previous exception, the internees had been all enemy aliens interned under the prerogative, and it had not therefore been necessary to establish the lawfulness of Regulation 14B. *R. v. Halliday ex parte Zadig*, [1916] 1 K.B. 738, 739; *see* 68 PARL. DEB., H.C. (5th ser.) (Nov. 12, 1914) 98 (Home Secretary remarking that the detention of enemy aliens was accomplished pursuant to the prerogative); *see also* *R. v. Superintendent of Vine Street Police Station ex parte Liebmann*, [1916] 1 K.B. 268, 270 (Crown justifying the arrests under the prerogative and noting that the emergency statutes were "immaterial").

229. BIRD, *supra* note 56, at 75.

230. *Liebmann*, [1916] 1 K.B. at 270.

231. *Id.*

232. 87 L.J.K.B. 43; 34 T.L.R. 4 (K.B. 1917).

Liebmann, a German national, was interned in 1915; Forman, a Czech national, was detained two years later.²³³ Both petitioned for writs of habeas, challenging their detentions as unlawful exercises of the prerogative. In both cases the courts first rejected the threshold claim that ARA had pre-empted the prerogative and then stretched the royal power to bring alien civilians within its reach by reclassifying them as “enemy combatants” fully subject to the King’s command.²³⁴

Forman dealt with the preemption question most directly. The petitioner’s argument was that wartime emergency legislation covered the field and the prerogative had therefore ceased to apply.²³⁵ The clause reserving royal powers in ARA, he pointed out, did not refer to any power to intern:

Any powers given under this section, or under any Order in Council made under this section, shall be in addition to, and not in derogation of, any other powers with respect to the expulsion of aliens, or the prohibition of aliens from entering the United Kingdom or any other powers of His Majesty.²³⁶

Under the canon of *ejusdem generis*, he contended, the statute did not authorize the government to intern under the prerogative but only to expel aliens or deny them admission.²³⁷ The court rejected this interpretation without explanation: “Counsel for the applicant admitted the existence at one time of a prerogative to intern prisoners of war, and it cannot be concluded that that prerogative has been removed by recent legislation.”²³⁸

233. Forman had come to London in 1912 and the following year married a British subject, the daughter of a lieutenant-colonel. He claimed that he was wholly on the side of the British and had taken a prominent part in the Czech national movement led by Jan Masaryk. In November 1916, he was invited by Masaryk to take charge of the Czech Press Bureau in the Strand. A few months later the police found two official Press Bureau circulars in a letter sent from the Czech Press Bureau to the Bohemian National Alliance in Chicago. Forman’s exemption was canceled, and he was interned. Forman’s attorney submitted that he was an alien friend. The following colloquy ensued. Mr. Justice Darling asked, “Why is he not an alien enemy?” Forman’s attorney replied that he had registered and that a non-combatant could not be made a prisoner of war unless some charge was preferred against him. Mr. Justice Darling then remarked that “[t]hese rules are only being observed on one side.” The attorney responded, “But we are on that side.” *Forman*, 34 T.L.R. at 5. Alfred Liebmann came to England in 1889. He obtained a formal discharge from German nationality in 1890 but never became naturalized as an English citizen. In 1914 he registered as an alien enemy and then applied to the police to cancel his registration. *Liebmann*, [1916] 1 K.B. at 269.

234. *Liebmann*, [1916] 1 K.B. at 274-75; *Forman*, 34 T.L.R. at 6.

235. *Forman*, 87 L.J.K.B. at 46.

236. ARA, 1914, 4 & 5 Geo. 5, c. 12, § 1(6).

237. *Forman*, 87 L.J.K.B. at 46.

238. *Id.* at 45. Liebmann also argued that if there was a prerogative power to intern, ARA would have been unnecessary. Mr. Justice Bailhache “felt the force” of the argument, and said he did not know why no express power to intern had been included

Given longstanding suspicions of the prerogative, however, the judges felt it incumbent to distinguish its use against aliens in the twentieth century from its employment against citizens by the Stuart monarchs in the seventeenth.²³⁹ "I am well aware," Mr. Justice Darling noted, "that the moment the word 'prerogative' is used there is, as a result of what took place in the seventeenth century, a strong feeling that any act which is deemed to have been done under it is bound to be illegal."²⁴⁰ The judges asserted, however—again without elaboration—that there could be no similarity between the prerogative recognized in the Aliens Restriction Act and the "practically unlimited prerogative which once brought an unfortunate monarch to the scaffold."²⁴¹

Beyond legitimizing the prerogative as a viable instrument of alien control, the judges also broadened it beyond the parameters of its historical use. The traditional power of the prerogative allowed the executive only to intern enemy combatants as prisoners of war.²⁴² As the court in *Liebmann* noted, there was no precedent, "except in the case of a spy, which covers the case of a civilian subject of a Power at war with this country."²⁴³ In an unprecedented ruling, the courts recharacterized enemy civilians as "enemy combatants" and "prisoners of war," thereby bringing them within the scope of royal power.²⁴⁴ Mr. Justice Bailhache conceded that it was at first sight "somewhat startling to be told that a civilian resident in this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war."²⁴⁵ Nonetheless, he would take notice of "certain notorious facts," including the likelihood that a German civilian in England posed greater danger to the realm than a German soldier or sailor outside the country:

This war is not being carried on by naval and military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment, on a scale hitherto unknown of carrier pigeons. Spying

in the emergency legislation, but he thought the emergency legislation had reserved the inherent power of the Crown to deal with alien enemies. *Liebmann*, [1916] 1 K.B. at 276.

239. *Forman*, 87 L.J.K.B. at 45.

240. *Id.*

241. *Id.* In *Liebmann*, the court made clear that its analysis of the prerogative was not applicable to British subjects or friendly aliens. [1916] 1 K.B. at 276, 279.

242. *See, e.g.*, *R. v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759); *Three Spanish Sailors' Case*, 2 Wm. Bl. 1324, 96 Eng. Rep. 775 (K.B. 1779); *Furly v. Newnham*, 2 Doug. K.B. 419, 99 Eng. Rep. 269 (K.B. 1780). These cases held that prisoners of war interned under the prerogative were not entitled to a writ of habeas corpus to challenge their detentions.

243. *Liebmann*, [1916] 1 K.B. at 275.

244. *Id.*

245. *Id.* at 274.

has become the hall-mark of German "kultur." In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movement of submarines and Zeppelins—a far greater danger, indeed, than a German soldier or sailor.²⁴⁶

Exhibiting the prejudices that permeated the wartime judiciary, Mr. Justice Low added that when dealing with the Germans, it was not necessary to wait for the commission of hostile acts.²⁴⁷ In the context of a war with people "who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul," it would "be idle to expect the Executive to wait for proof of an overt act or for evidence of an evil intent."²⁴⁸ Thus, the alien detention cases heightened judicial power by vesting the parameters of royal authority solely in the hands of the judges, who in rendering common law decisions were not obligated to make even formal obeisance to legislative intent.

The cases involving deprivation of personal liberty, therefore, illustrated how the warrior judges eagerly pursued their wartime agenda by inventively interpreting both statutes and the common law to bestow expansive powers on the government.²⁴⁹ In these manifestations of activism, the courts' policies were generally congruent with the interests of the government if not the intentions of Parliament. In other respects, however, the government had less reason to be satisfied with the course of judicial policymaking.

IV. THE FORMAL ASSERTION OF JUDICIAL POWER

In rendering pro-government decisions in the context of personal liberty, the courts carefully and indeed relentlessly preserved their formal powers to circumscribe the executive. Scholars have focused

246. *Id.* at 275.

247. *Id.*

248. *Id.* at 278. *Forman*, following *Liebmann*, reached the same result that alien civilians were enemy combatants and prisoner of war. Further, in *Forman* the court held that the fact of *Forman's* alien registration was meaningless; he was nothing but an alien enemy to whom a temporary indulgence had been granted. *R. v. Commandant of Knockaloe Camp ex parte Forman*, 87 L.J.K.B. 43, 45 (K.B. 1917).

249. The judges also assisted the war effort in a more directly political manner. Mr. Justices Younger and Sankey chaired the internment advisory committees; Mr. Justices Atkin and Younger were members of the Internment Commission; Lord Pickford was chairman of the Dardanelles Commission and also chaired the Chelsea military service tribunal; Lord Moulton was Director-General of Explosives in the Ministry of Munitions; Lord Justice Duke was the first chairman of the Defense of the Realm Losses Commission; and Lord Reading served as a special ambassador to the United States. See Scrutton, *supra* note 41, at 117-18; Note, *Judges and Political Issues*, 62 SOLIC. J. & WKLY. REP. 513, 513 (May 11, 1918); see also WILLIAMS, *supra* note 69, at 188-89.

too narrowly on the conflict between the individual and the state, overlooking the fact that judges did more than merely choose between one side and the other. They simultaneously pursued another objective, promoting their own institutional autonomy and authority.

The courts asserted their formal institutional power in four ways. First, and most significantly, they maintained the vibrancy of the writ of habeas corpus as a means of reviewing government conduct. Despite occasional language about deference to the executive, they determined all issues to be justiciable and consistently decided habeas petitions on the merits. Second, they exercised their authority by imposing on the government in selected areas an objective standard of review, requiring officials to act “reasonably” rather than merely in good faith. Third, the courts used their powers not only to manipulate legal standards but to “manage” the facts as well. Requiring an adequate factual basis for the government’s claims, they both investigated individual factual situations and took broader notice of “historical” facts to assess whether empirical realities justified the executive’s tactics. Finally, they applied special scrutiny to the administration when it acted in what the courts characterized as a “judicial” capacity.

A. Preserving the Vitality of Habeas Corpus

Virtually every wartime challenge to a deprivation of individual liberty came before the courts in the posture of a petition for a writ of habeas corpus. Regardless of the substantive result, the courts loudly asserted their jurisdiction to hear and decide such cases. Further, during the war they extended habeas jurisdiction to three nontraditional contexts—alien internment, deportation, and military service.

The most notable affirmations of the principle of reviewability appeared in cases involving DORA Regulation 14B. Scholars have traditionally analyzed these cases, particularly *Halliday*, in terms of the substantive assault on individual rights.²⁵⁰ This perspective is critical but nonetheless incomplete. Through the lens of institutional power, the cases look somewhat different. Counsel for Zadig announced in his argument that habeas corpus had survived DORA,²⁵¹ and the Lords enthusiastically agreed. Lord Atkinson extolled the principle that subjects retained “every right to have tested and determined in a Court of law, by means of a writ of

250. See, e.g., EWING & GEARTY, *supra* note 2, at 80-90; SIMPSON, *supra* note 2, at 15-33; TOWNSHEND, *supra* note 4, at 65-66; Alexander, *supra* note 69, at 29; Lowry, *supra* note 4, at 52-58.

251. *R. v. Halliday ex parte Zadig*, [1917] A.C. 260, 262 (H.L.).

Habeas Corpus," the legality of an order keeping them in custody.²⁵² According to Lord Wrenbury, the judges had authority to determine both whether the regulation was valid as applied—that is, whether Zadig was indeed of hostile origins—and whether it was ultra vires on its face. "If his case were that he had neither hostile origins or associations," the judge explained, "he could have his writ of habeas corpus on the ground that that was so, and if he established the fact he would be discharged."²⁵³ In the case at hand, he continued, the charge was that the regulation was ultra vires, and if "that were established he would be discharged."²⁵⁴

Other cases involving Regulation 14B further underscored the resilience of the writ. For example, in *Ex parte Howsin*,²⁵⁵ a case involving a British internee, an appellate judge stated "emphatically"²⁵⁶ that his refusal to issue the writ did not derogate in any way from his power to grant it in proper cases. Indeed, he declared, had Howsin simply said, "I have been interned and I don't know why," he might have issued the writ.²⁵⁷ Thus, although as a practical matter the likelihood of success was minimal, a 14B internee could impugn the legality of the detention order and obtain review of the merits of the decision.²⁵⁸

252. *Id.* at 272. The Lords also made the point that the Habeas Corpus Act had not been explicitly suspended as in earlier wars. *Id.* at 270, 308.

253. *Id.* at 308.

254. *Id.*

255. 33 T.L.R. 527 (C.A. 1917).

256. *Id.* at 528 (per Lord Pickford).

257. *Id.* In that case, however, the court's evaluation of the facts, including evidence provided by the petitioner herself, indicated that the detention was reasonable. *Id.* Habeas review was also routinely offered in cases involving Irish detainees. In addition to Brady and Foy, after 1920 many persons detained in Ireland by military tribunals challenged their detentions and received full review in the Irish courts. *See, e.g.*, *R. v. Allen*, [1921] 2 I.R. 241 (K.B.); *R. (Garde) v. Strickland*, [1921] 2 I.R. 317 (K.B.); *R. (Ronayne and Mulcahy) v. Strickland*, [1921] 2 I.R. 333 (K.B.); *R. v. Clifford & O'Sullivan*, [1921] 2 A.C. 570 (H.L.(I.)); *Egan v. Macready*, [1921] 1 I.R. 265 (Ch.); *R. (O'Hanlon) v. Governor of Belfast Prison*, 61 Ir. L.T. (K.B. 1922); *R. (Childers) v. Adjutant General*, [1923] 1 I.R. 5 (Ch.); *see* Charles Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940*, 25 HIST. J. 167, 186 (1982).

258. *See* SHARPE, *supra* note 2, at 96. Commentators claiming that the case stood for the propositions of non-justiciability and deference, *see, e.g.*, EWING & GEARTY, *supra* note 2, at 87-90; SIMPSON, *supra* note 2, at 25, have largely seized on the statement of one judge, Lord Finlay, that no tribunal was "less appropriate" for investigating the "question of restraint" than a court of law. *Halliday*, [1917] A.C. at 269. But the "question" he referred to was not the validity of internment policy, but rather whether the regulation was validly applied to Zadig—that is, "whether there is ground for suspicion that a particular person may be disposed to help the enemy." *Id.* In contrast, Zadig's arguments were oriented to challenging the regulation on its face, and Lord Finlay did not suggest that the broader issue was non-justiciable. Also, even the statement about individual cases was immediately followed by this sentence: "The duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee, presided over by a judge of the High Court, is provided to bring

Aliens interned under the prerogative could equally challenge their detentions by means of a habeas petition. The cases involving aliens were significant because under common law precedent, prisoners of war—a category that now included alien civilian internees—were not entitled to a writ of habeas corpus.²⁵⁹ Nonetheless, the judges during World War I never interpreted this rule to preclude the right of civilian alien detainees to sue. They issued orders to show cause to commanders of the camps and responded fully to internees' arguments as to the invalidity of their detentions. The courts did not determine that Liebmann and Forman lacked capacity to apply for the writ; rather, they concluded that a complete answer to the writ was the applicant's status as a prisoner of war detained by authority of the Crown.²⁶⁰ Even Lord Finlay asserted the right of an alien to challenge his detention: "If an alien be wrongfully arrested, even by order of the Crown, it cannot be doubted that a writ of habeas corpus is open to him, and it would be surprising if he has not the right to recover damages from the person who has wrongfully imprisoned him."²⁶¹ Again, however unlikely detainees were to prevail on the merits, the courts ardently upheld their right to contest their internments by habeas petitions and afforded them full hearings. Moreover, in denying the writs, the courts found on the merits that the policy was justified both in general—because enemy alien civilians were actually enemy combatants—and also in particular cases because the applicants were proven enemy aliens.²⁶²

Strikingly, in the deportation cases the courts upheld the habeas principle even though the applicable legislation seemingly precluded it. A regulation promulgated under ARA²⁶³ expressly stipulated that

before him any grounds for thinking that the order may be properly revoked or varied." *Id.* In other words, even for Lord Finlay it was precisely review on the merits by a judicially led committee that legitimized the internment process.

259. See, e.g., *R. v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759); *Three Spanish Sailors' Case*, 2 Wm. Bl. 1324, 96 Eng. Rep. 775 (K.B. 1779); *Furly v. Newnham*, 2 Doug. 419, 99 Eng. Rep. 269 (K.B. 1780) (holding that prisoners of war interned under the prerogative could not challenge their detentions by means of habeas corpus).

260. See, e.g., *R. v. Superintendent of Vine Street Police Station ex parte Liebmann*, [1916] 1 K.B. 268; *R. v. Commandant of Knockaloe Camp ex parte Forman*, 34 T.L.R. 4 (K.B. 1917).

261. *Johnstone v. Pedlar*, [1921] 2 A.C. 262, 273 (H.L.).

262. A third case, *Ex parte Weber*, [1916] 1 K.B. 280 (C.A.), rejected an application for habeas from an internee, a London clerk for a poultry merchant, on the ground that he had discharged his burden of showing that he had completely divested himself of his German citizenship. Although the formula "lack of capacity" was uttered, the court decided the case on the merits, finding that Weber's alien status was a complete answer to the writ. The House of Lords did not even bother to consider the standing argument that a prisoner of war was not entitled to sue. See SHARPE, *supra* note 2, at 113-14.

263. 4 & 5 Geo. 5, c. 12, § 1.

a person detained under a deportation order "shall be deemed to be in legal custody."²⁶⁴ Nonetheless, the courts did not consider themselves barred from deciding whether executive powers had been properly exercised. Acknowledging that the government enjoyed great discretion in making deportation decisions,²⁶⁵ the judges nonetheless consistently maintained that a court on habeas could go behind an order if the minister acted outside the proper scope of the legislation.²⁶⁶

In *R. v. Governor of Brixton Prison ex parte Sarno*,²⁶⁷ for example, the High Court declared that the production of an order good on its face would not necessarily foreclose habeas review, since courts indisputably had jurisdiction to deal with situations in which the government abused its powers. "If we were of opinion that the powers were being misused," Lord Reading insisted, "we should be able to deal with the matter."²⁶⁸ Mr. Justice Low employed even more robust language, stating vehemently that habeas would not necessarily be precluded by a facially valid order:

I do not agree that if the Executive were to come into this Court and simply say: "A person is in our custody, and therefore the writ of habeas corpus does not apply because the custody is at the moment technically legal," the Court would have no power to consider the matter and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown . . . would not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power.²⁶⁹

In a ringing assertion of the right of a court to curb abuses of power, he proclaimed that the "arm of the law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject."²⁷⁰

The Court of Appeal in *R. v. Superintendent of Chiswick Police Station ex parte Sacksteder*,²⁷¹ another case involving a French national deported to France to perform military service, confirmed *Sarno's* ruling that a court on habeas could go behind a seemingly

264. Aliens Consolidated Order 1914, art. 12, cl. 2; see *R. v. Governor of Brixton Prison ex parte Sarno*, [1916] 2 K.B. 742, 744.

265. See, e.g., *R. v. Sec'y of State for Home Affairs ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922, 935 (C.A.); *R. v. Home Sec'y ex parte Bressler*, 131 L.T.R. 386, 387 (C.A. 1924).

266. See SHARPE, *supra* note 2, at 118-19.

267. [1916] 2 K.B. 742.

268. *Id.* at 749. The court would deal with the matter, he stated, even if the case were not properly before it, which he intimated might be true in *Sarno's* case. *Id.*

269. *Id.* at 752. In the deportation case *Chateau Thierry*, the Court of Appeal stated that if "it were intended to do something illegal under a valid order, that would be good ground for restraining and preventing the illegal act." [1917] 1 K.B. at 930.

270. *Sarno*, [1916] 2 K.B. at 752.

271. [1918] 1 K.B. 578.

valid order. Lord Pickford was not prepared to go as far as Mr. Justice Low in *Sarno* and pierce a detention order to consider the state's motives in every case, but he was certainly "not inclined to say that in no case"²⁷² could the court investigate an order that appeared facially sound: "If that order is, if I may say so, practically a sham, if the purpose behind it is such as to show that the order is not a genuine or bona fide order, it seems to me that the Court can go behind it."²⁷³ Lord Warrington, while finding that the motive for carrying out the agreement with France was not sufficient to invalidate the order—the "intention" was the legitimate one of placing a man on board a ship even if "the motive actuating the intention" was improperly to land the man in France—nonetheless agreed that the court might penetrate a legal order for arrest if it "was a mere sham to cover up something which would be illegal."²⁷⁴ But in the present case there was "nothing of that sort."²⁷⁵

In addition to extending habeas jurisdiction during the war to reach circumstances of internment and deportation, the courts enlarged it in a third unprecedented way. In *R. v. Commanding Officer of 30th Battalion ex parte Freyberger*,²⁷⁶ both the Divisional Court and the Court of Appeal supported a habeas inquiry by treating a conscript in the armed forces as being someone in "detention."²⁷⁷ Freyberger predicated his habeas action on the claim that a soldier on active service was a person in "custody."²⁷⁸ Wholly unperturbed by the jurisdictional issue, the court entertained the action on the merits, ruling that Freyberger was indeed required to serve out his term of "detention."²⁷⁹ The case, as already noted, denied the right of a dual national serving in the army to declare alienage, and, like all the liberty cases, it illustrated how expanding the right to habeas review did not advance the cause of individual freedom; rather, it simply allowed judges ill-disposed to personal liberty to render troubling substantive decisions.

The only case of the entire war in which the courts denied the availability of habeas review altogether, *R. v. Commanding Officer of*

272. *Id.* at 586. Lord Pickford was perhaps influenced by the fact that the agreement with France had ended: "It is perhaps not unsatisfactory to be told that the matter really does not arise now because in consequence of other arrangements between this country and France cases of this kind will not arise again." *Id.* at 585.

273. *Id.* at 586-87.

274. *Id.* at 589.

275. *Id.* Numerous other cases also fully considered habeas challenges to deportation orders. See, e.g., *R. v. Governor of Brixton Prison ex parte Bloom*, 124 L.T.R. 375 (K.B. 1920); *R. v. Inspector of Leman Street Police Station ex parte Venicoff*, [1920] 3 K.B. 72; *R. v. Home Sec'y ex parte Bressler*, 131 L.T.R. 386 (C.A. 1924).

276. [1917] 2 K.B. 129.

277. *Id.* at 139-40.

278. *Id.* at 129.

279. *Id.*

Morn Hill Camp ex parte Ferguson,²⁸⁰ turned out to be an exception that proved the rule of reviewability. The petitioner was an Irish resident of Belfast who in 1915 sought temporary employment in England as a machine ruler. The police arrested him in August 1916 as an absentee under the Military Service Act.²⁸¹ Determining that he was "ordinarily resident" in Great Britain, a magistrate at the Thames Police Court handed him over to the military authorities.²⁸² Once in military custody, Ferguson applied for a writ of habeas, arguing that the magistrate's order to detain him in the Army was illegal because he did not "ordinarily" reside in Great Britain.²⁸³ The court concluded that the magistrate's decision could not be questioned by the habeas procedure.²⁸⁴ Its analysis, however, was not that military custody was an unreviewable "detention." Rather, it relied on the proposition that the law provided a sufficient remedy by allowing the order to be reviewed by a court on ordinary appeal.²⁸⁵ If there were "no means of questioning a magistrate's order," Lord Reading observed, there might be some ground for "invoking the assistance of this Court."²⁸⁶ The judges thus treated habeas challenges to a court order differently from those contesting executive action, apparently seeking to protect judicial decisions from collateral attack. Yet they did not find Ferguson's detention itself to be non-justiciable; on the contrary, their decision placed major reliance on the availability of another judicial forum to review it. The wartime liberty cases, therefore, despite favoring the government, contained repeated and unequivocal assertions of the formal principle of reviewability.

B. Imposing Selective Reasonableness Review

As has been shown, one strategy that the courts adopted to promote their belligerent policies was to impose a low standard of review on the government. In the exclusion and deportation cases, for example, they required the state to meet only a "good faith" or "bona fide" test.²⁸⁷ The wartime courts did not, however, embrace such a flabby standard uniformly. Rather, their level of scrutiny varied from situation to situation, depending on the judges' perceptions of national security requirements, the importance of the issues raised,

280. [1917] 1 K.B. 176.

281. *Id.* at 176.

282. *Id.* at 177.

283. *Id.*

284. *Id.* at 179-80.

285. *Id.*

286. *Id.* at 179. In dicta the court reached the merits nonetheless, finding that there was ample material in the affidavits to infer that Ferguson was "ordinarily resident" in Great Britain. *Id.* at 181.

287. See *supra* Parts III.A.3-4.

the kind of right—liberty or property—being affected, and the moral character of the litigant.

In Regulation 14B cases, in particular, the courts demanded a stricter “reasonableness” review. Although they generally found this higher standard satisfied, their establishment of a more rigorous test nonetheless demonstrated their power and willingness to demand more of the government in certain contexts. Scholars have treated *Halliday* as the most judicially irresponsible case of the war,²⁸⁸ but in fact the Lords in that case required the government to act reasonably. Lord Atkinson, most explicit in this regard, upheld detention because it was “reasonably probable” that a free person of hostile origins or associations would communicate with the enemy, spread false reports, or engage in other behavior prejudicial to the national defense.²⁸⁹ If the regulation had required “something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm,” he declared, he would have found Regulation 14B to be *ultra vires* and void.²⁹⁰

Other judges hearing the case, while not proposing an express “reasonableness” test, suggested that it was still their point of reference by lacing their pro-government opinions with pronouncements that internment was a reasonable and indeed necessary policy for winning the war. According to Lord Dunedin, it was “obvious” that internment was necessary.²⁹¹ Mr. Justice Rowlatt in the Divisional Court echoed this view: “It seems to me perfectly obvious that the control of the movements of persons of hostile origin or associations, and if necessary, the restriction of their liberty, is one of the most obvious measures which may have to be taken in time of war for the public safety.”²⁹² Even Lord Finlay, author of the well-known statement that Parliament could entrust powers to the government “feeling certain that such powers will be reasonably exercised,”²⁹³ proceeded immediately thereafter to evaluate the government’s actions and judge them to be in fact reasonable. In a time of “supreme national danger,”²⁹⁴ he remarked, one of the “most obvious” means of taking precautions against espionage was to restrict the freedom of persons “whom there may be any reason to suspect of being disposed to help enemy.”²⁹⁵ Thus, the Lords in

288. See, e.g., EWING & GEARTY, *supra* note 2, at 87-90; SHARPE, *supra* note 2, at 230; SIMPSON, *supra* note 2, at 25; Lowry, *supra* note 4, at 53.

289. *R. v. Halliday ex parte Zadig*, [1917] A.C. 260, 275.

290. *Id.* at 272-73. Preserving his options, he added that although it was “not necessary to decide this precise point on the present occasion,” he desired “to hold [him]self free to deal with it when it arises.” *Id.* at 273.

291. *Id.* at 271.

292. *R. v. Halliday ex parte Zadig*, [1916] 1 K.B. 738, 742.

293. *Halliday*, [1917] A.C. at 269.

294. *Id.* at 270.

295. *Id.* at 269.

Halliday, rather than deciding that the government had unreviewable discretionary powers, announced that its chosen policy of internment met their criterion of "reasonableness."

The courts also explicitly employed a "reasonableness" test when assessing whether Regulation 14B was validly applied in a specific case. *Ex parte Howsin*,²⁹⁶ significantly, did not involve a naturalized British subject but a "genuinely" English person—a natural-born Englishwoman of "pure English blood,"²⁹⁷ the daughter of a squire, who at the time of her arrest was living in her father's house in Yorkshire and nursing wounded soldiers as a Red Cross volunteer.²⁹⁸ Howsin was interned because of her "hostile associations" with an Indian friend whom she had known ten years before the war.²⁹⁹ In 1915 she visited the friend in Switzerland and returned to London with a message from him to a third party; an intermediary who had arranged the visit turned out to be a spy.³⁰⁰ Howsin was arrested, and the police found two suspicious pamphlets in her rooms.³⁰¹ She denied knowingly conveying any information, and her case seems illustrative of the government's admitted practice of resorting to internment under 14B when it lacked sufficient evidence to prosecute for violation of DORA regulations.³⁰² At the time her case was heard, Howsin had been in detention for twenty-two months, and she remained in prison camps for another two years.³⁰³

While declining to release her, the Court of Appeal took seriously Howsin's argument that it had power to inquire into the sufficiency of the grounds on which the Home Secretary had acted. The court did

296. *Ex parte Howsin*, 33 T.L.R. 527 (C.A. 1917).

297. See 81 PARL. DEB., H.C. (5th ser.) (Mar. 23, 1916) 426-27.

298. *Howsin*, 33 T.L.R. at 528. Her father, a surgeon who was shooting partridges at the time of her arrest, did not discover her whereabouts for seventeen days. See 96 PARL. DEB., H.C. (5th ser.) (July 24, 1917) 1093; 97 PARL. DEB., H.C. (5th ser.) (Aug. 9, 1917) 566; 104 PARL. DEB., H.C. (5th ser.) (Mar. 20, 1918) 1005-06; SIMPSON, *supra* note 2, at 22.

299. She may possibly have been targeted because of her sympathies for Indian nationalism. See SIMPSON, *supra* note 2, at 22-23.

300. *Id.* at 528.

301. *Id.*

302. See 81 PARL. DEB., H.C. (5th ser.) (Mar. 23, 1916) 427, 450 (Home Secretary declaring that no charge would ever be made against Howsin because her prevention was purely precautionary). Speaking of 14B detentions generally, the Home Secretary, Herbert Samuel, conceded that such cases were "not cases in which any indictment could be drawn" or legal proceedings "taken with any real hope of success." 80 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1916) 1249.

303. *Howsin*, 33 T.L.R. at 528. She was interned in September 1915, see 96 PARL. DEB., H.C. (5th ser.) (1917) 1093, and released in August 1919, see SIMPSON, *supra* note 2, at 23. Questions were often raised by supporters about her status in the House of Commons, but to no avail. See, e.g., 96 PARL. DEB., H.C. (5th ser.) (July 24, 1917) 1093; 97 PARL. DEB., H.C. (5th ser.) (Aug. 9, 1917) 566; 104 PARL. DEB., H.C. (5th ser.) (Mar. 20, 1918) 1005-06.

not reexamine general internment policy³⁰⁴—that issue had already been resolved in *Halliday*—but it applied a “reasonableness” rather than good faith standard to the government’s detention of Howsin herself. As Lord Pickford declared, the Home Secretary must “reasonably” come to the conclusion that the applicant had “hostile associations.”³⁰⁵

There were several likely reasons why the courts imposed a higher formal legal standard in Regulation 14B detention cases than Regulation 14 exclusion or ARA deportation cases. The penalty of internment was more severe than exclusion or deportation, and the affected persons were not aliens but more appealing natural-born or naturalized British subjects. Moreover, as far as the exclusion cases were concerned, the order was not purely preventive. The excluded person was suspected of already performing “prejudicial acts”—that is, acts inimical to the public safety—rather than merely of having “hostile origins or associations,” and this might have induced the courts to be less demanding of the executive.³⁰⁶ The critical point, however, is that the courts did not adopt a posture of undifferentiated acquiescence to the government, but were quite comfortable in applying stricter standards to serve particular priorities.

C. Requiring an Adequate Factual Showing

In addition to manipulating legal standards, the courts also dealt deftly with facts, claiming the power to examine closely whether there was an adequate evidentiary basis for the government’s position. They both scrutinized the circumstances of specific cases to determine whether ministerial orders were warranted and evaluated

304. As to the general right of the government to intern, Lord Pickford stated, “these Courts have no right to interfere. They might or might not think the power too wide, but that was not a matter for them.” *Howsin*, 33 T.L.R. at 528. Nonetheless, the court proceeded immediately to justify the policy: “This was temporary and exceptional legislation passed for the period of the war. It had been found essential for the Executive to be armed with certain exceptional powers. It was impossible to go on as in time of peace.” *Id.*

305. *Id.*

306. There were other reasons why the exclusion orders merited a lower standard. First, in exclusion cases the challenge was not to the regulation on its face as being *ultra vires*, but only to its interpretation and validity as applied, and the courts were understandably more disposed to defer to the government in its interpretation of its own regulation. Second, during oral argument in the exclusion case *R. v. Denison*, 32 T.L.R. 528, 529 (K.B. 1916), the judges were apprised of the fact that Regulation 14 had replaced an earlier regulation that allowed a removal order only against a person whose behavior gave “reasonable” grounds of suspicion that he was about to act in a manner prejudicial to the public safety. The fact that the government found the stricter standard to be inoperable may have influenced the judges. Third, the exclusion order issued from a military officer rather than the Home Secretary, and in a national security situation the courts may have been more amenable to respecting a military rather than a political judgment.

whether broader "historical facts" justified larger governmental policies.

Regardless of whether the standard was "good faith" or "reasonableness," the courts in individual cases asserted their power to investigate the sufficiency of the factual evidence. In the exclusion cases, for example, although the legal standard was minimal, the courts nonetheless examined the evidence to ensure that it was met. As Lord Reading declared in *Denison*, "in a case where the Court came to the conclusion on the facts before it that the authority could not suspect," it would assuredly have "power to interfere."³⁰⁷ Similarly, in *Ronnfeldt* the court held a full hearing, with examination and cross-examination, on rumors about Ronnfeldt's alleged pro-German sympathies.³⁰⁸ The courts equally assessed the facts when "reasonableness" was the standard. In *Howsin*, for example, Lord Pickford agreed that *Halliday* gave the court the power to "inquire into the facts on which the Home Secretary purposed to make the order."³⁰⁹ If there was no evidence on which he could reasonably conclude that Howsin had hostile associations, he stated, he would issue the writ.³¹⁰ Lord Pickford found, however, that Howsin herself had provided the requisite facts in an affidavit detailing her "hostile associations."³¹¹

In addition to conducting inquiries into individual facts, the courts also took "judicial notice" of the broader historical context to ascertain whether wartime exigencies truly warranted the government's measures. In so doing, the courts affirmed that *they* had the power to decide threshold factual questions about when the executive was entitled to exercise its discretionary authority. Such use of "judicial notice" was apparent both in Regulation 14B and prerogative internment cases. In *Halliday*, for example, the Lords

307. *Id.*

308. *Ronnfeldt v. Phillips*, 34 T.L.R. 556, 556 (K.B. 1918). In the deportation cases as well, the courts examined the facts to ascertain that the government was acting properly. *See, e.g.*, *R. v. Governor of Brixton Prison ex parte Sarno*, [1916] 2 K.B. 742, 750 (finding that Sarno was not a political refugee); *R. v. Inspector of Leman Street Police Station ex parte Venicoff*, [1920] 3 K.B. 72, 77 (commenting on Venicoff's moral "degradation"); *R. v. Superintendent of Chiswick Police Station ex parte Sacksteder*, [1918] 1 K.B. 578, 586 (taking evidence to determine whether the Home Secretary had made an individualized order).

309. *Howsin*, 33 T.L.R. at 528.

310. *Id.*

311. *Id.* The cases are also replete with dicta containing factual observations unnecessary to the decision at hand. In *Ferguson*, in which the court formally refused to consider the merits of an Irish conscript's habeas claim that he was not ordinarily a British resident, the judges simply could not resist pointing out that there was sufficient evidence that he was. [1917] 1 K.B. 176, 181. Similarly, the court in *Chateau Thierry* concluded that the deportee had not established that he was a political refugee or medically unfit for the army, although those considerations "ought not to affect the judgment in the present case." [1917] 1 K.B. 922, 928.

conditioned support for internment on their own factual assessment of the national security situation, concluding that the danger to the public safety was so severe that internment fell within the government's general regulatory competence. Lords Finlay and Atkinson cautioned that the existing situation of "supreme national danger"—the fact that Britain was overrun with German sympathizers—required "drastic remedies."³¹² In the same vein, Lord Dunedin observed that internment was obviously necessary "under the circumstances of a war like the present."³¹³ Thus, the Lords determined independently that factual predicates justified the government's strategies for winning the war.

Judicial willingness to engage in factual assessments of wartime necessities also revealed itself in the alien internment cases, in which the courts upheld government policy only after taking notice of "notorious" facts about German spying to conclude that enemy civilians were actually "enemy combatants."³¹⁴ Other forms of broad judicial factfinding occurred in *Sarno*,³¹⁵ in which the court offered its view on the relationship between petty crime and the war effort, and *Foy*,³¹⁶ in which the court held that domestic unrest undermined the struggle against a foreign enemy. In all these contexts, the courts insisted on their power to make an independent appraisal of the empirical necessity for executive policy.³¹⁷

D. Applying Special Scrutiny to "Judicial" Acts of the Executive

Finally, the courts exercised their power by requiring the government to conform to stricter standards when it acted in a "judicial" capacity. *Sacksteder*,³¹⁸ like *Chateau Thierry*,³¹⁹ involved a Frenchman seeking to avoid military service, but the former case addressed not the deportation order but rather the preceding

312. [1917] A.C. 260, 270-71, 275.

313. *Id.* at 271; see SHARPE, *supra* note 2, at 94.

314. *R. v. Superintendent of Vine Street Police Station ex parte Liebmann*, [1916] 1 K.B. 268, 270, 274-75, 277-78; see *infra* text accompanying notes 243-48.

315. *R. v. Governor of Brixton Prison ex parte Sarno*, [1916] 2 K.B. 742, 750; see *supra* text accompanying notes 267-70.

316. *R. v. Governor of Wormwood Scrubs Prison ex parte Foy*, 36 T.L.R. 432, 434 (K.B. 1920); see *supra* text accompanying notes 214-24.

317. Further, the courts made a factual determination that a "state of war" was raging in Ireland as a predicate to invoking martial law. See, e.g., *R. v. Clifford & O'Sullivan*, [1921] 2 A.C. 570 (H.L.(I.)); *R. v. Allen*, [1921] 2 I.R. 241 (K.B.); *R. (Garde) v. Strickland*, [1921] 2 I.R. 317 (K.B.); *R. (Ronayne & Mulcahy) v. Strickland*, [1921] 2 I.R. 333 (K.B.); *Egan v. Macready*, [1921] 1 I.R. 265 (Ch.); *R. (Childers) v. Adjutant General*, [1923] 1 I.R. 5 (Ch.).

318. *R. v. Superintendent of Chiswick Police Station ex parte Sacksteder*, [1918] 1 K.B. 578.

319. *R. v. Sec'y of State for Home Affairs ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922 (C.A.).

arrest.³²⁰ In 1917 the police arrested Sacksteder and conveyed him to Southampton to await a ship bound for France.³²¹ The Divisional Court rejected Sacksteder's application for a habeas writ based on *Chateau Thierry*, but the Court of Appeal called attention to a critical distinction—*Chateau Thierry* had involved an arrest rather than a deportation order.³²² Lord Pickford, who had himself sat in *Chateau Thierry*, noted that the earlier case only decided that a court could not ordinarily review the Home Secretary's deportation decisions; it was still open to a court to determine whether in conducting an arrest the government had acted lawfully.³²³ When power was given to a high officer to restrict the liberty of someone "living under the protection of our laws," he explained, "it must be done by that high officer himself" and with regard to the specific circumstances of each situation.³²⁴ In this instance, Lord Pickford concluded, the arrest was legitimate because the Secretary of State had "examined into this particular case."³²⁵

Lord Scrutton, concurring, claimed to approach the case with "the anxious care" that judges always accorded the liberty of the subject, even when the person was merely a foreigner "temporarily living within the King's protection."³²⁶ Since the appellant was a French subject who desired to avoid helping France, he observed, there was "not much room for sympathy."³²⁷ Still, it was necessary for the court to investigate whether the arrest was legal, since executive powers with regard to arrest and detention were "of a judicial character and cannot be delegated."³²⁸ If the Secretary of State had issued a general regulation to arrest all aliens without consideration of their particular character, he "should have had very serious doubt" whether the act was within the administration's power.³²⁹ In this case, however, he agreed with Lord Pickford that the minister had performed an individualized act.³³⁰ Thus, the judges demarcated administrative from judicial acts of the government, revealing themselves willing in the "judicial" context of arrest to go behind a seemingly valid order and ensure that the government had

320. *Sacksteder*, [1918] 1 K.B. at 578.

321. *Id.* at 581-82.

322. *Chateau Thierry*, [1917] 1 K.B. at 922.

323. *Sacksteder*, [1918] 1 K.B. at 584-85.

324. *Id.* at 585-86.

325. *Id.* at 586. There was some uncertainty about the facts in the early stages of the litigation, and the court *sua sponte* amplified the factual record by requesting an affidavit from the government on the question whether this particular individual had been selected for deportation. *Id.*

326. *Id.* at 589.

327. *Id.* at 590.

328. *Id.* at 591.

329. *Id.*

330. *Id.* at 591-92.

considered the case on a particularized basis.³³¹ When the government acted in a way that implicated judicial norms, in other words, the courts sought to ensure the integrity of the official process.³³²

During the war, therefore, the courts consistently affirmed their institutional power by preserving the principle of reviewability, imposing stricter legal standards on the government in specified situations, insisting that certain factual predicates be satisfied, and requiring an individualized process when the government acted in a "judicial" capacity. Regardless of its substantive rulings, the judiciary preserved its own authority in a manner hardly compatible with a charge of undifferentiated obsequiousness to an overbearing executive.

V. JUDICIAL ACTIVISM IN PROTECTING PRIVATE PROPERTY

If in liberty cases the courts uniformly produced outcomes favoring the government, they reacted much differently to executive attempts—instituted at the same time and under the same general powers as the internment schemes—to confiscate private property. The judges in property decisions actually constrained the government, exercising the powers they so scrupulously but only formally safeguarded in the context of personal freedom. In the statutory cases they inverted the norms applied in liberty decisions, prohibiting executive actions unless they were authorized expressly by DORA and were both reasonable and necessary to achieve statutory purposes. In the prerogative cases, rather than enlarging the authority of the Crown, they struck down administrative acts for exceeding the scope of permissible common law powers. Whether considering expropriations of private property under either statute or prerogative, the courts' sympathies lay with the individual rather than the state.

331. The distinction between administrative and judicial actions of the executive was also upheld in *R. v. Inspector of Leman Street Police Station ex parte Venicoff*, [1920] 3 K.B. 72, 80, which ruled that for the purpose of issuing deportation orders, the Home Secretary was acting as an executive rather than a judicial officer and therefore was not bound to hold an inquiry or give deportees an opportunity to be heard.

332. As long as the process of arrest was individualized, however, the authorities enjoyed substantial discretion. For example, the King's Bench took a broad view of police powers in *Michaels v. Block*, 34 T.L.R. 438 (K.B. 1918), in which an alien prisoner of war contested his arrest under Regulation 55. The regulation allowed the police to arrest any person whose behavior gave reasonable grounds for suspecting that he was about to act contrary to the public safety. DORA CONSOL. REGS., *supra* note 27, at Reg. 55. Mr. Justice Darling concluded that the arresting officer need not himself witness the questionable behavior but could base it on acts about which he was credibly informed. *Michaels*, 34 T.L.R. at 438.

A. *The Framework of Wartime Restrictions on Property Rights*

World War I witnessed comprehensive controls not just over personal freedom but also over economic activity. As the war progressed, the system of state economic management expanded to encompass price fixing, import and export regulations, agricultural subsidies, manpower allocation, and eventually food rationing.³³³ Various DORA regulations authorized the government to seize land and otherwise interfere with private property “to the extent necessary” to secure the public defense.³³⁴ The government placed special reliance on Regulation 2B, which empowered it “to take possession of any war material, food, forage and stores of any description.”³³⁵ Additional regulations vested in the administration the right to appropriate factories, requisition their output, and regulate their operations.³³⁶ Further, the military authorities enjoyed “a right of access to any land or buildings or other property whatsoever.”³³⁷

The wide powers of the government relating to property generally were augmented by special powers relating to the food supply. The Food Controller could make any orders that appeared to him “necessary or expedient to maintain the food supply of the country,” including requisitioning items and compensating the owner with a “reasonable profit” though not necessarily the market value.³³⁸ According to the economist William Beveridge, the regulatory output of the Food Ministry was “portentous.”³³⁹ In 1918 the *Food Supply*

333. See SPENCER C. TUCKER, *THE GREAT WAR, 1914-18*, at 206 (1998). On the general restructuring of the economy during wartime, see, for example, KATHLEEN BURK, *WAR AND THE STATE: THE TRANSFORMATION OF BRITISH GOVERNMENT, 1914-1919* (1982); HENRY CARTER, *THE CONTROL OF THE DRINK TRADE: A CONTRIBUTION TO NATIONAL EFFICIENCY, 1915-1917* (1918); SAMUEL J. HURWITZ, *STATE INTERVENTION IN GREAT BRITAIN: A STUDY OF ECONOMIC CONTROL AND SOCIAL RESPONSE, 1914-1919* (1949); E.M.H. LLOYD, *EXPERIMENTS IN STATE CONTROL* (1924); F.A. MCKENZIE, *BRITISH RAILWAYS AND THE WAR* (1917); STATE, SOCIETY AND MOBILIZATION IN EUROPE DURING THE FIRST WORLD WAR (John Horne ed., 1997); Peter K. Cline, *Reopening the Case of the Lloyd George Coalition and the Postwar Economic Transition, 1918-1919*, 10 J. BRIT. STUD. 162 (1970); R.H. Tawney, *The Abolition of Economic Controls, 1918-1921*, 13 EC. HIST. REV. 1, 3 (1943) (noting that by 1918 two-thirds of workers were engaged in industries subject to wartime controls). Economic controls were instituted mainly pursuant to DORA Amendment Act 1915, an act containing powers that Bonar Law declared to be “the most drastic that have ever been put to any House of Commons.” 70 PARL. DEB., H.C. (5th ser.) (Mar. 10, 1915) 1274; see Rogers, *supra* note 44, at 34.

334. DORA CONSOL. REGS., *supra* note 27, at Reg. 2.

335. *Id.* at Reg. 2B.

336. *Id.* at Regs. 7, 8, 8A.

337. *Id.* at Reg. 3. The government could also use land for military training, *id.* at Reg. 4, close roads, *id.* at Reg. 5, and remove vehicles and equipment, *id.* at Reg. 6.

338. *Id.* at Reg. 2F(1), (2).

339. WILLIAM H. BEVERIDGE, *BRITISH FOOD CONTROL* 69 (James T. Shotwell ed., 1928).

Manual, containing the regulations and orders then in force, comprised a volume of 700 pages.³⁴⁰ The ministry's orders were binding law, and during the war government officials initiated sixty-five thousand prosecutions of merchants, farmers, manufacturers, and consumers.³⁴¹ Almost ninety-three percent of these prosecutions were successful.³⁴²

In addition to utilizing DORA, the government could also confiscate property pursuant to the prerogative.³⁴³ As will be shown, the Crown's use of the prerogative in the property context, especially its denial of a legal obligation to compensate for prerogative takings, generated significant judicial opposition in the later stages and aftermath of the war.

B. Requisitioning Private Property: The Judicial Response

The courts actively pursued the protection of private property in three instances: when the amount of compensation rather than the taking itself was at issue; when the regulatory scheme effectuated a tax rather than a complete appropriation; and when the government interfered with the owner's right to secure property through litigation.³⁴⁴

1. The Compensation Controversy

The major question confronting the courts in the property area was not whether the government could confiscate property, but what

340. *Id.*

341. *Id.*

342. *Id.* at 70 n.2. Food control committees, along with the police and inspectors of weights and measures, brought the prosecutions, yielding £415,000 in fines and costs. *Id.* at 70, 234-35.

343. See Tawney, *supra* note 333, at 5 (noting that early in the war, when the reach of DORA was uncertain, the Crown relied primarily on its ancient prerogative powers); see also HURWITZ, *supra* note 333, at 151-52; LLOYD, *supra* note 333, at 52.

344. The general question of government authority to impose economic controls—that is, to regulate as opposed to confiscate—rarely troubled the courts, particularly with respect to the food supply. *Hudson's Bay Co. v. Maclay*, 36 T.L.R. 469 (K.B. 1920), for example, upheld the right of the Shipping Controller under DORA Regulation 39BBB to direct the use of ships at fixed rates of freight. The court noted that the Controller was acting to obtain wheat supplies for the United Kingdom and thus mitigate the "intolerable burden" of high prices during the war. *Id.* at 476. It distinguished the case from a situation of taking property without compensation. *Id.* at 477; see, e.g., *Sainsbury v. Saunders*, 35 T.L.R. 140 (K.B. 1918) (permitting the Food Controller to fix the price of tea); *John Robinson & Co. v. The King*, 36 T.L.R. 773 (K.B. 1920) (requiring cake manufacturers to accept a maximum price set by the Food Controller); *Fowle v. Monsell*, 36 T.L.R. 863 (K.B. 1920) (allowing the Food Controller to fix a maximum price for whiskey).

it should pay the owner when it did.³⁴⁵ Consistently, government ministries claimed that they could requisition property under the prerogative alone and that compensation was a matter of royal grace. On March 31, 1915, the Crown established a royal commission to evaluate claims for compensation and award voluntary payments.³⁴⁶ The other available avenue for appropriating property was pursuant to various nineteenth-century statutes, but under this option compensation was mandatory and the amount was determined by the courts.³⁴⁷ Wartime property cases often raised questions at the intersection of prerogative and statutory rights, and the courts resolved them in a manner distinctively different from their rulings in the liberty cases. The decisions generally resulted in a victory for

345. At least in the statutory arena, the simple right to requisition property when no issue of compensation was raised was not controversial, especially early in the war. Two cases in which such a challenge was mounted led to victories for the government. In *Sheffield Conservative & Unionist Club v. Brighton*, 85 L.J.K.B. 1669 (1916), the Army Council took possession of the plaintiffs' private club under DORA Regulation 2 to serve as offices for the Ministry of Munitions. Mr. Justice Avory held that such an action might be necessary for the public safety and defense and that the decision of the military authorities was conclusive, provided they did not act so unreasonably that there was ground for saying that they did not act bona fide. *Id.* at 1672. Regulation 2, he ruled, was not limited to operations of a "directly military" character. *Id.* at 1671. In *Lipton v. Ford*, [1917] 2 K.B. 647 (Comm. Ct.), the plaintiff charged that Regulation 2B, which authorized the requisitioning of his crop of raspberries, was ultra vires. Mr. Justice Atkin saw no reason why a regulation giving general powers of requisition was not reasonably capable of being a regulation for securing the public safety and defense. *Id.* at 654. As for the application of the regulation to raspberries, he noted that the Army Council could not take possession of a growing crop because powers of entry, tillage, and gathering were not expressly authorized by the regulation. In the case at hand, however, the government had merely given lawful notice of an intention to take possession of the raspberries after they were gathered. *Id.* at 655. Although the courts in both cases held for the government, they found all issues to be justiciable, imposed some sort of "reasonableness" requirement (albeit a weak one), and refused to infer executive powers from silence. *See also* *Minister of Munitions v. Chamberlayne*, [1918] 2 K.B. 758 (C.A.) (expansively interpreting the government's right under DORA to acquire property in the national interest). But at times the courts rejected the government's power to appropriate property even if it offered adequate compensation. *See, e.g.,* *Minister of Munitions v. Mackrill*, [1920] 3 K.B. 513 (Rwy & Canal Comm'n 1920) (holding that the government may not confiscate land for its resale value even though the owner would receive compensation, as it was the court's duty to protect the subject against undue exercises of royal power).

346. *See, e.g.,* LLOYD, *supra* note 333, at 51. The royal commission awarded compensation only to individuals who could prove they had suffered special damage and whose losses were "direct and substantial." DEFENCE OF THE REALM LOSSES ROYAL COMMISSION, FIRST REPORT, 1916, Cd. 8359, at 4; *see* HURWITZ, *supra* note 333, at 152. The royal commission was not a legal tribunal and its decisions were not subject to review in the courts. *See* LESLIE SCOTT & ALFRED HILDESLEY, THE CASE OF REQUISITION 91 (1920).

347. *See* SCOTT & HILDESLEY, *supra* note 346, at 91 ("If the subject claimed a right enforceable by law his remedy was in the Courts.").

the owner over the government and a derogation of the prerogative in favor of applicable statutes.

In re Petition of Right,³⁴⁸ the first case dealing with the right to compensation, was decided in the early months of the war. The lower courts sided with the government's prerogative theory, thereby misleading the public and the administration about the course of future rulings. The case arose in December 1914 when the War Office requisitioned an aerodrome in Shoreham from its private owners. When the aerodrome owners sought a declaration that they were lawfully entitled to statutory compensation, the Crown responded that confiscation was lawful under the prerogative as well as under DORA and that the owners were not entitled to compensation as of right.³⁴⁹

On the statutory claim, the trial court and Court of Appeal found that Regulation 2 of DORA, by conferring on the military authority an "absolute and unconditional power"³⁵⁰ to interfere with private property, impliedly repealed any right to compensation that might have existed under Victorian legislation.³⁵¹ On the prerogative issue, the courts concluded that the Crown was justified in taking premises necessary for the public safety and defense.³⁵² As in the alien internment cases, the judges rendered a broad factual assessment of military exigencies and revised common law precedent to confer new powers on the government. Although conceding that under traditional common law rules only actual invasion triggered prerogative powers,³⁵³ the courts now found—analogueous to their finding that enemy civilians were as dangerous as soldiers—that the enemy equally threatened the realm when not actually "at the gates." Mr. Justice Avory cautioned that under the "changed conditions of modern warfare," the realm now "requires protection from enemy aircraft and the long-range guns of enemy ships as in the old days it required protection from the landing of enemy troops."³⁵⁴ The Court of Appeal approved this expansion of prerogative powers by taking "judicial notice" that England's coasts had been attacked by Zeppelins

348. [1915] 3 K.B. 649 (C.A.).

349. *Id.* at 649-50.

350. *Id.* at 654 (per Avory, J.).

351. The courts found support for takings without compensation in the government's right under DORA to remove "restrictions" on its requisitioning powers in the nineteenth-century Defense Acts. In the courts' view, the "restrictions" that the government could eliminate included not merely procedural requirements but also the mandatory compensation provisions. *Id.* at 654, 660-62.

352. *Id.* at 653, 659-60, 666.

353. *Id.* at 653.

354. *Id.* He also asserted that acts of Parliament could not divest the King of his prerogative powers without express words. *Id.* Similarly, Lord Cozens-Hardy in the Court of Appeal found that the Act of 1842 did not affect the common law prerogative right, which could not be interfered with except by "plain language" or "necessary implication." *Id.* at 660.

and the enemy fleet: "To postpone action until the enemy has landed . . . would, or might, be fatal to the security of the realm."³⁵⁵

In finding that wartime exigencies required a widening of common law precedent, however, the Court of Appeal expressly demanded—as it declined to do in the alien prerogative cases—that the action of the Crown must be reasonable: "So the prerogative applies to what is reasonably necessary for preventing and repelling invasion at the present time."³⁵⁶ Given the attack on English shores, the invention of gunpowder, and the use of airplanes, the court reasoned, the authorities "might reasonably come to the conclusion to which they have in fact arrived."³⁵⁷ A majority of the judges of the Court of Appeal thus found the taking justified under both statute and prerogative; nonetheless, their analysis was significant in requiring a stronger showing from the government than in non-property cases.³⁵⁸

Matters changed abruptly when the case reached the House of Lords. Foreshadowing the anti-government decisions that would now follow, the Law Lords took a much dimmer view of the ministry's position. In July 1916, while the appeal was pending, the Crown suddenly settled the case in the company's favor. The reason for the settlement was that the judges had indicated to the law officers of the Crown that the case would go against them.³⁵⁹ Indeed, the Lord Chancellor, who was not sitting in the case, wrote a note to the Cabinet stating that none of the Law Lords accepted the Crown's view of the prerogative, and that even if DORA conferred power by regulation to abolish rights to compensation, no regulation did so in express terms.³⁶⁰ In situations involving property, in other words, the Lords required the enabling instrument to confer power explicitly on the government to intrude on individual rights—a stark contrast with their willingness to infer restrictions on freedom from silence in the internment cases.

355. *Id.* at 659. Lord Warrington added that the circumstances under which the prerogative power could be exercised "must of necessity vary with the times and the advance of military science." *Id.* at 666. In addition to taking "judicial notice" of military necessities, the Court of Appeal thoroughly investigated the particular facts regarding the aerodrome. The Master of the Rolls observed that military testimony about the need to occupy it had not been undermined by cross-examination. *Id.* at 659. In other words, the court did not simply defer to military judgment but held a hearing to determine that military occupation of the premises was indeed necessary.

356. *Id.* at 660.

357. *Id.* at 666 (per Warrington, L.J.).

358. Lord Pickford, seemingly more suspicious of the prerogative, preferred to base his judgment on DORA. *Id.* at 664.

359. See G.R. RUBIN, PRIVATE PROPERTY, GOVERNMENT REQUISITION, AND THE CONSTITUTION 1914-27, at 52 (1994).

360. *Id.*; see LLOYD, *supra* note 333, at 51 n.2.

In its first formal decision on the compensation issue, *Central Control Board v. Cannon Brewery*,³⁶¹ the House of Lords adhered to the approach adumbrated in the Lord Chancellor's note to the Cabinet in the aerodrome case. As part of the government's efforts to regulate the liquor trade, which was believed to cause absenteeism among munitions workers,³⁶² the Central Control Liquor Board in 1915 appropriated a pub in Middlesex. The owners did not object to the confiscation per se but rather to having their compensation assessed by the royal commission; they preferred the judicial mechanism set forth in a Victorian statute, the Land Clauses Act 1845.³⁶³ DORA did not expressly incorporate the Land Clauses Act, so the legal question was whether the specific forum provided by the Crown—the 1915 royal commission—trumped DORA's silence on the method of compensation. The owners argued that if a statute did not establish a special tribunal, assessment reverted to the courts under the Land Clauses Act.³⁶⁴

Two lower court decisions held in favor of the pub owners. In the Chancery Division,³⁶⁵ the court made clear—in contrast to the judicial preference in personal liberty cases for construing silence to enhance governmental power—that the absence of statutory language was no obstacle to upholding an individual's right against the government:

I quite agree that it is a difficulty in the plaintiffs' way that the Land Clauses Act is not specially mentioned, that its application to the case is not immediately obvious, that its presumed incorporation in the statute . . . is inconvenient and burdensome. But these difficulties are not, in my opinion, either separately or together, fatal to the plaintiffs' contention on this point.³⁶⁶

Since the alternative was the “inconceivable” notion that Parliament did not intend to provide compensation, the plaintiffs were obviously correct.³⁶⁷ In the Court of Appeal, Lord Bankes treated the government equally dismissively, observing that owners who claimed an enforceable legal right were offered only the possibility of an ex gratia payment: “Well might the respondents say that they asked for bread and were given a stone.”³⁶⁸

361. [1919] A.C. 744 (H.L.).

362. Lloyd George stated in the House of Commons upon introducing DORA Amendment No. 3, which instituted controls over the drink trade: “Drink is doing us more damage in the War than all the German submarines put together.” 71 PARL. DEB., H.C. (5th ser.) (Apr. 29, 1915) 868.

363. Land Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18.

364. *Cannon Brewery*, [1919] A.C. at 747-48.

365. *Cannon Brewery Co. v. Cent. Control Bd.*, [1918] 2 Ch. 101 (C.A.).

366. *Id.* at 114.

367. *Id.*

368. *Id.* at 129.

The House of Lords affirmed the judgments below. Lord Atkinson invoked the traditional canon that the property of a subject could not be taken away unless Parliament expressed its intention in "unequivocal language,"³⁶⁹ again rejecting in the property context the rule about inferences from silence that the courts employed so broadly in the liberty cases. As DORA did not address the issue of compensation, he declared, such compensation existed as of right, and the Land Clauses Act provided the normal method of assessing it.³⁷⁰ For his part, Lord Parmoor desired to enter "an emphatic protest" against letting the opinion of royal commissioners replace "claims made as a matter of right, under the protection of a rule of law."³⁷¹ Not only did DORA impliedly incorporate the Land Clauses Act, he announced, but the proposition that an executive body could claim private property under the prerogative was contrary to a principle "enshrined in our law" since Magna Charta.³⁷² *Cannon Brewery* thus underscored the judges' distinctive mode of construing silence in property statutes, their suspicion of the prerogative as a basis for invading property rights, and their decisive preference for a judicial rather than administrative tribunal for awarding compensation.³⁷³

Judicial activism in defense of property rights was again evident in the most significant property case of the war, *Attorney General v. De Keyser's Royal Hotel Ltd.*³⁷⁴ In 1916 the Crown took possession of a hotel for the purpose of housing the headquarters personnel of the Royal Flying Corps.³⁷⁵ A War Office letter informed the hoteliers that

369. *Cannon Brewery*, [1919] A.C. at 752.

370. *Id.* at 754-55.

371. *Id.* at 760.

372. *Id.*

373. A subsequent case, *Newcastle Breweries, Ltd. v. The King*, [1920] 1 K.B. 854, came down on the side of compensation as of right even more directly, striking down a regulation that rejected fair market value as the basis for compensation. In 1917 the Admiralty took possession of 239 puncheons of rum from breweries and wine merchants in Newcastle, offering the owners a "reasonable profit" of one-third its market value. Regulation 2B of DORA provided that when the Admiralty confiscated goods, the price should be determined by the royal commission. In the Divisional Court, Mr. Justice Salter refused to read DORA as depriving an owner of his statutory right to fair market value without a clearly expressed intention to do so. *Id.* at 866. Moreover, he declared, such a regulation could not fairly be held to be a regulation for securing the public safety and defense. *Id.* at 865; see also *Commercial & Estates Co. of Egypt v. Ball*, 36 T.L.R. 526 (K.B. 1920) (holding that the terms of Regulation 2B were not clear enough with respect to neutral countries to authorize the Controller of Timber Supplies to requisition the property of a neutral without paying full compensation). Before *Newcastle Breweries* could be heard on appeal, the Indemnity Act, 1920, 10 & 11 Geo. 5, c. 48, retroactively validated this and other executive expropriations during the war. See LLOYD, *supra* note 333, at 55 n.1; Cecil T. Carr, *Crisis Legislation in Britain*, 40 COLUM. L. REV. 1309, 1310 (1940).

374. [1920] A.C. 508 (H.L.).

375. *Id.* at 508.

compensation would be ex gratia and strictly limited to monetary loss.³⁷⁶ The letter seems to have relied on DORA regulations to support the taking, but the Crown's argument in court was based on the prerogative.³⁷⁷ The Lords concluded that the Crown's power to confiscate property under the prerogative was precluded by the Defense Act 1842,³⁷⁸ which guaranteed property owners a right to compensation and provided a judicial mechanism for assessing it.

Engaging in a lengthy discussion of the relationship between prerogative and statutory powers, the House of Lords rejected *In re Petition of Right*,³⁷⁹ a decision that granted the two sources of royal authority equal status in situations covering the same ground, and held that the statute controlled. Lord Dunedin, for example, announced that there was "no room for asserting an unrestricted prerogative right as existing alongside with the statutory powers."³⁸⁰ Another judge, Lord Moulton, took "judicial notice" of important historical changes that had occurred in the previous two centuries:

In the first place, war has become far more complicated, and necessitates costly and elaborate preparations in the form of permanent fortifications, and otherwise, which must be made in times of peace. In the second place, the cost of war has become too great to be borne by the Royal Revenues, so that money for it has to come from the people through the Legislature. . . . In the third place, the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment.³⁸¹

In his view, the Defense Act 1842 had rendered the prerogative unnecessary and indicated unmistakably that "the burden shall not fall on the individual, but shall be borne by the community."³⁸² The consensus of the court was that neither the public safety nor defense required "that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects."³⁸³ Thus, although in the alien internment cases ARA apparently had not covered the field sufficiently to pre-empt prerogative control over aliens, in the property cases a nineteenth-century statute was adequate to preclude

376. *Id.* at 510.

377. *Id.* at 514-17, 561; see RUBIN, *supra* note 359, at 88-89.

378. Defense Act, 1842, 5 & 6 Vict., c. 94. The compensation provisions of the Defense Act and the Land Clauses Act operated on the same principles. See RUBIN, *supra* note 359, at 64, 100. In finding the statute to control, the Lords in *De Keyser* never reached the question whether the prerogative itself might require compensation. See *id.* at 15-18.

379. [1915] 3 K.B. 649.

380. *De Keyser*, [1920] A.C. at 528.

381. *Id.* at 553.

382. *Id.* at 554.

383. *Id.* at 542 (per Lord Atkinson); see SCOTT & HILDESLEY, *supra* note 346, at 79-80 (summarizing the arguments of the suppliants' attorneys, which the House of Lords accepted).

royal power over individuals.³⁸⁴ War-related developments, in other words, necessitated an expansion of the prerogative to restrict the freedom of aliens while requiring a contraction of those same powers to spare property owners any “unfair burden.”³⁸⁵

2. Wartime Taxation Without Representation

A second context in which the courts readily and unapologetically thwarted executive policies was “taxation,” that is, when the government imposed economic loss without total expropriation. *China Mutual Steam Navigation Co. v. MacLay*³⁸⁶ involved a DORA regulation authorizing the Shipping Controller to requisition ships “in such manner as to make the best use thereof having regard to the crisis of the time.”³⁸⁷ The Controller compelled the owners of a line of British steamships to operate the vessels on behalf of the government rather than for their own profit. Claiming that the order was tantamount to a tax, the shippers credited the profits to their own account. Although Mr. Justice Bailhache declared the impugned regulation to be permissible, he nevertheless held that the order directing the shippers to continue their operations was *ultra vires*. The government, he observed, had requisitioned three things: the ships, the owners’ services, and the profits.³⁸⁸ The taking of ships, while valid in itself,³⁸⁹ did not include the power to requisition the services of the owners. Interestingly, by adopting a theory based on confiscation of services rather than taxation of

384. See also *Attorney Gen. v. Brown*, [1920] 1 K.B. 773 (construing a Victorian statute to prohibit the Crown from issuing a proclamation banning the importation of certain goods).

385. As for the statutory argument, the Lords held that Regulation 2 of DORA conferred no new powers on the government but merely authorized a taking under the Defense Act, 1842, 5 & 6 Vict., c. 94, § 16, which required compensation as of right. Admittedly DORA had suspended certain “restrictions” of that act, but such restrictions did not include provisions as to compensation, and subjects continued to enjoy their rights under the old statute. *De Keyser*, [1920] A.C. at 579; see SCOTT & HILDESLEY, *supra* note 346, at 92.

386. [1918] 1 K.B. 33.

387. DORA CONSOL. REGS., *supra* note 27, at Reg. 39BBB(3).

388. *China Mutual*, [1918] 1 K.B. at 40.

389. The decision assumed the right to requisition ships in an emergency under the prerogative. See W.S. Holdsworth, *The Powers of the Crown to Requisition British Ships in a National Emergency*, 35 L.Q. REV. 12 (1919); RUBIN, *supra* note 359, at 141-42; see also *The Zamora*, [1916] 2 A.C. 77 (P.C.) (suggesting in dicta that requisitioning did not give rise to a right of compensation); *The Sarpen*, [1916-17] All E.R. 1132 (C.A.) (assuming general right to requisition); *The Broadmayne*, 32 T.L.R. 304 (C.A.) (upholding the common law right of the Crown to requisition). After the establishment of the Ministry of Shipping in December 1916, the Shipping Controller could also requisition ships under Regulation 39BBB of DORA. See RUBIN, *supra* note 359, at 141-42.

property per se,³⁹⁰ the case illustrates the contrast between the liberty and property cases: the courts were willing to prohibit the government from infringing on personal freedom only when a property owner was engaging in economic activity.

Subsequently, however, the House of Lords did not shy away from invalidating a tax directly. A broad statute enacted in 1916 empowered the government to "make orders regulating or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase" of any article when it appeared "necessary or expedient" for the purpose of maintaining the food supply of the country.³⁹¹ To equalize milk prices, the Food Controller ordered wholesale dairies in Cornwall, Devon, Dorset, and Somerset to pay the government two pennies per gallon as a condition for receiving a milk license. The dairy owners challenged the tax as ultra vires the legislation.

Despite the wide enabling language of the Act, the Court of Appeal in *Attorney-General v. Wilts United Dairies*³⁹² ruled that the charge exceeded parliamentary authorization. Lord Atkin concluded that Parliament had granted no power to tax and indeed "no powers at all" to the Minister of Food.³⁹³ He noted that in light of Parliament's "complete success" in its historic struggle to gain control over taxation,

the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject.³⁹⁴

According to Lord Scrutton, a government official must show in "the clearest words" that Parliament had authorized a tax; even in wartime the executive could not by itself exclusively determine necessity.³⁹⁵ Further, he analogized the government's behavior to the Crown's use of the prerogative in the seventeenth century: "It is true that the fear in 1689 was that the King by his prerogative would claim money; but excessive claims by the Executive Government without grant of Parliament are, at the present time, quite as dangerous, and require as careful consideration and restriction from

390. By focusing on services, the judge claimed he was not reaching the issue of taxation, see *China Mutual*, [1918] 1 K.B. at 40, but the implications were obvious. Mr. Justice Bailhache then encouraged the owners to make voluntary arrangements with the Shipping Comptroller. *Id.* at 41. The owners immediately waived their rights under the ruling and did so, and other shipping companies followed suit. See RUBIN, *supra* note 359, at 144-45.

391. New Ministries and Secretaries Act, 1916, 6 & 7 Geo. 5, c. 68, §§ 3, 4.

392. 37 T.L.R. 884 (C.A. 1921).

393. *Id.* at 886.

394. *Id.*

395. *Id.* at 885.

the Courts of Justice.”³⁹⁶ Thus, Lord Scrutton suggested, subjects in the early twentieth century should be equally fearful of executive power whether exercised pursuant to prerogative or statute. The House of Lords, in a shorter opinion,³⁹⁷ agreed that the imposition was an unlawful tax. Although a minister enjoyed some freedom of action, he had no right “to act outside the law, nor could the law be unduly strained to allow him to do what it might be thought reasonable that he should do.”³⁹⁸ In matters of taxation, therefore, the judges maintained that the government’s view of its own reasonableness was simply not sufficient to render its conduct lawful.

3. Private Property and Judicial Access

The efforts of the courts to protect private property were also apparent at the point of intersection between the right to property and the right to judicial access. In *Chester v. Bateson*³⁹⁹ the High Court invalidated Regulation 2A(2), which provided that no landlord could sue to eject a munitions worker living in a certain area without the consent of the Minister of Munitions.⁴⁰⁰ According to Mr. Justice Darling, the question was whether forbidding a person to sue to recover possession of a house was a necessary or even reasonable way to secure public safety. Such an “extreme disability”⁴⁰¹ could be inflicted only by direct enactment of the legislature, and an “elemental right of the subjects of the British Crown cannot be thus easily taken from them.”⁴⁰² Ironically, in limiting the government to actions that were “necessary” and “reasonable,” Mr. Justice Darling relied on statements in *Halliday*, including Lord Atkinson’s observation that a regulation that failed to secure public safety “reasonably” would be ultra vires.⁴⁰³ *Halliday*, which was of course a liberty case, had easily found the government’s action to be both reasonable and “obviously” necessary.

Even more intriguing than Mr. Justice Darling’s reliance on the majority decision in *Halliday* was Mr. Justice Avory’s invocation of

396. *Id.* at 886.

397. *Attorney Gen. v. Wilts United Dairies*, 38 T.L.R. 781 (H.L. 1922).

398. *Id.* at 782. Mr. Justice Salter in *Newcastle Breweries Ltd. v. The King*, [1920] 1 K.B. 854, similarly found the government’s action to be tantamount to a tax. He stated that the deprivation of fair market value was a tax by the executive, and if Parliament had intended DORA to confer such power, it would have employed more precise language. *Id.* at 866.

399. [1920] 1 K.B. 829.

400. DORA CONSOL. REGS., *supra* note 27, at Reg. 2A(2).

401. *Chester*, [1920] 1 K.B. at 833.

402. *Id.* at 834. The regulation also provided that to sue without governmental permission was a summary offense. *Id.*

403. *Id.* at 832-33. Mr. Justice Darling also mentioned Lord Finlay’s remark that “Parliament may entrust great powers to His Majesty in Council, feeling certain that such powers will be reasonably exercised.” *Id.* at 832.

Lord Shaw's dissent in the same case, especially Lord Shaw's warning that there lurked in governmental conduct "the elements of a transition to arbitrary government" and "grave constitutional and public danger."⁴⁰⁴ Following this line of thought, Mr. Justice Avory considered that as a matter of constitutional law, the eviction regulation violated Magna Charta and the Bill of Rights. The judiciary, he declared, must not approach such an executive act "in a spirit of compliance rather than of independent scrutiny."⁴⁰⁵ Thus, a decision premised on *Halliday* turned out to protect individual rights after all—but rights to own private property and secure it in the courts rather than rights to mere non-economic personal liberty.⁴⁰⁶ There could be no greater contrast in wartime jurisprudence than between the courts' accommodating attitude to property owners and its disregard of far greater intrusions on individual rights in the sphere of personal freedom.⁴⁰⁷

404. *Id.* at 837.

405. *Id.* (quoting Lord Shaw). *Newcastle Breweries Ltd. v. The King*, [1920] 1 K.B. 854, also involved an issue of judicial access. Mr. Justice Salter, relying on *Chester*, found that a regulation transferring the adjudication of a property claim from a court of law to the royal commission removed a subject's right to a judicial decision and was not reasonably capable of being a regulation for securing the public safety and defense of the realm. *Id.* at 865. Similarly, Mr. Justice Greer agreed that a regulation excluding access to the courts for a civil wrong "shows on its face" that it was not a regulation for securing the public safety and defense. The regulation was invalid because it "shut the doors of the Courts to a class of the community." *Hudson Bay Co. v. Maclay*, 36 T.L.R. 469, 478 (K.B. 1920).

406. In addition to cases involving compensation, taxation, and legal process, other property cases also went against the government. For example, two cases interpreted the orders of the Food Controller not to reach parties challenging their application. In *Hinde v. Allmond*, 34 T.L.R. 403 (K.B. 1918), Ellen Hinde was fined fifty pounds at Chipping Norton Sessions for hoarding tea. The King's Bench rejected the magistrates' conclusion that tea was an "article of food" within the meaning of the Food Hoarding Order 1917. In quashing the conviction, Mr. Justice Darling stated that if the Food Controller had meant to prohibit persons from acquiring large quantities of tea, he could have said so. No one ate dried tea leaves, and it gave an unnatural meaning to the word "food" to include such an item. *Id.*; *cf. Sainsbury v. Saunders*, 35 L.T.R. 140 (K.B. 1918) (holding that the New Ministries and Secretaries Act, 1916, which referred to "food supply" rather than "article of food," was broad enough to allow the government to fix the price of tea). Later that same year the same court held that a May 16th order of the Food Controller regarding confiscation of beans, which was not publicized until May 17, came into operation on the latter date. Mr. Justice Bailhache remarked that unlike statutes, administrative orders were not public before they came into operation, and the May 16 date therefore afforded insufficient notice. The upshot of using the later date was that the plaintiff importers of the beans were not subject to the requisitioning rule, since the contracts for sale had been completed by May 16. *Johnson v. Sargant*, [1918] 1 K.B. 101.

407. Apart from the courts' obvious preference for property rights over civil liberties, it should also be noted that most of the property cases occurred at the end of or after the war when the needs of national defense were less pressing. Moreover, the government eventually had its way, albeit through Parliament rather than the courts. In 1920 Parliament enacted an indemnity bill retroactively awarding compensation for direct rather than market value loss in accordance with the approach of the royal

VI. THE MORAL IDEOLOGY OF THE WARTIME JUDICIARY

In earlier sections, this Article has demonstrated that the general response of the judiciary to executive conduct during the war was hardly one of indiscriminate compliance. The judges were activist in three ways: they validated the government's policies to deprive subjects of personal liberty; they preserved their own institutional power; and they protected rights of private property. In accomplishing these objectives they acted unevenly, pursuing some goals with more vigor than others, using divergent mechanisms and strategies, and applying varying legal standards and doctrines in different contexts. Yet another factor—an evolving wartime moral ideology—complicated their jurisprudence and contributed further to these inconsistencies.

A. *The Hierarchy of Moral Respectability*

During the war the courts introduced legal distinctions reflecting their moral vision, infusing their decisions with a bellicose moral ideology that merged suppositions about “Englishness” with conventional Victorian criteria of respectability. Although not evident in every case, judicial opinions often reflected notions of a moral hierarchy based on both national origin and traditional concepts of individual “character.” The fact that the judges acted according to unstated but pervasive views about the worthiness of the parties appearing before them renders certain judicial rulings explicable that seem otherwise difficult to decipher.⁴⁰⁸

Apart from aliens—whose differential treatment in wartime was to be expected—the hierarchy of national origin placed natural-born English persons at the apex, followed in descending order by naturalized subjects and the Irish. Although in theory all British subjects were entitled to the same judicial treatment, in actuality the more “English” a detainee, the better he or she was situated. This phenomenon was especially evident in the internment cases, in which the degree of judicial scrutiny of the executive correlated to the applicant's standing in the spectrum of wartime respectability. Natural-born citizens such as Howsin benefited from an explicit “reasonableness” review of government conduct, while naturalized German subjects such as Zadig enjoyed a softer, but not entirely

commission. Indemnity Act, 1920, 10 & 11 Geo. 5, c. 48; see RUBIN, *supra* note 359, at ix. Parliament feared that if past administrative actions were not validated, the government would have to pay 700 million pounds to property owners. See HURWITZ, *supra* note 333, at 153.

408. On the pervasiveness of Victorian moral distinctions in judicial rulings, see Rachel Vorspan, “Rational Recreation” and the Law: *The Transformation of Popular Urban Leisure in Victorian England*, 45 MCGILL L.J. 891 (2000).

toothless, test. The Irish fared worse than either of these groups and generally confronted even greater judicial hostility than enemy aliens.

In the case of the Irish, the judges brushed off their arguments, eschewed inquiry into individual claims, engaged in particularly tortuous reasoning, and rendered patently disingenuous judgments. *Foy*,⁴⁰⁹ for example, which upheld the internment of an Irish person in 1920 as a means of achieving the victory over Germany already accomplished in 1918, pursued an analysis quite different from the approach in more "deserving" cases. Deferring wholly to the executive, the court declined to investigate either the facts of the individual case or the circumstances of national emergency. It casually conceded and then disregarded the fact that Foy's denial of complicity with any "society" in Ireland was uncontradicted at trial.⁴¹⁰ As for the larger context, Foy's attorney had contended that there was no longer a "special military emergency" justifying martial law. Quite unusually and revealingly, the court renounced the opportunity to decide whether a state of emergency existed, consigning that question to executive determination alone.⁴¹¹ As previously discussed, the judges in the Irish cases also applied a strained and contorted reading of the law. Interpreting the term "Ireland" in ROIA to mean "England," for example, the court in *Brady*⁴¹² displayed a particularly dubious analysis to expand the reach of Regulation 14B. In cases involving Irish detentions, it seems, the courts applied no discernible legal standard to government action and accepted all ministerial claims, however unsupported or indefensible.

Not surprisingly, the only wartime case in which a court denied a habeas petition without considering its merits, *Ferguson*,⁴¹³ involved an Irishman called up for military service in the English army in 1916. Although the judges rejected Ferguson's habeas petition for various reasons, including his collateral attack on a legal

409. *R. v. Governor of Wormwood Scrubs Prison ex parte Foy*, 36 T.L.R. 432 (K.B. 1920).

410. *Id.* at 434.

411. *Id.* Lord Reading stated:

I must not be taken to mean that the Court cannot examine into the conditions in which arrest or restriction of personal liberty has been made, but only that when they have examined these conditions and have come to the conclusion that the Legislature has taken from the Courts the power of dealing with certain matters the Court must refuse to deal with them.

Id.

412. *R. v. Inspector of Cannon Row Police Station ex parte Brady*, 37 T.L.R. 854, 855-56 (K.B. 1921).

413. *R. v. Commanding Officer of Morn Hill Camp ex parte Ferguson*, 1 K.B. 176 (1917).

judgment, the case was still aberrant. It was the only reported habeas case of the war to find a claim of unlawful detention to be non-justiciable. The court may well have been influenced by the fact that Ferguson's arrest came only a few months after the Easter Rebellion and that, compounding his disfavored position as an Irishman, he sought to evade his obligation of military service.⁴¹⁴ The court's dismissive treatment likely stemmed in part from both traditional ethnic hostility and the incontrovertible reality that, although British subjects, some Irish were complicit with the Germans during the war.⁴¹⁵

In addition to reflecting a hierarchy based on national origin, judicial decisions also embodied sensitivity to traditional moral criteria. Intriguingly, the courts often linked objectionable moral behavior such as criminality or bad character with danger to the national defense. The connection was most obvious, of course, in the case of draft resisters, whose perceived cowardice unquestionably harmed the war effort. This moralistic view explains the apparent judicial hostility to the litigants in such cases as *Parton*, *Thierry*, and *Sacksteder*. In *Parton*,⁴¹⁶ for example, Mr. Justice Darling proclaimed during oral argument that the conscientious objector "ought really to be an outlaw, ought he not?"⁴¹⁷ Even Lord Scrutton, a judge relatively attuned to issues of civil liberties, declared in a public lecture in 1918:

From the point of view of a judge, it is difficult to see how the State can exist if everybody who conscientiously objects to the law may disobey it, and then shrieks complaints when he is punished. . . . [A] world in which an individual recognizes no duties as a citizen, except those which his conscience approves of, is a world of anarchy.⁴¹⁸

414. *Id.* at 177.

415. See, e.g., *R. v. Casement*, [1917] 1 K.B. 98, 100 (finding an Irishman guilty of treason for attempting to recruit Irish prisoners of war for the German army); EWING & GEARTY, *supra* note 2, at 338 n.39; EDWARD NORMAN, *A HISTORY OF MODERN IRELAND, 1800-1969*, at 257-58 (1973); A.J.P. TAYLOR, *ENGLISH HISTORY, 1914-45*, at 89-90 (1973).

416. *R. v. Central Tribunal ex parte Parton*, 32 T.L.R. 476 (K.B. 1916).

417. *Id.* at 476. Mr. Justice Darling's moralistic attitudes were hardly subtle. In presiding over the Oscar Wilde case, he summed up to the jury as follows: "Oscar Wilde wrote filthy works, as you know: he was guilty of filthy practices. . . . Well, gentlemen, it is possible to regard him as a great artiste, but he certainly was a great beast; there is no doubt about that." *Quoted in* HYNES, *supra* note 47, at 228.

418. Scrutton, *supra* note 41, at 131.

Indeed, all draft dodgers—whether natural-born British subjects,⁴¹⁹ naturalized subjects,⁴²⁰ alien allies,⁴²¹ or dual nationals⁴²²—received short shrift from the courts, and the especially low level of judicial scrutiny in the deportation cases may have resulted in part from the fact that many of the petitioners were draft avoiders.⁴²³

The courts also drew connections between moral behavior and the war effort that were more subtle than the “cowardly” refusal to fight. *Sarno*,⁴²⁴ another deportation case, explicitly linked criminality to national vulnerability in wartime. A Russian with an unsavory history, Sarno had no regular employment but assisted in keeping a house for prostitutes and thieves.⁴²⁵ In challenging his deportation order, he did not bother to argue that he was not undesirable; rather, he claimed that his disreputable character posed no danger to the

419. In addition to *Parton*, another military service case involving a natural-born Englishman was *Fraser v. Military Authorities*, 116 L.T.R. 447 (K.B. 1917), in which the court rejected a claim based on an exemption for officers. In 1914 Fraser had joined the army as a lieutenant and by 1916 had been promoted to the rank of captain. He proceeded with his regiment to France but obviously did not acquit himself well, as he was brought back to England and asked to resign his commission. He was subsequently drafted for service in the regular forces. His argument was that he came within the exception for officers because, although he subsequently lost his commission, he was an officer at the time of the passing of the Military Service Act. The court cursorily rejected a claim from such an “undeserving” applicant, stating simply that the applicable date was not the date when the statute was passed but the date he was called up. *Id.* In the cases involving dual nationals, of course, the court relied on the date the Act was passed to restrict the exemption.

420. In a case involving a naturalized Russian draft dodger, for example, the court construed a penal provision in ARA to apply to naturalized citizens as well as aliens. *Agdeshman v. Hunt*, [1916-17] All E.R. 559, 559-60 (K.B.), concerned a naturalized Russian who falsely claimed to be an alien to avoid serving in the British army. In 1917 the police charged David Agdeshman under ARA with unlawfully furnishing to the police false particulars with respect to his nationality. The defendant’s argument, brazenly enough, was that ARA only applied to aliens, and he was not an alien but a British subject. Regulation 27(2) of ARA stated: “If any person furnishes or causes to be furnished to a registration officer any false particulars . . . he shall be deemed to have acted in contravention of this order.” *Id.* at 560. Claiming to give the words their “natural and ordinary meaning,” the court held that the provision against furnishing false particulars was wide enough to apply to British subjects as well as to aliens. *Id.* at 561. Although the Act was passed to impose restrictions on aliens, there was no reason citizens needed to be expressly included. “It was also intended to make such provisions as are necessary for the purpose of carrying those restrictions into effect.” *Id.* As in *Halliday*, the court implied expansive coverage from silence, this time to ensure that a draft resister would not escape his punishment.

421. See, e.g., *R. v. Sec’y of State for Home Affairs ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922 (C.A.); *R. v. Superintendent of Chiswick Police Station ex parte Sacksteder*, [1918] 1 K.B. 578.

422. See *supra* Part III.A.2.b.

423. See *Chateau Thierry*, [1917] 1 K.B. 922 (C.A.); *Sacksteder*, [1918] 1 K.B. 578.

424. [1916] 2 K.B. 742.

425. *Id.* at 743.

realm.⁴²⁶ The executive, he contended, could not exercise a power designed to secure public safety in wartime for the purpose of deporting an undesirable person.⁴²⁷ Lord Reading insisted, however, that criminality undermined national security by draining police resources:

Although his actual offence may be merely the commission of a crime, nevertheless in time of war, when all the activities of persons engaged in police protection and in bringing criminals to justice must necessarily be restricted because of the demand that has been made upon persons of military age, the commission of crime may contribute to endanger the safety of the realm, and in time of war suspicion may justify action which could not be justified in time of peace.⁴²⁸

In judicial eyes, immoral behavior of any type undermined the successful prosecution of the war.

Other deportation cases also involved morally suspect individuals. For example, in *R. v. Inspector of Leman Street Police Station ex parte Venicoff*⁴²⁹ the deportee was an undesirable Russian alien who in the course of divorce proceedings was accused of living on the immoral earnings of his wife and another woman.⁴³⁰ "If these statements are true," proclaimed a disgusted Lord Reading in refusing to review the deportation order, "they disclose as degrading a charge as can well be imagined."⁴³¹ Parliament, he declared, had expressly empowered the Home Secretary to make such orders unconditionally.⁴³² Again, the minimal standard applied in the deportation cases seems to have derived at least partially from the

426. *Id.* at 746.

427. *Id.*

428. *Id.* at 750; see TREVOR WILSON, *THE MYRIAD FORCES OF WAR: BRITAIN AND THE GREAT WAR, 1914-1918*, at 153-54 (1986) (discussing the wartime burden on the police).

429. [1920] 3 K.B. 72.

430. *Id.* at 74.

431. *Id.* at 77. Venicoff brought a habeas action, claiming that he was entitled to make representations to the Home Secretary against the charges. Lord Reading concluded, however, that the Home Secretary need not hold an inquiry. *Id.* at 79-80.

432. *Id.* at 78. Another example of substantial judicial deference to the executive in a case of an "undeserving" person was *R. v. Governor of Brixton Prison ex parte Bloom*, 124 L.T.R. 375 (K.B. 1920). In 1920 the applicant, a Russian Jew, pleaded guilty before a metropolitan magistrate to charges of assaulting the police and failing to notify them of his change of address. The magistrate sentenced him to fourteen days' imprisonment and recommended him for deportation. Lord Reading restated his earlier view:

We have no right to sit on appeal from the Home Secretary when he has used the executive powers conferred upon him provided that he has used them in a lawful way in accordance with the Act. If he has come to a conclusion from which we might differ (and there is no ground for suggesting that we should), we could not interfere.

Id. at 378.

fact that the deportees were not only aliens but also persons guilty either of draft dodging, vice, or criminal behavior. Lord Bankes implicitly covered all the options when he stated in *Chateau Thierry* that it was immaterial whether someone was deported because his military services were required or because he was undesirable "on account of his character."⁴³³

The judicial tendency to differentiate morally among litigants was sharply etched in two prisoner of war exemption cases that yielded contrary results. Both involved the Military Service Act 1916,⁴³⁴ which contained an exemption from service for any person "who has at any time since the beginning of the war been a prisoner of war, captured or interned by the enemy, and has been released or exchanged."⁴³⁵ The first case, *Robinson v. Metcalf*,⁴³⁶ concerned a British subject who had left England long before the war and resided in Germany for twelve years while working as a clerk in a commercial house.⁴³⁷ Two days after war was declared, Robinson left Hamburg for Denmark by train, and during the journey he was stopped and detained twice for a total of two hours.⁴³⁸ At one point during the detention a German officer informed him that he was a prisoner of war.⁴³⁹ Lord Reading concluded that although Robinson had the "status" of a prisoner of war while he was detained, he was not a "prisoner of war, captured or interned" within the meaning of the statute, as he had only been detained temporarily for purposes of investigation.⁴⁴⁰ As in the internment cases, the court felt comfortable offering a definition of the military term "prisoner of war," and it construed the exemption to exclude a claim from an Englishman with a longstanding residence in Germany.⁴⁴¹

While the decision in *Robinson* was unexceptionable, it contrasted vividly with *R. v. Burnham*,⁴⁴² the only case in which an

433. *R. v. Sec'y of State for Home Affairs ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922, 935 (C.A.). There seems to have been particular concern during the war about the effects on English society of Russian and other Eastern European immigrants. Sir Edward Troup, Permanent Undersecretary of State in the Home Office, referred to their "demoralizing habits" and noted that but for the operation of the immigration laws, "hundreds of thousands of immigrants from Russia and from Central Europe would have crowded into England; and, if that had happened, certain goods might have been cheaper, but the whole social conditions of the country would have been altered substantially for the worse." SIR EDWARD TROUP, THE HOME OFFICE 145 (1925).

434. 6 & 7 Geo. 5, c. 15.

435. *Id.* § 8.

436. 33 T.L.R. 542 (K.B. 1917).

437. *Id.* at 542.

438. *Id.*

439. *Id.*

440. *Id.* at 543.

441. *Id.*

442. 119 L.T.R. 308 (K.B. 1918).

applicant prevailed on a claim of military exemption for any reason. In *Burnham* the judges strained mightily, using a variety of theories, to reach a result in the applicant's favor. Predictably, the case involved a respectable British family caught on holiday in Germany when the war erupted. Ernest King, his wife, and daughter were in Germany visiting another daughter when war broke out; they immediately tried to return home, but all rail and sea travel had been canceled.⁴⁴³ Instructed not to leave the city, King took an apartment in Hamburg, and six weeks later his wife and daughters were allowed to return to England.⁴⁴⁴ During the following two months, King reported to the Hamburg police five or six times, but he otherwise had full liberty to do as he liked.⁴⁴⁵ Other British subjects who attempted to leave during that same period were imprisoned.⁴⁴⁶ Eventually King was informed that he could leave if he took an oath not to take up arms or do anything to assist in the war against Germany.⁴⁴⁷ He was further told that if he broke his word he would be shot upon capture, and that if he refused to give his word he would be detained in Germany until the end of the war.⁴⁴⁸ King signed the requested document and returned to England.⁴⁴⁹

As the Military Service Act 1916 was wending its way through Parliament, the War Office issued King a letter stating that it would honor his oath not to bear arms against Germany, and he also received an exemption from his local military tribunal for being a released civil prisoner of war on parole.⁴⁵⁰ Despite these guarantees, he was called up to service in 1918.⁴⁵¹ On the authority of *Robinson*, a magistrate found him guilty of being an absentee and ordered him transferred to military custody.⁴⁵²

King appealed his conviction, claiming an exemption under the "prisoner of war" clause.⁴⁵³ Mr. Justice Darling, who had been a member of the panel in *Robinson*, found the case distinguishable. He could see "no good whatever" in requiring King to serve, since the appellant had given his word that he would not.

[W]hen we are dealing with an enemy such as Germany, whose plighted word is not worth anything, we ought ourselves to be very careful not to give any reason to suppose that we should encourage any Englishman,

443. *Id.*
 444. *Id.* at 308-09.
 445. *Id.*
 446. *Id.*
 447. *Id.*
 448. *Id.*
 449. *Id.*
 450. *Id.*
 451. *Id.*
 452. *Id.*
 453. *Id.*

soldier or not, to break a solemn undertaking on oath given before an officer in Germany by which he got an advantage.⁴⁵⁴

Acknowledging that moral attitudes shaped his views, he added that “[i]t may be that one’s judgment in this case is somewhat coloured by that feeling.”⁴⁵⁵

The judges’ formal reasoning in the case was hardly persuasive. Mr. Justice Darling’s theory was that unlike the temporary train detentions in *Robinson*, being prevented from leaving Hamburg was “really equivalent to imprisonment.”⁴⁵⁶ It was true that “Hamburg is a large place,” but this was of no consequence since “many prisons are large.”⁴⁵⁷ Moreover, it was not necessary that “interned” should mean confined in a place that was limited or constructed in a particular way.⁴⁵⁸ Mr. Justice Bailhache reached the same result on a different, equally implausible basis. In contrast to his colleague, he thought that internment must occur in a place “with some definite limits and set aside for that purpose,” but it was not necessary that the captors go through the form of actually placing the prisoner there “even for five minutes.”⁴⁵⁹ It was sufficient that King “was told that he would be so placed.”⁴⁶⁰ The contorted analysis in both opinions suggests that the judges were influenced by King’s position in the spectrum of wartime respectability. They went out of their way to give special consideration to a gentleman who had given his word of honor to the Germans, was trying to keep it, and had for two years been told by various authorities in Britain that he would not be required to violate it.

The courts extended their war-informed moralism to alien litigants as well. Civilian alien enemy detainees, reconceived as German enemy combatants, were considered to be dishonorable. As the court remarked in *Liebmann* when justifying the government’s detention policy, in a contest with people who consider that “no blow can be foul,” the government need not “wait for proof of an overt act or for evidence of an evil intent.”⁴⁶¹ Finding that aliens were German “combatants” and prisoners of war rather than civilians “preventively” detained meant in effect that the internees were not “innocent” civilians but morally deserving of their harsh fate.

454. *Id.* at 310.

455. *Id.*

456. *Id.*

457. *Id.* If he had attempted to leave, the judge continued, he would have been imprisoned and confined in a smaller place than Hamburg. He was thus “practically imprisoned” rather than, as in *Robinson*, merely detained for inquiry. *Id.*

458. *Id.*

459. *Id.* at 311.

460. *Id.*

461. *R. v. Superintendent of Vine Street Police Station ex parte Liebmann*, [1916] 1 K.B. 268, 278.

Naturalized subjects of alien origin received more discriminating treatment. Two cases involving naturalized Germans, reaching opposite conclusions as to the permissibility of discriminating between naturalized and natural-born citizens, suggested the influence on the court of the relative respectability of the individuals before it. In *Ernest v. Commissioner of Metropolitan Police*,⁴⁶² a naturalized British subject changed his name in 1915 from Maurice Ernst to Maurice Ernest, thereby violating a DORA regulation that prohibited a naturalized person from using any name other than the name by which he was ordinarily known at the commencement of the war.⁴⁶³ Ernest pointed to the fact that the British Nationality and Status of Aliens Act 1914⁴⁶⁴ entitled a naturalized subject to "all political and other rights, powers, and privileges" of a natural-born British subject.⁴⁶⁵ The court concluded that the Act had been superseded by the regulation, which had the force of statute and impliedly repealed any rights conferred under the Act.⁴⁶⁶ In addition, the court determined that it was not ultra vires for regulations to discriminate between different classes of citizens, given that naturalized subjects were "more disposed than others to do acts injurious to the welfare of the State."⁴⁶⁷ Mr. Justice Darling was particularly unsympathetic to Ernest because he had received a prior warning from the police and chose not to act on it: "There is no grievance, for the fact that proceedings were taken against the appellant before the magistrate was his own fault."⁴⁶⁸

In contrast, however, where a naturalized German was not only blameless but also an eminent member of the Privy Council, the court suddenly found it unacceptable to discriminate between naturalized and natural-born subjects. Sir Edward Speyer had become a naturalized British subject in 1892 and began serving as a member of the Privy Council in 1909.⁴⁶⁹ Highly respected before the war, he was subsequently attacked in certain quarters for his German origins.⁴⁷⁰ He resigned his privy councillorship and asked the Prime Minister to revoke his baronetcy, but the King and Prime Minister refused to accede to his requests.⁴⁷¹ Undeterred by this impressive show of

462. 121 L.T.R. 222 (K.B. 1918).

463. *Id.* at 222.

464. 4 & 5 Geo. 5, c. 17.

465. *Ernest*, 121 L.T.R. at 223.

466. *Id.* at 224.

467. *Id.* Mr. Justice Darling observed that if naturalized subjects "give up a name with a German sound, it is more difficult for the police to discover what persons are doing who may be supposed not to have the best intentions with regard to this country." *Id.* at 223.

468. *Id.* at 224.

469. *R. v. Speyer*, 115 L.T.R. 89, 92 (C.A. 1916).

470. *Id.*

471. See GARNER, *supra* note 56, at 71.

support for Speyer, the Anti-German League brought legal proceedings to remove him from the Privy Council.⁴⁷² The League argued that DORA had impliedly revived an old disability in the Act of Settlement 1700 preventing naturalized subjects from serving as privy councillors or members of Parliament.⁴⁷³

The Court of Appeal, in an elaborate and meticulous analysis, inferred the presence of a right to hold the office from statutory silence on the subject of disability. Lord Swinfen Eady remarked that it was "incredible," if Parliament intended to keep alive a disqualification for membership in the Privy Council, that it had not been mentioned.⁴⁷⁴ In his view, general words conferring equality on naturalized subjects in the British Nationality Act 1914 impliedly overrode the specific disabilities in the Act of 1700.⁴⁷⁵ He insisted that the practice of "repealing earlier enactments by express words has been by no means universally adopted in our legislation."⁴⁷⁶ Thus, parliamentary silence plus "general language" sufficed to allow a naturalized German to retain a high position of state, although in *Halliday* the same approach to statutory construction had forced naturalized Germans into internment camps. An eminent German performing valuable service to the state, held in esteem by King and Prime Minister, was spared discrimination on the basis of his naturalized status.

B. Ranking Values: Property Trumps Morality

Perhaps most revealingly, in the property cases the courts declined to draw any moral distinctions at all, treating all victims of governmental confiscatory policy as equally "deserving." This suggests that preserving private property was an even higher value for the courts than moral discrimination. During the war the courts protected the property rights not only of British subjects, but even those of enemy aliens and Irish rebels—two suspect groups whose claims to rights of personal freedom received coldly dismissive treatment.

The uniform protection of property rights was strikingly evident in two House of Lords cases decided at the end of the war, one dealing with aliens and the other with Irish property. The first, *Hugh Stevenson & Sons v. Aktiengesellschaft Fur Carton-Nagen-Industrie*,⁴⁷⁷ protected German property not just against the Crown

472. *Id.*

473. *Speyer*, 115 L.T.R. at 90.

474. *Id.* at 92.

475. *Id.* at 93.

476. *Id.* at 96. Lord Bankes agreed, acknowledging that the language of the 1914 Act was not "happily chosen." *Id.* at 98.

477. [1918] A.C. 239 (H.L.).

but also against British citizens. At the outbreak of war the government did not confiscate enemy assets but liquidated many enemy businesses, placing their assets in the safekeeping of government-appointed custodians. Some businesses with enemy ownership were allowed to remain in operation under the strict supervision of the Board of Trade.⁴⁷⁸ A policy of confiscation of enemy assets would have met strong opposition within the financial community, as it would have undermined the confidence of other countries in the security of private property in Britain.⁴⁷⁹

Hugh Stevenson involved a German-British partnership dissolved at the outbreak of war. The British partners continued to operate the company, and the question was whether they could use the existing machinery without making an allowance to their former German partners.⁴⁸⁰ At the trial level, Mr. Justice Atkin determined that the Germans could recover their portion as of the outbreak of war but were not entitled to any subsequent profits or interest.⁴⁸¹ In the Court of Appeal, one judge agreed with Mr. Justice Atkin, while two others held that the German interest must be respected.⁴⁸² The House of Lords affirmed the majority decision below, concluding that the British partners carried on the business as trustees for the enemy partners, who would be entitled at the end of the war to their proportionate share of the profits.⁴⁸³ Firmly rejecting cases in the United States ruling that no interest could accrue to enemies during the war, the court insisted that such precedents were not in conformity with English law.⁴⁸⁴ As Lord Finlay declared: "It is difficult to see on what principle the interest is to be forfeited if private property is to be respected."⁴⁸⁵

If *Hugh Stevenson* preserved the property rights of enemy aliens, *Johnstone v. Pedlar*⁴⁸⁶ extended the property principle to a litigant who otherwise seemed destined to fail: an alien Irish-born rebel.

478. See Trading with the Enemy Act, 1914, 4 & 5 Geo. 5, c. 87, §§ 2-3; Trading with the Enemy Amendment Act, 1914, 4 & 5 Geo. 5, c. 12; Trading with the Enemy Amendment Act, 1915, 5 & 6 Geo. 5, c. 79; Trading with the Enemy (Extension of Powers) Act, 1915, 5 & 6 Geo. 5, c. 98; Trading with the Enemy Amendment Act, 1916, 5 & 6 Geo. 5, c. 105; see also BIRD, *supra* note 56, at 11, 322-23; GARNER, *supra* note 56, at 87.

479. BIRD, *supra* note 56, at 336; see Ronald F. Roxburgh, *German Property in the War and the Peace*, 37 L.Q. REV. 46, 46 (1921) (pointing out that German property was not confiscated but liquidated and retained to pay Germany's reparations).

480. [1917] 1 K.B. 842 (C.A.)

481. [1916] 1 K.B. 763.

482. [1917] 1 K.B. 842 (C.A.).

483. [1918] A.C. 239 (H.L.).

484. *Id.* at 245, 255-56, 259.

485. *Id.* at 245. The Lords counseled that the temporary suspension of the remedy should not be confounded with the permanent loss of the right. *Id.* at 247, 253-54, 258.

486. [1921] 2 A.C. 262 (H.L.).

Pedlar had become a naturalized United States citizen, participated in the Easter rebellion, suffered internment, and upon his release engaged in illegal military maneuvers in Ireland.⁴⁸⁷ Eventually rearrested and imprisoned, he sued to recover a sum of £124 that the police had seized from him at the time of his arrest.⁴⁸⁸

The government claimed that the plaintiff was an alien and that the Crown could ratify seizure of his money as a discretionary act of state.⁴⁸⁹ Rejecting this contention, the Lords held that such a defense was not available against British subjects; further, an alien friend residing within the realm with the permission of the Crown was to be treated in the same manner as a British subject.⁴⁹⁰ Pedlar's right to equality existed, the court ruled, even though he had committed treason against England.⁴⁹¹ As the Crown had not revoked its allegiance to Pedlar by charging him with treason, he was entitled to his property. According to Lord Phillimore:

The respondent has indeed no merits. On his own admission, he might have been tried, convicted and executed for high treason. His conduct shows evidence of much hostile feeling. He has since been expelled and rightly expelled from the country. But at the time when his money was taken from him, he was residing in the country, like any other alien, with the tacit permission of the King. He owed temporary allegiance to the King and for that reason could have been tried for high treason; but he was entitled till his trial to ordinary protection.⁴⁹²

His unworthiness, in other words, was irrelevant to his right to recover his money.⁴⁹³ Thus, to protect the principle of private property, the Lords were willing to protect the property even of an Irish-born alien in open rebellion against the government. Like *Hugh Stevenson*, *Pedlar* underscored the fact that property rights, even of persons at the bottom of the moral hierarchy, commanded a judicial sympathy that claims to personal freedom did not.

487. *Id.* at 269.

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.* at 297.

493. As in *Chester and Newcastle Breweries*, the court in *Pedlar* was also careful to maintain rights of judicial access to secure property. If aliens were not placed in the same position as British subjects with respect to tort claims against the government for recovery of property, Lord Finlay proclaimed, they would be "at the mercy of any department entitled to use the name of the Crown." *Id.* at 273. Such an unfortunate consequence would have "far-reaching" effects upon aliens in the country as to rights to person and property. *Id.*

VII. CONCLUSION

Historians have criticized the English courts during World War I as being too deferential to the executive and overly eager to sacrifice individual rights. The wartime judges, they have insisted, failed to exercise sufficient oversight of the government or carve out adequate space for individual liberty. This portrayal, while certainly true on one level, is nonetheless misleading, and this Article has argued that historians must view judicial behavior during World War I with a more nuanced and discriminating eye. The judges' frequent statements proclaiming deference to the government were ultimately no more reliable than their repeated vows of commitment to individual liberty. In dealing with issues of internment, deportation, conscription, and confiscation of property, the courts in fact pursued an activist political, institutional, and moral agenda.

First, engaging in a judicial activism that generally coincided with governmental interests, the judges waged the war in ways that that went beyond parliamentary intent. They did so through innovative and inconsistent strategies of statutory interpretation, sometimes inferring additional powers from silence and at other times adopting literal interpretations of textual language. They also manipulated techniques of common law analysis, revealing themselves particularly agile in expanding prerogative powers over the alien population.

Second, the courts formally asserted and preserved their own institutional power. Even in the domain of personal liberty, they maintained their autonomy and authority to review executive conduct, especially through the writ of habeas corpus. Regardless of the substantive results of the cases, the judges found all issues to be justiciable and rendered decisions on the merits. In addition, they applied more rigorous legal standards to government conduct in selected instances, investigated whether there was adequate factual evidence to support executive actions, and required the government to adhere to a particular process when it acted in a "judicial" capacity. The traditional "individual rights" framework that has permeated scholarly analysis, focusing on substantive results in conflicts between individuals and the state, obscures the fact that during the war the courts meticulously safeguarded and indeed enhanced their institutional authority.

Third, in stark contrast to their approach to issues of liberty, the judges actively promoted rights of private property, particularly regarding matters of compensation, taxation, and judicial access. In statutory cases they struck down governmental regulations and orders as being unreasonable or unauthorized by Parliament, and in prerogative cases they restricted the traditional common law power of

the Crown to expropriate property without paying mandatory compensation.

Finally, the courts suffused their judgments with moralistic overtones, rendering decisions that reflected evolving notions of wartime moral respectability. They expanded conventional Victorian moral concepts to incorporate a new criterion of worthiness based on national origin, relegating aliens and the Irish, along with persons of more traditionally "undeserving" character, to the bottom of the wartime moral hierarchy. As this Article suggests, a pervasive moralism, reconfigured to include patriotic criteria, was an important determinant in judicial outcomes.

The varying moral perspectives and political predilections informing judicial decisions led to many inconsistencies and contradictions in wartime jurisprudence. Legal standards and levels of review varied both according to the substantive right at issue—liberty or property—as well as the perceived moral status of the litigant. This absence of uniformity was hardly an attractive feature of wartime decisionmaking, but it nonetheless substantially qualifies the notion that the courts during the war demonstrated only undifferentiated acquiescence to the executive. More forceful and less flaccid than they have been depicted, the judges pursued with vigor their chosen substantive and institutional priorities.

Arguably, of course, the judiciary's activism in selected areas only underscores its failure with respect to civil liberties. That is, the judges' bold success in other spheres makes their abdication of any effective role in preserving individual liberty even more indefensible. Indeed, their position on civil liberties contributed to a persistent national culture tolerant of infringements on individual freedom. Despite sanguine expectations in 1914 that suspensions of individual rights would only be temporary,⁴⁹⁴ emergency controls continued long after the war had ended.⁴⁹⁵ Much less peripheral than usually pictured, the judges were, as a consequence, far more culpable.

494. In 1915 Lindsay Rogers expressed his belief that emergency measures would only be temporary. He wrote that "extraordinary situations require extraordinary remedies, and there is no reason to believe but that the Englishman's traditional love of liberty, of due process of law, of security, will persist so strongly that when the war is over there will be a reestablishment of all safeguards, and the temporary lapse will not afford a binding precedent for similar action, when the times are not so abnormal." Rogers, *supra* note 44, at 37; see Clarke, *supra* note 41, at 41 (stating that after four years of DORA, "people will be glad to feel that their liberty of action and speech is once again only checked by the ordinary law of the land").

495. A standing power to introduce restrictions was conferred on the government in the Emergency Powers Act, 1920, 10 & 11 Geo. 5, c. 55. DORA itself was not repealed until the Statute Revision Act, 1927, 17 & 18 Geo. 5, c. 42. See INGRAHAM, *supra* note 42, at 296 n.24. Many restrictive provisions of DORA were retained in various statutes. See, e.g., Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75; Firearms Act, 1920, 10 & 11 Geo. 5, c. 43; Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46; Shops Act, 1920, 10 & 11 Geo. 5, c. 58. ARA, far from being discarded at the end of the

Most important, the World War I experience sharply illustrates the ability of the judiciary to manipulate concepts, doctrines, standards, and techniques to achieve its objectives. For judges to affirm their institutional power to review executive conduct is critical, but hardly sufficient, to safeguard individual liberty. During the war the English judiciary used its power and resources to promote not personal freedom but other substantive priorities such as military success, property rights, and traditionalist and nationalist moral values. The historical lesson is that courts do not respond automatically to events, and they surely do not automatically serve as guardians of civil liberties. Judicial power must be used to a purpose. In the current period of "perpetual war," it is to be hoped that judges will exercise their rights of review in a manner far more hospitable to individual freedom than did the warrior judges of World War I.

war, was adapted and strengthened by the ARA Amendment Act, 1919, 9 & 10 Geo. 5, c. 92. The deportation provisions introduced during the war survived for decades. See SHARPE, *supra* note 2, at 117-18. The Incitement to Disaffection Act, 1934, 24 & 25 Geo. 5, c. 56, and the Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, also developed from wartime legislation. See EWING & GEARTY, *supra* note 2, at 25, 93 ("Here again what began life as emergency powers to deal with the defence of the realm gradually became part of the general law.").

