

BEYOND THE RULE OF LAW:
ASPECTS OF THE DEFENCE OF THE REALM ACTS
AND REGULATIONS, 1914-1918

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ASPECTS OF THE DEFENCE OF THE REALM ACTS AND REGULATIONS, 1914-1918

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ABSTRACT

No piece of war legislation enacted in Great Britain during the First World War had such diverse and far-reaching effects as the Defence of the Realm Act, one of the first emergency steps taken by Asquith's Liberal Government in August 1914. The acronym DORA, by which contemporaries soon began referring to this general emergency statute, or 'enabling' law, is a familiar one to anybody with the most cursory knowledge of the British Home Front between 1914 and 1918. Both the act and its supplementary code of regulations are often mentioned, but seldom explained, in historical accounts of Britain and the First World War. There is in this substantial body of work, however, no detailed treatment of DORA; its legal and constitutional aspects have been especially neglected.

For the past thirty years the historiography of Home Front in Britain during the First World War has been dominated by study of mass participation in the war effort and of the long-term social and political consequences of this mobilisation for 'total' war. This influential 'war and social change' school of historical thought has been contested by historians who view modern industrialised warfare as the occasion for, rather than agent of, change and by those who question whether 'total' war has materially affected class or gender inequalities at all. Yet all three shades of historiographical opinion have to a large extent been debating an agenda set by issues of social structure, gender, social provision, prices and incomes, and public health. Without challenging directly this broad historiographical tendency, this thesis does imply that, if the transformative effects of war, or otherwise, are to be properly assessed, then issues of the law and constitution deserve rather more attention than they have received hitherto.

Although the thesis attempts to convey the range of uses to which DORA was put by successive wartime administrations, it concentrates on a number of contentious civil liberties issues. After the examination in chapter one of DORA's origins, a series of related case studies deal with the following subjects: wartime challenges to customary judicial procedures; the impact of DORA on organised opposition to British war policy; and, finally, the assortment of coercive measures that were implemented to address the problematical venereal disease question. The epilogue surveys the role of DORA in the aftermath of war. The unitary theme of these chapters is the contribution of DORA to the erosion of executive accountability and the growth of state power in wartime Britain. To place so much weight upon questions of civil liberties is perhaps to risk regressing to the old, whig-liberal view of the wartime state as a portent of totalitarianism and of war in general as an unfortunate interruption in the orderly march of liberty and progress. However, the expansion of the British state has become a focus of much renewed critical scrutiny of late, and the thesis is certainly reflective of this historiographical reorientation.

This thesis is based to a large extent on the records of the Home Office and the War Office—the two departments most intimately involved with the special powers that have been selected for analysis. It is principally concerned with the evolution and administration of some exceptional war measures. Yet considerable attention is also paid to the critical response which these governmental initiatives elicited and to the overall civil libertarian and constitutional case against DORA. The distinctive contribution of this work is its clarification of some assumptions which both contemporaries and historians have made about this controversial body of war legislation. The ensuing discussion, therefore, closes a sizeable gap in the historical literature. In addition, this study of DORA should raise some broader

questions about the changing character of government in twentieth-century Britain in particular, and about emergency executive discretion in democratic political systems generally.

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CONTENTS

Abstract	iii
Acknowledgments	vi
Lists of Abbreviations	ix
Introduction	1
1. A Liberal State Contemplates War: The Origins of DORA	32
2. Military Jurisdiction and the Right of Civil Trial	61
3. "Secret Trial or No Trial": The Controversies over Trials in <u>Camera</u> and Regulation 14B	90
4. DORA and Dissent I: The Use and Abuse of Regulation 27	130
5. DORA and Dissent II: Censorship by Administrative Order	170
6. The Contagious Diseases Acts Revisited? DORA and the Venereal Disease Question	214
7. Epilogue	250
Conclusion	273
Appendices	279
Bibliography	287

ABBREVIATIONS

CID	Committee of Imperial Defence
CIGS	Chief of the Imperial General Staff
CMA	Competent Military Authority
CNA	Competent Naval Authority
DMI	Director[ate] of Military Intelligence
DORA	Defence of the Realm Act
DORR	Defence of the Realm Regulation
DPP	Director of Public Prosecutions
FSC	Friends Service Committee
GOC	General Officer Commanding
ILP	Independent Labour Party
MIS	Security Service
MO5	Special Section, Military Intelligence Branch, War Office
NCCVD	National Council for Combating Venereal Diseases
NCF	No-Conscription Fellowship
UDC	Union of Democratic Control

ABBREVIATIONS USED IN THE NOTES

ADM	Admiralty Papers
BLPES	British Library of Political and Economic Science
CAB	Cabinet Papers
CPT	C.P. Trevelyan Papers
<u>DN</u>	<u>Daily News and Leader</u>
FO	Foreign Office Papers
<u>HI</u>	<u>Historical Journal</u>
HMSO	His Majesty's Stationery Office
HO	Home Office Papers
<u>LL</u>	<u>Labour Leader</u>
<u>MG</u>	<u>Manchester Guardian</u>
PD	Hansard, Parliamentary Debates, fifth series
PP	Parliamentary Papers
SRO	Statutory Rules and Orders
WO	War Office Papers

INTRODUCTION

The Scope of DORA

Early in December 1914, the Daily News expressed disquiet at the new Defence of the Realm Consolidation Act. The powers which it had conferred upon the executive were, according to this voice of English Radicalism,

ample enough to turn this country into a Socialist Mecca or to start an unending stream of heads rolling into the mud of Tower Hill; and between these two extremes there is space for an infinity of lesser plagues and vexations.¹

Behind the hyperbole of this statement lay some insight into the versatility of this novel piece of emergency powers legislation. During the next four years DORA helped construct an imposing edifice of supply, production, pricing, and distribution controls over the war economy. DORA also had a dramatic effect upon civil liberties in wartime Britain. Among the many "lesser plagues and vexations" for which DORA provided the legal authority might be included the black-out, for example, or the regulation of alcohol consumption and horse racing.

A Defence of the Realm Bill had been introduced and passed on 7 August 1914, three days after the British declaration of war on Germany. This first DORA was soon extended by an amending law of 28 August 1914. These two statutes were shortly superseded by a third, which came into effect on 27 November 1914. It is this Defence of the Realm Consolidation Act to which most contemporaries (and historians) have referred when employing the acronym DORA. Two important amendments to this statute were carried the following

¹ "The World we Live in," DN, 2 Dec. 1914, 4.

March. The first of these curbed the judicial authority of the military in DORA cases. The second increased the powers of the state over munitions supply and was a prelude to the sweeping war production and manpower controls ushered in four months later by the Munitions of War Act. In May 1915 a separate DORA established state control of the liquor trade in certain areas. The Defence of the Realm (Acquisition of Land) Act of December 1916 protected the state against the loss of public money expended on the buildings and plant constructed on requisitioned property. In May 1918 a Defence of the Realm (Food Profits) Bill was passed in order to penalise speculative trading in foodstuffs. The related Defence of the Realm (Beans, Peas and Pulse Orders) Act of June 1918 affirmed the purchase price for a consignment of these commodities, set by the Food Controller in May 1917 but since challenged successfully in court by some aggrieved wholesale traders.²

The first DORA was a 'framework' law which stated that "His Majesty in Council has power during the continuance of the present war to issue regulations...for securing the public safety and the defence of the realm." Initially, there was some uncertainty as to the extent of this ordaining power. These doubts were reduced by the act of November 1914 but never completely eliminated. In July 1915, for example, the Parliamentary Draftsman advised legislating the confirmation of the Defence of the Realm Regulations. However, the Home Secretary saw "some danger in suggesting that we have exceeded our powers," and nothing came of this proposal.³ The majority of controls and prohibitions pertaining to the defence of the realm continued to be implemented by delegated legislation. Wartime governments sought the formal sanction of Parliament only on the few occasions cited above. Some 31 DORRs were put in place by the Order in Council of 12 August 1914. By April 1915 67 regulations were in force, and this total had climbed to 131 by late July of the following year.

² For these and all future references to, or quotations from, the various Defence of the Realm Acts, see Appendix A.

³ HO 45/11007/271672/71B, Sir John Simon (minute), 15 July 1915; F.F. Liddell to Sir Edward Troup (Permanent Under-Secretary, Home Office), 15 July 1915.

The fourth Defence of the Realm Manual, revised to 31 May 1917, contained 206 regulations, to which another 54 had been added by the end of the war. Many DORRs were periodically extended or revised. In all, some 86 Orders in Council issued from DORA during the First World War; the first 4 referred to the original statute, the remainder to the act of November 1914.⁴

To understand how this huge weight of delegated legislation accumulated between 1914 and 1918 is to understand a great deal about the changing character of the British state at war. DORA impinges on a range of separate issues that are well covered in the secondary literature: government labour policy and wartime industrial relations, for example, pacifism and dissent, propaganda and censorship, and the mobilisation of the nation's material and manpower resources for 'total' war. But the substantial corpus of scholarship on Britain and the First World War lacks a coherent, overall treatment of DORA. This thesis was conceived as a wide-ranging inquiry into the growth of state power in wartime Britain. Yet it would be impossible, in a study of this scope, to assess every policy initiative for which a DORR was drafted. Instead, it will concentrate on the legal and constitutional dimensions of DORA and some of the civil liberties issues raised by the act and part of its auxiliary code of regulations. The thesis is primarily a study of the inception and enforcement of some extraordinary powers relating to three aspects of life on the British Home Front: the administration of justice, freedom of expression, and the vexatious venereal disease question. A secondary objective is

⁴ For citations to individual DORRs, refer to Appendix B. DORA Orders in Council were printed in the official London Gazette and often by the mainstream press as well. The consolidated code of DORRs was first published late in September 1914, in the official Manual of Emergency Legislation (London: HMSO, 1914), 409-17. The revised and updated version of this code appeared in each of the next 4 supplements to this volume, up to 31 August 1915. Thereafter, a separate Defence of the Realm Manual (London: HMSO) was devised, the first edition of which was issued in late May 1916. This increasingly bulky volume included the text of all statutes, regulations, and orders issued under these regulations. With the publication of the sixth edition in September 1918, the flood of orders relating to the supply and production of food and war material were hived off into 3 different volumes. The May 1915 amending act was accompanied by a separate code of regulations that applied exclusively to the sale and consumption of alcohol.

to evaluate the critique of DORA, which was stimulated by the encroachments of wartime governments onto the areas of policy that are here under review. After assessing the origins of DORA in chapter one, the next two chapters examine judicial procedures under the legislation. Chapters four and five are concerned with the impact of DORA on the antiwar movement in Britain. Chapter six scrutinises a number of DORRs aimed at women labelled as prostitutes. The final chapter discusses the lingering influence of DORA in the postwar era. Although a great many DORRs interfered with the rights of property owners and nurtured the growth of 'war collectivism' in the economic sphere, the thesis does not seek to fill in this corner of the wider civil liberties picture.⁵

Antecedents

The civil libertarian case against DORA rested on three related propositions, each of which will be examined separately to introduce some central themes of this study. The first charge levelled at DORA saw it as an avowedly liberal⁶ state's unexpected and disproportionate response to the crisis of war. The critics of DORA understood that the present threat to civil liberties was not without precedent in British history. Yet wartime Britain's Victorian political inheritance had supposedly opened a huge and more than a purely temporal breach between the present and such unavailing episodes as 'Pittite Repression'. For example, by August 1915 Lord Courtney had become sufficiently worried about the erosion of free speech under DORA as to remind the Liberal Home Secretary of the latitude enjoyed by the dissenting opponents

⁵ Although see below, 250-56. The legal basis of wartime economic control is examined briefly by E.M.H. Lloyd, Experiments in State Control at the War Office and Ministry of Food (Oxford, 1924), ch. 5.

⁶ The designation 'liberal' is not strictly coterminous with the political party for whose long term prospects the war proved so disastrous. The lower case usage is employed more loosely, to denote wariness of the wartime state, as opposed to party affiliation. In this connection, it needs to be remembered that there were a few civil libertarians of the Right and that the antiwar socialists of the Independent Labour Party were among the the staunchest defenders of individual and industrial freedom.

of the Crimean War. Sir John Simon acknowledged the "force of the historical argument" for tolerance presented by the veteran Liberal peer. But there had been nothing equivalent to the DORRs in either this or any other earlier struggle; an observation by which Courtney felt "completely if painfully answered."⁷

Sir John Simon was correct in his assertion that DORA had no parallel in any previous national emergency. A string of notoriously repressive laws had been enacted in the 1790s to counteract the influence of the 'British Jacobins'. But neither the Pitt nor the later Ministries of the French Revolutionary and Napoleonic eras had wielded a statutory power so sweeping and general as that conferred on the executive by DORA over one hundred years later.⁸ In a broader sense, however, DORA signified the modernisation of an emergency executive discretion that had never been forfeited by the Victorian liberal state, although, crucially, exercised latterly only at the margins, as opposed to centre, of the British Empire. Martial law, the legal basis of this civil and military emergency power, was one of the shadowiest areas of constitutional law. Martial law was simply the common law right, indeed duty, of the Crown, and all British subjects for that matter, to employ all necessary force (but no more) against rioters, rebels, or invaders. These powers had no statutory basis. No special rules suddenly applied after a proclamation of martial law. Even the proclamation itself served merely as notification that a state of emergency existed already.

The last proclamation of martial law on mainland Britain had been issued in response to the anti-Catholic Gordon Riots of 1780. Martial law had been proclaimed in Ireland in 1798 and again in 1803. After the failure of Irish rebellion, however, martial law appeared to lapse

⁷ Courtney Papers, XI/89/187-92, Simon to Courtney: 17 Aug. 1915; Courtney to Simon, 19 Aug. 1915.

⁸ Two Defence of the Realm Acts had been passed in 1798 and 1803, but these were hardly statutory precursors of DORA. They merely obliged the county authorities to compile census returns for civil defence purposes; neither law significantly enhanced executive freedom of action (see Linda Colley, *Britons: Forging a Nation, 1707-1837* [New Haven, 1992], 289-300).

into complete desuetude. Yet nineteenth-century constitutional texts still upheld the legitimacy of this form of emergency executive discretion.⁹ Martial law no doubt carried a distasteful association of tyranny for the educated mid-Victorian who shared the "pervasive middle class faith in which economic liberalism, political liberalism and social stability were all interlocked." The relaxed optimism of these years was, of course, profoundly blinkered. As Bernard Porter has argued, the contrasting norms of colonial rule and Irish government were not factored into this "grand liberal theorem."¹⁰ Martial law was employed on at least twelve occasions in British imperial possessions between 1805 and 1865. The frailties of the "grand liberal theorem" were further exposed by the lengthy catalogue of 'coercion' laws enforced in nineteenth-century Ireland. Forty-six such measures were passed to combat political violence and agrarian disorder between 1837 and 1887. This legislation usually provided an explicit sanction for steps which typically followed a proclamation of martial law: the suspension of civil jurisdiction, the restriction of freedom of movement and assembly, and the suppression of political organisations and publications.¹¹

On mainland Britain as well there was a certain, if lesser, discrepancy between liberal ideological formulations and the reality of strong government. The history of popular radicalism before 1850 is punctuated by instances of the yeomanry and the regular army assisting the civil power. Thereafter, civil peace was upheld mostly by new county and borough police forces. From around 1860, however, troops started once more to be deployed in aid of the civil power, increasingly at the behest of central government rather than local

⁹ Charles Townshend, "Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940," *HJ* 25 (1982): 167-75; Richard A. Cosgrove, "The Boer War and the Modernization of British Martial Law," *Military Affairs* 44, 3 (1980): 124.

¹⁰ Bernard Porter, The Origins of the Vigilant State: The London Metropolitan Police Special Branch Before the First World War (London, 1987), 182, 193.

¹¹ Townshend, "Legal and Administrative Problems of Civil Emergency," 168, 175.

authorities this time, and most often to assist in the policing of major industrial disputes.¹² Yet the wartime critics of DORA were broadly correct in identifying as unparalleled for almost a century the formal restrictions on British, or more accurately perhaps, English, freedoms that sprouted from DORA's statutory roots. These civil libertarians no doubt lamented the excesses of colonial rule, the depressing record of Irish 'coercion' and the occasional resort to heavy-handedness at home. But they preferred to see DORA as an aberration and not as the refinement of existing civil and military emergency methods.

The opposition to DORA grasped the crucial importance of replacing martial law with a statutory emergency code. This shift was started well before the outbreak of war by the military, who wished to circumvent the legal ambiguities of the common law emergency power. The military's understanding of martial law was conditioned by its vivid collective memory of two infamous nineteenth-century episodes: the Bristol Reform Riots of 1831 and the Jamaica Rebellion of 1865. On the first occasion the Mayor of Bristol was tried for failing to disperse a pro-Reform crowd. After his acquittal the commanding officer of the local military detachment was held accountable for the collapse of public order in the city. This disgraced Colonel committed suicide and his subordinate was dishonourably discharged. Nor could the military err safely by exceeding their mandate, as the aftermath of the ruthlessly crushed Jamaica Rebellion demonstrated amply. Aside from the wave of liberal introspection about Britain's imperial role brought forth by this incident, the prosecution of Governor Eyre and two army officers "threw the problem of emergency powers into the foreground of British

¹² F.C. Mather, Public Order in the Age of the Chartists (Manchester, 1959), chs. 3-5; T.A. Critchley, A History of the Police in England and Wales, rev. ed. (London, 1978), chs. 2-4 passim; Jane Morgan, Conflict and Order: the Police and Labour Disputes in England and Wales 1900-39 (Oxford, 1987), ch. 3; Keith Jeffery, "Military Aid to the Civil Power in the United Kingdom: An Historical Perspective," in Military Intervention in Democratic Societies, ed. Peter J. Rowe and Christopher J. Whelan (London, 1983), 52-53. According to Jeffery's evidence the army supported the civil authorities on 24 occasions between 1870 and 1908.

politics."¹³ These men were acquitted, but, from a military viewpoint, the uncertainties surrounding their use of martial law were most unsatisfactory.

The leading late-Victorian constitutional authorities still emphasised the constraints which governed the resort to martial law. A.V. Dicey included a short discourse on this subject in his seminal Introduction to the Study of the Law of the Constitution. First published in 1885, this remained the most influential treatise on the British constitution until well after the author's death in 1922. Addressing the issue of emergency executive discretion, Dicey accepted the controlled use of martial law. But this common law power might be invoked only if the civil courts had been rendered inoperative. In addition, crown servants were answerable for any unlawful acts which they committed, unless they were provided with ex post facto legal indemnification. Thus, crisis government was legitimate, but not all constraints on untrammelled executive discretion were thereby lifted.¹⁴ Dicey's position was reinforced by another eminent Victorian jurist, F.W. Maitland. The less abstract Maitland, however, applied his "finely honed historical sense,...[and] surmised that in an actual crisis the military would use little restraint."¹⁵

Dicey also insisted that the delegation to the executive of broad and predetermined emergency powers was congruent only with the French-style état de siège and quite inimical to British legal traditions.¹⁶ He was implying that British subjects were far better insulated against executive abuse of power during wartime than their less fortunate continental counterparts—an assumption which meshed with his overall mistrust of French administrative

¹³ Townshend, "Legal and Administrative Problems of Civil Emergency," 170 and passim; Bernard Semmel, Democracy versus Empire: The Jamaica Riots of 1865 and the Governor Eyre Controversy (London, 1962), especially ch. 6.

¹⁴ A.V. Dicey, Introduction to the Study of the Law of the Constitution, 8th ed. (London, 1915), ch. 8.

¹⁵ Cosgrove, "Modernization of British Martial Law," 124.

¹⁶ Dicey, Law of the Constitution, 288.

legal practice.¹⁷ In February 1915 Lord Chancellor Haldane struck the same mildly chauvinistic note as had the famous constitutional lawyer. He assured fellow peers that "there were introduced, under the Defence of the Realm Act, nothing amounting to the 'state of siege' in Continental countries." Yet the detailed regulatory schemes of DORA approximated quite closely the continental model of emergency executive discretion. No doubt unwittingly, Haldane was actually encapsulating the constitutional significance of DORA when he defined the emergency legal conventions of the French as

a condition of things intermediate between the normal condition and martial law, assuming the shape of a new Code under which very large discretion is given to the administrative authorities to interfere with the liberty of the subject.¹⁸

The military had been perplexed by Dicey's formulation of martial law. Instead of disputing the doctrinal basis of his arguments, however, the War Office began to lobby for a precise and easily verifiable set of rules governing the army's behaviour in emergency situations.¹⁹ Since the mid-1880s the advocates of emergency powers legislation had been striving quite openly for something analogous to the supposedly 'alien' état de siège.²⁰ DORA was the product of careful deliberation spread over many years. But the military viewpoint prevailed only after the outbreak of war in August 1914. An instrument of executive discretion more sophisticated than martial law, DORA had been shaped by military planners who thought that "every contingency should be provided for, and as little as possible left to

¹⁷ See Richard A. Cosgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist (London, 1980), 91-102.

¹⁸ PD (Lords), 4 Feb. 1915, 18, col. 452-53.

¹⁹ G.R. Rubin, "The Royal Prerogative or a Statutory Code? The War Office and Contingency Legal Planning, 1885-1914," in The Political Context of Law, ed. Richard Eales and David Sullivan (London, 1987), 145-154.

²⁰ See, for example, WO 32/7112/1A, Lieutenant-Colonel G.M.W. Macdonogh, "Home Defence: The Military Government of the Theatre of Active Operations or other Territory placed under Martial Law," 6 Jan. 1911.

chance and the inspiration of the moment."²¹

War, Civil Liberties, and the State

(i) The Ambiguities of DORA

The second broad charge in the indictment of DORA concerned the danger which it allegedly posed to civil liberties. The initials DORA soon acquired sinister overtones of an intrusive and unaccountable state power. They were anthropomorphised into that "cruel and capricious maiden who at the snap of her fingers could close down a newspaper, requisition a ship, or prohibit whistling for cabs."²² Some DORRs appeared to mirror the very Prussian militarism with which the British Army was engaged in mortal combat. DORA was often portrayed as part of an unholy trinity of legislative powers that were leading Britain inexorably towards the 'servile state' prophesied by the Edwardian social critic, Hilaire Belloc.²³ The Munitions Act had introduced a strict workshop discipline and curtailed the free movement of labour. The implementation of conscription in March 1916 challenged freedom

²¹ CAB 16/31/E.P.2, 1, "Memorandum by the General Staff on the Need for an Emergency Powers Bill," 1 May 1914.

²² Arthur Marwick, The Deluge: British Society and the First World War (London, 1965), 36.

²³ See, for example, Beatrice Webb's diary entry for 2 January 1916: "The Munitions of War Act and the Defence of the Realm Act, together with the suppression of a free press, has been followed by the Cabinet's decision in favour of compulsory military service. This decision is the last of a series of cleverly devised steps, each step seeming at once harmless and inevitable, even to the opponents of compulsion, but in fact necessitating the next step forward to a system of military and industrial conscription...The 'servile state' will have been established" (Norman and Jeanne Mackenzie, eds., The Diary of Beatrice Webb, vol. 3 [Cambridge, Mass., 1984], 244). This is an intriguing statement of civil libertarian disquiet, given the Webbs' general view of the war as an 'opportunity' for their Fabian strategy of incremental collectivist reform. Belloc was an idiosyncratic, Catholic reactionary, appalled at the drift of New Liberal social legislation before the war. Elements of his critique of state capitalism resurfaced later in the assault on 'war collectivism' mounted by the militant leaders of the rank and file labour movement in engineering. See James Hinton, The First Shop Stewards' Movement (London, 1973), ch. 1.

of conscience and upset the 'venerable' principle of voluntary military service.²⁴ DORA was another potent symbol of the state's determination to subordinate, if necessary, all aspects of social, economic, and political life to the imperative of military victory.

Most of the historical evidence presented in the following chapters does, indeed, build up an image of DORA as the thin end of a wedge driven by the pressure of war between the British people and their vaunted individual rights. From DORA there issued a formidable battery of legal powers, the draconian implications of which for civil liberties cannot but be noticed. Yet DORA did not wreak quite so much havoc on these civil liberties as its critics sometimes imagined. None of the prohibitions or restrictions featured below were employed indiscriminately by the responsible government departments—for the most part, the War Office and the Home Office. By March 1915 military jurisdiction over civilians had been drastically reduced. Comparatively few (non-Irish) British subjects of "hostile origins or associations" were interned without trial under Regulation 14B. The courts heard DORA cases in camera only infrequently. Dissent was not systematically muzzled, and the official response to the problem of venereal disease in the forces was hesitant. In addition, as the legal basis of 'war collectivism', DORA undermined the liberal state not only with governmental repression but with ostensibly progressive social and economic measures as well.

Both principal sources of official documentation employed here, the War Office papers and the Home Office papers, indicate a degree of caution in the use of those powers on which this thesis has chosen to focus. This wariness rarely reflected any tender solicitude for civil liberties. The moderation of the authorities was determined by more pragmatic considerations. For example, the prosecution of antiwar speakers and writers was eschewed to avoid further publicising their 'discreditable' causes. On the venereal disease question, the

²⁴ Gerry R. Rubin, "Explanations for Law Reform: The Case of Wartime Labour Legislation in Britain, 1915-1916," International Review of Social History 33 (1987): 250-70; Thomas C. Kennedy, The Hound of Conscience: A History of the No-Conscription Fellowship, 1914-1919 (Fayetteville, 1981), 1-5. Voluntarism in recruiting was an essentially Victorian convention.

War Office and Home Office were sensitive to the political and moral objections to 'state regulation of vice'. The opponents of DORA even registered the occasional tactical triumph: the restoration of civil trial, for example, the relaxation of Regulation 40D, or the amendment of Regulation 27C. These limited gains were secured largely because each of these issues estranged a wider constituency than the small minority of the British population who consistently defended civil liberties during the First World War.

Given the weight of countervailing pressure for truly drastic action in defence of the realm, any such partial concessions were significant. The military jurisdiction of DORA cases, for example, was treated by right-wing 'scaremongers' as a useful counter-espionage tool. The same spy fever and antialien hysteria underlay the zest for a more rigorous internment policy towards naturalised British subjects. Jingoistic politicians and publicists tended to equate all shades of dissent with 'pro-Germanism' or treachery. Both the Dominion governments and the votaries of 'national efficiency' in Britain urged the adoption of coercive approaches to the venereal disease problem. Inside government, junior and middle ranking departmental officials frequently advocated stringent measures that were vetoed by their superiors. More generally, the bulk of patriotic parliamentary and public opinion cared far less about individual freedom at home than about the success of the British Army in the field.

The effects of DORA on civil liberties in Britain could easily have been more devastating. Quite apart from popular support for, or at least tolerance of, extreme measures, DORA extended an astonishing degree of latitude to successive wartime administrations. The impact of theoretically draconian DORRs was softened only by political decisions. There was no legal mechanism of restraint in the language of DORA. After the legislative enactment of November 1914, the Cabinet was, effectively, empowered to take virtually any course of action that they judged necessary for the defence of the realm. Moreover, the courts invariably upheld the loose construction which the executive began to place upon the crucial enabling provision of DORA. The following ruling of the House of Lords, in the test case of the

executive's authority to intern without trial, captures the spirit in which courts at all levels tended to interpret both the statute and the DORRS.

However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement.²⁵

One constitutional-legal text pinpoints several cases in which "the subordination of the prerogative to common law and statute was emphatically asserted." Yet only after the Armistice was the wide scope of DORA's delegating authority thus circumscribed. In the heat of war, as the author concedes, the courts were "not averse...from straining the law in favour of the obvious necessities of a time of peril."²⁶

The preceding observations suggest some more general insights about the vulnerability of civil liberties under the British system of government. Mythologised notions of freedom were, of course, integral to the popular historical consciousness of early twentieth-century Britain. Long after the First World War even, the old association between British national development and a robust commitment to freedom was commonplace. Yet, in spite of the reverence with which liberty was regarded by commentators such as Dicey, the British constitution offered only a veneer of protection to the traditional British freedoms discussed in the Law of the Constitution. Under Dicey's rule of law, two modern legal scholars have noted, "freedom is not something that can be asserted in opposition to law; it is the residue of conduct permitted in the sense that no statute or common law rule prohibits it."²⁷ But Dicey looked on the residual nature of British freedom as a source of strength, to be compared more than favourably with "those declarations or definitions of rights so dear to foreign

²⁵ The Times, 2 May 1917, 4. See below, 123-25.

²⁶ Sir C.K. Allen, Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law, 2d ed. (London, 1956), 42, 44 and passim for discussion of the leading cases.

²⁷ K.D. Ewing and C.A. Gearty, Freedom Under Thatcher: Civil Liberties in Modern Britain (Oxford, 1990), 9.

constitutionalists."²⁸

Dicey understood that his sovereign Parliament might decide to exercise its incontestable legislative authority to the detriment of Britain's customary (as opposed to codified) structure of rights. In all but the most exceptional circumstances, however, the legislature and judiciary could be trusted to act as bulwarks of liberty. Dicey also denied that extraordinary legislative measures were "at best only a substitution of the despotism of Parliament for the prerogative of the Crown." Emergency powers were not inherently corrosive of the rule of law.

The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges.²⁹

Yet Dicey's understanding of parliamentary sovereignty was perfectly consistent with the enactment of still more draconian measures, such as DORA, which, at a stroke, authorised the executive to exercise additional, unspecified powers independently of the legislature's scrutiny. Nor could it be guaranteed that the judiciary would be unaffected by the atmosphere of crisis government. In truth, Dicey overvalued Parliament and the courts as institutional safeguards of freedom, just as he underestimated the leeway which Britain's unwritten constitution generally allowed for the expansion of state power and the abridgment of civil liberties.

(ii) Contemporary Viewpoints

The underlying ethos of DORA was perhaps most attuned to that authoritarian strain of British Conservatism which had been prominent in the Edwardian movements for Tariff Reform, 'national efficiency', rearmament, and compulsory military service. In DORA, Social

²⁸ Quoted in *ibid.*

²⁹ Dicey, Law of the Constitution, 408-09.

Imperialists such as Lord Milner sensed something "symbolic of the people's desire to place at the disposal of the Government all the human and material resources of the country."³⁰ The mainstream Unionist³¹ position was more ambivalent. The acceptance of an exalted state power 'for the duration' was balanced by a suspicion of the Milnerites' conception of an authoritarian, interventionist state.³² Unionists of all hues were more comfortable than most of their Liberal counterparts with the strident nationalism and xenophobia of the war years. One historian of the 'patriotic' political party during wartime has observed its "deeply running but ill-defined feeling that, in an infinite variety of ways, the Liberals were much less suited than the Unionists to deal with questions relating to the war."³³

Yet some Liberals, having resolved that the war was just, determined that nothing should inhibit its vigorous prosecution. They agreed that jettisoning liberal principles was not only acceptable, but also of paramount importance to strategic success. The erstwhile Radical, David Lloyd George, was the leading spokesman of this Liberal tendency inside the Government. Influential backbenchers struck similar attitudes, but the future Prime Minister's

³⁰ A.M. Gollin, Proconsul in Politics: A Study of Lord Milner in Opposition and in Power (London, 1964), 230-31; Robert Scally, The Origins of the Lloyd George Coalition: The Politics of Social Imperialism, 1900-1918 (Princeton, 1975), especially ch. 4's treatment of the prewar context. Lord Milner was the ideological mentor of a whole generation of Social Imperialists. High Commissioner of South Africa from 1897-1905 and a brooding presence on the domestic political scene in the decade before the war, Milner espoused imperial unity, social discipline, and elite bureaucratic rule. After the outbreak of war his stock rose even higher among his followers, owing to his previous experience of civil administration during the war years of 1899-1902. However, he remained in the political wilderness until the advent of the Lloyd George Coalition, inside whose War Cabinet he was perhaps the key figure during 1917.

³¹ In acknowledgment of the formal merger between the Conservative and Liberal Unionist Parties in 1912, the designation 'Unionist' is preferred to 'Conservative' throughout this thesis.

³² J.O. Stubbs, "The Impact of the Great War on the Conservative Party," in The Politics of Reappraisal, 1918-1939, ed. G. Peele and C. Cook (London, 1975), 33-34.

³³ Idem, "The Conservative Party and the Politics of War, 1914-1916," (D. Phil. thesis, Oxford, 1973), 101; quoted in Trevor Wilson, The Myriad Faces of War: Britain and the Great War, 1914-1918 (Cambridge, 1986), 199.

thinking was not typical of the Liberal Party's as a whole. Most Liberal ministers regarded as regrettable necessities the measures of compulsion which Lloyd George accepted without reservation. These Liberals could agree that in war, salus respublicae suprema lex, but they were unsettled by the implications of this maxim.³⁴ Another swathe of prowar Liberal opinion refused to concede that British freedoms must be surrendered temporarily in order to ensure their future survival. DORA, compulsory military service, and the Munitions Act were all disturbing and paradoxical domestic by-products of the international struggle for freedom. Former New Liberals articulated their disenchantment at the transformation of the state into an instrument of coercion, rather than orderly progress.³⁵ For some the rise of home-grown 'Prussianism' had, by late 1916, sapped all moral authority from the struggle against militarism abroad. The intrusiveness of the wartime state was one of several factors which persuaded growing numbers of prowar Liberals to seek a 'peace by negotiation'.³⁶

They joined in this quest that small body of dissenters who had decried the war as immoral and unjust from the outset. There were several strands of dissenting opinion in Britain: Radical-Liberal, Socialist, Nonconformist.³⁷ These disparate forces nevertheless shared a few fundamental propositions regarding shared responsibility for the war and the prerequisites of a lasting peace.³⁸ To the typical dissenter this war was not just destructive and unnecessary, it was an illiberal force as well. The opponents of British intervention had

³⁴ Trevor Wilson, The Downfall of the Liberal Party, 1914-1935 (London, 1966), 30-50.

³⁵ Michael Freeden, Liberalism Divided: A Study in British Political Thought, 1914-1939 (Oxford, 1986), ch. 2.

³⁶ H. Weinroth, "Peace by Negotiation and the British Anti-War Movement, 1914-1918," Canadian Journal of History, 10 (1975): 373-74. On the prowar British (especially Liberal) understanding of 'Prussian militarism', and the effect of this perception of Germany on planning for peace, see Lorna S. Jaffe, The Decision to Disarm Germany: British Policy towards Postwar German Disarmament, 1914-1919 (Boston, 1985), especially ch. 1.

³⁷ See Keith Robbins, The Abolition of War: The 'Peace Movement' in Britain, 1914-1919 (Cardiff, 1976), ch. 1.

³⁸ For a further elaboration, see below, 130, n. 2.

few illusions about the likely drift of domestic policy during wartime. The fanatically Cobdenite editor of the Economist saw "one vital omission" in the dissenting foreign policy platform of the fledgling Union of Democratic Control.

The first and most important thing is to prevent a military despotism being established in this country bringing with it conscription, protection and a substitution of martial law for trial by judge and jury. If this happens self government goes and all possibility of influencing the course of events on the lines you indicate.³⁹

For some dissenters the wartime state assumed an unusually malevolent countenance and the fate of individual freedom was the key issue thrown up by the war. DORA contributed to the declining confidence of Radicalism in the democratic potential of state power, judiciously deployed. The impetus of war to collectivist social and economic measures was more than outweighed by the simultaneous attack on the "hard-won achievements of nineteenth-century British Liberalism as a whole." As a result, the "basic building blocks" of the liberal creed took precedence over the collectivist thrusts of the New Liberalism.⁴⁰ In 1917 the New Liberal economist and political theorist, J.A. Hobson, published a lengthy and doom-laden testament of his personal ideological reorientation.

In war not only does the State become absolute in its relations towards the individual, but militarism becomes absolute within the State. The truth is attested in Great Britain by the virtually unlimited powers over the citizen vested by DORA in 'the competent military authority,' and by the novel powers exercised by Orders in Council for the application of that and other emergency Acts...

invasions of personal liberty have been made under Acts of Parliament or powers of the Executive, novel, ill-defined and arbitrary and by methods of procedure contravening the established practices of English law and the constitution.⁴¹

Having earlier regarded the struggle for individual rights as a closed chapter, Hobson now saw DORA as part of a renewed threat to the formerly secure safeguards of freedom.

³⁹ Morel Papers, F6/1, F.W. Hirst to E.D. Morel (Secretary, UDC), 19 Aug. 1914.

⁴⁰ Freeden, Liberalism Divided, 19, 26.

⁴¹ J.A. Hobson, Democracy after the War (London, 1917), 13-15.

Such Liberal disillusionment with the domestic ramifications of the war effort influenced profoundly the transition of Radical dissent from organised Liberalism to Labour. This shift in political allegiances was primarily a result of the Labour Party's adoption of a dissenting foreign policy.⁴² Yet also important was the growing sense that Labour cared far more than the Liberal Party about the core liberal principle of freedom.⁴³ Sections of the labour movement were impressed by the benefits of 'war collectivism' and the enhanced prestige this had brought the unions. From the libertarian socialist perspective, however, the war looked like "a stage in the construction of a state capitalism which would weigh even more heavily on the workers than nineteenth-century individualism."⁴⁴

This short examination of contemporary political perspectives on civil liberties and the wartime state is useful because a whole school of historical thought has sought to explain the high politics of wartime as an ideological contest between "freedom" and "organisation."⁴⁵ In this interpretive schema, the war automatically placed the adherents of liberal principle on the defensive. The strains of the conflict then divided organised Liberalism and hastened the collapse of this party as a viable political force. The ousting of Asquith from the premiership in December 1916 is usually portrayed as the last decisive action in this struggle—the Lloyd George Coalition being dominated by the Liberal Prime Minister and Unionist politicians who had no qualms about ditching liberal principle in the interests of military victory.

These party political developments lie outside the parameters of this study.

⁴² Marvin Swartz, The Union of Democratic Control in British Politics during the First World War, especially ch. 10; Catherine Ann Cline, Recruits to Labour: The British Labour Party, 1914-1931 (Syracuse, 1963), ch. 1.

⁴³ Peter Clarke, Liberals and Social Democrats (Cambridge, 1978), 194-202.

⁴⁴ Hinton, First Shop Stewards' Movement, 43-44.

⁴⁵ A.J.P. Taylor, "Politics in the First World War," repr. in Essays in English History (London, 1977), 229 and passim; Wilson, Downfall of the Liberal Party, chs. 1-3; Stephen Koss, "The Destruction of Britain's Last Liberal Government," Journal of Modern History 40 (1968): 257-77; Alfred Gollin, "Freedom or Control in World War I," Historical Reflections 2 (1975): 135-55.

Nevertheless, the historiographical controversy does have some relevance. Several recent works have revealed continuities of policy across one or both major political disjunctions of the war: December 1916 and May 1915, when Britain's last Liberal Government was replaced by the Asquith Coalition.⁴⁶ To a certain extent, this observation applies to the steady, continuous growth of DORA throughout the war. The advent of the Lloyd George Coalition did not herald a sudden civil liberties crisis. The new Unionist Home Secretary, for example, was just as hesitant to prosecute dissenters as his Liberal predecessors. Again, only in the spring of 1918 was a genuinely draconian venereal disease policy implemented. On the other hand, the introduction of Regulation 14B in June 1915 can be linked to the influence of antialien hardliners on the new Coalition. In addition, the authorities' tolerance of dissent was progressively diminished during 1917. Notwithstanding the reluctance to institute legal proceedings, there existed under DORA alternative, extra-judicial means for the containment of antiwar views. A different argument against 'continuity' would be the exponential growth of regulatory schemes of 'war collectivism' during the last eighteen months of the fighting.

Delegated Legislation and the Rule of Law

In 1925 the former Permanent Under-Secretary to the Home Office recalled that the easy recourse to the DORRs during wartime had been of invaluable administrative assistance:

While the war lasted they were essential to its successful prosecution. They took the place of legislation with the immense advantage that they could be altered from day to day as new demands arose, new difficulties had to be met, and new modes of evasion were detected.⁴⁷

However, this expedient was a source of grave disquiet to the defenders of civil liberties. In

⁴⁶ See, for example, John Turner, British Politics and the Great War: Coalition and Conflict, 1915-1918 (New Haven, 1992), ch. 2; Keith Grieves, The Politics of Manpower, 1914-1918 (New York, 1988), especially 3-4; J.C. Bird, Control of Enemy Alien Civilians in Great Britain, 1914-1918 (London, 1986) ch. 2 *passim*.

⁴⁷ Sir C.E. Troup, The Home Office (London, 1925), 239.

fact, the substitution of delegated legislation for statutory law constitutes the third general charge listed in their wartime indictment of DORA. It was seen as a sinister development which had transferred the legislative responsibilities of Parliament to the executive. DORA was, therefore, subverting the entire basis of accepted constitutional practice. This complaint was linked to the second area of civil libertarian concern because, without this discretionary ordaining power, DORA could not have caused quite the same damage to civil liberties. This third strand of criticism centred less on the substance of the DORRs than on delegated legislation as an administrative method.

It has already been noted that DORA was a 'skeleton' statute whose administrative frame was fleshed out by numerous Orders in Council. This form of legislation is characteristic of modern, bureaucratic government. It was less commonplace in early twentieth-century Britain, although not nearly so atypical as the critics of DORA presupposed. The latter shared A.V. Dicey's skewered view that delegated legislation suited only the French system of administrative law. Dicey stressed that the French model was incompatible with his rule of law, implicit in which was the absolute supremacy of a single jurisdiction, affording everyone, theoretically, the same degree of protection. The French droit administratif, by contrast, was distinct from ordinary law; it was a separate jurisdiction which existed to mediate the legal relationship between individuals and the state and, according to Dicey, placed French government officials above the ordinary law. More pertinently, the droit administratif also entrusted extensive legislative and judicial powers to the executive.⁴⁸

Dicey conceded that some executive freedom of action was inevitable, owing to the growing complexity of public administration. But in 1901 he was still writing that a bona fide administrative jurisdiction had "obtained no foothold in England."⁴⁹ This view held sway with other respected authorities on the constitution. Sir Courtenay Ilbert, for one, agreed with

⁴⁸ See Cosgrove, Albert Venn Dicey, 91-102.

⁴⁹ Quoted in *ibid.*, 99.

Dicey that delegated legislation savoured of the uniquely continental taste for bureaucratic and unaccountable government.

Englishmen have a deep-seated distrust of official discretion, a deep-seated scepticism about bureaucratic wisdom...If his liberty of action is to be subjected to restraint, he prefers that the restraint should be imposed by laws which have been made after public discussion in the representative assembly... Therefore, although he acknowledges the impossibility of providing for every detail in an Act of Parliament, and the consequent necessity of leaving minor matters to be regulated by statutory rules or by executive discretion, he scrutinizes with a jealous eye provisions which delegate the power to make such rules, or which leave room for the exercise of such discretion, and insists that they should be carefully expressed and limited, and be hedged round with due safeguards against abuse.⁵⁰

The wartime criticism of DORA often implied that these 'alien' administrative expedients were being foisted on the British people under the cover of a national emergency. There were calls for a restoration of the two constants in Dicey's personal "grand liberal theorem": parliamentary sovereignty and the rule of law. The proliferation of DORRs challenged the legislative authority of Parliament. The corresponding growth in executive discretion was corroding the rule of law. DORA was also seen as a threat to the rule of law in a more specific sense. By conferring quasi-judicial powers on special government tribunals, the legislation had strayed onto the jurisdiction of the courts. For example, a Defence of the Realm Losses Commission had been established to assess *ex gratia* compensation payments for requisitioned property. A Home Office Advisory Committee adjudicated the appeals of Regulation 14B internees, and a separate Home Office tribunal decided the fate of antiwar literature seized under Regulation 51.⁵¹

There were two problems with these constitutional criticisms. First, they overlooked the steady expansion of administrative jurisdiction in Britain during the previous century.

⁵⁰ Sir Courtenay Ilbert, *Legislative Methods and Forms* (Oxford, 1901), 39-40. As Assistant Parliamentary Counsel to the Treasury from 1886-1899, and Parliamentary Counsel from 1899-1902, Ilbert drafted a great deal of government legislation.

⁵¹ See below, 108-11, 182-86. The Losses Commission is discussed briefly by Marwick, *Deluge*, 139 and by Lloyd, *Experiments in State Control*, 51-57. The commissioners produced 4 reports and there is a detailed record of their deliberations in Treasury Papers 80/1-4.

Delegated legislation was a crucial instrument of the Victorian 'Revolution in Government'.⁵² It became even more prevalent under Asquith's reform-minded Liberal ministry before the war.⁵³ Dicey, an inveterate antistatist, had opposed the drift of prewar social policy not just on constitutional grounds. But many plaudits of Edwardian social reform were, ironically, among the most vociferous critics of government by bureaucracy during wartime.⁵⁴ The second flaw in the civil libertarian critique of delegated legislation was its imputation that British freedoms would be safer if only Parliament had a power of veto over the DORRs. The patriotic majorities in both legislative chambers cared little about breaches of constitutional precedent so long as the war was won. If contentious DORRs had been embodied in the statutory form, Parliament would no doubt have assented to most of this legislation.⁵⁵ The few Liberal and ILP MPs who regularly spoke out on civil liberties questions could rarely muster sufficient parliamentary strength even to force an emergency debate on DORA.

The defence of parliamentary sovereignty was also based on an outmoded view of British constitutional practice. It was naive to presume that, in the second decade of the twentieth century, legislation emanated from Parliament. When Bagehot published his celebrated study of The English Constitution in 1867, the Commons had already begun to assume the "dignified" role ascribed by the author to the monarchy and the House of Lords. The Reform Act of that year reduced the number of constituencies still small enough to be 'managed'. Local magnates were superseded by mass party organisation at the national and

⁵² To which historiographical debate Dicey himself, ironically, made a pioneering, if polemical, contribution with his 1905 Lectures on the Relationship between Law and Public Opinion in England during the Nineteenth Century.

⁵³ From 1894-1900 the average annual number of Statutory Rules and Orders was approximately 1000. This figure rose to 1349 for the period 1901-1914 and climbed to 1459 during the war years. The annual average peaked at 2275 for 1919-1921, before falling to around 1500 for the remainder of the interwar period (see Allen, Law and Orders, 31).

⁵⁴ Cosgrove, Albert Venn Dicey, 222-25; Freedon, Liberalism Divided, ch. 2 passim.

⁵⁵ Although see below, 228-30.

constituency level. The 'independent' member was eclipsed by the loyal party man. The reins of party discipline holding the individual MP became progressively tighter, especially after parliamentary seats were redistributed in 1884 and the franchise further extended the following year. Just as parliamentary democracy was becoming more inclusive, the constitutional significance of Parliament was diminishing. The increasingly busy legislative agenda was set entirely by the Cabinet. Parliament simply did not have a legislative influence independent of the evolving two party system to which it was so firmly tied.

The critique of delegated legislation was not fully cognisant of either wartime political realities or of recent constitutional developments. The contemporary case against DORA becomes more compelling, however, if the use of delegated legislation is considered in conjunction with the general diminution of Parliament's role during wartime, and if two other points are taken into account as well. First, the opponents of DORA often objected less to delegated legislation per se than to the elasticity of the phrase, "defence of the realm." In March 1917 Lord Parmoor, a nominally Unionist peer, but staunch liberal critic of DORA, complained that 'hese words had been "so construed as to include within their ambit almost every portion of our social and civil life."⁵⁶ Many DORRs appeared to Parmoor and others to be only tangentially connected with the stated purpose of the statute. These were not mere administrative details, but distinct legislative powers which, surely, merited the proper parliamentary sanction. Parliament would probably have blocked few such measures, but the critics of DORA might have been able to delay their implementation or to secure the occasional favourable amendment.

Second, DORA may not have started the erosion of executive accountability in British government, but the war definitely accelerated the preexisting trend. By the early 1920s conservative jurists and Justices had begun to frown upon the enormous volume of delegated legislation issued in the past decade. This disquiet was prompted as much by the enhanced

⁵⁶ PD (Lords), 7 Mar. 1917, 24, col. 416.

role of the state as by the administrative methods responsible for its growth. Although these postwar critics had had few qualms about executive discretion during wartime, they now saw a dangerous constitutional imbalance arising from the indiscriminate delegation of legislative power. Some sought a return to Dicey's fictive paradise in which discretionary authority played no part in constitutional life. The more constructive response was to accept this de facto administrative jurisdiction and to press for a modicum of parliamentary and judicial control over it.⁵⁷

Many critics of DORA, meanwhile, had drifted towards a labour movement in which their civil libertarian perspectives were "ultimately subordinated to a Labour Party socialism which placed its emphasis on nationalisation and the power of the state."⁵⁸ Labour needed a strong state to effect an expeditious transfer of the 'commanding heights' of the economy to public ownership. The narrower constitutional implications of these policy commitments were spelt out by Harold Laski in September 1932. The leading socialist intellectual had just participated in an official inquiry into the scope of ministerial discretion. Laski's contributions jarred not only with the tone of constitutional-legal orthodoxy struck by most of his colleagues, but with the Left's wartime critique of DORA. The so-called Donoughmore Committee's final report exhibited an instinctive mistrust of delegated legislation. By contrast, Laski stated plainly that the legislative programme of a future Labour Government "would take the form of general formulae conferring wide powers on the appropriate government departments; and those powers would be exercised by Order in Council."⁵⁹

⁵⁷ The different judicial perspectives are dealt with in C.K. Allen, Bureaucracy Triumphant (London, 1931), ch. 3.

⁵⁸ James Hinton, Protests and Visions: Peace Politics in Twentieth-Century Britain (London, 1989), 73.

⁵⁹ Harold Laski, "Labour and the Constitution," New Statesman and Nation, 10 Sept. 1932; PP, Report of the Committee on Ministers' Powers, 1931-32, Cmd. 4060, xii: 341; Cosgrove, Albert Venn Dicey, 95-96.

Comparisons

DORA was not a uniquely drastic response to the crisis of war. In each of the belligerent nations, constitutional norms lapsed either as war loomed or as the hostilities started. Both French and German law provided for a broad measure of emergency executive discretion. In France these extraordinary powers were embodied in the état de siège, a venerable concept which derived from the military commander's customary jurisdiction over the civilian inhabitants of a besieged fortress town. Only during the revolutionary era did the term acquire its later association with the temporary suspension of rights across a much wider and perhaps only indirectly menaced area. The siege provisions that took effect in France during the First World War were grounded in a law of 1849. During the subsequent imperial era the head of state had had sole control over this formidable instrument, but an 1875 statute transferred the promulgation of a siege, together with its duration and geographical scope, to the domain of the French Parliament. The état de siège was instituted by a presidential decree of 2 August 1914, and, in accordance with French law, Poincaré's declaration was confirmed by statute two days later.⁶⁰

The military immediately assumed complete responsibility for the trial of offences "against the safety of the Republic, against the Constitution, against public peace and order." The military's involvement with the administration of justice in wartime France gradually tailed off, but numerous suspects were tried by court martial in the early stages of the fighting. These cases were heard not only in close proximity to the Front but sometimes also at great distance, and they concerned both major and minor infractions of the law. The état de siège also bestowed upon the military dictatorial powers of search and seizure, and the authority to restrict freedom of speech, movement, and assembly. Press censorship in France was far more thoroughgoing and overtly political than in Britain. British newspapers risked

⁶⁰ Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (Princeton, 1948), 79-91.

ex post facto punishment for infringing the censorship DORRs, but their French (and German) counterparts were also mandated to file copy with the censorship authorities in advance of publication.⁶¹

The German equivalent of the état de siège was the Kriegszustand (state of war), imposed throughout Germany on 31 July 1914. Between 1914 and 1918 it proved indispensable as a legal instrument for the economic regulation of war industries and political repression of the German peace party. The Kriegszustand conformed quite closely to the French military emergency model, at least prior to its modification under the Third Republic. For example, in Germany too a host of special restrictions and prohibitions affected civilian life, and a massive shift of judicial and executive authority to the military took place. Although the general effects of German and French emergency legal practice were similar, contrasting rules of procedure governed the initiation of their respective exceptional measures. The Kriegszustand was a more thoroughly military institution than the état de siège. The former was proclaimed by the Kaiser alone—in his capacity as commander in chief, rather than head of state—and neither its continuation nor its precise terms were at all conditional upon a subsequent parliamentary review. These differences were "in keeping with the more autocratic character of the German Empire" and reflected the dominant position of the military in the imperial state.⁶²

To civilians in the Dominions, the implications of an imperial war effort were quickly brought home by emergency legislation remarkably similar in spirit and intent to DORA.

⁶¹ Ibid., 83 and 92-103; Jean-Jacques Becker, The Great War and the French People (New York, 1986), 48-56.

⁶² Rossiter, Constitutional Dictatorship, 36 and passim; John Williams, The Home Fronts: Britain, France and Germany, 1914-1918 (London, 1971), 7-9. A classic study of imperial Germany is Gerhard Ritter, The Sword and the Sceptre: The Problem of Militarism in Germany, vol. 2, The European Powers and the Wilhelmian Empire, 1890-1914 (London, 1972), ch. 7. For a revisionist treatment of the same 'problem', focusing on a supposedly defining moment of 'Prussian militarism', see David Schoenbaum, Zabern 1913: Consensus Politics in Imperial Germany (London, 1982).

After the British declaration of war, the Canadian Government soon settled upon the sweeping terms of what became the War Measures Act. This legislation equipped Ministers with broad and indeterminate powers for maintaining "the security, defence, peace, order and welfare of Canada."⁶³ The War Measures Act provided legal authority for, *inter alia*, the internment of over 8,500 civilians of German and 'Austro-Hungarian' nationality or extraction, the enforcement of prohibition, and press and postal censorship. In at least one test case, the courts affirmed the legality of the delegating power set down in the statute.⁶⁴ The Australian War Precautions Act was another all-embracing measure. It extended to areas of policy which in Britain were covered by separate aliens and trading-with-the-enemy controls.⁶⁵ By October 1916, the Australian Peace Alliance was convinced that civil liberties had been subverted by the latitude which the act afforded the executive.

Under the provisions of the War Precautions Act, 1914-1916, and the very numerous regulations made thereunder, the naval and military authorities have the widest and most arbitrary power that could be well conceived...

Be it remembered that regulations are not passed by Parliament—they are made by the Governor-in-Council; they do not necessarily express the will of Parliament, and Parliament does not debate them...Behind the backs of your representatives are your liberties thus filched away.⁶⁶

These constitutional criticisms mirrored those which were directed at DORA by dissenters in Britain. The Australian opposition to the war was particularly disturbed by the restrictions placed on the written and spoken word. Special search and seizure regulations

⁶³ Quoted in Desmond Morton and J.L. Granatstein, Marching to Armageddon: Canadians and the Great War, 1914-1919 (Toronto, 1989), 7.

⁶⁴ *Ibid.*, 82, 191-94. Most 'Austro-Hungarians' belonged to the subject nationalities of the Habsburg Empire. The vast majority of these (about 5,000 of the total number of internees) were of Ukrainian descent, and designated 'enemy aliens' owing to their immigration from the Habsburg territories of Ruthenia, Galicia, and Bukovyna. On the postal censorship, see Allan L. Steinhart, Civil Censorship in Canada During World War I (Toronto, 1986).

⁶⁵ Michael McKernan, The Australian People and the Great War, 2d. ed. (Sydney, 1984), 155-56.

⁶⁶ "Leaflet No. 7," quoted in LL, 26 Oct. 1916, 2.

were used against socialist and pacifist publications, and Regulation 28 prohibited antirecruiting statements and incitements to 'disaffection', language which matched that of DORR 27. Similar restraints were imposed under New Zealand's War Regulations Act. Separate regulations made it an offence to "express any seditious intention," and outlawed statements "likely to interfere with military recruiting, training or discipline."⁶⁷ Infringements of these regulations were prosecuted only selectively at first, but as the conscription crisis in that country intensified in late 1916, these punitive sanctions were strengthened and enforced more strictly in the last two years of the war. According to Paul Baker, the labour and pacifist opponents of conscription were seriously hampered as a result, and also by the deterrent effect exerted by the War Regulations Act.⁶⁸

Given the remoteness of the Dominions from the main theatres of military operations, their stringent emergency measures appear disproportionate to the threats which they were meant to counteract. The same observation applies with yet more force to the largest liberal-democratic backer of the Allied cause, although the United States did not even enter the conflict until April 1917. Supporters of the American war effort invested in their national cause a liberal idealism characteristic of much prowar sentiment in Britain. Yet domestic freedoms suffered still more in the quest to 'make the world safe for democracy' than in the British fight against 'Prussian militarism'.⁶⁹ The whole "dreary, disturbing, and, in some respects, shocking chapter out of the nation's past" has been carefully documented by successive generations of American historians. They have demonstrated amply that federalism, a Bill of Rights, and the separation of powers provided no greater protection

⁶⁷ Quoted in Paul Baker, King and Country Call: New Zealanders, Conscription and the Great War (Auckland, 1988), 45.

⁶⁸ *Ibid.*, 75-78, 153-68.

⁶⁹ Paul Murphy, World War One and the Origins of Civil Liberties in the United States (New York, 1979), 15. For a recent treatment, on which the ensuing discussion is largely based, see Michael Linfield, Freedom Under Fire: U.S. Civil Liberties in Times of War (Boston, 1990), ch. 4.

against overbearing state power than did Britain's infinitely more flexible system of government. The closest statutory equivalents to DORA in the United States were the Espionage and Sedition Acts. Unlike DORA and parallel measures in the Dominions, however, this war legislation was not part of a single emergency powers code, applicable to war production, for example, just as much as to censorship. The Espionage Act was enacted in June 1917 for the express purposes of preventing the transmission of unauthorised military and naval information and of penalising the dissemination of antiwar views. The Sedition Act was essentially a stronger version of the same statute, as amended by Congress in 1918.

The revised legislation prohibited virtually all criticism of the United States Government; it even criminalised the discouragement of potential buyers of war bonds. Numerous First Amendment violations were sanctioned by both statutes. For example, the U.S. Postmaster-General prohibited the distribution by mail of hundreds of socialist publications. More than one hundred people, including former socialist presidential candidate, Eugene Debs, were sentenced to prison terms of ten years or more. The Espionage and Sedition Acts were not the only threats to civil liberties in the United States during the First World War and its aftermath. Federal and state authorities, along with the many semi-official citizens' committees formed to root out 'disloyalty', illegally arrested and detained thousands of 'slackers' and 'subversives'. These patriotic vigilante organisations also committed many other depredations. The weight of repression, official and unofficial, fell heaviest on the American socialist movement. The Bolshevik Revolution only fuelled the war-induced suspicion of domestic radicalism in the United States. American socialists were not nearly so seriously divided as were their Western European counterparts on the question of the war and the Socialist Party of America's antiwar stand had a particular resonance for Eastern European immigrants, many of them refugees from tsarism.⁷⁰

⁷⁰ The party's share of the vote in municipal and state elections also held up in cities with a lower percentage of recent immigrants. Indeed, the strength and nationwide scope of American socialism in this era can be too easily forgotten (see James Weinstein, The Decline of

The immoderation of Federal and state governments in the United States raises two questions of direct relevance to this study of civil liberties in Britain during the First World War. First and most obviously, the worst abuses for which DORA was responsible were not nearly so shocking as those sanctioned by the American authorities. The leading British dissenters were not insulated from repressive measures but they experienced nothing comparable to the stiff sentencing of Debs. Virtually all the charges levelled at antiwar speakers and writers in Britain were tried as misdemeanours by magistrates. These local noteworthies often voiced their utter contempt for dissenting defendants but were unable to exact retribution more severe than six months in prison with hard labour. The second, more problematic, point raised by the American experience concerns the evident ineffectiveness of constitutional safeguards of individual rights. British parliamentary practice, it has already been noted, paved the way for DORA. Yet, notwithstanding the absence of British constitutional flexibility in the United States (not to mention continental style mechanisms of siege), civil liberties were compromised far more seriously by President Wilson's administration than by wartime governments in Britain. No quick explanation of this apparent paradox can be assayed. Suffice to say that the office of the Presidency is actually a formidable instrument of emergency rule, that the United States Constitution does allow for the employment of force to keep the peace, and that, not unlike Parliament, although not nearly to the same extent, Congress actively assisted in the wartime expansion of executive authority.

Although DORA does not stand out so prominently in comparative perspective, this does not mean that the civil liberties record of wartime governments in Britain can be viewed with complacency. First, if the focus was widened to cover Ireland as well, a quite different

picture emerges.⁷¹ Second, civil liberties in wartime Britain were not threatened by DORA alone. Civil libertarian opinion was perplexed by other emergency statutes as well, particularly the Aliens Restriction Act, the Munitions of War Act, and the Military Service Acts. Some war measures, such as the censorship of cablegrams and the mail, were taken without any clear statutory authority whatsoever. The war also coincided with a dramatic increase in the scope of internal security operations in Britain and in the resources at the disposal of the security services. Both MI5 and the Special Branch of the Criminal Investigation Department at Scotland Yard sometimes made use of DORA. But they leaned more heavily on the shadowy methods of modern civil intelligence in their wartime "progression from counter-espionage to political surveillance."⁷² Third, the administration of DORA could easily have been more iniquitous. It was usually moderated by decisions taken on policy grounds, as opposed to by any formal constraints. As regards this latter observation, however, it cannot be presumed that any concrete safeguards of liberty would have proven any more resilient to wartime pressures than did those of the United States. The distinction between what is legal and what is not is all too easily blurred in the highly charged atmosphere of nations at war.

⁷¹ The impact on civil liberties of war and rebellion in Ireland is not discussed below. These issues would have to be related to the rapidly shifting political situation in Ireland. In addition, DORA was more of a novelty on mainland Britain than in Ireland, with its long history of 'coercion' legislation. On the Irish dimension of DORA, however, see Charles Townshend, "Military Force and Civil Authority in the United Kingdom, 1914-1921," Journal of British Studies 28 (1989): 280-92; W. Brian Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain (Oxford, 1992), ch. 2 passim.

⁷² Nicholas Hiley, "Counter-Espionage and Security in Great Britain during the First World War," English Historical Review 101 (1986): 653 and passim. In July 1914 there were only 14 officers and staff of MO(t). By November 1918, its offspring, MI5, was responsible for 844 people, and its budget had increased from between £6,000 and £7,000 to almost £100,000. During the same period, the Metropolitan Police Special Branch grew from 114 to 700 and, in 1915 alone, the number of postal censors climbed from 170 to 1,453.

Chapter 1: A LIBERAL STATE CONTEMPLATES WAR: THE ORIGINS OF DORA

Introduction

On 7 August 1914 the Home Secretary, Reginald McKenna, introduced a Defence of the Realm Bill in the House of Commons. It had not even been circulated to MPs beforehand as a printed bill. Nevertheless, the House passed this legislation without hesitation. McKenna fielded no searching questions during the attenuated Commons discussion. Quite the contrary; the parliamentary correspondent of the Daily Chronicle recorded that the bill "passed through all its stages amid cheers."¹ Less than a month later, this legislation had been amended and it was overhauled more thoroughly in November 1914. But this appearance of slapdash legislative improvisation is somewhat deceptive. Emergency powers legislation had been the subject of detailed, if intermittent, discussion in official circles for many years before the war. This chapter seeks to shed light on these origins of DORA and to link them with other Edwardian initiatives designed better to equip the British Home Front for the exigencies of modern warfare. The DORA of 8 August 1914 was not the formidable instrument coveted for so long by the military proponents of a statutory, as opposed to a common law, solution to the problem of emergency executive discretion. Yet the first batch of DORRs were at least embryonic of "the Hydra-headed monster which, between 1914 and 1918, grew out of the phrase 'defence of the realm.'"²

¹ Daily Chronicle, 8 Aug. 1914, 5; PD (Commons), 7 Aug. 1914, 65, col. 2191-93; Lord Simon, Retrospect (London, 1952), 103.

² C.K. Allen, Law in the Making (Oxford, 1927), 462.

The War Office Emergency Powers Bill, 1888

Military emergency legislation was first drawn up in July 1888, by Colonel John Ardagh of the War Office. This draft bill listed a range of powers for the military to wield over British civilians either during wartime or just prior to an outbreak of war. The bill authorised the military to pass over, use, and occupy all land and roads. They were also empowered to destroy buildings and to requisition supplies. The bill was geared towards assisting the defence preparations of the army. There was far less emphasis on the control of the general population, although many civilians would obviously be affected by the huge interference with property rights that was envisaged.³ The drafting of the bill had coincided with that staple of the late-Victorian and Edwardian political diet, the invasion scare. In May 1888 Lord Wolseley, Adjutant-General at the War Office, spoke publicly about the danger of a cross-channel invasion. As with similar episodes in later years, rival strategic conceptions lay at the heart of the scare. The invasion alarmists wanted a greater share of finite resources devoted to the army and home defence. The naval strategists argued that command of the sea alone would be sufficient to thwart any prospective invaders. The latter were vindicated in spectacular fashion by the 1889 Naval Defence Act, which authorised the expenditure of £21.5 million on new capital ships and inaugurated the celebrated 'two power standard'.⁴

³ See CAB 16/31/E.P.2, 1, "Memorandum by the General Staff on the Need for an Emergency Powers Bill," 1 May 1914. Statutory powers of acquiring land for military purposes were not without precedent, but existing legislation prescribed a cumbersome requisition procedure, quite ill suited to moments of crisis and which the War Office measure was intended to circumvent. Some 6 Defence Bills were passed between 1842 and 1873. The first of these Victorian statutes was modelled on a law of 1804, but their legislative roots went far deeper, to the War of the Spanish Succession and a 1708 statute authorising the acquisition of land by the state for the erection of fortifications. Arguably, vestiges of the once sweeping prerogative powers of requisition still remained in the late-nineteenth century (see Leslie Scott and Alfred Hildesley, The Case of Requisition [Oxford, 1920], ch. 2. I am grateful to Ms. Diana Condell for the above reference).

⁴ That is, that the Royal Navy would henceforth maintain a battleship fleet at least equal in size to those of the next 2 largest navies combined. For the controversy of 1888 and subsequent war scares, see John Gooch, "The Bolt from the Blue," in The Prospect of War: Studies in British Defence Policy, 1847-1942 (London, 1981), 6-8. On the position and

This strategic decision undermined the rationale of the War Office's Emergency Powers Bill, which had been premised, in part, on the possibility of a hostile invasion. When Ardagh's draft was submitted to Lord Salisbury's Secretary of State for War, Edward Stanhope, in December 1889, he decided that the bill could not pass. Stanhope favoured instead a short bill, conferring drastic powers, to be kept in readiness and activated by Order in Council at the appropriate moment. The department's position was summarised in a letter to the Treasury, dated 22 June 1891:

For the safety of this country, it is essential that Her Majesty should possess in a time of great national emergency powers over the land, property, and persons of Her subjects which are far in excess of those which the common law confers. At the same time it is necessary, both for securing prompt obedience to the mandates of military necessity and for assuring military commanders against actions for things illegal done in the execution of their duty, that these extraordinary powers at an extraordinary crisis should be sanctioned by the law.⁵

The matter was considered further during the short-lived Rosebery administration of 1894-1895. The Liberal Secretary of State for War, Sir Henry Campbell-Bannerman, wanted to drop his department's legislative plans. Yet Ardagh was not deterred from submitting a revised version of his bill after the election of a Conservative-Liberal Unionist Government later in 1895. Additional powers were grafted onto those of the original. The bill now authorised postal, telegraphic, and press censorship plus the arrest and detention of suspected spies.⁶

This new draft was then referred to the Parliamentary Draftsman, who prepared a detailed critique of the War Office position. Sir Courtenay Ilbert was convinced that martial law was flexible enough to cope with the most desperate scenario. Besides, many provisions

motivation of the invasion alarmists, see A.J.A. Morris, The Scaremongers: The Advocacy of War and Rearmament, 1896-1914 (London, 1984), especially chs. 8 and 11. On the broader political/strategic context, see David French, The British Way in Warfare, 1688-2000 (London, 1990), ch. 6.

⁵ Quoted in CAB 16/31/E.P.2, 1, "Need for an Emergency Powers Bill."

⁶ See WO 32/7112/26A, "Martial Law in the United Kingdom: Case for Opinion of the Law Officers of the Crown," 17 July 1913. The same piece contains the draft legislation of 1895.

of the draft bill duplicated existing statutory powers. The acquisition of land was covered by the Defence Acts; control over railway traffic, by the 1871 Regulation of the Forces Act and the 1888 National Defence Act; espionage, by the 1889 Official Secrets Act; the export of matériel, by the 1879 Customs and Inland Revenue Act. More seriously, an actual crisis would necessitate "much stronger steps than would be authorized by the War Office draft." The statute might be held to detract from the powers of the Crown under the common law, "and would probably involve the imposition of restrictions and limitations which would be inconvenient and misleading, and which in practice it would be necessary to disregard." This problem would be exacerbated by Parliament's reluctance, in peacetime, "to confer on the military authorities, either directly or through an Order in Council, any powers in excess of those given by the existing law."⁷ The bill was, therefore, shelved and not even dusted off after the Fashoda crisis of 1898, although this threat of war with France exposed the military's uncertainty of its legal position during a mobilisation.⁸

The Impact of the Boer War

The Boer War, catalyst of other political, ideological, and policy changes, also brought the issue of military emergency powers to the fore. By the middle of November 1899 martial law had been applied throughout Natal and across much of Cape Colony as well. Martial law supplemented, but did not oust, civil judicial authority. Courts martial were to be reserved for serious cases of treason, sabotage, or "aiding and abetting" the enemy. In practice, however, the demarcation of the military and civil jurisdictions was blurred. This confusion was the result of military discretion being extended beyond the judicial sphere. District

⁷ CAB 16/31/E.P.2, 1 (Appendix 3), "Emergency Powers," 5 Aug. 1896. The original of the Ilbert memorandum has not been located. There is another copy among papers referred to the Law Officers by the War Office in 1913 and filed in WO 32/7112.

⁸ Ibid., "Need for an Emergency Powers Bill."

commanders could subject civilians to a wide range of restrictions. Curfews were imposed, freedom of movement curtailed, food and horses requisitioned, and a press censorship applied. One sign of the conflict between the military and civil authorities was the Cape government's complaint that officers were overstepping the mark and interfering with the ordinary courts. The military, meanwhile, confronted the realities of guerrilla warfare and the antagonism of the Afrikaner population in a sprawling noncombatant zone. They were predictably insensitive to these objections and advocated a more rigorous application of martial law. The problems were never satisfactorily resolved, and according to Charles Townshend, "the South African experience did little if anything to assist government in working out a politically and administratively functional system of emergency powers."⁹

By A.V. Dicey's definition of martial law, these jurisdictional disputes should not have arisen: martial law could not be enforced in peacetime, and a 'state of war' existed only if the ordinary courts could not function. Yet the nature of the combat in South Africa had rendered Dicey's rigid criteria obsolete. This issue was addressed in the case of ex parte Marais, a Boer civilian who had been interned at the behest of the military in Cape Colony. Marais challenged his internment on the grounds that the civil courts remained open and that, therefore, the military had no authority over him. In November 1901 the case reached the Judicial Committee of the Privy Council, the highest appellate tribunal against the judgment of a colonial court. Marais's counsel, the future Liberal Secretary of State for War and Lord Chancellor, R.B. Haldane, contended that "the right of the Crown to resort to such an extremity as the proclamation of martial law was limited by the necessity of the case, and when the regular Courts were open there was no power to resort to that extremity." But judgment went against Marais, and by implication, Dicey's construction of martial law as well. The chair of the tribunal, Lord Chancellor Halsbury, held that warfare had so evolved that

⁹ Townshend, "Legal and Administrative Problems of Civil Emergency," 183 and *passim*.

hostile acts could be perpetrated many miles from the theatre of operations: "the fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging."¹⁰

This ruling significantly altered the definition of a 'state of war' and stands as a belated judicial acknowledgment of actual military practice during the Boer War. Lord Halsbury's judgment was endorsed by two contributions to the debate over martial law in the Law Quarterly Review of April 1902. Frederick Pollock, the editor of this prestigious legal journal, and an eminent jurist in his own right, also propounded the view that extra-legal emergency measures were justified by their expediency and not only by Dicey's strict standard of "immediate necessity." H. Erle Richards agreed that the executive had never been so hampered in wartime as earlier constitutional authorities had tended to imply. He also ventured that any action in support of a military operation not only fell outside the jurisdiction of the ordinary courts for the duration of the emergency, but after the cessation of hostilities as well.¹¹ It has been suggested that the decisions in ex parte Marais and other contemporaneous cases effected a "modernization" of British martial law.¹² Yet, the judicial and scholarly sanctions of an enhanced military emergency discretion notwithstanding, the War Office's interest in emergency powers legislation did not lapse.

One officer closely involved with the administration of martial law in Cape Colony was Major George Cockerill. As head of the Special Section of the War Office intelligence branch, MO5, from 1906-1908, Cockerill also contributed to the prewar discussions of military

¹⁰ The Times, 6 Nov. 1901, 12; 19 Dec. 1901, 3; Cosgrove, "The Modernization of British Martial Law," 125; idem, "Lord Halsbury: Conservatism and Law," in Edwardian Conservatism: Five Studies in Adaptation, ed. J.A. Thomson and Arthur Mejia (London, 1986), 138-41.

¹¹ Frederick Pollock, "What is Martial Law"; H. Erle Richards, "Martial Law," Law Quarterly Review 18, 70 (1902): 133-42, 152-58. Dicey confronted these arguments in a subsequent edition of the Law of the Constitution (Appendix, Note 10, "Martial Law in England during Time of War or Insurrection").

¹² Cosgrove, "The Modernization of British Martial Law," 124-26.

press and cable censorship and of a general emergency statute as well. In June 1917 he reminded Herbert Samuel of the relevance of the Boer War to the exceptional measures currently in force on the Home Front.

The principles on which the censorship has been conducted from the end of September 1914 onwards owe something to the previous experience I acquired through administering Martial Law for two years in the Cape Colony...both the censorship regulations and the Defence of the Realm Regulations themselves were modelled on drafts prepared by me personally about 1906, and based on my own practical experience in reconciling military exigencies with popular liberties.¹³

In a memoir Cockerill again recalled how the Boer War had shaped his thinking about executive discretion during wartime. It became obvious to him thereafter that, "if war came and espionage and sabotage were to be preven'ed, it would be necessary to enforce in this country regulations similar in character and intention to those issued in Cape Colony under martial law." But there were limits to the lessons of the Boer War because, in the event of a conflict closer to home, "martial law was unlikely to be tolerated in this country." Therefore, "such powers as might seem to be required would better be conferred by statute."¹⁴

It was not the political difficulties raised by the use of martial law so much as the indeterminate nature of these common law powers that accounts for the predilection of Cockerill and other military planners for legislation. Much of the dissatisfaction with martial law in South Africa was attributable to the leeway it afforded individual officers. Cockerill sought a more centralised administration of martial law. When martial law was reimposed on Cape Colony in January 1901, a uniform code of regulations was duly issued, undercutting local discretion. In addition, a special tribunal was established to review allegations of

¹³ Samuel Papers, A/60/7, Cockerill to Samuel, 13 June 1917. Cockerill was reappointed head of MO5 in October 1914. The following April, at the higher rank of Brigadier-General, he became Director of Special Intelligence. In these capacities, Cockerill oversaw a variety of internal security matters and held considerable sway over the wartime administration of DORA (biographical information from The Times, 20 Apr. 1957, 11).

¹⁴ Brigadier-General Sir George Cockerill, What Fools We Were (London, 1944), 24-25.

military injustice.¹⁵ This formal approach conflicted with the conventional wisdom that martial law was synonymous with executive improvisation. These faltering steps to systematise martial law provided a foretaste of DORA; they were an important contribution to the changing face of emergency executive discretion.

Edwardian Invasion Alarmism

Emergency powers legislation was not seriously reconsidered until the appointment in 1906 of a joint naval and military conference to consider "the Powers Possessed by the Executive in Time of Emergency."¹⁶ The Edwardian debate again reflected official and popular anxiety about the country's vulnerability to invasion. One of the first tasks of the new Committee of Imperial Defence was to assess the nature of this threat. The CID concluded that no potential enemy was presently capable of staging a successful landing. This report, which was publicised by Prime Minister Balfour in May 1905, was avowedly orthodox and a vindication for the still dominant school of 'blue water' strategic thinking.¹⁷ But the public controversy did not abate. Invasion alarmism was one manifestation of the growing Germanophobia of Edwardian Britain; the issue was exploited by military men who wanted a greater share of defence spending allocated to the army and also by the advocates of compulsory military service. One of the loudest voices for rearmament and conscription was that of the press mogul, Lord Northcliffe, who also understood the commercial potential of the public's vicarious fascination with invasion scares and spy plots. It was Northcliffe's Daily Mail which

¹⁵ Ibid., 18; Townshend, "Legal and Administrative Problems of Civil Emergency," 178-79; Byron Farwell, The Great Boer War (London, 1976), 329.

¹⁶ ADM 116/3408, "Report of Conference of Representatives," Apr. 1907.

¹⁷ Gooch, "The Bolt from the Blue," 10. On the CID generally, see Nicholas d'Ombrain, War Machinery and High Policy: Defence Administration in Peacetime, Britain 1902-14 (London, 1973) and John P. Mackintosh, "The Role of the Committee of Imperial Defence before 1914," English Historical Review 77 (1962): 490-503.

in 1906 helped revive a lowbrow literary genre, by serialising William le Queux's enormously popular The Invasion of 1910.¹⁸

Some of the most incorrigible alarmists belonged to the intelligence branch of the War Office, which wanted the joint naval and military conference to approve its dormant draft bill. But the conference decided in April 1907 that the Liberal Government's strategic policy militated against a measure which acknowledged the threat of invasion.¹⁹ The conference report did conclude that a series of "small and independent measures" might be possible. Four specific suggestions followed: the creation of an examination service to control the movement of foreign merchant vessels from home ports; the control of military and naval information; the amendment of the Official Secrets Act, and the surveillance of resident aliens. Discussion of the first proposal in April 1907 exposed the dilemmas of the contingency legal planners. In the event of war, or of acute diplomatic tension preceding war, freedom of navigation would have to be restricted to prevent the channels of commercial harbours being blocked by an act of sabotage. The appropriate legislation might be enacted in peacetime, it was agreed, but it would be hedged around with so many restrictions as to render it nugatory during an actual crisis.²⁰ Significant progress was made, however, in the three other areas singled out by the conference report.

¹⁸ Zara S. Steiner, Britain and the Origins of the First World War (London, 1977), 154-63; Kennedy, Hound of Conscience, 11-19; Morris, Scaremongers, 104-10 and ch. 16 passim; I.F. Clarke, "The Battle of Dorking 1871-1914," Victorian Studies 8 (1965): 307-27; David French, "Spy Fever in Britain, 1900-1915," Historical Journal 21 (1978): 355-58.

¹⁹ This strategic orientation was reinforced by a second CID invasion inquiry. Launched in November 1907 as a concession to the 'invasionists', the subcommittee only duplicated the conclusions of the preceding report (see Morris, Scaremongers, ch. 11).

²⁰ ADM 116/3408, "Report of Conference of Representatives." See also, Nicholas Hiley, "The Failure of British Counter-Espionage Against Germany," HJ 28 (1985): 835 and, on the frustration which liberal scruples caused the supporters of strong measures, Porter, Origins of the Vigilant State, 167.

Press Control, Official Secrecy and Aliens Surveillance

There was a long history of antagonism between the British press and the armed forces.²¹ The final decade of the nineteenth century witnessed a heightening of official anxiety about indiscrete newspaper reporting during wartime. The competitive market for news and a mushrooming tabloid readership, reared on sensationalism, were the root causes of this disquiet. These fears led to the inclusion of a censorship clause in the 1895 draft Emergency Powers Bill. By 1899 the War Office was even more convinced of the need for a statutory power over the press in wartime. But the customary latitude enjoyed by military correspondents prevailed during the Boer War. This led to clashes between the journalists and the army, but no censorship of British news was introduced. The supporters of wartime press control felt vindicated by the Japanese defeat of Russia in the war of 1904-1905.²² Before the benefits of Japan's strict censorship policy were fully apparent, the War Office circulated another request for legislation. This was backed up by evidence of the crucial intelligence which both British and foreign newspapers were prone to divulge. The proposal was then referred to the CID, which decided, in December 1904, to prepare a bill prohibiting the publication in wartime of any unauthorised naval and military news.

The authorities took the trouble to solicit press opinion of their draft scheme. In June 1906 the editors' Newspaper Society gave it a guarded endorsement, subject to assurances of editorial freedom and a steady flow of official war news. However, the new Liberal Prime Minister, Campbell-Bannerman, and the influential Newspaper Proprietors' Association, both opposed the measure. By February 1908 the CID had lost all hope for the success of its

²¹ Peter Towle, "The Debate on Wartime Censorship in Britain, 1902-1914," in War and Society, ed. B. Bond and I. Roy (London, 1975), 103.

²² *Ibid.*, 103-09.

legislative plan.²³ Renewed calls for wartime press censorship followed the Morning Post's inadvertent disclosure of sensitive military information during the Agadir crisis of 1911. The press was this time handled with greater dexterity and persuaded to accept a measure of voluntary censorship. In October 1912 a Joint Standing Committee of Admiralty, War Office, and press representatives was created, a body which, several times before the war, advised newspapers to refrain from publishing items of military and naval news. The press saw this arrangement as a lasting solution, rendering compulsory censorship superfluous, even during wartime. The CID welcomed the voluntary agreement in so far as it furnished "a greater measure of security than we have possessed hitherto." But they still favoured the imposition of statutory press controls after an outbreak of war.²⁴

A measure of formal press control had, arguably, been established already by the 1911 Official Secrets Act. This legislation satisfied a long-standing military demand. For over twenty years the War Office had complained that the 1889 Official Secrets Act provided no meaningful safeguards against either bona fide spies or irresponsible newspapers.²⁵ The earlier statute reflected the nascent secrecy ethos of British government, but its powers were fairly limited. Convictions were difficult to secure, and the act was designed only to prevent the disclosure of information by civil servants. In 1908 Lord Chancellor Loreburn introduced a bill to amend the Official Secrets Act. Several of the new provisions applied to the publication

²³ CAB 38/6/100, "Control of the Press in Time of War or Threat of War: Memorandum by the General Staff sent to Admiralty and India Office," 12 Oct. 1904; CAB 38/6/119, "Minutes of the 61st meeting of the CID," 9 Dec. 1904; Morris, The Scaremongers, 148-56; Towle, "Debate on Wartime Censorship," 109-10; Colin Lovelace, "British Press Censorship during the First World War," in Newspaper History from the Seventeenth Century to the Present Day, ed. G. Boyce, J. Curran and P. Wingate (London, 1978): 308-09.

²⁴ CAB 38/23/6, "Report of the Standing [CID] Sub-Committee Enquiry regarding Press and Postal Censorship in Time of War," 31 Jan. 1913; Colin Lovelace, "Control and Censorship of the Press in Britain during the First World War," (Ph.D. diss., University of London, 1982), 19-24.

²⁵ For example, CAB 16/31/E.P.2, 1, "Need for an Emergency Powers Bill."

of military and naval information in the press.²⁶ This antagonised the newspaper interest, which had recently set itself against any legislative proposals of this kind. The bill was dropped but received fresh consideration next year by the Foreign Espionage Subcommittee of the CID. This subcommittee's July 1909 report advised that "great need exists for amending this Act in order to make it an efficient weapon in dealing with espionage." The lessons of the previous year were obvious. Any amendments "should only apply to actual espionage, and should not contain clauses, the tendency of which would be to restrict the freedom of the press."²⁷

The bill was redrafted, but section two still contained prohibitions—against the receipt, retention, or communication of classified information—which impinged upon press freedom. The Secretary of State for War, R.B. Haldane, thought that the inevitable criticism could be undercut only by presenting the bill as a military measure. It was held back until the height of the Agadir crisis in the summer of 1911, when the threat of war provided a perfect backdrop against which to ask Parliament to confer these drastic powers on the executive. Yet Parliament was not apprised of the true purport of the bill. Haldane himself presented it to the Lords as a counter-espionage measure and said that it was designed to make the existing statute more enforceable. Sir Rufus Isaacs echoed this rather disingenuous claim when the bill came down to the Commons. There was, the Attorney-General said, "nothing novel in the principle of the Bill." The Under-Secretary of State for War, Colonel J.E.B. Seely, further assured the House that "in no case would the powers be used to infringe the liberties of His Majesty's subjects." Largely due to the efforts of Seely, the bill sailed through all its stages in a

²⁶ David Vincent, "The Origins of Public Secrecy in Britain," Transactions of the Royal Historical Society, 6th series, 1 (1991): 229-48; David Hooper, Official Secrets: the Use and Abuse of the Act (London, 1987), 22-25.

²⁷ CAB 38/15/16, "Foreign Espionage," 24 July 1909; Morris, Scaremongers, 156-163.

single sitting, with hardly a murmur from the Liberal backbenches.²⁸

Government officials clearly regarded the new legislation as a tool of censorship, as much as one of counter-espionage. Although "the speedy passage of the Act...was due in a great measure to a general understanding that [it]...was in the main directed against the 'spy' class," the Attorney-General advised the CID, it might be interpreted more loosely "in exceptional cases or in special circumstances." The Permanent Secretary to the War Office, Sir Reginald Brade, saw the act as a reinforcement for the voluntary agreement he had helped strike with the press.²⁹ If the Official Secrets Act anticipated the restriction of free speech under DORA during the First World War, the circumstances in which the bill passed in August 1911 were also portentous. The situation bore an uncanny resemblance to that which attended the enactment of DORA three years later. Both bills were rushed through without meaningful scrutiny. On both occasions, critics were disarmed by the rhetoric of national security, which resonated all the more powerfully due to the prospect of war. Both pieces of legislation were presented as meeting specific and limited counter-espionage objectives. Yet both measures involved a more thoroughgoing extension of state power. This was twice hidden from Parliament initially, but was evident, in the first instance, from the Government's broad construction of the Official Secrets Act and, in the second, by the plethora of diverse delegated legislation that issued from DORA.

The prewar British state also extended its reach over the resident alien population.

²⁸ PD (Commons), 18 Aug. 1911, 29, col. 2251-2260; (Lords), 25 July 1911, 9, col. 641-4; Haldane had been ennobled as a Viscount earlier in 1911. During the short Commons debate the Liberal MP for Sutherlandshire, Sir Alpheus Morton, did say that the bill "upsets Magna Charta altogether," but he promptly voted for it. Sir William Byles, who was one of only 12 MPs who divided with the 'Noes', also struck a dissonant note. He was disturbed by the shifting of the burden of proof in the interests of the prosecution: "a very startling innovation upon our ordinary legal precedents." Perhaps the Liberal MP for North Salford was 1 of the 2 members whom Seely recalled being "forcibly pulled down by their neighbours after they had uttered a few sentences" (J.E.B. Seely, Adventure [London, 1930], 144-46). See also Hooper, Official Secrets, 26-31; French, "Spy Fever in Britain," 360-61.

²⁹ CAB 38/23/6, "Report of the Standing Sub-Committee Enquiry regarding Press and Postal Censorship in Time of War," 31 Jan. 1914; Morris, Scaremongers, 292, n.35.

Invasion alarmism often centred on the security threat posed by expatriate Germans living in Britain. The German spy masquerading as a waiter, barber, or tourist was a stock character of Edwardian invasion literature. The evidence of genuine espionage, meanwhile, was rather scanty, although it tended to be taken at face value by MO5. The dossier of suspected espionage cases compiled by Lieutenant-Colonel James Edmonds, head of MO5 from 1908-1910, even included several letters to William le Queux from the latter's over-imaginative readership.³⁰ Edmonds managed to persuade the sceptical Lord Haldane to commission a CID inquiry into the aliens question, which, in July 1909, recommended the systematic surveillance of suspected alien spies by a new Secret Service Bureau attached to MO5.³¹ Another CID subcommittee was formed the following March, to consider possible restrictions on enemy aliens in wartime. In July 1910 it approved a system of aliens registration in peacetime as a useful precautionary measure.

The entire resident alien population was affected by creeping official paranoia about spies. The proposed register was to include not only those foreigners domiciled in Britain who were the objects of suspicion, but also the personal details of all non-British nationals. The clandestine surveillance operation was overseen by MO(t), the counter-espionage wing of the Secret Service Bureau. The fledgling internal security organisation was assisted by the Metropolitan Police Special Branch, which had itself evolved into a quasi-political police force since its inception in the 1880s. Some 28,830 people had been registered by July 1913, more than 11,000 of whom were of German or Austro-Hungarian extraction.³² The next month

³⁰ French, "Spy Fever in Britain," 356-57. Edmonds was later knighted and became an Official Historian of the British war effort. Lord Esher, who listened to Edmonds testify before the CID Foreign Espionage Subcommittee, recalled the head of MO5 as that "silly witness from the War Office. Spy catchers get espionage on the brain. Rats are everywhere—behind every arras" (quoted in Morris, *Scaremongers*, 160, and 156 for the Edmonds-le Queux association).

³¹ CAB 38/15/16, "Foreign Espionage."

³² Hiley, "Failure of British Counter-Espionage," 849-56; Porter, *Origins of the Vigilant State*, 166-73. The total number of registered aliens constituted a sizeable proportion of the resident alien population of nearly 250,000 people, especially in that only adult males were

Cabinet approval was extended to the CID's scheme of wartime aliens controls. These proposals had been refined over the course of three years, which the War Office took as further proof of the need for equally meticulous planning of a general emergency powers bill.³³ Also significant were the delegating provisions of this Aliens Restriction Bill, which, like those of DORA subsequently, allowed this framework measure to be filled in by a detailed Order in Council.

The Faltering Progress of Draft Emergency Powers Legislation

Given the progress made in the above three areas, it is surprising that the old War Office Emergency Powers Bill did not make more headway. MO5 never lost its conviction that such legislation should be prepared and kept in readiness for the expected emergency. But their plans continued to encounter the political and legal obstacles first raised by Sir Courtenay Ilbert in 1896. The military viewpoint is well captured in a memorandum of January 1911, prepared by Lieutenant-Colonel George Macdonogh, Edmonds's replacement the previous year

logged and the register was not introduced in either the City of London or Metropolitan Police districts, where 56% of resident aliens were domiciled. On the bureaucratic evolution of internal security operations, see also Hiley, "Counter-Espionage and Security," 662-66. MO(t) was a forebear of the more famous MI5. In 1910 the espionage and counter-espionage functions of the Secret Service Bureau were clarified and placed on a sounder institutional footing with the subdivision of the Bureau into 'Foreign' and 'Home' Sections. The latter was designated MO(t) and placed under the command of Captain Vernon Kell. MO(t) became MO5(g) after August 1914, and was revamped and expanded shortly afterwards. MI5 came into existence as part of a general administrative overhaul of the Directorate of Military Operations in December 1915. Eight sections of this administrative branch, including MO5, were hived off into a new Directorate of Military Intelligence, headed by Major-General George Macdonogh. This new branch of the War Office also included a Subdirector for Special Intelligence, originally established in April 1915. MI5 was 1 of 4 sections attached to this subdirector. It was again headed by Kell (by now a Lieutenant-Colonel) and was henceforth concerned exclusively with internal security. The Special Branch provided invaluable support to MO(t), which lacked the executive authority to make arrests, and before the war especially, the manpower and budgetary resources for routine surveillance work.

³³ Bird, Control of Enemy Alien Civilians, 37-40; WO 32/7112/26A, Lieutenant-Colonel George Macdonogh (head of MO5) to Colonel Henry Wilson (Director of Military Operations), 6 Aug. 1913.

as the head of MO5. The chief thrust of Macdonogh's detailed argument was that the prerogative and common law powers of the executive were far too indistinct to be relied upon in time of war. First, martial law was only legally enforceable when the ordinary courts had ceased to function. Second, statutory powers of 'coercion' had been conferred on Dublin Castle as far back as 1799. By this previous recognition of the executive's limited discretion to quash rebellion, Macdonogh was convinced that, "if it was expedient a hundred years ago to rely not on the prerogative but on statute for establishing Martial Law, it is still more expedient, if not essential, to do so at the present day." Otherwise, executive freedom of action must be hampered in all circumstances short of a full-scale invasion.

The head of MO5 played down the implications of the judgment in ex parte Marais and was also sceptical about the legal scholars' recent recasting of martial law in an executive-minded mold. Macdonogh looked at the problem through Dicey's prism. Hence, emergency executive discretion appeared to be hamstrung by the latter's doctrine of 'immediate necessity'. Emergency legislation was, accordingly, all the more vital:

There are a hundred things that a military Commander may wish to do in the presence of a hostile invasion or when such an invasion is to be expected, but which cannot be considered as being immediately necessary...

As special powers will be needed by these authorities not merely when an invasion has actually taken place but also during the 'Precautionary Period' when raids and invasions are imminent, it would appear desirable that a Bill should be prepared and kept ready to be passed rapidly through Parliament when the emergency arises, conferring all the necessary powers.

The memorandum also suggested headings for draft legislation. Most were lifted from the 1895 Emergency Powers Bill, but the latest proposal was more drastic.³⁴ Macdonogh acknowledged that its provisions were "stringent" but insisted that "they are not more than are required to meet the situation that would be caused by a hostile invasion." Many of these

³⁴ See, for example, the draft headings for the following powers which were not included in the 1895 draft bill: (3) to search dwellings and other houses; (6) to take over in part or in whole the civil administration; (8) to take over all means of transport and communication; (11) to prohibit the assembly of public meetings; (21) to try by court martial all offences by whosoever committed; (22) to take all measures necessary for the public safety; (23) that the Habeas Corpus Act shall be suspended.

controls did appear during the war, in the guise of DORRs, but never, of course, in a circumstance as grim as that here envisaged by Macdonogh.³⁵

Macdonogh's views were endorsed by his immediate superior, Colonel Henry Wilson, who then proposed to the Chief of the Imperial General Staff that the matter be "thrashed out" by a subcommittee of the CID. This suggestion was also put to the Secretary of State, Lord Haldane, who opposed it on the grounds that emergency measures of the military were covered by a short section in the Manual of Military Law. The relevant paragraph simply alluded to the common law right of the executive to take any action necessary for the national safety. Macdonogh was understandably exasperated, having amply demonstrated, he believed, the limitations of these powers.³⁶ The issue was revived in October 1912, by which time there was a new Secretary of State, Colonel Seely, more disposed to the War Office view than his predecessor. Seely agreed with the new CIGS, General Sir John French, that a CID subcommittee should be instructed to prepare a draft bill.³⁷

Preliminary arrangements for the establishment of such a body had already started when Seely observed that "we must carry the legal people along with us, if we are to have any chance of getting the preparation of a draft bill agreed to by the Prime Minister."³⁸ Unfortunately for the War Office, the Attorney-General, Sir Rufus Isaacs, and the Solicitor-General, Sir John Simon, were steadfastly opposed to legislative innovation in this field.

³⁵ WO 32/7112/1A, "Home Defence: The Military Government of the Theatre of Active operations or other Territory placed under Martial Law," 6 Jan. 1911. Macdonogh was also a trained barrister with a keen understanding of the historical background to, and the constitutional complexities of, this question.

³⁶ WO 32/7112/1, Wilson to Major-General Sir Archibald Murray (Director of Military Training), 12 Jan. 1911; 3, Wilson to General Sir William Nicholson (CIGS), 25 Jan. 1911; 5, Murray (on Haldane's position) to Wilson, 31 May 1911; Macdonogh to Wilson and Murray, 31 May 1911.

³⁷ Ibid., 12, French to Seely, 24 Dec. 1912; 13, Seely to French, 4 Jan. 1913. Haldane had been appointed Lord Chancellor in June 1912.

³⁸ Ibid., 19, Seely to French, 5 Feb. 1913; 17B, Major R.H. James (Directorate of Military Training) to Captain Maurice Hankey (Secretary, the CID), 4 Feb. 1913.

There seems to us to be great danger in endeavouring to make an exhaustive list of the powers which the executive may exercise in times of emergency. The great merit of the Common Law is that it will justify even an unprecedented course of action if it is fairly covered by the maxim salus respublicae suprema lex. We are convinced that it is far better to rely upon the good sense of the community and the necessity of the case backed up if need be by a Bill of Indemnity when the crisis is passed.³⁹

This legal opinion widened further the breach between the adherents of legislation in the military and the common law viewpoint of the civilian politicians.⁴⁰ The Law Officers were astute in tackling the authoritarian pragmatism of the military mind by asserting the greater pliability of martial law. By concentrating on this point, they did not have to state the political objections to emergency powers legislation.

Macdonogh was in no mood to be appeased. It was naive to expect, as did the Law Officers, "that everyone will do the right thing in a time of crisis." The historical evidence suggested that, without precise instruction, "the persons administering martial law are almost certain to do either too much or too little." Simon and Isaacs, he continued, had relied too much on Ilbert's outdated 1896 memorandum. At that time, the British Empire had not confronted a powerful German Navy, and the threat of invasion had been entirely chimerical. Furthermore, the smooth passage of the Official Secrets Act convinced Macdonogh that Parliament might sometimes be persuaded to enact drastic legislation. If it was assumed that a satisfactory measure could be drafted at short notice, then "we must conclude that a large part of the labours of the CID are valueless."⁴¹ The indignant head of MO5 refused to let the matter rest. He continued to urge the establishment of the CID subcommittee, irrespective of the Law Officers' opinion, and submitted Draft Martial Law Regulations as a basis for more discussion. Seely was compliant, and Macdonogh was also helped by Admiralty support for

³⁹ Ibid., 26A, "Opinion of the Law Officers of the Crown," 17 July 1913.

⁴⁰ For a detailed treatment of this theme, see Rubin, "Royal Prerogative or a Statutory Code," *passim*.

⁴¹ WO 32/7112/27A, Macdonogh to Wilson, 13 Nov. 1913.

an inquiry. Although this department was sceptical about legislating extraordinary powers in advance of a crisis, they agreed that the whole question must be settled by the CID.⁴²

The CID Subcommittee on Emergency Powers in War

At the 125th meeting of the CID, on 3 March 1914, it was at last decided to establish a special Subcommittee on Emergency Powers in War.⁴³ The following terms of reference were worked out jointly by Admiralty and War Office officials:

- (a) What legislation if any is necessary or desirable to give the various Departments concerned the legal right to take such emergency measures, including the exercise of martial law, as may be necessary during the precautionary period, and in war; or to protect servants of the Crown and other persons acting in co-operation with them from any legal proceedings, criminal or civil, to which they may render themselves liable through carrying out the instructions of a Department of State in connection with such emergency measures;
- (b) When, and by what means, such legislation if considered necessary or desirable can be most conveniently passed;
- (c) What Regulations should be drawn up to give force to the legislation when passed, and how the various Departments should co-operate therein.⁴⁴

The subcommittee was to be chaired by the Home Secretary, Reginald McKenna, and it included Macdonogh, Brade, and Major R.H. James from the War Office, Sir John Simon, by now the Attorney-General, as well as Home Office, Treasury, Admiralty, Board of Trade, and Board of Customs and Excise representatives.

⁴² Ibid., 26A, Macdonogh to Wilson, 6 Aug. 1913; 28, H.J. Creedy (Private Secretary to the Secretary of State), minute, 29 Jan. 1914. The Admiralty's decision was taken in the light of the CID Home Ports Defence Committee's declaration of support for the kind of 'examination service' scheme reviewed at the 1907 joint conference (see CAB 38/26/8, "Measures to Prevent the Blocking of Commercial Harbours: Memorandum by the Home Ports Defence Committee," 27 Mar. 1913; CAB 16/31/E.P.3 [Appendix 1], Admiralty to Customs and Excise, 8 Jan. 1914).

⁴³ CAB 38/26/11.

⁴⁴ CAB 16/31/E.P.1, "Sub-Committee of the Committee of Imperial Defence: Emergency Powers in War: Composition and Terms of Reference," 23 Mar. 1914. See also, WO 32/7112/29A, Brade to Hankey, 12 Feb. 1914; CAB 16/31/E.P.3 (Appendix 3), Sir Graham Greene (Permanent Secretary, the Admiralty) to Brade, 6 Mar. 1914.

The War Office referred the subcommittee to Macdonogh's Draft Martial Law Regulations and submitted two lengthy memoranda, both of which drew heavily on the head of MO5's detailed staff work. The first of these outlined the unsatisfactory progress since draft legislation had been mooted in 1888. It also summarised the arguments against continued legislative inaction. The second memorandum was an historical overview of martial law. This document again emphasised the uncertain nature of these common law powers and reiterated the Macdonogh thesis that "nothing short of an Act of Parliament can enable martial law to be established on a satisfactory basis in this country."⁴⁵ The Admiralty representatives on the subcommittee disagreed with this judgment. Like the Law Officers, they favoured the indemnification of extra-legal executive acts by legislation passed during or after an emergency. Yet this department was prepared to see draft regulations issued to Home Commands as an informal basis for action.⁴⁶

The secretary of the subcommittee had urged the necessity of clarifying emergency procedures in each of three different situations that might arise:

- (1) During the Precautionary Period.
- (2) In the event of war when invasion is threatened or imminent.

⁴⁵ CAB 16/31/E.P.2 (Appendix 1), "Draft Martial Law Regulations," 4 Apr. 1914; E.P.2, 1, "Need for an Emergency Powers Bill"; E.P.2, 2, "Memorandum on Martial Law in the United Kingdom," 4 Apr. 1914.

⁴⁶ The Admiralty representatives on the subcommittee were Greene, the Permanent Secretary, and Rear Admiral A.C. Leveson, Director of Operations Division. Their position is perhaps best explained by the less central role which the naval authorities expected to play in administering the War Office's elusive statutory code: "The naval forces are not directly concerned with the administration of Martial Law, as if any force is landed it would be placed at once under the general direction of the military officer commanding the district. The Admiralty requirements are of a much more limited character, and have regard only to protective measures that could not under any circumstances affect the comfort or liberty of citizens generally, or else aim at immediately requiring the use of material required for naval purposes, subject to payment of a fair price in due course" (ibid., E.P.5, "Memorandum by the Admiralty," 26 June 1914).

(3) In the event of an actual invasion.⁴⁷

At the only meeting of the subcommittee, on 30 June 1914, Macdonogh emphasised the crucial distinction between the second and third types of emergency. An invasion would provide "the only condition under which a proposal to establish martial law would be entertained."⁴⁸ But McKenna then declared that he "was not clear as to the necessity of distinguishing between (b) and (c)." Thus, the Home Secretary appeared to admit the possibility of stringent emergency powers legislation in the less critical of these two situations. Unfortunately, however, the ensuing discussion did not get beyond the legal problems posed by the institution of the precautionary stage.

Macdonogh began by detailing the statutory powers which his department would like to exercise at such a critical juncture. He listed a variety of restrictions over personal and property rights and also requested the latitude "to take all measures necessary for the public safety." Sir John Simon remarked that this final point "covered all those that had preceded it, and was itself covered by the common law." Major James of the War Office then referred to the legal problems of erecting defence works on private property, one symptom of the debilitating lack of statutory authorisation for emergency executive acts. Since 1909 Home Commands had been instructed to use their discretion in this matter; there were no precise guidelines as to how far property rights might be overridden. This arrangement satisfied the Attorney-General because GOCs were clearly "not called upon to do more than was reasonably necessary." According to James, however, "the interpretation of what was reasonably

⁴⁷ Ibid., E.P.3, Hankey, "Emergency Powers in War," 29 Apr. 1914. The precautionary period was defined by the Reserve Forces Act, 1882 as a "case of imminent national danger or greater emergency." This stage was to be instituted before a general mobilisation, so as to "safeguard places liable to sudden attack at a time when relations with a foreign maritime power are such that a declaration of war, with the possibility of a coincident or even antecedent attack, is imminent" (WO 33/688, ch. 2, "A War Book for the War Office," July 1914).

⁴⁸ CAB 16/31, "Sub-Committee of the Committee of Imperial Defence: Emergency Powers in War: Minute of the 1st Meeting held on June 30, 1914." Quotations in the remainder of this section are from this record of these proceedings.

necessary' would vary with the character of the responsible officer, and it was this danger that the War office wished to avoid." Simon countered that "any Bill introduced for this purpose to Parliament must contain some such qualification." James replied that a statutory definition was still more satisfactory, no matter how restrictive it might be. But the subcommittee chair, Reginald McKenna, was persuaded that legislation might even hamper the executive authorities and that, hence, "they would be no better off than before."

Instead of a bill, the Attorney-General favoured a Royal Proclamation of the precautionary period. This pronouncement was to inform the public that extraordinary executive action was imminent; it might also communicate the substance of the intended emergency measures. More importantly, a Royal Proclamation would "reassure" any faint hearts in the military who were reluctant to take the necessary steps on their own authority. Simon concluded that this was a more sensible approach than legislating, which implied "that the powers available under the common law were regarded as inadequate, and would of itself weaken those powers." Macdonogh was not enthusiastic about this proposed course, but his War Office colleagues were prepared to accept the Attorney-General's plan. Sir Reginald Brade added that instructions might be inserted in the separate Home Defence schemes, outlining the steps for each GOC to take. The meeting concluded with an order for the War Office "to co-operate with the Attorney-General in drafting a Proclamation setting forth the powers exercisable by the military authorities in time of national emergency."

The Outbreak of War

The updated War Book, issued early in July 1914, could only report that the "the question of a General Powers, Emergency, Bill is under consideration by a Sub-Committee of the Committee of Imperial Defence."⁴⁹ Before this subcommittee could settle an emergency legal framework

⁴⁹ CAB 15/5, "War Book 1914," ch. 4, para. 44. The War Book listed all government measures to accompany the precautionary period and a declaration of war. Each department

appropriate to an actual outbreak of war, it was preempted by the fateful deterioration of the international situation. At the height of the diplomatic crisis, on 29 July 1914, government officials were informed that the precautionary period had been declared. This led to the immediate institution of various preventive and defensive measures by the military and naval authorities, the security services, and a new Home Office Police War Duties division.⁵⁰ Yet no emergency proclamation was issued until Britain declared war on Germany. This delay conflicted with the policy approved by the CID subcommittee on 30 June 1914. But this decision itself contradicted the more authoritative emphasis of the War Book on maintaining secrecy during the precautionary stage. The CID's Secretary had stressed previously that "when relations with another State are critical, it will be undesirable to draw attention by the passing of an 'Emergency Powers' Act to the enforcement of precautionary measures."⁵¹ The same objections presumably precluded a premature Royal Proclamation.

When this proclamation did appear, on 4 August 1914, there was no intimation of any extraordinary measures to follow, but it otherwise reflected accurately the Attorney-General's recommendation to the Emergency Powers in War subcommittee.

It is Our undoubted prerogative and the duty of all Our loyal subjects acting in Our prerogative and the duty of all Our loyal subjects acting in Our behalf in times of imminent national danger to take all such measures as may be necessary for securing the public safety and the defence of Our realm...

We strictly command and enjoin Our subjects to obey and conform to all instructions and Regulations which may be issued by Us or Our Admiralty or Army Council, or any officer of Our Navy or Army, or any other person acting in Our behalf for securing the objects aforesaid, and not to hinder or obstruct, but to afford all assistance in their power to, any person acting in

had its own internal War Book which subdivided the various departmental responsibilities between different administrative branches. See J.M. Bourne, Britain and the Great War, 1914-1918 (London, 1990), 16.

⁵⁰ Hiley, "Failure of British Counter-Espionage," 858. See also the first hand accounts of Troup, Home Office, 240-41 and Basil Thomson, Queer People (London, 1922), ch. 4. From June 1913 until April 1919, Thomson was Assistant Commissioner of the Metropolitan Police, in charge of the Criminal Investigation Department and Special Branch.

⁵¹ CAB 16/31/E.P.3, Hankey, "Emergency Powers in War," 29 Apr. 1914; WO 33/688, ch. 2, "A War Book for the War Office," July 1914.

accordance with any such instructions or Regulations or otherwise in the execution of any measures duly taken for securing those objects.⁵²

Astonishingly, the proclamation was superseded only four days later by the enactment of DORA. This signified the Liberal Government's dramatic, if belated, acceptance of a statutory basis for the defence of the realm. The most obvious explanation for this policy reversal is that military preferences carried more weight now that the nation was at war. One historian still finds it "a little surprising that a statute of the kind rejected in June was hastily enacted after the outbreak of war." Yet the question of emergency powers legislation during wartime, as opposed to the precautionary period, had not yet been ruled out by the CID subcommittee, as G.R. Rubin observes.⁵³

The passage of DORA upset the dominant prewar assumptions about emergency executive discretion. But it was not quite the sweeping law which the War Office had for so long craved. The statute was aimed squarely at the prevention, detection, and punishment of espionage and sabotage. DORA was undoubtedly a stringent piece of national security legislation, but its reach was limited. In this sense DORA was of a piece with the plethora of legislation hurriedly enacted after the outbreak of war. The Radical editor, A.G. Gardiner, was impressed by the facility with which Parliament had given "powers to the State which in normal times would freeze the blood of Sir Frederick Banbury." As R.J.Q. Adams asserts, however,

these measures...were meant not to bring the meaning of the War home to the nation, to declare that the realm was in danger, but, rather, to prevent that feeling. They were intended to ensure what seemed to be the deepest desire of the nation, best typified by the slogan popular in those first weeks of War:

⁵² "Proclamation, dated August 4, 1914, Regarding the Defence of the Realm," Manual of Emergency Legislation, 145.

⁵³ Townshend, "Military Force and Civil Authority," 280; Rubin, "Royal Prerogative or a Statutory Code?" 155. Although the meeting of 30 June 1914 was a setback to the military planners, Macdonogh and Hankey were not deterred from refining the former's draft DORRs as the July Crisis unfolded.

'Business as Usual'.⁵⁴

The explosion of legislative activity provides one gauge of the patriotic consensus forged by the German invasion of Belgium in a country which might otherwise have been seriously divided by the Cabinet's decision for war. The Law Journal also saw the proliferation of emergency statutes as a testament to the vitality of the rule of law in wartime Britain. This liberal-leaning legal weekly would develop profound misgivings about DORA. Yet, for the moment, it was "all to the good from the point of view of an ordered community, that our rulers prefer to proceed under the authority of Parliament instead of taking all powers in their own hands."⁵⁵

During the short Commons debate of DORA, the Home Secretary did not dwell on these delegating provisions of the Government's legislative proposal:

His Majesty in Council has power during the continuance of the present war to issue Regulations as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in His behalf, for securing the public safety and the defence of the realm....

The critics of DORA would protest that if there had been the merest hint as to how loosely these words would be construed, then parliamentary support for the bill would not have been so forthcoming. This particular charge betrayed their civil libertarian disquiet with DORRs issued much later. The allegation did not reflect the sentiments of Parliament in August 1914, when lawmakers would probably have acceded to a far more imperious ministerial request.

⁵⁴ DN, 29 Aug. 1914, 4; R.J.Q. Adams, Arms and the Wizard: Lloyd George and the Ministry of Munitions, 1915-1916 (London, 1978), 4. Banbury was the veteran Unionist MP for the City of London, and a lifelong antistatist. Between 5 August and 18 September 1914 a total of 41 bills were passed, invariably after the most abbreviated parliamentary discussion. Statutory authorisation was obtained, *inter alia*, for suspending debt payments, circulating paper currency, prohibiting trade with the enemy, and restricting the freedom of resident enemy aliens. Auxiliary Orders in Council were also issued, along with several Royal Proclamations. There is a comprehensive list of Bills, Royal Proclamations, Orders in Council, rules, regulations, and notifications passed or implemented as a direct consequence of the war between 1 August and 30 September 1914 in the Manual of Emergency Legislation, v-xi. For a discussion of the most significant, see Marwick, Deluge, 29-39.

⁵⁵ "The New War Legislation," Law Journal, 29 Aug. 1914, 505.

Few people yet grasped the strains which 'total' war would exert on the British state (and which DORA would be manipulated to ease), and there is no evidence from August 1914 that departments even contemplated the cavalier use of the statute's ordaining power.

The dangerously vague terms of the quoted passage were, in any case, constrained by subsections (a) and (b) of the single clause act. These only authorised the enforcement of regulations designed to prevent communication with the enemy, or to secure the safety of communications, docks, railways, and harbours.⁵⁶ In addition, the power to make regulations appeared to be confined within the existing (i.e., common law) limits of Admiralty and Army Council authority.⁵⁷ Nevertheless, the Order in Council of 12 August 1914—finalised the same day at a consultation between the Law Officers, and War Office, Admiralty, and Home Office officials—imposed some noteworthy restrictions on the civil population.⁵⁸ These DORRs were divided into three categories. The thirteen "General Regulations" conferred on every Competent Naval or Military Authority, or persons acting under their direction, sweeping powers of access, requisition, seizure, search, and arrest. Chief Constables were instructed by the Home Office to "aid them [the military] generally in giving effect to all the Regulations...to induce the public to submit quietly to the Military requirements."⁵⁹

There were also fourteen "Regulations specially designed to prevent persons

⁵⁶ By the Defence of the Realm (No. 2) Act of 28 August 1914, the power to issue regulations was extended to "the spread of reports likely to cause disaffection or alarm," and to "the suspension of any restrictions on the acquisition or user of land...under the Defence Acts, 1842 to 1875, or the Military Land Acts, 1891 to 1903."

⁵⁷ Rubin, "Royal Prerogative or a Statutory Code?" 156-57. This further curb on the executive's discretion under the act was probably unintended; it was at odds with the assertion of Regulation 28 that "powers conferred by these Regulations are in addition to and not in derogation of any powers exerciseable by members of His Majesty's naval and military forces."

⁵⁸ ADM 1/8397/370, Oswyn Murray (Assistant Secretary, the Admiralty) to Greene, 12 Aug. 1914.

⁵⁹ HO 45/10690/228849/5, Home Office to Chief Constables, 14 Aug. 1914. In practice, the military were far more involved with the administration of the DORRs than the navy (see below, 64-65).

communicating with the enemy and obtaining information for disloyal purposes, and to secure the safety of means of communication and of railways, docks, and harbours."⁶⁰ These regulations created a battery of new criminal offences; suspects were to be tried by court martial. Some of these DORRs reinforced the impression that defending the realm simply meant deterring or punishing enemy agents and saboteurs. For example, Regulation 15 prohibited the sketching or photographing of defence works; Regulation 16, any interference with telegraphic apparatus or messages; and Regulation 20, the unauthorised possession of explosives. Regulations 14 and 21, however, were potentially broader in scope; they became useful tools of domestic censorship.⁶¹ The blackout and curfew provisions of Regulations 23 and 24 were the first of DORA's many, and often hugely resented, impositions on the general population. Seven of the regulations in this second category applied only to "the vicinity of any railway or of any dock or harbour." The Defence of the Realm (No. 2) Act of 28 August 1914 authorised their extension to other "proclaimed areas,"⁶² but the administrative distinction under DORA between these special zones and the rest of the country remained until late November 1914.

⁶⁰ A third category of DORRs comprised 4 "Supplemental" regulations, dealing with general points of definition and interpretation. Except for Regulation 28 (see above, n. 57), these touched on minor, technical matters.

⁶¹ See below, 134-35.

⁶² Specifically, to "any area which may be proclaimed by the Admiralty or Army Council to be an area which it is necessary to safeguard in the interests of the training or concentration of any of His Majesty's Forces." The restrictions which applied exclusively at first to "defended harbours" or, after 28 August 1914, to "proclaimed areas," were Regulations 6 (power of removal), 7 (closure of licensed premises), 17 ('treating', procuring of sensitive information), 20 (possession of explosives), 22 (signalling), 23 (extinguishing of lights), 24 (curfew). For a complete list of all "proclaimed areas" and "defended harbours" as of late 1914, see Manual of Emergency Legislation, supplement no. 2 to December 5th, 1914 (London: HMSO, 1914), 84-97. The "proclaimed areas" are not to be confused with the "prohibited areas" which were scheduled to the Aliens Restriction Order. There was a considerable geographical overlap between these two specially designated zones. Both tended to include docks, naval bases, military installations, coastal areas, and their immediate hinterlands. The rationale of the "prohibited area" concept was slightly different. They were part of a battery of enemy alien controls. Without explicit authorisation, enemy alien civilians could neither reside in, nor enter, the "prohibited areas." See Bird, Control of Enemy Alien Civilians, 210-24.

Conclusion

The passage of DORA in August 1914 represented a qualified triumph for the War Office. The department had been trying to obtain agreement in principle to emergency legislation since 1888. DORA accomplished this, although only with the statute of November 1914 did the military viewpoint triumph completely. Before the war, the advocates of a legislative approach were opposed by civilian politicians who preferred the tractability of martial law and who understood the political objections to a statutory code. The case of ex parte Marais adjusted the doctrine of martial law to fit the realities of modern warfare. Yet the Boer War also dramatised the problems associated with this form of military emergency power. The War Office continued to see legislation as the only practical way of bolstering executive discretion during wartime. Executive 'ad hocery' may have been satisfactory earlier but it would ill serve a future war administration, faced with immeasurably more complex problems. In this sense, the military perspective meshed with the ethos of 'preparedness', which had been given institutional recognition with the establishment of the CID in 1903.

It was strange that the prewar debates did not yield a fixed policy sooner. In several contiguous areas, state power had been extended already, or agreed schemes had been laid. A draft emergency powers code would have been consistent with the outcome of the debate over press control during wartime, for example, the amendment of the Official Secrets Act, the peacetime surveillance of resident aliens, or the preparation of wartime enemy aliens restrictions. These developments leave an impression of "an ostensibly liberal state...not totally innocent of the kind of requirements to be placed upon it by the Great War."⁶³ As the Victorian optimism about Britain's international security and economic power had faded, the British state had extended its reach at home. But it had done so, as Bernard Porter observed, largely by covert means. After 4 August 1914 "the old liberal safeguards" were challenged

⁶³ John Stevenson, "More Light on World War One," HJ 33 (1990): 200.

quite openly.⁶⁴ More than anything else it was war legislation, the Munitions and Military Service Acts, as well as DORA, which seemed to be eroding the foundations of the liberal state.

⁶⁴ Porter, Origins of the Vigilant State, 179.

Chapter 2: MILITARY JURISDICTION AND THE RIGHT OF CIVIL TRIAL

Introduction

The main purpose of the DORRs, according to Sir Edward Troup, was to confer on the Competent Military Authorities certain general powers and "to enable them to be exercised."¹ But DORA also equipped the military with very specific judicial powers. Each of the DORRs in the second part of the new code created a criminal offence. Alleged offenders were to be prosecuted "in like manner as if such persons were subject to military law and had on active service committed an offence under section five of the Army Act." The Home Secretary had averred that the court martial was the only procedure appropriate for the serious transgressions of the law envisaged by the statute.² The prospect of military jurisdiction over British civilians escaped critical scrutiny amidst the alarms and excursions of August 1914. The overwhelming prowar majority in the Commons was no doubt impressed more by the gravity of the national crisis than by the implications for civil liberties of courts martial, or anything else written into the first DORA. Besides, the judicial authority of the military would have appeared to be limited by subsections (a) and (b) of the act.

By late November 1914, however, voices were being raised in support of a right of civil trial in DORA cases. The critics of military jurisdiction were not responding to a sudden crisis of civil liberties brought on by the outbreak of war. The military showed restraint in the

¹ HO 45/10690/228849/5, Home Office to Chief Constables, 14 Aug. 1914.

² PD (Commons), 7 Aug. 1914, 65, col. 2192.

use of their judicial powers during the early months of the fighting.³ The inherent dangers of a military jurisdiction over civilians were nevertheless impressed upon civil libertarians after the death penalty was added to the punitive sanctions at the disposal of the court martial tribunal. This change was effected by the Defence of the Realm Consolidation Act which, inter alia,⁴ authorised a sentence of death in cases where "the intention of assisting the enemy" was proven. This strengthening of DORA had taken place against a backdrop of rising popular hysteria about enemy espionage and of partisan accusations of official laxity in the face of this allegedly pervasive problem. Yet the passage of the bill also elicited the first sustained criticism of DORA from a civil liberties standpoint.

Amending legislation was enacted in March 1915 to settle, after a fashion, this little-known wartime controversy. The statutory curtailment of military jurisdiction in March 1915 appeared to reinforce a keynote liberal principle just as 'business as usual' attitudes and

³ Only 30 people had been prosecuted under the DORRs up to 7 January 1915. Of the 23 convictions, the harshest sentence was the 3 month imprisonment of Mr. H. Fochtenberger, for a breach of the lighting restrictions. Only 5 prison sentences in all had been carried out; 13 others had been quashed on appeal as ultra vires the statute (WO 32/5526/13A, "Return of Civilians Tried Under the Defence of the Realm Regulations, from September, 1914 to January, 1915." The overturned convictions are discussed below, 219).

⁴ The act also extended nationwide the application of all DORRs hitherto restricted to "defended harbours" or "proclaimed areas." The most significant amendment touched not on military jurisdiction over civilians but on the general discretionary authority of the executive. This was effected by a subtle drafting change in the opening sentence of clause one: "His Majesty in Council has power during the continuance of the present war to issue Regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of members of His Majesty's forces, and other persons acting in his behalf." These delegating powers were now more flexible than those of the first DORA. The Government possessed a statutory power "not merely to issue Regulations as to the existing powers of the Army Council...but to issue Regulations independently of, and not constrained by, existing military powers" (Rubin, "Royal Prerogative or a Statutory Code?" 157). The legal and administrative doubts about the vires of the DORRs were not banished by this revamping of DORA's ordaining powers. Earlier in November 1914 the Admiralty had requested a DORR for the suspension of any statutes or regulations pertaining to the pilotage of ships in or around home ports. The Parliamentary Draftsman, however, had advised that such action would be ultra vires the DORA, and the insertion of an explicit sanction to this effect in the bill suggests that the power to issue DORRs was still viewed as too limited for such purposes as the Admiralty's (ADM 1/8404/443, Greene to Liddell, 11 Nov. 1914).

methods were being challenged from both inside and outside the Asquith Government. Yet the Defence of the Realm (Amendment) Act should not be misused as a gauge of the resilience of the rule of law in a liberal state at war. The constraints which this act placed on the growth of a 'British Prussianism' were of limited practical significance and certainly did not inhibit the increasingly rapid and far-reaching extension of DORA's authority outside the judicial sphere. Indeed, the right of civil trial was enshrined in law the same day, 16 March 1915, as the Defence of the Realm (Amendment No. 2) Act⁵ took effect, a quite different measure and a foretaste of the still more stringent production and manpower controls of the July 1915 Munitions of War Act.

Military Jurisdiction

The upholders of civil jurisdiction looked at judicial procedure under DORA as an unwarranted divergence from A.V. Dicey's strict standard that the civil courts must continue to function until absolutely impossible for them to do so. This desperate scenario had not been created by the British declaration of war on Germany. Regulation 1 even conceded this point, by stating that "ordinary civil offences will be dealt with by the civil tribunals in the ordinary course of law." This DORA clearly envisaged discrete spheres of military and civil jurisdiction. As in the Cape Colony and Natal during the Boer War, trial by courts martial would not entail the total eclipse of the ordinary courts. The Law Journal regarded this division of judicial authority as a most unsatisfactory arrangement.

This Regulation [1] rather accentuated the vice of the statute, because it assumed that, while the military authorities were exercising their arbitrary powers against persons charged with offences under the Act, the civil courts were still able to deal with other offenders.⁶

⁵ On this measure, see Chris Wrigley, David Lloyd George and the British Labour Movement (Hassocks, 1976), chs. 4 and 5 passim.

⁶ Law Journal, 27 Feb. 1915, 101-02.

Some critics of DORA assessed the impact of the legislation on the courts as tantamount to a proclamation of martial law.⁷ This apocryphal view was far less accurate than Lord Parmoor's observation that DORA was based "not on the imposition of martial law, but on the extension of military law to civilians."⁸ Martial law derived from the powers of the Crown under the common law; whereas military law comprised a set of rules (the King's Regulations) grounded in annually renewable legislation. These two branches of law had been quite separate since the late-seventeenth century, if not earlier, but the terms were still misused interchangeably in the Victorian period⁹ and, evidently, even later as well. Parmoor's clarification of this important distinction did not place DORA in any less contentious a light because the Army Act (the statutory basis of military law) ordinarily applied only to serving soldiers.

There was under DORA no provision for the trial of civilians by naval disciplinary procedures. Yet the powers created by the DORRs were conferred jointly on Competent Naval, as well as Military, Authorities. On the islands off the north-east and west coasts of Scotland, CNAs had sole responsibility for the administration of DORA.¹⁰ CNAs also existed in the major ports and dockyards, but their jurisdiction overlapped with that of the area CMA's. In December 1914 it was resolved that, in zones of joint military and naval jurisdiction, the CMA was ultimately responsible for the enforcement of the DORRs, unless an exclusively naval interest was involved. In addition, if the CNA wished to prosecute a DORA case (at least before the magistracy were authorised to hear minor cases and before a right of

⁷ "Britain Under Martial Law," LL, 17 Dec. 1914, 4; Forward, 12 Dec. 1914, 1.

⁸ PD (Lords), 4 Feb. 1915, 18, col. 445.

⁹ F.H. Dean, "The History of Military and Martial Law," in A Guide to the Sources of British Military History, ed. Robin Higham (Berkeley, 1972), 613.

¹⁰ On the Shetland CNA's arrest and week-long detention of the Post Office staff at Lerwick in November 1914, ("a curious business suggesting of Zabern methods") see Scottish Office Papers, HH 31/17/25478/1253.

civil trial was established for more serious infractions of the DORRs), they were obliged to transfer suspects to military custody.¹¹

The courts martial controversy erupted, ironically, just as the military's hitherto undivided jurisdiction in DORA cases was being split. Subsection five of the Defence of the Realm Consolidation Act had empowered the magistracy to try minor breaches of the DORRs. The War Office wanted all DORA offences punished but also to free the military from the obligation of prosecuting the less serious cases themselves.¹² Crucially, however, it was incumbent upon CMAs to determine the gravity of offences and the mode of trial for each defendant. These changes amounted to nothing more than a partial restoration of civil jurisdiction, barely noticed when set alongside the capital sentencing provisions of the same statute.

"We Have Martial Law for Journalists, but not for German Spies"

The decision to extend the law's ultimate sanction to a certain category of DORA cases was surely linked to the spy contagion spread so wilfully by the politicians and publicists of the jingo Right during the first few months of the war. Yet the same 'scaremongers' who urged the stricter application of DORA to combat enemy espionage also suspected the Asquith Government of twisting its censorship authority under this legislation to party advantage. The Unionist opposition generally welcomed DORA as a signal that the Government appreciated the gravity of the national crisis. Yet DORA was also a potentially dangerous instrument, which 'untrustworthy' Liberal ministers might wield to inhibit legitimate political criticism. These right-wing fears were exaggerated, far less commonplace than grumbling about the

¹¹ ADM 1/8400/400, "Defence of the Realm Regulations: Amendment to Instructions to Competent Naval Authorities," War Order 487, Dec. 1914.

¹² See HO 45/11007/271672, Liddell to Troup, 16 Nov. 1914; PD (Lords), 27 Nov. 1914, 18, col. 205-06.

dearth of genuine war news and the bureaucratic muddling of the censors,¹³ but not entirely misplaced.

According to Nicholas Hiley, Germany's ramshackle prewar spy ring in Britain was actually broken up very quickly after the outbreak of war. Some details of these internal security operations were released in order to reassure the public. But popular anxieties did not abate, nor did the readiness of the 'scaremongers' to exploit this issue for political advantage. By mid September 1914 the Metropolitan police had dealt with nearly nine thousand inquiries from Londoners suspicious of enemy aliens within their midst. Lord Northcliffe's Daily Mail did not stand alone on the Right in discerning a "German spy system....so wide, so extraordinarily efficient, so immensely dangerous that it cannot be too severely repressed."¹⁴ Espionage alarmists lent credence to unsubstantiated rumours of hostile aliens with access to secret arsenals; of spies in high places, protected by their social position; of contraband petroleum sales to German U-boat crews; and of clandestine signalling to the German fleet from the east coast. The Government's critics were irritated most by the latitude still enjoyed by most enemy alien civilians. They pressed for a stricter internment policy and the designation of the entire east coast as a "prohibited area" under the Aliens Restriction Order. There were also demands for tougher, systematically enforced DORRs.¹⁵

A communiqué from the Home Office, dated 8 October 1914, tried to scotch the more fanciful imaginings about enemy agents and saboteurs, whilst also demonstrating the seriousness with which the spy threat was regarded. The statement detailed the range of

¹³ See Lovelace, "British Press Censorship," 310-11.

¹⁴ Daily Mail, 16 Oct. 1914, 4; Hiley, "Counter-Espionage and Security," 37-38; French, "Spy Fever in Britain," 364-66.

¹⁵ On this last point, see the public appeals for greater vigilance from Lord Leith (Morning Post, 20 Oct. 1914, 10) and William Joynson Hicks (PD [Commons], 12 Nov. 1914, 68, col. 87), both of whom were incorrigible alarmists. More generally, see French, "Spy Fever in Britain," 365-66; Christopher Andrew, Her Majesty's Secret Service: The Making of the British Intelligence Community (New York, 1986), 177-82; Bird, Control of Enemy Alien Civilians, 45-91 *passim*.

statutory powers at the Government's disposal and mentioned the recent amendment of Regulation 16, prohibiting the unlicensed possession or importation of homing pigeons. Further counter-espionage measures were introduced by Order in Council of 14 October 1914.¹⁶ The Home Office statement also alluded to the arrest and impending court martial of Karl Hans Lody, an espionage suspect who had just been apprehended in Ireland. Lody was convicted of spying early the following month and executed by firing-squad at the Tower of London on 10 November 1914. He had not been charged under DORA because the maximum penalty for an offence against any regulation was penal servitude for life. Instead, Lody had been tried by court martial under "customary international law," as an enemy national engaged in hostile acts on British territory.¹⁷ On 20 November 1914 J.G. Butcher gave notice of a parliamentary question asking the Home Secretary why nobody convicted of espionage under DORA could be sentenced to death. No reply was prepared, however, because legislation removing this 'anomaly' had already been drafted.¹⁸

The 'scaremongers' had no intention of being sidelined by the party truce negotiated between Asquith and the Unionist leader, Bonar Law, in August 1914. Indeed, the abuse of the Home Secretary and Lord Chancellor Haldane, over their indifference to the German spy

¹⁶ "Statement Issued by the Home Office and Appearing in the Press, Friday, October 9th, 1914," Manual of Emergency Legislation, supplement no. 2, 516-20. Regulation 16 was amended by SRO 1302, 1 Sept. 1914 and SRO 1405, 17 Sept. 1914. The bizarre side of the homing pigeon scare is touched upon briefly by Andrew, Her Majesty's Secret Service, 178. The new DORRs issued by SRO 1543, 14 Oct. 1914, were Regulation 13A (powers of search over people entering or leaving the United Kingdom); 16A (prohibition against possession of unlicensed telegraphic equipment); 16B (power to prevent embarkation of persons suspected of future communication with the enemy); 16C (prohibition on transmission of written messages other than through the post).

¹⁷ Law Journal, 14 Nov. 1914, 622-23.

¹⁸ HO 45/10765/271164, Troup (minute), 20 Nov. 1914; Hiley, "Counter-Espionage and Security," 638-39. For a firsthand account of the Lody case, see Sir Basil Thomson, The Scene Changes (New York, 1937), 243-50. A War Office file, WO 141/82, "Hans Lody: Espionage," remains closed under the 100 year rule.

peril, dramatised the shallowness of this informal political agreement.¹⁹ McKenna deplored the attempts of certain of his political critics to manufacture a spy problem. Early in September 1914 he instructed the Official Press Bureau to admonish the Globe for its irresponsible claim that thousands of armed enemy aliens were at large in the metropolis. The 'popular' patriotic London daily was also reminded that there were under the DORRs "legal powers...to make his [McKenna's] desire for supervision effective." The editor replied defiantly that his newspaper's coverage of the spy question was "in effect, a public expression of the fear, which actually exists, that the danger is not fully realised at the Home Office." A sympathetic fellow editor was outraged by the department's threatened use of a regulation "made for a wholly different purpose...to shield itself from an exposure of its inefficiency."²⁰

Later the same month the Home Secretary admonished privately the editor of the Daily Express for his newspaper's assertion that valuable intelligence was reaching the German High Command from sources in Britain.²¹ McKenna was not the only minister who brandished the DORRs at the Government's critics. The Prime Minister had personally threatened stricter press legislation after The Times, on 30 August 1914, ran a 'defeatist' report of the British Expeditionary Force's retreat from Mons.²² Indeed, the strengthening of

¹⁹ See Cameron Hazlehurst, Politicians at War July 1914 to May 1915: A Prologue to the Triumph of Lloyd George (London, 1971), ch. 3. Strictly speaking, the party truce extended only to by-elections, which were not to be contested if a seat became vacant. It also implied, however, a suspension of party rivalry generally and led to bipartisan initiatives on recruiting and the relief of distress. If opposition critics were not deterred from exploiting the spy mania, nor was the Government inhibited from introducing distinctly partisan Home Rule and Welsh Church disestablishment legislation before Parliament was prorogued on 17 September 1914. On the political difficulties of McKenna and Haldane, see Stephen McKenna, Reginald McKenna 1863-1943: A Memoir (London, 1948), 48; Stephen E. Koss, Lord Haldane: Scapegoat for Liberalism (New York, 1969), chs. 5 and 6 passim.

²⁰ Harold Smith (Secretary, the Press Bureau) to Charles Palmer, 7 and 8 Sept. 1914; Palmer to Smith, 8 Sept. 1914 (correspondence published in the Globe, 10 Sept. 1914); Leo Maxse, "Under the Heel of the Press Bureau," National Review, Oct. 1914, 223.

²¹ Blumenfeld Papers, McK.1, McKenna to R.D. Blumenfeld, 29 Sept. 1914.

²² PD (Commons), 31 Aug. 1914, 65, col. 373-74. A few days later, the Director of the Press Bureau, F.E. Smith, admitted to Parliament that he had approved, and even doctored, the

Regulation 21, announced two days later, was linked directly by the Morning Post to "the forcible manner in which public attention was recently called to the dissemination of alarming accounts of happenings in the war area."²³ The Post revelled in the embarrassment which the Mons Dispatch briefly caused its major commercial rival. Before long, however, the premier organ of the British officer class almost fell foul of DORA itself, over a scathing editorial on Churchill's leadership at the Admiralty.²⁴

The Director of the Press Bureau, Sir Stanley Buckmaster, struck another raw nerve on the Right with his Commons statement of official censorship policy on 12 November 1914. In addition to the suppression of sensitive military and naval information, Buckmaster told MPs, he also endeavoured to quash criticism

of such a character as that it might destroy public confidence in the Government (*sic*) conduct of the war...weaken the confidence of the people in the administration of affairs, or otherwise cause distress or disturbance.²⁵

The editor of the jingoistic National Review, Leo Maxse, saw this speech as an ominous portent of "a censorship of views as well as news."²⁶ The Director of the Press Bureau was also attacked in the Unionist parliamentary protest of the censorship subsection of the Defence of the Realm Consolidation Bill. Alongside McKenna's veiled threats to the Globe, observed

offending passage. This curious episode is discussed in The History of The Times, vol. 4, The 150th Anniversary and Beyond 1912-48, (London, 1952), 222-27.

²³ Morning Post, 2 Sept. 1914, 9. It is more probable that the DORA had been redrafted before the Mons Dispatch appeared and that the keynote change (the application of 21 beyond the vicinity of defended harbours) had simply been made to bring the regulation into conformity with specific statutory powers of censorship ushered in by the Defence of the Realm No. 2 Act of 28 August 1914.

²⁴ Keith Wilson, ed., The Rasp of War: The Letters of H.A. Gwynne to the Countess Bathurst, 1914-1918, (London, 1988), 26-28 (Gwynne to Lady Bathurst, 1 Sept. 1914); 41-42 (Gwynne to Sir Stanley Buckmaster, 14 Oct. 1914); HO 139/5/4, Buckmaster (memorandum), n.d. (Oct. 1914). The offending article was "The Antwerp Blunder," Morning Post, 13 Oct. 1914, 6.

²⁵ PD (Commons), 12 Nov. 1914, 68, col. 127.

²⁶ "Names," National Review, Dec. 1914, 505.

the Scottish Unionist MP, Sir Henry Craik, Buckmaster's understanding of his mandate suggested that the Government was exceeding its legitimate censorship authority.²⁷ Bonar Law then presented a robust defence of the necessity for political criticism during wartime and made a pointed reference to the circumstances of the Aberdeen Coalition's collapse in 1855.

If these powers had been in existence at the time of the Crimean War, and the men who carried the Amendment which defeated the Government had made the statement outside which they made in the House...they would have been liable to be dealt with under the principles laid down by the Solicitor-General.

Although the present administration had not yet employed its punitive powers, continued the Leader of the Opposition, their very existence "exercised a pressure on the Press which on the whole is greater than ought to have been exercised, and which in the long run might be found to be detrimental to...the successful carrying on of the War."²⁸

Another Unionist MP, Lord Robert Cecil, was successful in moving an amendment which appeared to relax slightly the censorship provisions of the bill. The original injunction against "the spread of reports likely to cause disaffection or alarm" was restricted to "the spread of false [underlining mine] reports" etc. The amendment carried, largely because Liberal and Labour opinion was equally disturbed by the "grotesque dictum of Sir Stanley Buckmaster."²⁹ But at least these latter upholders of free speech were not clamouring simultaneously for stringent measures against aliens and suspected spies. Fearful of a Liberal censorship operating "for purely party purposes,"³⁰ the opposition saw no inconsistency between its suspicion of the censorship regulations and an approach to the spy question which emphasised the dangers, as opposed to the rights, of the individual. These ambivalent right-

²⁷ PD (Commons), 23 Nov. 1914, 68, col. 899-901.

²⁸ Ibid., col. 906-08 (Buckmaster had added the Directorship of the Press Bureau to his legal responsibilities after F.E. Smith's resignation from the former post on 25 September 1914).

²⁹ Ibid., 25 Nov. col. 1251-53 and *passim*; DN, 25 Nov. 1914, 4.

³⁰ Bonar Law Papers, 35/3/54, Charles Palmer (editor, the Globe) to Bonar Law, 24 Nov. 1914.

wing attitudes towards DORA are captured in the banner headline from the Daily Express which introduces this section.³¹ They also surfaced in the Lords debate of the Defence of the Realm Consolidation Bill, where, in spite of the misgivings expressed by his Unionist colleagues in the lower House, Lord Crawford called the bill,

a vindication by the Government of those people who have been called 'scaremongers' and all the rest of it, who have thought it their duty to bring forward in Parliament the dangers with which they were acquainted.³²

The Right of Civil Trial

Crawford was responding to objections of fellow peers that civilians might henceforth be executed by order of a military tribunal. The editor of the Liberal Economist was gratified that the latest DORA had been improved modestly by Cecil's amendment. But he could not "understand why the House of Commons has allowed sentence of death to be inserted without appeal."³³ At Hirst's prodding,³⁴ former Liberal Lord Chancellor Loreburn raised this issue in the Lords. Here, the debate was dominated by criticism both of this drastic innovation in particular and of military jurisdiction over civilians generally. Loreburn was horrified that the state now had "the power to deny any British subject when they think fit the right which he now has to have the trial for his life before an ordinary tribunal."³⁵ He only refrained from moving to restore the right of civil trial after Lord Haldane pleaded for the bill to pass at once, the last day of the parliamentary session. In return, the incumbent Lord Chancellor promised that no capital sentences would be carried out before Parliament had again reviewed the new

³¹ Daily Express, 28 Nov. 1914, 1.

³² PD (Lords), 27 Nov. 1914, 18, col. 211.

³³ Ramsay MacDonald Papers (Rylands), Hirst to James Ramsay Macdonald, 26 Nov. 1914 (I am grateful to Mr. Andrew Gregory for this reference).

³⁴ CPT 73, Hirst to Trevelyan, 25 Nov. 1914.

³⁵ PD (Lords), 27 Nov. 1914, 18, col. 207.

DORA.

Loreburn was supported by a Liberal colleague, Lord Bryce, by the nominal Unionist, Lord Parmoor, and by another ex-Lord Chancellor, Lord Halsbury, Tory Diehard and leader of the 'ditchers' in the peers' struggle against the Parliament Bill in 1911. Halsbury saw "no necessity for getting rid of the fabric of personal liberty that had been built up for many generations." The war had quite naturally interfered with some individual rights, but "this wholesale sweeping away of them is greatly to be deprecated." Parmoor added that war hysteria "makes it all the more necessary that every British civil subject should have the rights and protection which not only the Common Law but also the Statute Law of this country have given him over a long series of years."³⁶

Parmoor and Halsbury were hardly exemplars of that libertarian conservatism exemplified by Lord Hugh Cecil, for example, and between which tendency and the strident nationalism and compulsionism of the Morning Post and National Review there existed a huge gulf.³⁷ Despite his being tagged a "conservative lawyer" by the Nation,³⁸ Lord Parmoor had strong liberal inclinations and Liberal Party affiliation before the Home Rule split of 1885-1886. A forceful advocate of the League of Nations and staunch defender of conscientious objection, the war exerted a radicalising effect on this veteran politician. Parmoor would crown his career as Lord President of the Council in the first Labour Government.³⁹ Halsbury, the erstwhile scourge of liberal causes, was now lauded by the Nation for exhibiting "a touch of that true conservatism which, as a rule, we look for in vain in the utterances of politicians."⁴⁰

³⁶ Ibid., col. 208-10.

³⁷ See Arthur Meija, "Lord Hugh Cecil: Religion and Liberty," in Edwardian Conservatism, ed. Thomson and Meija, 11-40.

³⁸ Nation, 5 Dec. 1914, 294.

³⁹ See Lord Parmoor, A Retrospect: Looking Back Over a Life of More Than Eighty Years (London, 1936), 104-33.

⁴⁰ Nation, 19 Dec. 1914, 377.

Yet his latest stand was not at all perverse and actually typified the constitutional lawyers' characteristic mistrust of statutory emergency powers. Two days previously, Halsbury had implied that the common law was sufficiently resourceful to meet the special needs of the present situation. This was exactly the position of Sir John Simon and other Liberal lawyers in their prewar dealings with the military proponents of a statutory emergency code.⁴¹

The Lords' protests were applauded by the Daily News in language redolent of Dicey's discourse on the subject of martial law. Military jurisdiction was "a blow at the reputation of the civil courts which nothing but extreme necessity can justify. Such necessity may exist; but proof of its existence has not yet been produced." A Manchester Guardian leader distilled the essence of the liberal outrage which the wartime challenge to civil jurisdiction had evoked.

To place the civilian under the soldier and the law under military administration is to pay the Germans the compliment of imitation—a compliment which is very far from their due. We are fighting, we are told, against militarism. But the ark of the covenant of militarism is the supremacy of the army over the civil law. This supremacy has been asserted at an important point in the Defence of the Realm Act....

The socialist Glasgow Forward addressed the issue in similar terms, but added a twist of class bitterness to its analysis. The leaders of the labour movement would have to show "sufficient speed and consistency as to demand that no Prussianisation or Potsdamisation military dodgery be attempted here while the working class is being asked to go abroad to fight it."⁴²

Not only the Liberal and Labour press were perturbed by the prospect of courts martial for British civilians. Newspapers of all political stripes harboured an excessive, but not irrational, fear of "arbitrary prosecutions by irate colonels."⁴³ Before the criticism of courts

⁴¹ PD (Lords), 25 Nov. 1914, 18, col. 152-53; Rubin, "Royal Prerogative or a Statutory Code?" 153-54 and passim.

⁴² DN, 28 Nov. 1914, 4; MG, 25 Feb. 1915, 6; Forward, 16 Jan. 1915, 1.

⁴³ PD (Commons), 24 Feb. 1915, 70, col. 296. The comment was Sir Harry Lawson's (later Lord Burnham), proprietor of the Daily Telegraph and Unionist MP for Mile End.

martial started in earnest, only one such trial had been held involving the press.⁴⁴ Yet Sir Stanley Buckmaster's recent speech was hardly reassuring; nor was the revamping of the censorship regulations by the Order in Council that accompanied the new DORA. The Government's right-wing critics actually had more to fear from the civilian Director of the Press Bureau than from the military authorities. Buckmaster (and several Cabinet colleagues) believed that the Asquith administration was being wilfully undermined by the jingo press. In November 1914 Buckmaster had resolved to prosecute The Times and Daily Mail, over some scurrilous allegations of inadequate military and naval preparation. But neither Kitchener nor Churchill would agree when this proposed course was aired in Cabinet. Buckmaster complained about this lack of support, but only drew a "mean and shabby attack" from the War Office and Admiralty chiefs when he pursued the matter further. According to one Cabinet minister, Kitchener "as usual tried to control the exercise of censoring the press, but would not incur the odium of restraining, much less prosecuting the press."⁴⁵

The Director of the Press Bureau later recalled with some bitterness how his attempts to restrain the Northcliffe press in particular had been blocked by ministers anxious to cultivate newspaper support.⁴⁶ Buckmaster's problems derived from the ambiguous status of the Press Bureau. It did not enjoy full departmental authority, which precluded prosecutions launched unilaterally by the Director. Furthermore, the submission of copy to the Bureau was entirely voluntary, and even the evasion of its publishing guidelines ('D' notices) was not a criminal offence unless such action also constituted a breach of the DORRs. Buckmaster was

⁴⁴ HO 45/11007/271672/9, Brade to Troup, 10 Dec. 1914. On 19 October 1914 a military tribunal acquitted a Swansea journalist of charges laid under Regulation 21 ("No person shall by word of mouth or in writing spread reports likely to cause disaffection or alarm among any of His Majesty's forces or among the civilian population").

⁴⁵ Edward David, ed., Inside Asquith's Cabinet: From the Diaries of Charles Hobhouse (London, 1977), 205-07 (13 Nov. 1914); J.M. McEwen, ed., The Riddell Diaries, 1908-1923 (London, 1986), 95 (10 Nov. 1914).

⁴⁶ Stephen Koss, The Rise and Fall of the Political Press in Britain, vol. 2, The Twentieth Century (Chapel Hill, 1984), 245.

frustrated with the limited powers of his office; twice in 1915 the Press Bureau tried to increase its legal authority over the press.⁴⁷ Both these initiatives were foiled by Sir Reginald Brade, the influential Permanent Secretary to the War Office, who enjoyed the confidence of well-connected newspaper men like Sir George Riddell,⁴⁸ proprietor of the News of the World and himself a confidant of senior politicians, most notably Lloyd George.

As vice-chair of the Newspaper Proprietors' Association, Riddell also acted as a more formal liaison point between Fleet Street and Westminster and Whitehall. Riddell shared the mistrust, widespread in his profession, of the "drastic and unique provisions" of the Defence of the Realm Consolidation Bill.

The legislation has taken place so rapidly that the measures have not been properly discussed. The press have been singularly ill informed and lacking in criticism regarding a law which wipes out Magna Charta, the Bill of Rights, etc., in a few lines. We have got some alterations made, but trial by court martial still stands. A very dangerous innovation....⁴⁹

After the bill became law, the Newspaper Proprietors' Association passed a resolution urging that all press offences be tried by the ordinary courts. The secretary of the Association conceded that under the new arrangements the magistrates would now hear the less serious infringements of the DORRs, but as "it appears to be left to the military authorities to decide which method is to be adopted, the variation does not seem to offer any additional or adequate safeguard to the liberty of the subject."⁵⁰ A deputation from the Association sought a pledge from the Home Secretary that all press offences be tried by judge and jury, or failing that, by the magistracy. However, McKenna had no authority to undercut the CMA's choice of trial procedure, and he conceded neither of these demands.

⁴⁷ Lovelace, "Control and Censorship of the Press," 126-32.

⁴⁸ See *ibid.*, 130.

⁴⁹ McEwen, ed., Riddell Diaries, 95 (20 Nov. 1914) and 86-87.

⁵⁰ HO 139/25/105/1, Thomas Sandars to Troup 4 Dec. 1914. The Association's resolution is enclosed with HO 45/11007/271672/4, Sandars to McKenna, 27 Nov. 1914.

The deputation was apprised of a recent communication to the District Commands, instructing all CMAs to refrain from proceeding judicially in press cases without War Office approval. Brade hoped that "centralising" the administration of the censorship DORRs would mollify the newspaper interest.⁵¹ The latter, however, wanted nothing less than a statutory guarantee of civil trial in DORA cases. By February 1915 even The Times had lent its authoritative voice to this quest. The flagship of the Northcliffe Press saw no inconsistency between its treatment of this issue and others, conscription principally, on which the claims of the state took precedence over those of the individual. The newspaper appropriated, for the moment, the rhetoric of the liberal critics of 'British Prussianism'.

The procedure contemplated by Regulation 56 and some other provisions is too much of a German type...wholly alien to our ways...

Above all countries England has earned praise as one in which the course of justice is unimpaired even in times of strain and stress. We must not lose that good name in a war against militarism and its despotic methods.⁵²

The Defence of the Realm (Amendment) Bill

(i) Military Resistance

On 7 January 1915 Lord Crewe announced that the Government was now prepared to restrict further the military's jurisdiction over DORA cases.⁵³ The Attorney-General's office had already drafted legislation which entitled any British civilian charged with a capital offence against the DORRs to claim a jury trial. The military members of the Army Council had been prepared to allow magistrates to hear minor cases, but they opposed this additional interference with the administration of justice under DORA. The Director of Military Training complained that ordinary courts were less qualified to judge the gravity of DORA offences

⁵¹ HO 45/11007/271672/9, Brade to Troup, 10 Dec. 1914; Troup to Brade, 11 Dec. 1914.

⁵² "The Rights of Civilians" The Times, 5 Feb. 1915, 9.

⁵³ PD (Lords), 7 Jan. 1915, 18, col. 339.

than were the military and that civil procedures were "too slow for such military exigencies in time of war."⁵⁴ A memorandum of the Directorate of Home Defence advised that, because of the

general belief that an offender has a better chance of escape from a jury than from a Court Martial, it is reasonably certain that the proposed right to trial by jury will usually be claimed and trial by Court Martial will become a dead letter.⁵⁵

This last problem was magnified in sceptical military minds by subsection two of the amending bill, which allowed defendants to choose their mode of trial before any detailed investigation of the charges. This language overturned that of Regulation 57, which had implied that "the intention of assisting the enemy" (the key criterion for inflicting the death penalty) might be established only during the proceedings. Hence the Attorney-General's bill would enable defendants in virtually all cases to opt for civil trial because nearly every infringement of the DORRs was potentially punishable by death. The civil courts would be clogged with DORA cases and the regulations would lose much of their force. The inevitable result of the proposed change in the law would be a net reduction in the exemplary influence exerted by military justice, expeditiously administered.

Trial by Court Martial was instituted in the interests of the Defence of the Realm which, presumably, will not be advanced by the practical withdrawal of the power to try by Court Martial, and to inflict, without undue delay, the only punishment which is appropriate and effective when a British subject is proved to be a traitor to his country. Trial by Civil Court does not seem to me to be likely to be equally effective.⁵⁶

The bill had been drawn up at the personal request of the Prime Minister. According to the Attorney-General, Sir John Simon, Asquith had been impressed by the arguments of

⁵⁴ WO 32/5526/9, Major-General L.E. Kiggell to Lieutenant-General Sir Wolfe Murray, 14 Jan. 1915.

⁵⁵ Ibid., 1, "Defence of the Realm (Amendment) Bill: Trial by Jury in place of Court Martial," 6 Jan. 1915.

⁵⁶ Ibid. See also Ibid., 2A and 2B, 6 Jan. 1915, for similar arguments from the Departments of the CIGS and Adjutant-General, and *ibid.*, 1A for the bill, dated 5 January 1915.

Lord Bryce, who had spoken against the courts martial of civilians during the Lords debate of 27 November 1914. Lord Haldane also alluded to the fractious peers in emphasising "the necessity for a bill."⁵⁷ The anxieties of the reputable press lobby provided an even more compelling inducement for the introduction of amending legislation. But resistance from inside the War Office left the future of any such measure uncertain.⁵⁸ Simon now added to his original proposal a provision for the suspension of civil trial in cases of invasion or emergency. Sir George Riddell reminded him "that the military authorities could declare martial law at such times without any statute." The Attorney-General had consistently upheld this view himself, stressing the inferiority of legislation to the common law even after the passage of DORA. His critical opinion of draft Defence of the Realm (Invasion) Regulations (circulated in October 1914) had insisted that

the proper course...is to rely on the far wider powers of the Common Law. If we attempt to define by statutory rules made in advance what the military authorities may do in the event of invasion, the inference at once arises that they may do nothing which is outside the definition. The true view is that they may do anything reasonably necessary.⁵⁹

Simon had not really climbed down from his entrenched 'common law' position; he told Riddell that his bill had been altered only because "the Army people were so used to long codes that they wanted it all in black and white."⁶⁰ But the "Army people" were not so easily

⁵⁷ Ibid., 6B, Haldane to Brade, 7 Jan. 1915; *ibid.*, 6F, Simon to Brade, 12 Jan. 1915.

⁵⁸ The department's civilian Permanent Secretary was not, however, quite so averse to legislative change as were some of his colleagues in the military. Dining with Riddell on 28 January 1915, Brade left an impression "that the War Office would support an amendment of the Defence of the Realm Act on the lines indicated" (Lord Riddell, Lord Riddell's War Diary, 1914-1918 [London, 1933], 54-55 [28 Jan. 1915]).

⁵⁹ Ibid., 54 (25 Jan. 1915); HO 45/11007/271672/47, Simon, "Opinion of the Attorney-General," n.d. (Oct. 1915).

⁶⁰ Riddell, War Diary 54 (25 Jan. 1915). See also Bonar Law Papers, 36/3/3, Thomas Sandars to A. Caird (editor, Daily Mail), 26 Jan. 1915. This report of the meeting, by the secretary of the Newspaper Proprietors Association, was sent to Bonar Law on 1 February 1915, along with the following note attached by an appreciative Lord Northcliffe: "The enclosed is some little result of your protest in the House of Commons."

appeased. They could not agree that courts martial were justified only in the exceptional circumstances foreseen by Sir John Simon. Moreover, the redrafted bill eliminated the distinction between capital offences and other infringements of the DORRs. Thus, civil trial could be claimed even more easily under the latest proposal than under the original version. The controversy had arisen not over military jurisdiction per se, complained the Adjutant-General's department, but over the increased sentencing power of the court martial tribunals. This grievance had been "seized upon as a pretext completely to modify the original Acts which passed without opposition in both Houses." The objections of the Lords could be addressed by restoring the status quo ante the Defence of the Realm Consolidation Act. This would leave serious espionage offenders to be tried by the civil courts for treason and the scope of military jurisdiction under DORA otherwise unaffected.⁶¹

(ii) "The Proper Balance"

This last suggestion was vetoed by the CIGS, but General Sir Wolfe Murray otherwise endorsed the arguments against fresh legislation. He too doubted "the existence of sufficiently strong public feeling to warrant the amendment."⁶² However, the General Staff could not halt the progress of the revised draft bill, which was introduced by Simon on 24 February 1915. The Government had almost been preempted by Lord Parmoor, who had unveiled his own measure in the Lords on 6 January 1915. This single clause bill guaranteed civil trial unconditionally to anyone not under to military discipline "who has committed or is alleged to have committed any offence which is punishable by the law of England." Parmoor then withdrew his bill before second reading on the understanding that agreement in principle had

⁶¹ WO 32/5526/13A, "Memorandum of the Adjutant-General Regarding the Bill by which it is Proposed to Amend the Defence of the Realm Regulations," 30 Jan. 1915.

⁶² Ibid., 14, Murray (minute), 1 Feb. 1915.

been reached between himself and the Government.⁶³ But the plaudits of the peer's bill were to be disappointed with certain aspects of the government legislation. The Defence of the Realm (Amendment) Bill applied exclusively to British subjects; the right of civil trial had to be claimed and did not naturally follow the laying of charges. More seriously, this entitlement could be withdrawn at a stroke "in the event of invasion or other emergency arising out of the present War." For the Nation, the bill failed the critical test "that the civil courts ought to be open to civilians whenever they are able to sit, a proposition which...is of the essence to the British constitution."⁶⁴

The Attorney-General had to steer a passage between the supporters of an unqualified right of civil trial and proponents of military jurisdiction who were broadly satisfied with existing arrangements for the trial of DORA offences. Several Unionist peers had already promised a rough ride for any amending legislation. Lord Curzon, the future War Cabinet member, doubted the extent to which the Halsbury and Parmoor speeches had represented the true sentiments of the House in November 1914.⁶⁵ Lord Crawford lamented the Government's proposed relaxation of "the strong line they at first took." He also said that "the rights of the individual have to give way when it is a case of maintaining the existence of our race." Even this incurable 'scaremonger' did not go so far as the former Foreign Secretary, Lord Lansdowne, who was "prepared even to risk an occasional miscarriage of justice rather than allow our law or our Regulations to remain in an inefficient condition."⁶⁶

Liberal and Labour MPs, hostile to the bill for quite different reasons, carried several

⁶³ The Parmoor bill is in *ibid.*, 3A, 6 Jan. 1915; PD (Lords), 4 Feb. 1915, 18, col. 466-67 and *passim*.

⁶⁴ Nation, 27 Feb. 1915, 667. See also, MG, 20 Feb. 1915, 6; DN, 20 Feb. 1915, 4.

⁶⁵ PD (Lords), 7 Jan. 1915, 18, col. 341.

⁶⁶ *Ibid.*, 4 Feb. 1915, col. 459, 465-66.

minor amendments through the committee stage.⁶⁷ For example, the time allotted defendants to choose their form of trial was extended from four to six days. An addition to subsection two promised to communicate the nature of the charge to the accused "as soon as practicable after arrest." The bill's civil libertarian critics did not succeed in securing the omission of "other special emergency" as a circumstance in which civil trial might be suspended. They feared that this subsection might be invoked during an industrial dispute. Indeed, the War Office had assumed that "civil disturbance would be included in the term 'Special Emergency', but direct reference to such a state was doubtless omitted for political reasons."⁶⁸ Simon insisted that an actual invasion was not the only contingency for which it might be necessary to suspend the act. He was, however, prepared to accept the greater specificity of the phrase "special military [underlining mine] emergency." An entirely new subsection extended the bill's application to women who had relinquished their British nationality by marriage to alien subjects. But there was no chance of the same protection being made available to all civilians, regardless of nationality. C.P. Trevelyan, a leading Liberal dissenter, pressed for the coverage of all persons save alien enemies. Even this more modest amendment remained unpalatable to Simon, owing to the practical difficulty, as he saw it, of ascertaining the correct nationality of anyone except British-born or naturalised British subjects.

After the Commons failed to remove this discrepancy Lord Courtney looked to the upper House for redress. Lord Loreburn agreed with Courtney that, in principle, the option of civil trial "ought to be extended to everyone, including Alien Enemies." Yet Loreburn had referred exclusively to British subjects in the Lords debate of 27 November 1914, because he had "wanted to get cooperation so as to secure forty nine out of fifty [cases?] instead of wrecking all for the sake of the fiftieth case." Having stated this view initially, Loreburn felt

⁶⁷ Except where indicated, this paragraph is based on PD (Commons), 2 Mar. 1915, 70, col. 670-759.

⁶⁸ WO 32/5526/17, Directorate of Home Defence (memorandum), 23 Feb. 1915.

unable to press for a more inclusive measure.⁶⁹ In all likelihood, any such attempt would have been foiled. Lord Courtney's desire to provide even enemy aliens with the fullest protection of the law was at odds with the rapidly rising Germanophobia of wartime Britain. On the issues of nationality and legal rights raised by the new bill, J.G. Butcher reflected the popular mood more faithfully in his call for a citizenship status review of all naturalised subjects of enemy origin.⁷⁰

The only substantial amendment passed by the Lords was hardly a concession to the defenders of civil judicial procedure. This additional subsection authorised the hearing of DORA cases *in camera*, whenever a civil court agreed with the prosecution's application that secrecy was "in the interests of the national safety." Lord Haldane stressed that the bill now struck "the proper balance between the two sets of views which were put forward."⁷¹ It was returned to the Commons on 16 March 1915 and received Royal Assent the same day. Although Lord Parmoor recalled the Defence of the Realm (Amendment) Act being "accepted as satisfactory under the special circumstances,"⁷² it had been compromise measure that pleased neither contending party. The one side was unhappy that resident aliens were left unprotected and that the new law might be abrogated without due cause by Royal Proclamation. The other was appalled that the Government had pandered even this much to its liberal critics and that the deterrent value of the Defence of the Realm Consolidation Act had been at all reduced.⁷³

The amending legislation actually had a minimal effect on the trial of DORA cases on

⁶⁹ Courtney Papers, XI/57./102-4, Courtney to Loreburn, 8 Mar. 1915; Loreburn to Courtney, 10 Mar. 1915.

⁷⁰ PD (Commons), 24 Feb. 1915, 70, col. 302-03.

⁷¹ PD (Lords), 11 Mar. 1915, 18, col. 679.

⁷² Parmoor, A Retrospect, 129.

⁷³ Compare, for example, the speeches of Lords Parmoor and Bryce with those of Lords Desart, Newton and Lansdowne, PD (Lords), 15 Mar. 1915, 18, col. 680-98.

mainland Britain.⁷⁴ As soon as the magistracy had been authorised the previous November to try minor infractions of the DORRs, the vast majority of such cases started to come before these civil courts of summary jurisdiction. This trend was not at all affected by the further contraction of military jurisdiction in March 1915. The relative merits of court martial against trial by jury were rarely of material importance. The role of the magistracy in DORA cases also affected the legal rights of defendants charged under the DORRs. For example, dissenters often complained that the local noteworthies who sat on the bench instinctively adopted the same dim view of their antiwar opinions as did the prosecuting authorities. The magistrate's court was "absolutely impregnable to evidence of every sort," objected one South Wales ILP member, "and prejudice and political bias rule the roost."⁷⁵ Moreover, by the stipulation of Regulation 58, persons accused of summary offences against the DORRs could not request a trial by judge and jury instead, as they might if charged with other misdemeanours. Given the violent disruption of antiwar gatherings, and the opprobrium attached to conscientious objection, it is a decidedly moot point whether British juries would have been any more inclined than its magistracy to uphold freedom of speech for British dissenters.

The military had objected to the Defence of the Realm (Amendment) Bill because they believed that a degree of military jurisdiction conveyed a useful message to a nation in arms. But they did not wish to be saddled with the administrative burden of constituting numerous court martial tribunals. Besides, the CMAs were not emasculated by the passage of the bill.

⁷⁴ The significance of the Defence of the Realm (Amendment) Act in Ireland was far less oblique. During the Easter Rising of 1916 the 'special military emergency' subsection was invoked. A martial law proclamation was also issued, but the rebel leaders were tried and executed by reference to the statutory suspension of civil jurisdiction. The 'special military emergency' remained in effect for the rest of the war and beyond, providing a convenient legal pretext for the stricter application of certain DORRs to Ireland than elsewhere in Britain (see Townshend, "Military Force and Civil Authority," 280-92; Simpson, In the Highest Degree Odious, 17-19, 26-33).

⁷⁵ CFT 77, Harry Davies to E.D. Morel, 9 June 1916. See also, Bertrand Russell Archive, Rec. Acqu. 1/805, F.W. Pethwick Lawrence, The Liberties of the Subject As Affected by the Defence of the Realm Act and other Recent Legislation (Peace and Freedom Leaflet No. 2, 1916); PD (Commons), 29 June 1916, 83, col. 1098-1102.

They could still insist upon courts martial for the trial of suspected spies of non-British nationality. These were exactly the circumstances for which the military had all along desired to preserve military jurisdiction in DORA cases. By late October 1915, courts martial had convicted nine men of espionage offences against the DORRs. Yet the military did not always opt to try such cases themselves. Three of six alleged spies apprehended in the spring of 1915 were tried and convicted by judge and jury, although none of the accused, as German nationals, enjoyed the right of civil trial embodied in the recently amended DORA.⁷⁶

Regulation 56(13): The CMA and 'Press Offences'

A second area of military judicial authority left untouched by the legislation of March 1915 was the entitlement of CMAs to institute proceedings in DORA cases. Nervous journalists and editors soon received a blunt reminder of military influence over the decision to prosecute. On 8 April 1915 Portland magistrates fined a journalist called Dyson five pounds for communicating naval information possibly useful to the enemy. The precise charge, laid under Regulation 18, was of mailing a report on the sinking of a German U-Boat, which the editor of a local paper (who was himself convicted and fined ten pounds) had then published. Counsel for Dyson contended that the reporter had been counting on his editor or the censorship authorities to excise any objectionable passages.⁷⁷ Despite the comparatively small fine, Dyson's conviction was regarded as significant for two reasons. First, he had been prosecuted merely for forwarding the unauthorised information. Reporters were not usually privy to confidential Press Bureau notices, and, according to the editor of a leading national

⁷⁶ PD (Commons), 28 Oct. 1915, 75, col. 352. The intelligence background to these cases is discussed by Hiley, "Counter-Espionage and Security," 639-42 and Andrew, Her Majesty's Secret Service, 184-87.

⁷⁷ The Times, 9 Apr. 1915, 5 and 8 May 1915, 3 for the unsuccessful High Court appeal, which focused on the vires of Regulation 18 as opposed to the essentially technical nature of Dyson's offence.

daily, it was therefore "unfair to prosecute them for collecting news which has to go through the editorial sieve."⁷⁸

The President of the National Union of Journalists, F.E. Hamer, made the same point in a letter to the editor of The Times. Hamer also commented on a second disturbing aspect of the Dyson case, the "highly judicial function" discharged by the local CMA:

While the instructions under the Act reach the Press through one authority, the prosecutions under the Act are left in the hands of the central, district, or local commandants, and each of these obscure local officials can act quite independently of one another. The result is that the Act may be read in a hundred different senses in different part of the country, and what may be an innocent act in one area may be made a criminal act in another.⁷⁹

A deputation from the Union, received by Buckmaster on 22 April 1915, urged that prosecutions under the censorship regulations be launched "only with the sanction of the Director of the Press Bureau, or some other central authority, so as to ensure uniformity of treatment for all cases."⁸⁰ Buckmaster would have gladly complied with the journalists' request. The Director of the Press Bureau had long coveted for his office more direct control over the press and had recently proposed an amendment of the DORRs to this effect.

This draft Order in Council enabled the Bureau to proceed in cases passed over by the CMAs, thereby satisfying Buckmaster's desire for "the power to punish as well as to threaten the Press."⁸¹ Although the Home Office was not unsympathetic, the Permanent Secretary to the War Office was steadfastly opposed to this suggested change. Brade observed that, in each case, the Press Bureau would have to rely on evidence of the same CMA which had just declined to prosecute. A shrewd defence would exploit such an obvious anomaly. Brade

⁷⁸ H.A. Gwynne Papers, MS. Gwynne dep. 3, Gwynne to Buckmaster, 26 Apr. 1915. See also, President of the editors' Newspaper Society (J.S.R. Phillips, editor of the Yorkshire Post) to The Times, 10 Apr. 1915, 5; DN, 10 Apr. 1915, 4; The Times, 17 Apr. 1915, 9; Nation, 24 Apr. 1915, 99; PD (Commons), 22 Apr. 1915, 71, col. 381-83.

⁷⁹ The Times, 22 Apr. 1915, 8.

⁸⁰ *Ibid.*, 23 Apr. 1915, 7.

⁸¹ HO 139/21/84/16, Buckmaster to McKenna, 28 Feb. 1915.

resented both the implied criticism of War Office policy and Buckmaster's vendetta against "influential newspapers."

Buckmaster has it at the back of his head that the reasons why we have not prosecuted have been either that we have been afraid of our offender or that we are not sufficiently bloodthirsty. He has no sense of proportion. I am quite certain that if the thing were handed over to him, there would be very speedily a mutiny, and the Press Bureau would be closed. The fact is, of course, that the Press are as upright and patriotic as any body.⁸²

Late in April 1915 Buckmaster was still complaining that "I have no control over the prosecution; I have no powers to institute proceedings and it is plain that if this office is to be made effective for its real purpose I ought to possess both." Brade had prevailed, perhaps because of the misgivings of the "one or two press friends" with whom the Permanent Secretary had discussed the proposed amendment of the DORRs.⁸³

The protests of the journalists' deputation to Buckmaster were not unheeded, but the Press Bureau was not advantaged by the change in procedure heralded by Regulation 56(13), issued on 2 June 1915. The new DORR created a special category of 'press offence', over which the Director of Public Prosecutions, Sir Charles Mathews, was entrusted with responsibility for authorising or vetoing legal action.⁸⁴ If the Press Bureau had been handed this power instead, as the journalists had suggested, there is every indication that a more severe, as well as a more uniform, treatment of the press would have ensued. The DPP, however, promised to prosecute only selectively the cases referred to him by the civil or military authorities. Mathews told the new Co-Directors of the Press Bureau early in June 1915 that he had been "both chastened and instructed by...the Dyson case." Before

⁸² HO 45/11007/271672/33B, Brade to Troup, 9 and 15 Mar. 1915 and (for the Home Office viewpoint) Troup to Brade, 8 Mar. 1915. See also, Lovelace, "Control and Censorship of the Press," 131-32.

⁸³ Gwynne Papers, MS. Gwynne dep. 3, Buckmaster to Gwynne, 27 Apr. 1915; HO 45/11007/271672/33B, Brade to Troup, 9 Mar. 1915.

⁸⁴ See CAB 41/36/23, 28 May 1915. In Scotland this power rested with the Lord Advocate; in Ireland, with the Attorney-General for Ireland.

undertaking a criminal prosecution, he would need to be "satisfied that something more than mere inadvertence or carelessness has taken place, and that something more than a mere technical breach of the Regulations has been committed."⁸⁵

Regulation 56(13) interposed the civil authority of the DPP between the CMAs and the press. But this second concession to the upholders of civil jurisdiction was, like the recent Defence of the Realm (Amendment) Act, of minor practical importance. Mathews was no cipher, but his was an essentially advisory role. If either the War Office or the Home Office had pushed harder for the systematic prosecution of 'press offences', the DPP would have had to comply. As it was, Mathews usually counselled against prosecution even when he was confident that an offence had been committed wilfully and that a conviction could be secured. The DPP's cautious approach was criticised occasionally but favoured by the shrewder departmental officials who, like Mathews, appreciated that court proceedings (especially those involving dissenting individuals and organizations) often served only to advertise further the people or causes that legal action was intended to discredit.⁸⁶

Civil libertarians were understandably perplexed by the encroachments of the state on freedom of expression in wartime Britain. DORA had conferred draconian powers on the military and other authorities and, in conjunction with a range of formal and informal controls, was responsible for an unprecedented degree of interference with the written and spoken word. Yet there was little chance of the censorship DORRs being applied haphazardly by local military commanders. In February 1915 Brade reminded Buckmaster that, irrespective of any obligation under the DORRs, the War Office impressed upon Home Commands that

Local Military Authorities are not allowed to start proceedings. They have instructions to report to this Office in every case in which proceedings may

⁸⁵ HO 139/25/105(part 1)/1, Mathews to E.T. Cook, 6 June 1915; Mathews to Sir Frank Swettenham, 11 June 1915. Buckmaster had been appointed Lord Chancellor in the Asquith Coalition.

⁸⁶ See below, ch. 4, especially 150-51.

appear to be desirable, and the initiative is to be always taken by us.⁸⁷

In April 1916 these instructions were extended voluntarily by the War Office to cover types of printed matter—pamphlets, leaflets, handbills—excluded from the ambit of Regulation 56(13). In addition, the Director of Special Intelligence at the War Office, Brigadier-General George Cockerill, was pledged to discuss with the Home Office general questions of censorship policy. Enforcement of the novel and drastic restraints imposed on freedom of expression in wartime Britain was very much a joint civil and military concern.⁸⁸

Conclusion

In March 1915 Lord Newton drew an unfavourable contrast between the revival of 'business as usual' in the trial of DORA offences and ministerial exhortations about the exceptional nature of the present crisis.⁸⁹ Yet the outcome of this wartime legal controversy was not really a sign of the Asquith Government's continuing sensitivity to issues of liberal principle. The novel extension of military jurisdiction to civilians appeared, at first, entirely fitting to some of the prohibitions imposed by the earliest DORRs. By November 1914, however, it was already apparent that DORA was far more pliable than the blunt counter-espionage instrument which Reginald McKenna had presented to the Commons the previous August. The interventions of several eminent peers in the Lords debate of the Defence of the Realm Consolidation Bill prompted the upholders of liberal principle to realise that, in military jurisdiction, lay the very kernel of that 'Prussianism' which the British Army was pledged to

⁸⁷ HO 139/21/84/16, Brade to Buckmaster, 28 Feb. 1915.

⁸⁸ HO 45/10801/307402/33, Troup (minute of conversation with General Cockerill), 28 Apr. 1916. CMAs had a freer hand in dealing with verbal infringements of the DORRs. Yet, as Cockerill recorded in December 1916, "the general principle has been adopted of advising no prosecution" (HO 45/11007/271672/161A, Cockerill [memorandum], 1 Dec. 1916. See also, below, 142-44, 176-78).

⁸⁹ PD (Lords), 11 Mar. 1915, 18, col. 688.

defeat in the field. Early in 1915 the Government introduced amending legislation, which established a qualified right of civil trial in DORA cases. The military were justified in complaining that the outcry against courts martial was not a "popular agitation against arbitrary trials or excessive sentences."⁹⁰ They had opposed this bill because of a symbolic value attached to military jurisdiction and also because of its imagined effectiveness as a deterrent.

The Defence of the Realm (Amendment) Act shrank the authority of the military over the administration of justice in DORA cases. CMAs were still entitled to institute proceedings over suspected infringements of the DORRs. After the introduction of Regulation 56(13) even this more limited judicial function was withdrawn from the military in cases involving the press. Some of the more contentious DORRs, to be examined below, vested powers in the military (and civil) authorities which failed to offer injured parties even the flawed opportunity for legal redress of a court martial. The consolidation of civil judicial procedure early in 1915, although not unimportant, did not at all stunt this parallel growth, nurtured by DORA's delegating powers, of an increasingly broad measure of emergency executive discretion. The circumvention of the courts and the substitution of regulations for statutory law featured prominently in the wartime critique of DORA. But these criticisms rarely led to even the kind of partial concessions that were granted to the upholders of civil jurisdiction early in 1915. The small minority of genuine civil libertarians in wartime Britain were fortunate that, on this issue at least, they could count on the support of "a certain section of the Press, who," according to the Radical MP, R.B. Outhwaite, "are not in the first place concerned with the liberties of the subject."⁹¹

⁹⁰ WO 32/5526/13A, "Memorandum of the Adjutant-General Regarding the Bill by which it is proposed to amend the Defence of the Realm Regulations," 30 Jan. 1915.

⁹¹ PD (Commons), 2 Mar. 1915, 70, col. 700.

Chapter 3: "SECRET TRIAL OR NO TRIAL": THE WARTIME CONTROVERSIES OVER TRIALS IN CAMERA AND REGULATION 14B

Introduction

In the second part of his wide-ranging discourse on civil liberties, published in the Nation between April and July 1916, J.A. Hobson singled out in relation to DORA "two powers of so menacing a character as to deserve special note." The distinguished New Liberal intellectual was referring to the trial of DORA cases in camera and to internment without trial under Regulation 14B. On the one hand, judicial secrecy eliminated two essential attributes of an equitable criminal justice system:

First, security for the defendant against that conspiracy between the executive and the judiciary, whereby the will of the former can be imposed as the act of the Court, which history shows to be the usual result of secret hearings; secondly, that public knowledge of the evidence in the case requisite to ensure general confidence in the justice of the verdict. For it is essential not only that justice should be done, but that it should be known to have been done.¹

On the other hand, executive detention denied DORA suspects even the defective chance of restitution provided by a secret trial. Trials in camera invited comparison with the procedures of the detested Star Chamber court of early Stuart England; Regulation 14B was suggestive of another potent symbol of royal despotism—the lettres de cachet of ancien régime France. The most venerated constitutional authorities could be invoked in defence of publicity in courts of law and freedom from arbitrary arrest and imprisonment. The rule of publicity was one of those "ancient maxims," wrote another contributor to the Nation in a quotation

¹ J.A. Hobson, "The War and British Liberties." II: "Secret Trial or No Trial," Nation, 29 Apr. 1916, 123. See also, I: "The Suppression of Free Speech," 15 Apr. 1916, 68-69; III: "The Claims of the State Upon the Individual," 10 June 1916, 307-08; IV: "Liberty as a True War Economy," 29 July 1916, 524-25.

from Burke, for which "a great state ought to have some regard."² Yet executive detention and judicial secrecy were also defended as perfectly proportionate responses to a national crisis of unprecedented gravity and complexity. To the advocates of greater vigilance in defence of the realm, the "ancient maxims" of the constitution paled into insignificance.

The controversy over trials in camera had played itself out by the early part of 1916. Despite the ephemeral nature of this issue, the casual recourse to judicial secrecy during 1915 demonstrated the ease by which contentious actions might be justified in the "national" or "public" interest. The origins and uses of Regulation 14B shed light on issues of nationality and naturalisation thrown up by the war. More centrally, this drastic detaining power raised important constitutional questions about the scope of executive discretion under DORA and the relationship between statutory law and delegated legislation. Although the authorities did not invoke Regulation 14B in a reckless or indiscriminate manner, the DORR highlighted the loopholes which delegated legislation provided for arbitrary executive acts, thereby confirming many of the worst liberal fears about DORA.

Secret Trial

(i) Publicity and the Public Interest

The secret trial of DORA cases was not authorised by legislation until the enactment of the Defence of the Realm (Amendment) Bill in March 1915. Subsection three of this statute made allowance for the civil trial of these cases in camera, whenever judges agreed with the prosecution that secrecy was "in the interests of the national safety." This subsidiary provision was introduced by the Lord Chancellor only after the substance of the bill had been subjected to the rigorous scrutiny of the Commons. Haldane explained that it would sometimes be necessary for the courts to exercise this discretion in order to prevent disclosure of sensitive

² 'Legalist', "Liberty of the Press," *ibid.*, 2 Oct. 1915, 19.

military or naval information. The Lords amendment was accepted without protest in the Commons. Sir John Simon assured MPs "that the prosecution, in asking the Court to exercise its power under this Section, will only do so within the limits of what is necessary for the national safety."³ Subsection three may have been inserted at the behest of the security services, who apprehended three espionage suspects during the early spring of 1915. Although these were the kind of DORA cases for which the military had wished to reserve courts martial, the men—all German nationals—were tried by judge and jury. The Law Journal had recently pointed to the shortcomings of the Defence of the Realm (Amendment) Act but now conceded the foresight behind subsection three.⁴

The critics of DORA could agree that secrecy was a legitimate procedure in serious felony cases where military or naval interests were involved. As long as subsection three applied only to jury trials, it was unlikely that minor infringements of the DORRs would be tried in camera. On 10 June 1915, however, an amendment to Regulation 58 authorised the exclusion of the public from courts of summary jurisdiction as well. The magistrate would have to be satisfied that such action served "the public interest"—a criterion that was, arguably, more restrictive than "the national interest" referred to in subsection three. Nevertheless, this language gave the magistracy considerable discretion to suspend the publicity which ordinarily attended the administration of justice; so much so that the Home Office reminded the Clerks to the Justices that these powers should be used "sparingly." In addition, Chief Constables were instructed to apply for secrecy only on the advice of a CMA or the DPP.⁵

³ PD (Commons), 16 Mar. 1915, 70, col. 1920; (Lords), 11 Mar. 1915, 18, col. 701.

⁴ Law Journal, 24 Apr. 1915, 199-200. The legal weekly was also gratified that the norms of publicity had not been completely suspended and that the less confidential particulars of the prosecutions had been reported in the press (22 May 1915, 248-49). Indeed, a more detailed account of the unsuccessful appeal lodged by one of the defendants, 'M' (Karl Muller), appeared in the Times Law Reports, 22 Oct. 1915, 1-3, but not until three months after his execution by firing-squad on 23 June 1915. See also, above, 84, n. 76.

⁵ HO 158/16/422, 420, Troup to Clerks to the Justices, 21 June 1915; Troup to Chief Constables, 16 June 1915. The Clerks to the Justices were the permanent officials of the

Regulation 58 was intended to cover breaches of the DORRs where no intention of assisting the enemy existed but where proceedings in open court might still imperil the national safety. One such case appeared to arise in the summer of 1915. On 13 July 1915 the World, an obscure military weekly, divulged details of the recent Allied strategic conference in Calais. The Attorney-General, Sir Edward Carson, brought this flagrant breach of Regulation 18 to the attention of the Cabinet. He then instructed the DPP to launch a prosecution. After consulting the City of London magistrate before whom the case would have been brought, the DPP reportedly discouraged legal action, on the grounds that the publicity of court proceedings would only aggravate the mischief of an already serious offence. Regulation 58 offered no solution because the verdict and sentence would have to be delivered in open court, thereby attesting to the veracity of the offending passages. The War Office accepted this advice. Kitchener's private secretary wrote to Carson that, regrettably, the question was not whether the author of the piece might be convicted, but whether it was "worth giving the Germans an indication of what occurred at the conference for the sake of punishing the writer." Thus, the editor of the World escaped with a dressing down from the DPP.⁶

The Attorney-General had been inclined to proceed regardless, because "if such matters are to be published and no prosecutions instituted through fear of greater publicity, I cannot see how we are to deal with such questions." The Director of Special Intelligence at the War Office, General Cockerill, also regarded as most unsatisfactory a situation in which "the worse the offence, the more necessary must it always be to ignore it." He suggested three possible courses of action. 'Press offences' might be removed from the jurisdiction of the courts and penalised administratively, by a temporary suppression order, for example. Alternatively, it could be made an offence to publish any naval or military information, unless

magistrates' courts.

⁶ WO 32/4893/4B, H.J. Creedy to Carson, 17 July 1915; 4A, Carson to Kitchener, 17 July 1917; 6A, Mathews to Cockerill, 22 July 1915.

passed by the censor or communicated by an accredited authority. Cockerill himself ruled out the first suggestion as politically unacceptable and the second as administratively unworkable. The proper solution, he believed, would be afforded by legislating for the trial of all such cases wholly in camera and by prohibiting any allusion to the court proceedings in the press.⁷ The Director of Military Operations approved but was also afraid "that Parliament will not like to give such powers unless the need for them can be made out very clearly." Cockerill was then instructed by the CIGS to consult with the Law Officers "as to whether any improvements could be effected, with any probability of success, in existing legislation."⁸

(ii) Stretching the "Public Interest"

The issue of judicial secrecy was soon subsumed under a more general interdepartmental review of the Government's punitive powers over the press. No amendments to either DORA or the DORRs resulted from these inconclusive deliberations.⁹ While the scope of judicial secrecy stayed the same, magistrates began to invoke their existing powers more readily. Liberal opinion could tolerate judicial secrecy in spy trials and perhaps even in cases involving the wilful or inadvertent disclosure of military or naval information. It was a far different, quite unacceptable, proposition to resort to secrecy in less dangerous circumstances. In the autumn of 1915, however, several cases involving the dissenting critics of official war policy were held in camera. The first of these secret hearings followed the August 1915 police raids on the offices of the Labour Leader and the publishers of this Manchester-based ILP weekly, the National Labour Press. A large quantity of printed matter was seized on the grounds that its publication constituted a breach of Regulation 27.

⁷ Ibid., 4A, Carson to Kitchener, 17 July 1917; Cockerill to Major-General C.E. Callwell (Director of Military Operations), 18 July 1915.

⁸ Ibid., 2, Callwell to General Murray (CIGS), 19 July 1915; 3, Murray to Callwell, 20 July 1915.

⁹ See below, 137.

Summons were then served on the editor of the paper and the manager of the press to show cause why this material should not be destroyed.

Acting under instruction of the DPP, the prosecution had moved for the case, under Regulation 51A, to be held in camera. The Salford magistrate was informed that it would "not be in the public interest that the proceedings should take place in open court." The true purpose of the application was revealed in the prosecution's further submission that they were "anxious not to give to mischievous matter which they desired to suppress a gratuitous advertisement." Although the magistrate granted this prosecution request, he refused to hold that the Labour Leader had breached Regulation 27. Yet the symbolic value of this ruling was reduced, in the eyes of the Manchester Guardian, by the secrecy in which the proceedings had been conducted. The Leader had been denied "the opportunity of making clear to the public the grounds on which that verdict rested or of adequately vindicating the purpose and policy of the paper."¹⁰

The outcome of subsequent in camera hearings proved more satisfactory to the prosecuting authorities. Early in September 1915, two ILP activists were successfully prosecuted in camera under Regulation 27 for statements delivered at a public meeting in Stockport.¹¹ The seizure of antiwar literature from the ILP's publishing ventures in Manchester had been coordinated with a similar police action against the ILP head office in London. The latter raid also led to secret court proceedings under Regulation 51A. Counsel for the ILP, one of several plaintiffs in the case, had countered that the national safety could not be jeopardised by maintaining full publicity. But the Mansion House magistrate, Sir John Knill, granted the prosecution's request and did his utmost to ensure complete secrecy. Knill ultimately condemned all the material listed in the police summons. He delivered his judgment without

¹⁰ MG, 25 Aug. 1915, 10; 27 Aug. 1915, 6. Both this case and Regulation 51A are discussed more fully below, 170-73. On Regulation 27, see ch. 4 passim.

¹¹ LL, 9 Sept. 1915, 2.

even disclosing the authors or titles of the prohibited material, still less the contents. Instead, he referred to each by the number against which it was listed in the police summons. This prompted one correspondent in the Nation to write that, with the growing emphasis on secrecy, "the procedure becomes less like that of justice and more like that of censorship." The same writer later quipped that "after trial in secret we have judgment in cipher."¹²

The most bizarre secret trial was that of Joseph Fall, a fifty-eight-year-old commercial traveller who appeared before Blackpool magistrates on 30 October 1915, charged with making statements prejudicial to recruiting. Fall was no antiwar activist, but he had been careless enough to demonstrate a want of patriotic resolve to the occupants of a first class railway carriage. "You are quite right not to join," Fall allegedly told one witness: "If I had a son I wouldn't let him fight for buggers like Lord Derby, Winston Churchill and the King of England." A second witness testified that Fall then said that "war was only to put money into rich men's pockets." The court had been cleared for the presentation of this testimony and the sworn statement of the CMA that this language had indeed contravened Regulation 27. The Blackpool magistrates took a dim view of Fall and handed down a stiff one hundred pound fine.¹³

(iii) The Critics of Judicial Secrecy

To the defenders of free speech, judicial secrecy merely exacerbated the pernicious practice of penalising dissonant political views, or in the case of the hapless Joseph Fall, even casual remarks. Liberal opinion began to insist on the customary openness of judicial proceedings as a crucial safeguard of freedom. In his letter of support to the Labour Leader, the Liberal MP for North Salford, Sir William Byles, detected in judicial secrecy "one more touch of the militarism under which we are being trained to live." A pseudonymous

¹² S.V. Bracher, Nation, 23 Oct. 1915, 151; 6 Nov. 1915, 214.

¹³ HO 45/10795/302677/3, Hugh Singleton (Joint Clerk to the Justices, Blackpool) to Troup, 9 Nov. 1915. A record of the secret proceedings is attached to this correspondence.

contribution to the Nation, from a barrister at the Temple, spoke of the "good reason to fear that advantage is being taken of the phrase 'in the public interest' to hurry behind closed doors any issue in regard to which the Crown's representative may choose to employ this grave description."¹⁴ After the prosecution's request for secrecy was again granted in the ILP head office case, the leading Party organ concentrated its fire on the supine role of the magistracy.

Apparently those who represent the authorities have only to ask the Magistrate to hear the case in camera to secure his consent: even if no stronger reason is urged than the unwillingness of the Prosecution to give the defendants a gratuitous advertisement, that is considered sufficient reason to repudiate the historic right of the British citizen to make his defence in open court.¹⁵

The Law Journal criticised the magistrates' failure to distinguish between Regulations 18 and 27. The former DORR prohibited the communication of unauthorised military information. Hence, secrecy might often be justified in Regulation 18 cases. Regulation 27, however, was more likely to be infringed by antiwar speakers or writers, and the secret trial of these 'offenders' hardly protected the public interest to the same degree as an unpublicised spy trial. As the Law Journal continued, "the mere desire to deprive unwise individuals of a gratis advertisement for their views is not a sufficient reason for overriding the liberty of the subject." The Manchester Guardian adopted a similar editorial line in response to the conviction of Joseph Fall:

The case is notable among many similar ones which have lately taken place and we believe that this ready extension of secret trial is a grave menace to the prestige and efficiency of justice, and likely to defeat the end it seeks to serve. The case of a spy who may divulge matter that menaces the safety of the kingdom is entirely apart. It is hardly conceivable that in this or in any other recent cases heard in camera the accused could have said anything that would have had the smallest effect on the 'defence of the realm,' or that to have given publicity to the views he expressed would have brought them anything but

¹⁴ LL, 2 Sept. 1915, 3; 'Legalist', Nation, 2 Oct. 1915, 19.

¹⁵ LL, 16 Sept. 1915, 6.

further discredit.¹⁶

The in camera hearing of DORA cases was criticised in Parliament as well as in the press. On 14 September 1915 Lord Parmoor forced a short Lords debate on the topic. He considered judicial secrecy acceptable if proceedings in open court genuinely compromised the national safety. But the rule of publicity otherwise remained essential "as the great sanction and safeguard of our legal liberties." Lord Courtney agreed with his brother-in-law about the "desirability, if possible, of maintaining every safeguard of publicity in the conduct of any prosecution in one of the Courts of Law."¹⁷ Sir William Byles twice complained to the Solicitor-General, Sir F.E. Smith, about the Mansion House magistrate's determination to deny all publicity in the ILP head office case. On 26 October 1915, the Radical, R.B. Outhwaite, implied that the Home Secretary had violated his earlier pledge that judicial secrecy would be used only to protect military or naval confidentiality.¹⁸

(iv) The Official Response

It would be exaggerating to suggest that these criticisms caused any great discomfort to the Government. In his well-received riposte to Parmoor, Lord Chancellor Buckmaster stressed less the stringency of military emergency enactments thus far than their moderation. Lord St. Davids applauded Buckmaster for voicing sentiments closer to those of majority opinion in the House. This Unionist backbench peer was also critical of the stand taken by Lords Parmoor and Courtney; their liberal solicitude for the "safeguards of publicity" was dangerously outmoded.

What were the safeguards of publicity for? They were to prevent poor individuals from being oppressed by richer people; to prevent subjects who were weak being trampled upon by a strong Government. In old days there

¹⁶ Law Journal, 2 Oct. 1915, 469-70; MG, 1 Nov. 1915, 6.

¹⁷ PD (Lords), 14 Sept. 1915, 19, col. 796, 802.

¹⁸ PD (Commons), 12 Oct. 1915, 74, col. 1168-69; 19 Oct. 1915, col. 1621; 26 Oct. 1914, 75, col. 28.

was meaning in the 'safeguards of publicity.' But we are now in other times. We are not now afraid of a tyrannous Government. Some of us would like the Government to be even stronger...I submit that all this talk about the safeguards of publicity is now out of date; it is absurd...What we have to think about to-day is the safety of the country, and that is what every one is thinking about out of doors.¹⁹

The Solicitor-General had no qualms about defending judicial secrecy. If a court decreed that the printed matter brought before it was in contravention of the DORRs, Smith told the Commons, it was "essential that the articles of the publications referred to should not be made public." Sir John Simon insisted that his original guidelines for the hearing of cases in camera had not been broken.²⁰

After the case of Joseph Fall was brought to his attention, however, the Home Secretary tried to conciliate his liberal critics. Although Simon did not censure the Blackpool magistrate, he repeated his injunction from March 1915 "that trial in camera should only be resorted to in so far as national interests really demand, and that it is of great importance to maintain the good practice of public trial as far as possible." Lord Parmoor read this statement "with much approval" and was doubtless gratified by the policy change that followed in its wake.²¹ On 6 November 1915 the Home Office requested details of the Fall case from the Blackpool Clerk to the Justice. H.B. Simpson, a Home Office Assistant-Secretary, was convinced that the convicted salesman's language had been "highly seditious." This junior official's impeccable sense of class propriety told him that "as the defendant was travelling First Class a fine of £100 was probably no more than he deserved." Yet Simpson was mystified by the exclusion of the public, because "it would be all to the good that a man who has used such language should be publicly put to shame."²²

¹⁹ PD (Lords), 14 Sept. 1915, 19, col. 804.

²⁰ PD (Commons), 12 Oct. 1915, 74, col. 1169; 26 Oct. 1914, 75, col. 28.

²¹ *Ibid.*, 4 Nov. 1915, 75, col. 810; Simon Papers, MSS Simon 51/203, Parmoor to Simon, 12 Nov. 1915.

²² HO 45/10795/302677/3, Simpson (minute), 9 Nov. 1915.

Simpson was reluctant, however, to urge greater caution in the use of Regulation 58, lest this advice be "misconstrued."²³ A Home Office hardliner, he presumably wanted the magistrates to keep trying in camera the real opponents of British war policy. But the Home Secretary thought it best to remind the magistracy that secret procedure represented "a very unusual course" which was not to be taken lightly. New instructions were communicated on 1 December 1915:

The usual and proper practice is that all cases should be heard in open court, and Regulation 58 authorises a departure from that practice only when application is made by the prosecution in the public interest...in every case where an application is made by the prosecution for hearing evidence in camera the Secretary of State is sure that the court will give its careful consideration to the question how far (if at all) the application can properly be complied with.²⁴

(v) The Legal Challenge

The public criticism of trials in camera surely lay behind this reminder to the magistrates' courts. The efforts of the Liberal press and a few parliamentarians were more fruitful than the legal challenge to judicial secrecy mounted after the Mansion House magistrate's ruling in the ILP head office case. At the (in camera) appeal hearing, the secrecy of the original proceedings was cited as one of several grounds on which the magistrate's order should be quashed. Counsel for C.H. Norman, an uncompromising pacifist and author of three of the condemned pamphlets, argued that the magistrate had had no authority to bar the public from court. Subsection five of the Defence of the Realm Consolidation Act stated that the Summary Jurisdiction Act applied to the trial of minor offences against the DORRs and that this 1879 statute did not sanction the secret trial of suspected misdemeanants. Therefore, the provision for secrecy in Regulation 58 was ultra vires DORA.

The two High Court judges disputed this point. The vires of judicial secrecy in

²³ Ibid.

²⁴ Ibid., Simon (minute), 17 Nov. 1915; Simpson to Clerks to the Justices, 1 Dec. 1915.

proceedings under Regulation 51A was not in doubt, said Mr. Justice Avory, because this form of legal action did not even constitute the "trial of a person" as prescribed by the DORA of November 1914. With a similar degree of casuistry, Mr. Justice Lush denied that the judgment in Scott v. Scott applied to the present case. This 1913 ruling had upheld a right of public trial unless justice could not be administered in open court. Yet Mr. Justice Lush countered that the Mansion House hearing had not been concerned with the administration of justice. Rather, the magistrate had had simply to determine "whether or not certain documents should be destroyed." Even without Regulation 58, the proceedings could still have been held in camera. Mr. Justice Avory's general defence of the vires of Regulation 58 hints at the broad measure of executive discretion which most courts were prepared to see exercised under DORA.

When one considers the purpose of the statute under which these regulations were made, it is clear that a regulation authorising that such matters can be heard in camera is essentially within that purpose...It is quite obvious, when the whole object of these proceedings is to suppress the publication of certain documents, that the hearing in public of a matter of this description would bring about the very mischief which the proceedings were intended to prevent.²⁵

Mr. Justice Lush also presided over C.H. Norman's civil action against the DPP's wrongful detention of his pamphlets. This time the in camera hearing of the October 1915 appeal was challenged. Norman's counsel argued that the County Court Act made no provision for this procedure, but Mr. Justice Lush agreed with the respondents that secrecy had been legitimate; the documents in question had already been condemned judicially and there was no guarantee that the plaintiffs would not divulge their contents in open court. Besides, the High Court had an "inherent power" to hear evidence in camera. If the plaintiffs were entitled to insist upon an open hearing "the very mischief which the regulation [51A] was intended to obviate might be brought about."²⁶ Although Norman's suit was dismissed as

²⁵ There is a record of these secret proceedings in HO 45/10786/297549/18A, 29 Oct. 1915.

²⁶ The Times, 11 Feb. 1916, 4.

"frivolous," the very fact of its being held publicly constituted a minor victory for the critics of secret trial.

At another in camera hearing early in 1916, Guildhall magistrates rejected Fenner Brockway's appeal of the Mansion House order for the destruction of his play, The Devil's Business, a political satire on the arms trade, first performed before the war. Perhaps the Aldermen went behind closed doors to disguise the obvious discrepancy between the play's condemnation by City of London magistrates and its acceptance by the Salford magistrate last August.²⁷ The resort to secrecy at the Guildhall was attacked as a breach of the recent Home Office circular,²⁸ but proceedings were rarely held in camera thereafter. Secret trial assumed a progressively less prominent position in the civil libertarian indictment of DORA. If prosecuted at all, dissenters were tried publicly which, ironically, did give them the "gratuitous advertisement" that prosecuting authorities had earlier hoped to avoid. This problem, in turn, provides a partial explanation for the reluctance of the authorities to proceed against dissenters, even if convictions appeared likely.

The Origins of Regulation 14B

Prior to the Order in Council of 10 June 1915 there was under DORA no explicit sanction for the internment of British subjects without trial. There were by this time over twenty thousand 'enemy alien' internees, but these civilians were detained under the prerogative powers of the Crown. The outcome of a bizarre case in December 1914, however, had appeared to add a power of detention to the powers of arrest in Regulation 55.²⁹ On 24 November 1914 a

²⁷ See Samuel Hynes, A War Imagined: The First World War and English Culture (London, 1990), 81-82).

²⁸ LL, 13 Jan. 1916, 2.

²⁹ Regulation 55 entitled the military, naval, and various civil authorities to "arrest without warrant any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has acted or is acting or is about to act in a manner prejudicial

Scottish steamer had inadvertently rammed a Royal Navy submarine at the mouth of the River Humber. The captain and crew were placed in custody by order of the CNA for Hull. A week elapsed without charges being laid, prompting the ship's captain, Anthony Dove, to apply for a writ of habeas corpus. Dove's counsel conceded that his arrest had been legitimate but submitted that "the authorities were not entitled to detain him in gaol for an unreasonable time." Mr. Justice Lush replied that, a few days only having passed, the inference could not be drawn that no charges were to be preferred. Although his habeas corpus appeal was turned down, Dove was released a week after the court hearing and later charged with negligence of navigation under the Merchant Shipping Act.³⁰

Dove's detention was discussed during the Commons debate of the Defence of the Realm (Amendment) Bill in March 1915. Several MPs were disturbed by the earlier contention of Mr. Justice Lush that there was "nothing in the regulations requiring that a charge should be formulated within a particular time."³¹ Tim Healy, the veteran lawyer and Irish National MP, asserted that the DORRs could not thus override habeas corpus law. He even encouraged Dove to sue for false imprisonment. The Liberal MP Ellis Davies moved an amendment, stipulating that charges be formulated within forty-eight hours of an arrest. The Attorney-General was reluctant to saddle the authorities with a specific time constraint. But Simon did propose an alternative amendment, which required the communication of charges to an accused "as soon as practicable after arrest." He also denied vehemently that DORA sanctioned internments without trial.

If a British subject is arrested, in connection with the Defence of the Realm Act, and an unreasonable time elapsed before he was told what was the charge against him, it would take a great deal to convince me that he would not be

to the public safety or the defence of the Realm."

³⁰ The Times, 3 Dec. 1914, 3.

³¹ *Ibid.*

able to move for a writ of habeas corpus.³²

Yet, less than three months later, the Asquith Government was preparing to effect just such a denial of due process. Instead of relying on the dubious ruling in ex parte Dove, however, a new DORR was drawn up.

Regulation 14B was a supplement of the stricter enemy aliens policy announced just before the advent of the Asquith Coalition late in May 1915, but the issues of immigration and nationality had for years been tainted with intolerance and prejudice. A powerful Edwardian restrictionist lobby had predicted dire economic, social, and biological consequences if immigration from Europe continued unabated.³³ The outbreak of war only increased the depth of these prewar fears. Liberal ministers were soon hounded by right-wing 'scaremongers' for playing down the enemy alien threat, and the clamour for more internments intensified as anti-German sentiment hardened in the spring of 1915. Asquith believed, too late as it turned out, that his Liberal administration would be fatally weakened unless it adopted a hard line towards enemy aliens. On 13 May 1915 he informed the Commons that, henceforth, every enemy alien male of military age would be detained unless he could show grounds for exemption from the new general rule of internment. Enemy aliens above the age of military service were to be repatriated. By stressing his paramount concern for public order and for the personal safety of the affected individuals, the Prime Minister put a liberal gloss on this promise of drastic action.³⁴

Before this new policy took effect, some forty thousand enemy aliens were still at large

³² PD (Commons), 2 Mar. 1915, 70, col. 709-10 and passim. The first quotation is from the text of the Defence of the Realm (Amendment) Act.

³³ Colin Holmes, John Bull's Island: Immigration and British Society, 1871-1971 (Basingstoke, 1988), 56-72. The enactment of the 1905 Aliens Bill, which authorised the exclusion of "undesirable" aliens from the British Isles, was a dramatic illustration of the influence of restrictionist thinking on official policy.

³⁴ Bird, Control of Enemy Alien Civilians, 88-91.

in Britain.³⁵ There were also an estimated nine thousand naturalised British subjects of enemy origin.³⁶ All naturalised subjects were obliged to submit to British law but they were also, ideally, entitled to its fullest protection. For example, the Defence of the Realm (Amendment) Act had denied to all resident aliens the right of civil trial, but the statute drew no distinction between naturalised and natural-born British subjects. Likewise, naturalised subjects of enemy origin were exempt from the regimen of enemy aliens controls implemented in August 1914. Sir John Simon spelled out the reciprocity of the naturalisation compact in June 1915, ironically, just as he was explaining a measure, Regulation 14B, which threatened to undermine it.

When a person is naturalised and given a certificate he is, by the terms of that certificate, assured by the State that henceforward he will stand in the same position as a person who is a natural-born British subject. I think we should be acting very foolishly if we did not remember that we had given that promise.³⁷

Many naturalised subjects of enemy origin backed up their support for the Allied war effort with public protestations of their patriotism. But these unsolicited expressions of British allegiance did not diminish the ill feeling that arose towards such people. A special enmity was reserved for the more prominent naturalised former Germans, especially those with political or financial connections, and even more so if Jewish as well. It was often contended that naturalised enemy aliens posed a greater threat to the realm than did those who had

³⁵ Bird calculates that enemy alien civilians were arrested at the rate of about 1,000 per week during the summer of 1915. There were over 32,000 internees by the end of November 1915, an increase of over 60% since May. In this 6 month period there were 15,410 applications for exemption from internment by enemy aliens, of which 7,348 were granted (*ibid.*, 101).

³⁶ *Ibid.*, 235. This latter figure would probably have been higher had naturalisation fees—£5 until 1913, £3 thereafter—been lower (see Bernard Wasserstein, Herbert Samuel [Oxford, 1992], 91).

³⁷ PD (Commons), 17 June 1915, 72, col. 843.

retained their original nationality and were at least subject to the Aliens Restriction Orders.³⁸ There were calls for the wholesale revocation of naturalisation certificates, especially those granted to former Germans after the implementation of dual nationality legislation in Germany in January 1914. This law permitted German-born subjects of other states to hang on to their nationality of birth as well, thereby reinforcing the taint of disloyalty carried by naturalised subjects of German origin. Indeed, the existence of the so-called Delbruck Law lent a spurious legitimacy to the harassment of these people by the British authorities. The Home Office chose to ignore all claims of discharge from enemy nationality which lacked proper authentication. Even when this proof was forthcoming, the individual concerned was often still classified as an enemy alien.³⁹

Some Liberal ministers were troubled by the intolerant atmosphere of wartime Britain. The Party had traditionally taken a *laissez-faire* line on immigration matters. Liberals had opposed the Aliens Act of 1905 and administered it fairly after being elected to office in December of that year.⁴⁰ During a Cabinet discussion of the enemy aliens question, on 10 May 1915, Asquith affirmed that "nothing would induce him to repudiate any grant of the full privileges of citizenship to all naturalised persons." He was supported by Walter Runciman, and more surprisingly, by Churchill, architect of the prewar aliens register. The Prime Minister had evidently had a change of heart before he presented the Liberal Government's new aliens measures to the Commons three days later. In addition to his pledge of a stricter internment policy, Asquith said that, in cases of suspicion involving British subjects of enemy

³⁸ Colin Holmes, *Anti-Semitism in British Society, 1876-1939* (London, 1979), 121-25; C.C. Aronsfeld, "Jewish Enemy Aliens in England during the First World War," *Jewish Social Studies* 18 (1957): 277-83; Bird, *Control of Enemy Alien Civilians*, 245-48. During February 1915 Lord Galway warned fellow peers of "the proud boast of enemy aliens that, even though they may be naturalised, they remain German or Austrian at heart. Should there be an invasion...these men will rush to join the invaders and offer their services as guides" (PD [Lords], 3 Feb. 1915, 18, col. 422).

³⁹ Bird, *Control of Enemy Alien Civilians*, 240-45.

⁴⁰ Holmes, *John Bull's Island*, 66-67, 72.

origin, "we shall have the same power of detaining him as if he had never been naturalised at all."⁴¹

Internment Policy under Regulation 14B

(i) "Hostile Origin or Associations"

Asquith's Commons statement was a clear portent of 14B, although the DORR did not come into force until after the formation of the Coalition at the end of that month. Regulation 14B has to be situated in this wider context of wartime Germanophobia. This measure also reflected two specific concerns of the security services; first, that Germany was operating a spy ring run by naturalised subjects of German origin; second, that there might not be sufficient evidence to convict such espionage suspects.⁴² The DORR was drafted by Sir John Simon, Home Secretary in the new administration. Although a committed liberal individualist, who later resigned over conscription, Simon consistently defended Regulation 14B. Many years later he justified it as "a hateful necessity."⁴³ The practical effect of 14B was to extend some of the Aliens Restriction Orders to British subjects of "hostile origin or associations." On the recommendation of a CMA or a CNA, the Home Secretary could oblige any such person to reside in a particular locality, to report periodically to the police, and to comply with other restrictions on freedom of movement. Most controversially, 14B also authorised internment without trial. Finally, the DORR provided internees with a right of appeal to a special

⁴¹ David, ed., Inside Asquith's Cabinet, 241 (10 May 1915); PD (Commons), 13 May 1915, 71, col. 1875-76.

⁴² Simpson, Highest Degree Odious, 13. Intelligence gleaned from one of the spies arrested in the early spring, together with the 7 arrests made in May and early in June 1915, implied that neutral nationals visiting from abroad posed a more serious security risk (see Andrew, Her Majesty's Secret Service, 186-87). Not all these suspects were tried and it is possible that some were interned under 14B.

⁴³ Simon, Retrospect, 104. For a detailed treatment of Simon's shifting political fortunes during the war, see David Dutton, Simon: A Political Biography of Sir John Simon (London, 1992), ch. 2.

advisory committee appointed by the Home Secretary.

There were no protests against 14B in June 1915. A staunch critic of executive detention later, the Law Journal was reassured initially that the appeal process signified "a similar recognition of the reign of law as was responsible for the restoration of trial by jury." When Simon outlined his new powers to the Commons on 17 June 1915, he had insisted that 14B did not posit any legal distinction between natural-born and naturalised British subjects.⁴⁴ Despite its hollow ring, this claim was not entirely empty. The DORR applied both to persons of "hostile origin" and to those of "hostile associations." Only naturalised subjects and British-born subjects of enemy alien parentage could be of "hostile origin." But any British subject could, potentially, be of "hostile associations," a phrase with dangerously imprecise connotations. Strictly speaking, a single standard of citizenship—the formal basis of extant nationality and naturalisation law—remained intact. It was only preserved, it should be noted, at some cost to the civil liberties of the whole population. Yet the real purpose of 14B was to supplement the Aliens Restriction Orders and, effectively, to deny to British subjects of enemy origin or parentage the safeguard of presumed innocence.

(ii) Internment and Appeal Procedures

As Brian Simpson has observed, "very little is known about the administration of Regulation 14B." Nothing like the same documentation exists as there does for the internment of enemy aliens. There is a dearth of material in the Public Record Office: a Home Office file on the internment of Sinn Feiners in 1918 and a Metropolitan Police record of the Islington Internment Camp, the converted Poor Law institution where most 14B internees (and many enemy aliens) were held.⁴⁵ The Sankey Papers do contain the minute book of the Home Office

⁴⁴ Law Journal, 19 June 1915, 304; PD (Commons), 17 June 1915, 72, col. 843-44.

⁴⁵ Simpson, Highest Degree Odious, 16-17. A few male internees were held at Brixton, Pentonville, and Reading prisons; the far smaller number of women were interned at the Aylesbury Inebriates Reformatory. The PRO files are HO 144/1496/362269 and Metropolitan Police Papers 2/1633.

Aliens' Advisory Committee from April 1916 until December 1918. But this promising source is of limited value. The minutes often register little more than the fact that the panel had convened. They make only sporadic reference to the grounds on which decisions were taken or to the influence of the security services on internment policy.⁴⁶ In addition, much of the material pertains not to 14B cases but to appeals against repatriation or internment by enemy alien civilians. Probably the best source on 14B is Hansard, which records the efforts of a few MPs to elicit information about the administration of the DORR and to draw attention to the plight of individual internees.

The detaining power of Regulation 14B rested ultimately with the Home Secretary, but internment orders were executed on the recommendation of the CMA or CNA. For practical purposes these authorities were Captain Reginald Hall, the Director of Naval Intelligence, and Colonel Kell of MI5. Kell's department constantly updated its register of possible 14B internees. These names were communicated to the Home Office and by this department to the appropriate police authority. The police would then report on the movements of the listed persons and inform MI5 about fresh cases of suspicion. If it was decided that internment was justified, an order would be served and the suspect detained immediately.⁴⁷ The internee could then exercise his or her right of appeal to the Home Office Aliens' Advisory Committee. This body had been appointed in May 1915 to review applications for exemption from internment or deportation submitted by enemy aliens. It split into two subcommittees. The first, chaired by Mr. Justice Younger, reviewed repatriation orders; the second, chaired by Mr. Justice Sankey, reviewed internment orders.⁴⁸ It was to the brief of this latter panel that 14B

⁴⁶ There are, however (Sankey Papers, MSS Eng. Hist. c. 548/92-122), detailed notes on Philip Laszlo de Lombos, the Hungarian-born society portrait painter interned in September 1917, and whose fate is discussed in Simpson, Highest Degree Odious, 23.

⁴⁷ Bird, Control of Enemy Alien Civilians, 249-50.

⁴⁸ There was also a separate Scottish appeal tribunal, chaired by Lord Dewar. See *ibid.*, 95-96 and Simpson, Highest Degree Odious, 15-16 for details of other appointees and of various personnel changes to the committees during the war.

cases were added in June 1915.

Regulation 14B internees were supposedly less vulnerable to unsubstantiated accusations of disloyalty than were enemy aliens. After Asquith's tougher aliens policies took effect in May 1915, enemy alien internees faced an a priori presumption of guilt. Yet, according to Troup, "when a British subject of hostile origin is proposed to be interned...some prima facie ground for believing him to be a danger to the Realm has to be alleged before the Committee can recommend his internment." In practice, however, this distinction between enemy alien and naturalised subjects was not always maintained. As the Permanent Under-Secretary conceded:

In some cases, even if the Committee was not itself satisfied that any case of suspicion was established, they recommended internment on a definite statement from Colonel Kell or Captain Hall that he had reason to believe the man was dangerous.⁴⁹

This fragment of evidence implies that the Advisory Committee's quasi-judicial role was compromised by undue deference to the security services. Reviewing the case of one Otto Simonis in May 1916, for example, the panel recommended his continued detention "on the express evidence and advice [underlining mine] of Capt. Hall."⁵⁰

Internees were disadvantaged in other respects by the appeal process. At first they were not even apprised of the grounds for suspicion against them. Following an outburst of parliamentary criticism early in 1916, the Home Secretary did promise that, henceforth, all 14B internees would be given a general statement justifying their arrest and imprisonment. But the degree of disclosure varied from case to case, and internees could not cross examine their accusers at the appeal hearing.⁵¹ As the terms of confinement grew longer, critics of the DORR

⁴⁹ CAB 24/55/G.T.4961, Troup, "Treatment of Alien Enemies and Persons of German Origin," 26 June 1918.

⁵⁰ Sankey Papers, MSS Eng. Hist. c. 548/21, 17 May 1916.

⁵¹ PD (Commons), 2 Mar. 1916, 80, col. 1234; 22 Oct. 1917, 98, col. 482.

pressed for the periodic reconsideration of 14B cases by the Advisory Committee.⁵² In July 1917 the Home Office conceded this point and instructed Mr. Justice Sankey to review a number of applications his panel had previously rejected. But procedures remained unchanged. Lord Russell was denied his request of "a fair opportunity to the accused persons to meet any case there may be against them."⁵³ Although there was no flurry of successful appeals, in September 1917 the Advisory Committee did recommend the release of Arthur Zadig and Hilda Howsin, two long-term internees and ex parte to failed legal action against Regulation 14B. The Home Office accepted this advice, as it claimed to do in all 14B cases,⁵⁴ but the department was slow to act on it. The Home Secretary referred to difficulties in settling arrangements for the release of these two internees. Zadig was not released from the Islington camp until June 1918; Howsin languished at Aylesbury until August 1919.⁵⁵

(iii) The Scope of 14B and Individual Cases

Despite the ease by which internment could be authorised and confirmed, the authorities employed Regulation 14B selectively. Nicholas Hiley records 226 cases of internment under this DORR from 1915 to 1919. Given the absence of exact dates, it is not clear whether this number clashes with Simpson's estimate of 160 internments before the Armistice. The latter's figures are drawn from Hansard. On 2 March 1916 there were sixty-nine internees, fifteen of whom were British born. By the following February these numbers had climbed, respectively, to seventy-four and thirty-one. As of 21 June 1917 there were a total of 125 internees. Seventy-seven of these were British subjects by birth or naturalisation;

⁵² For example, Law Journal, 28 July 1917, 290.

⁵³ PD (Lords), 24 July 1917, 26, col. 25; Sankey Papers, MSS Eng. Hist. c. 548/69-70, Sir George Cave (Home Secretary) to Sankey, 27 July 1917.

⁵⁴ PD (Commons), 18 Mar. 1918, 104, 659.

⁵⁵ *Ibid.*, 4 Dec. 1917, 100, col. 250; 13 Dec. 1917, col. 1371; 14 Dec. 1917, col. 1513-14 (both had their freedom of movement restricted, and Howsin was to post a £1000 bond); 10 June 1918, 106, col. 1880. See also, Simpson, Highest Degree Odious, 23.

the remaining forty-eight were non-enemy aliens. This was the only reference to internees in this latter category. It is not clear how this number changed during the remainder of the war, although at least four Russian internees were released for deportation from Britain early in 1918. In December 1917 there were seventy-three British internees, fifty-four being of "hostile origin." By 6 June 1918, these numbers had been reduced, respectively, to sixty-seven and forty-nine. As late as April 1919, there were still sixty-six internees, including forty-one British-born subjects. None of these figures include Irish internees, of whom there were still over one hundred on mainland Britain in March 1920.⁵⁶

In the most detailed official statement of internment policy under the DORR, Simon's successor as Home Secretary, Herbert Samuel, obviously wanted to demonstrate the legitimate grounds for suspicion that existed in 14B cases. On 2 March 1916 he sketched out the circumstances of six "typical" internments. The first two of these cases were British-born subjects of German antecedents, against both of whom there was evidence of "pro-German sentiments." The next two cases involved German-born women who had acquired British nationality by marriage. The first woman had betrayed disloyal sympathies in some intercepted correspondence; the second had already been convicted of a minor espionage offence and had served a six month prison sentence. The final two cases were both men "of pure British birth" but with known connections to German espionage agencies.⁵⁷

Given the size of MI5's index of suspicious persons,⁵⁸ it is unremarkable that some internment orders were served on pretexts far more flimsy than those in the above cases. In December 1915 the Advisory Committee reviewed the case of one Richard Lange, a British-

⁵⁶ Hiley, "Counter-Espionage and Security," 669. The source for Hiley's figure, possibly the Kell Papers, is unclear. The Hansard references are from Simpson, Highest Degree Odious, 17, 29. For the December 1917 figures and the Russian deportations, see PD (Commons), 17 Dec. 1917, 100, col. 1609; 21 Jan. 1918, 101, 642-43.

⁵⁷ PD (Commons), 2 Mar. 1916, 80, col. 1231-33.

⁵⁸ See Andrew, Her Majesty's Secret Service, 174-76.

born man of German parentage. The exact grounds for his internment in November 1915 are unclear, although the panel had before them a statement that Lange had earlier applauded, in a Liverpool pub, the sinkings of the Lusitania and the Arabic. This evidence also reported Lange's belligerent tendencies under the influence of alcohol and that he might have expressed contrary sentiments had anybody defended the sinkings. In mitigation, he had also for many years served in the Lancashire Volunteers and was enlisted in the seventh King's Liverpool Regiment at the time of his arrest. In spite of the evidence pointing to a drunken indiscretion, Lange's internment was confirmed. Stanley Baldwin, one of the four MPs on the Advisory Committee, observed that he was "a big, beery fellow, safer in for his own sake."⁵⁹

The background to the arrest and subsequent internment of Hilda Howsin in August 1915 was rather bizarre. Howsin, a volunteer Red Cross nurse, was under suspicion because of a prewar acquaintance with an Indian nationalist called Virendranath Chattopadhyaya. During 1915 Chattopadhyaya and several associates were linked by British intelligence to a fantastical German assassination plot against the Entente's political leadership. In May 1915 Howsin had twice met Chattopadhyaya in Montreux and then returned to England with a message for a woman in London. The recipient of this letter was also interned, but charges were preferred against neither woman.⁶⁰ Although Herbert Samuel informed one of her defenders privately that "Miss Howsin has been very fortunate not to have been put on trial,"⁶¹ no detailed evidence of any wrongdoing ever entered the public domain. Instead, government spokesmen merely insinuated that Howsin was a threat to the realm. For good measure, the Attorney-General added that the police raid on the West Riding home of Howsin's father had

⁵⁹ Sankey Papers, MSS Eng. Hist. c. 548/124.

⁶⁰ On the Howsin case, see Simpson, Highest Degree Odious, 22-23 and the contemporary account of Basil Thomson, Scene Changes, 266-78.

⁶¹ CPT 67, Samuel to Trevelyan, 31 Mar. 1916. Trevelyan was one of several MPs who criticised the protracted incarceration of Howsin (see PD [Commons], 23 Mar. 1916, 81, col. 424-25; 19 Apr. 1916, col. 2310; 10 July 1916, 84, col. 11-12; 9 Aug. 1917, 97, col. 566).

uncovered "literature of an extremely seditious character."⁶²

(iv) The Irish Internments

Samuel's Commons speech of 2 March 1916 had stressed that Regulation 14B had not been conceived by the Government in order "to suppress criticism of itself," and that internees were "not domestic opponents for [sic] the Government."⁶³ But this claim was seriously tested by the internment of several *émigré* Russian socialists⁶⁴ and, especially, by the Irish internments of 1916 and 1918. Regulation 14B was first used against Irish republicanism in the bloody aftermath of the Easter Rising of 1916, when the Prime Minister personally ordered the transportation to England of over eighteen hundred suspected Irish rebels. This action, however, revealed considerable uncertainty about the legality of detaining these prisoners by executive order on mainland Britain.

⁶² PD (Commons), 23 Mar. 1916, 81, col. 445.

⁶³ *Ibid.*, 2 Mar. 1916, 80, col. 1237.

⁶⁴ See James Smyth and Murdoch Rodgers, "Peter Petroff and the Socialist Movement in Britain, 1907-18" and Ron Grant, "G.V. Chicherin and the Russian Revolutionary Cause in Great Britain," in From the Other Shore: Russian Political Emigrants in Russia, 1880-1917, ed. John Slatter (London, 1984), 100-138; Richard K. Debo, "The Making of a Bolshevik: Georgii Chicherin in England, 1914-18," Slavic Review 25 (1966): 651-62. The detention of Petroff in January 1916 was bound up with both the sectarian wartime politics of the marxist British Socialist Party and with official attempts to undermine trade union privileges in the munitions workshops of Clydeside, where the Russian leftist had been based since the previous November. The travails of Georgii Chicherin, a future Soviet Commissar of Foreign Affairs, related to his efforts on behalf of the large, mainly Jewish, Russian immigrant community concentrated in London's East End. In response to vocal, anti-semitic demands for the conscription of friendly alien 'shirkers' and 'job stealers', the British Government had promised in December 1916 that Russian residents of military age would be either conscripted or repatriated. The British side of a reciprocal agreement was ultimately embodied in the Military Service (Convention with Allied States) Act of July 1917. Urging defiance of this new legislation, Chicherin was arrested and interned under Regulation 14B in August 1917. In January 1918, both he, Petroff, and two other Russian internees were released and deported, in order to discourage retaliatory action by the new Bolshevik regime against British subjects still in Russia. The two other Russian 14B cases were those of Hasse and Natenbruk. A third, Witcop, refused to leave for Russia until the release of her common law husband, who had been declared of German nationality by the Home Office. A fourth Russian, Sairo, was deported in April 1918 (see PD (Commons), 21 Jan. 1918, 101, col. 642-43; 9 April 1918, 104, col. 1310-11).

The Home Secretary was afraid that writs of habeas corpus might be granted because the prisoners had not yet been served with orders under Regulation 14B. The prisoners could, of course, be indicted, but not tried by English courts for offences allegedly committed in Ireland. Nor could they be tried by court martial on mainland Britain. Although the Defence of the Realm (Amendment) Act had been suspended in Ireland on 26 April 1916, the right of civil trial "has not been and could not be suspended in Great Britain." Samuel regarded the return of the prisoners for civil trial in Ireland as futile because of unreliable Irish juries. He also stated his "strong objections to transporting this large body of men back to Ireland for court martial." Besides, as Samuel conceded, there would be insufficient evidence to convict many suspects. Regulation 14B, therefore, offered by far the most satisfactory solution. An amendment of the DORR was considered, extending it to all persons suspected of involvement in the failed uprising. But this change was rejected because it would be "open to the grave objection of being in the nature of ex post facto legislation." Samuel was confident, however, that Sir Roger Casement's botched landing off the Kerry Coast in a German submarine, together with a reference in the rebel proclamation to "gallant allies in Europe," were sufficient proof of the "hostile associations" of republican sympathisers.⁶⁵

The Cabinet approved this new use of Regulation 14B, and an Irish judge, Mr. Justice Pim, was appointed to the Home Office Advisory Committee.⁶⁶ There were compelling reasons for an expeditious review of this special category of 14B cases. On 10 July 1916 R.B. Outhwaite urged the committee to process Irish appeals with great haste, "in view of the statement being made in America that the condition of people in Ireland under General

⁶⁵ CAB 37/147/36, Herbert Samuel, "Irish Rebels Interned in England," 15 May 1916; Wasserstein, Herbert Samuel, 180-81. An obvious motive for the deportation of suspects from Ireland was to undercut the jurisdiction over them of the military, which had hastily tried over 2,000 Irish cases by court martial and whose 'excesses' were being criticised from both inside and outside the Government (see Townshend, "Military Force and Civil Authority," 283).

⁶⁶ Sankey Papers, MSS Eng. Hist. c. 548/24, Samuel to Sankey, 8 June 1916.

Maxwell is no better than that of Belgium under von Bissing.⁶⁷ The reconstituted Advisory Committee, sitting at Wormwood Scrubs and Wandsworth Prisons, worked hard to dispose quickly of the Irish applications. The panel showed more leniency to the Irish prisoners than to naturalised Britons or non-enemy aliens. Whereas few 14B internees in these last two categories were released on appeal, the Advisory Committee recommended the discharge of 69% of the Irish cases they reviewed between 22 June and 28 August 1916. Representations were made by 1,846 of the 1,867 prisoners transferred to England. The panel advised exemption from internment for 1,273 and continued detention for the remaining 573.⁶⁸ In October 1916 the Home Secretary informed the Commons that more Irish prisoners would be released on assurances of good behaviour. Not all internees complied, but a general amnesty was nevertheless announced on 14 June 1917.⁶⁹

A second wave of Irish internments took place in May 1918. The confluence of political instability in Ireland with the British crisis of military manpower provided the backdrop. On 25 March 1918 the War Cabinet resolved to extend the application of the Military Service Acts to Ireland. Germany's spectacular offensive had suddenly increased the likelihood of such recruitment last resorts as Irish conscription. Lloyd George tried to sweeten this bitter pill with a promise to implement the Home Rule recommendations of the moderate nationalist and southern Unionist forum that had been negotiating a settlement to the Irish Question since the previous July. Yet all shades of nationalist opinion were resolutely

⁶⁷ PD (Commons), 10 July 1916, 84, col. 14 (Maxwell was the commander of the British garrison in Ireland). The Government did not need reminding of the unfortunate impact of events in Ireland on American attitudes towards Britain (see Catherine B. Shannon, Arthur J. Balfour and Ireland 1874-1922 [Washington, 1988], 212-25).

⁶⁸ Sankey Papers, MSS Eng. Hist. c. 548, "Minute Book of Home Office Aliens Advisory Committee." Sankey, who chaired this panel, remarked in the minutes that "the work had been of an exacting and anxious character and the Committee have frequently sat from 10:00 A.M. to 9:00 P.M." Most of the unsuccessful applicants were dispatched to 2 camps in Frongoch, North Wales (Simpson, Highest Degree Odious, 19).

⁶⁹ PD (Commons), 18 Oct. 1916, 86, col. 690; George Dangerfield, The Damnable Question: A Study in Anglo-Irish Relations (Boston, 1976), 258.

opposed to any conscription scheme.⁷⁰ Anticipating outright resistance, the War Cabinet contemplated detaining 150 or so leading republicans. But the Home Secretary advised that Regulation 14B would have to be amended in order to make any such preemptive strike. The "hostile associations" of Sinn Fein were no longer so obvious as in 1916, so Sir George Cave recommended the extension of 14B to the same category of persons whose freedom of movement was restricted under Regulation 14. That is, the amended regulation would cover not only persons of "hostile origin or associations," but also "any person who is suspected of acting, or having acted, or being about to act, in a manner prejudicial to the public safety or the defence of the realm."⁷¹

Both Lloyd George and the Chief Secretary for Ireland, H.E. Duke, welcomed this change, in the light of Irish intelligence reports predicting a violent reaction to the implementation of compulsory military service.⁷² Regulation 14B was duly amended on 20 April 1918, but no internments followed. In fact, it was then decided to defer conscription in favour of yet another voluntary recruitment drive in Ireland. Although this decision destroyed the original rationale for acting against Irish republicanism under 14B, the new Lord Lieutenant, Field Marshal Lord French, was convinced of the political wisdom of instituting just such a draconian policy. On the night of 17 May 1918 about one hundred Sinn Fein leaders were arrested. They were later removed to England and lodged in several different prisons. The arrests were followed by an official communiqué alleging a sinister German-Irish

⁷⁰ A.J. Ward, "Lloyd George and the 1918 Irish Conscription Crisis," *HJ* 17 (1974): 109-15; R.J.Q. Adams and Philip P. Poirier, The Conscription Controversy in Great Britain, 1900-18 (London, 1987), 228-37; Dangerfield, Damnable Question, 268-84. Although Irish conscription had hitherto enjoyed little official support, it was a pet cause of the jingo Right and especially of H.A. Gwynne's Morning Post (see Wilson, ed., Rasp of War, 235-37, 266 and passim).

⁷¹ CAB 24/48/G.T.4267, Cave, "Internment of Sinn Fein Leaders," 18 Apr. 1918. The amended DORR would apply only to Ireland because its coverage was restricted to areas where the right of civil trial had been suspended under the Defence of the Realm (Amendment) Act.

⁷² CAB 23/6/395(13), 19 Apr. 1918.

republican connection.⁷³ This statement was obviously for public consumption because 14B, as amended, now provided for internment on grounds other than those of "hostile origin or associations."⁷⁴

The Case against Regulation 14B

(i) The Eclipse of Parliament

The critics of 14B were incensed by the substitution of delegated legislation for statutory law on such a pivotal issue of liberal principle as the individual's right to a fair trial. Regulation 14B was a stark reminder of the unspecified powers which DORA enabled the executive to employ. No challenge to the hallowed habeas corpus law could be taken lightly, but internment by DORR was a particularly offensive expedient. Lord Parmoor's contribution to a lively debate of 14B on the letters page of The Times took exception to "the wide and indefinite terms in which authority has been given by the emergency statutes to issue regulations having the force of law." The administration of the DORRs, as upheld by the courts, threatened to revive the worst excesses of Tudor despotism. Parmoor saw DORA as the modern equivalent of the Statute of Proclamations, the infamous 1539 law which elevated the royal decree to the standing of a parliamentary enactment. He also hinted that such a boundless delegation of Parliament's legislative authority as implied by Regulation 14B

⁷³ Charles Townshend, The British Campaign in Ireland, 1919-1921: The Development of Political and Military Policies (London, 1975), 8-10; Dangerfield, Damnably Question, 285-95; CAB 24/52/G.T.4261, "Statement in Regard to Irish Arrests."

⁷⁴ A point made in the Law Journal, 25 May 1918, 177-78 and by Simpson, Highest Degree Odious, 27. Simpson also records that 102 Irish 14B internees were still being held in Britain as late as 31 March 1920. A few persons were held even beyond this date under the equivalent regulatory scheme of the 1920 Restoration of Order in Ireland Act. In January 1920 Lord Chief Justice Reading ruled against an Irish 14B internee in habeas corpus proceedings on the grounds that, technically, hostilities in Europe had not ceased (see also below, 255, n. 18).

smacked more of the continent's administrative legal traditions than of the British rule of law.⁷⁵

The Law Journal echoed Parmoor's animadversion to these 'alien' practices. Ever since the notorious Tudor statute had been repealed in 1547, Britain had been spared "any recognition of the system of 'administrative law,' which under varying regimes has persistently affected and crippled the liberties of continental nations." Recent statutes had delegated a quasi-legislative role to the executive, but there was "no parallel whatever for an absolute surrender of those functions in the matter of most concern to the subject—his personal liberties." If Parliament had capitulated on this point, added the Nation, why legislate in any circumstances?

Why, indeed, do anything by the direct action of Parliament? We have a kind of Conseil d'Etat sitting in the shape of a Coalition Government. Let it assume, through its bureaucratic services, those superior rights of the State over the private citizen which is the essence of the droit administratif.⁷⁶

Yet the critics of 14B insisted that Parliament had not contemplated any such wholesale abdication of its authority in passing the first DORA, and that habeas corpus had been "unconsciously suspended" in August 1914.⁷⁷

The sentiments of Parliament on the rights of suspects were more plainly revealed, it was argued, by the passage of the Defence of the Realm (Amendment) Bill in March 1915. But this legislative guarantee of civil trial had effectively been nullified by 14B. Strictly speaking, the DORA did not override the amending act. Only persons charged under the DORRs were entitled to claim a jury trial, and only after a CMA had determined that the offence was not to be tried by a magistrate. Regulation 14B was aimed at suspects against whom there might be insufficient evidence to mount any prosecution. J.A. Hobson noted the distinction but considered it irrelevant to the larger issue of civil liberties. Was it conceivable, he wondered,

⁷⁵ The Times, 28 Feb. 1916, 4.

⁷⁶ "Legislation by Administrative Order," Law Journal, 12 Feb. 1916, 83-84; Nation, 12 Feb. 1916, 691-92.

⁷⁷ DN, 10 Feb. 1916, 4.

that the Executive should seek to evade the plain intention of the Act...by urging that in these cases a person is not 'alleged to be guilty of an offence against any regulations,' and should contend that the fact that 'no charge is communicated to him' deprives him of the right of a trial by jury?⁷⁸

Ellis Davies was another exasperated Liberal, to whom it was "obvious that all the supposed safeguards, both in the Act in question and those introduced into the Amending Act in March are worthless, and that we are no longer under the Constitution save as expressed by the Executive in the regulations."⁷⁹

(ii) The Advisory Committee and the Rule of Law

Civil libertarian opinion was equally appalled by the appeal process under Regulation 14B. The strong judicial presence on the Home Office Advisory Committee was deceptive. At root this body was part of the executive, whose actions it could legitimise but, unlike a court of law, not countermand. The appeal procedures subverted a fundamental axiom of the rule of law, stated by Lord Parmoor, "that judicial functions should be left to the judiciary."⁸⁰

Wilfrid Ashley was another, but most unlikely, critic of the Advisory Committee. The Unionist MP for Blackpool was disturbed that supplication could only be made to an adjunct of the same branch of government which had served the internment order in the first place. Under 14B, therefore, "the same person is prosecutor and judge: a combination particularly repugnant to our English notions of justice." Ashley did not question the special powers of arrest under the DORRs but wanted the "more English course of procedure" provided by a proper trial to be followed thereafter.⁸¹ He also assailed the hypocrisy of Sir John Simon,

⁷⁸ Nation, 29 Apr. 1916, 124.

⁷⁹ "The Liberty of the Subject," DN, 10 Feb. 1916, 4. See also, Law Journal, 29 Jan. 1916, 45; Nation, 18 Mar. 1916, 868-69; LL, 3 Feb. 1916, 5: "Parliament enacts a measure in March 1915, to safeguard the right of trial of British subjects; in June 1915, the Home Secretary issues a regulation depriving British subjects of the right of trial!"

⁸⁰ The Times, 1 Mar. 1916, 9. See also, Simpson, Highest Degree Odious, 16.

⁸¹ The Times, 2 Mar. 1916, 9; PD (Commons), 2 Mar. 1916, 80, col. 1226 and *passim*, and also, 21 Feb. 1916, col. 411; 23 Feb. 1916, col. 690-91; 29 Feb. 1916, col. 877-78. No

architect of 14B and to whom Ashley had earlier made unsuccessful representations on behalf of a Turkish internee.⁸² Ashley wondered how the Liberal former Home Secretary could object "to compelling young men to defend their country, and yet make a regulation which enabled him to intern, at his own pleasure, any British subject he likes."⁸³

A widely cited passage from the Law Journal listed several other complaints about the Advisory Committee. Its procedures did not afford the subject the same degree of protection as a proper trial,

for all the elementary conditions of a trial are absent; there is no statement of facts constituting the charge, no indication whatever of the evidence in support of it, no opportunity for the accused to examine witnesses or documents, no right even for him to appear before his accusers or the committee. The privilege of making 'representations' is in these circumstances no security; it is a mere mockery, for it imposes on the accused the impossible burden of proving a negative, and reverses entirely the regular course of justice.⁸⁴

In addition, the Advisory Committee deliberated in camera and did not even follow a set procedure for every case. As the Home Secretary admitted in October 1917, procedural matters were "in the discretion of the Committee." For example, sometimes internees were informed of the exact nature of the suspicions against them; sometimes the charges were only communicated in the most general terms.⁸⁵

libertarian Tory traditionalist, Ashley even sat on the Unionist War Committee, an influential 'ginger group' which urged a more vigorous prosecution of the war. Few of its members had any misgivings about ditching constitutional niceties in defence of the realm. Perhaps, as Herbert Samuel ventured (2 Mar. 1916, 80, col. 1227), Ashley was moved by a sentimental interest in the matter, as a descendant of the first Lord Shaftesbury, architect of the 1679 Habeas Corpus Act.

⁸² Mount Temple Papers, BR 77/28, Simon to Ashley, n.d. (Sept. 1915).

⁸³ PD (Commons), 2 Mar. 1916, 80, col. 1224.

⁸⁴ "Imprisonment without Trial," Law Journal, 12 Feb. 1916, 74. Quoted in The Times, 14 Feb. 1916, 4 and Nation, 26 Feb. 1916, 747.

⁸⁵ PD (Commons), 25 Oct. 1917, 98, col. 1022.

(iii) The Role of the Judiciary

The critics of 14B wanted the courts to play a more central role in the administration of the DORR. Yet they also accused the judiciary of undue complacency in upholding executive detention by DORR. With the exception of Lord Shaw's dissenting judgment in the landmark case of Rex v. Halliday ex parte Zadig—a vigorous defence of freedom and judicial independence in wartime—judges had allegedly veered from their customary habit of interpreting contentious legislation in favour of the subject rather than the Crown. Mr. Justice Bankes had clearly exceeded his competence, observed one critic, in ruling against Zadig by reference to the national crisis as much as to the strict letter of the law. "Such obiter dicta on the part of judges," he complained, "seem to underestimate the fundamental separation of judiciary and the Crown." After the dismissal of Zadig's Lords appeal, which their Habeas Corpus Defence Fund had helped finance, the Nation lamented this ruling as "one of the many decisions which would seem to make an end of the conception of judges as interpreters of the law, and to regard them as mere hands of the executive."⁸⁶ On this occasion, the Law Journal reserved its contempt for the remarkable assertion of the Lord Chancellor that courts of law were ill suited to adjudicate on matters arising from the administration of 14B.

When politicians or bureaucrats say that a court of law is 'unsuitable' to decide whether or not a British subject should enjoy his liberty, property, or other rights, we know what they mean: their secret opinion is that a court of law will act judicially and not uphold acts of mere administrative caprice, prejudice, or favouritism...But the Lord Chancellor is not a bureaucrat and cannot hold a Court to be 'unsuitable' merely on the ground that it will do justice without fear or favour. It remains a mystery why judges should be supposed, when sitting as a court of law and not as members of an Executive Advisory Committee, to be unable to decide the question whether or not there is any reasonable ground of suspicion that a British subject may be a danger to the public safety....⁸⁷

The rejection of Hilda Howsin's application for a writ of habeas corpus in July 1917

⁸⁶ Nation, 19 Feb. 1916, 728; 12 May 1917, 131. See also, Alfred Havighurst, Radical Journalist: H.W. Massingham, 1860-1924 (London, 1974), 233-34.

⁸⁷ Law Journal, 5 May 1917, 172.

sparked further execration of judicial timidity. In Mr. Justice Ridley's declaration of his inability to interfere with ministerial discretion, the Labour Leader detected "an entirely new precept in English law."⁸⁸ In the aftermath of the Howsin hearing, pressure from the relentless Parmoor and other peers persuaded the Home Office to review certain 14B cases.⁸⁹ Yet this small concession was a rare success for the opponents of executive detention. For the most part, the critics of 14B were simply ignored. Indeed, the Irish internments after the Easter Rising constituted a significant tightening of internment policy, and the 'Irish' amendment in April 1918 extended the detaining powers of the DORR in formal terms. Despite the outward lack of achievement, the civil libertarians did hold the line against a more repressive administration of 14B urged (or at least condoned) by powerful, countervailing currents of legal and political opinion.

Regulation 14B Upheld

The aforementioned case of Rex v. Halliday ex parte Zadig provided the only serious wartime legal test of Regulation 14B. Arthur Zadig was a naturalised British subject who came to the attention of the authorities owing to perhaps ill-judged representations on behalf of his brother and business partner, a German national who had been interned as an enemy alien. Zadig himself was interned on 14 October 1915.⁹⁰ More than Zadig's liberty was at issue in his application for a writ of habeas corpus. The case also tested the very basis of the Home Secretary's detaining power and the broad scope of DORA's delegating provisions. Counsel for Zadig did not question the specific reasons for his internment. Rather, they contended that 14B exceeded the authority of DORA and that, hence, the DORR, as much as the order served

⁸⁸ LL, 19 July 1917, 2.

⁸⁹ PD (Lords), 24 July 1917, 26, col. 23-31.

⁹⁰ The Times, 12 Jan. 1916, 3.

on Zadig, was invalid. The presence at the high court hearing of the Attorney-General, Sir F.E. Smith,⁹¹ attested to the importance which the Government attached to its outcome.

The Attorney-General presented the argument that Regulation 14B was valid by virtue of the general delegating powers of DORA. "If it were objected that those words were extremely wide," he said, "the answer was that at the present time it was to be expected that His Majesty in Council would be armed by the Legislature with powers of an extraordinary character." Smith was challenged over his loose construction of DORA. Counsel for Zadig averred that such a drastic curtailment of freedom as internment without trial clearly required "direct Parliamentary sanction." But Lord Chief Justice Reading concurred with the principal submission of the Crown; namely, that the power to issue regulations was not curbed by the other subsections of clause one, each of which detailed a specific purpose for delegated legislation. Lord Reading concluded that

Parliament intended by the statute to give power to make regulations for the prevention of offences, for the protection of the national interests, for the securing of public safety, and for the defence of the realm, and that the power to do so was to be found in the words of the Act which had been the subject of discussion before them.⁹²

The ruling against Zadig was appealed early the following month. Zadig's barrister contrasted 14B with the controversial, but not unprecedented, practice of legislating the suspension of habeas corpus. By the latter method Parliament at least retained ultimate control over the liberty of the subject. DORA notwithstanding, he added, "it was inconceivable that Parliament should have left that question of policy to a subordinate authority." Furthermore, "the tendency during the war for the Courts to make concessions to the Executive was one which certainly should not go any further." Yet the court of appeal appeared to behave in exactly the way that Zadig's counsel so deplored. The appeal was

⁹¹ Smith had assumed this Cabinet position in November 1915, following Sir Edward Carson's resignation. Smith's replacement as Solicitor-General was Sir George Cave, who succeeded Herbert Samuel as Home Secretary in December 1916.

⁹² The Times, 21 Jan. 1916, 27.

dismissed without the Crown even having to appear. Lord Justice Swinfen-Eady's judgment denied that Parliament had been hoodwinked over Regulation 14B. On the contrary, by enacting the delegating provisions of DORA in August 1914, the supreme legislative body "had expressed its intention with irresistible clearness."⁹³

In March 1917 the Zadig case reached the House of Lords. The barrister and Liberal MP, William Llewelyn Williams, disputed the divisional and appeal courts' interpretation of the statute. The ordaining power was surely limited by that part of subsection one which detailed the modes of trial for offences against the DORRs. This language obviously precluded internment without trial and had been reinforced by the right of civil trial set down in the Defence of the Realm (Amendment) Act.⁹⁴ In delivering judgment on 1 May 1917, however, Lord Chancellor Finlay rejected this plea. He reaffirmed that DORA did authorise regulations for certain unspecified preventive purposes. Regulation 14B had not been issued in defiance of Parliament, and it did not necessarily follow that, if the legislature was prepared to suspend habeas corpus, a statutory internment scheme should have been implemented. Only Lord Shaw disagreed with the majority verdict of the four Lords of Appeal. This lone dissident foresaw government by Committee of Public Safety if the "power to issue Regulations was so vast that it covered all acts which...were in the Government's view directed towards the general aim of public safety or defence." As regards the DORR under review, Lord Shaw preferred the analogy of Louis XIV's "more silent, more sinister" system of lettres de cachet. Shaw insisted that, "if Parliament had intended to make this colossal delegation of power, it would have done so plainly and courageously, and not under cover of words about regulations for safety and defence."⁹⁵

The fate of Zadig had generated considerable public discussion of the wider issues

⁹³ Ibid., 10 Feb. 1916, 3.

⁹⁴ Ibid., 2 Mar. 1917, 2.

⁹⁵ Ibid., 2 May 1917, 4.

raised by Regulation 14B. The case against executive detention dominated the debate, but the Government and its supporters defended 14B with vigour. The Home Secretary responded to parliamentary criticism by pandering to xenophobia and prejudice. In the absence of "any clear, definite line" between the enemy alien, the naturalised subject of enemy origin, and the British subject of enemy parentage, he told the Commons, it was imperative for the Home Office to hold a power of executive detention over all three.

I have always held the view...that 'nationalisation' would be a much better word to use than 'naturalisation' in these cases, because, although a man may change his nation, he does not always thereby change his nature.

Samuel's predecessor recalled the department having been bombarded with complaints from the public about the latitude enjoyed by naturalised subjects of enemy alien origin. Sir John Simon's liberal conscience had been sufficiently troubled by conscription for him to resign from office in January 1916. Yet he exhibited no retrospective qualms about the draconian detaining power which he had drafted the previous June. Indeed, he thought it "inconceivable that we should suddenly release into our midst a limited number of persons every one of whom is the centre of the very gravest suspicion by the authorities."⁹⁶

J.G. Butcher's justification of 14B was of a piece with his unremitting hostility to enemy aliens and naturalised subjects of enemy origin. The Unionist MP's letter to The Times of 29 February 1916 rested upon two standard defences of DORA: first, that emergency measures were, by definition, temporary; and second, that the guardians of civil liberties underestimated the present threat to the realm.

In time of unexampled stress and danger, it is folly to insist on a rigorous application of all the constitutional doctrines which we jealously maintain in times of peace. There are in this country persons who, although British subjects by naturalization or otherwise, yet owing to their German or other hostile origin or associations are a danger to the State when allowed to remain at large...

Is it better during the war to curtail the liberties of persons of the

⁹⁶ PD (Commons), 2 Mar. 1916, 80, col. 1228, 1251. One such complaint of the kind to which Simon referred is in the Simon Papers, MSS Simon 51/16-18, Katherine E. Burrell to Simon, 31 May 1915.

character I have described, or to imperil the public safety by leaving them at large? The most sensitive constitutionalist need not hesitate to accept the former alternative.⁹⁷

Regulation 14B received additional judicial, as opposed to rhetorical, reinforcement from the failed habeas corpus action of Hilda Howsin in July 1917. The divisional court was unimpressed by Howsin's sworn statement contesting the imputation of disloyalty against her. In denying the writ, Mr. Justice Ridley said that he could not challenge ministerial discretion on a matter of national security. Although Mr. Justice Low was in overall agreement with the ruling, he appeared to question his colleague's extraordinary assertion of judicial impotence. Low even suggested that Howsin's application might be viewed more favourably if proven that the Home Secretary had exercised his powers improperly.⁹⁸ Yet the only additional evidence presented to a second hearing, on 16 July 1917, was a supplementary affidavit in which Howsin simply denied any "hostile associations." Lord Chief Justice Reading ruled that if habeas corpus was granted on the basis of this empty submission, then "every person interned could demand a writ simply by denying that the Home Secretary had acted rightly."⁹⁹ The representations of counsel for Howsin were dismissed a third time in the court of appeal. This time Lord Justice Pickford delivered the homily on the sanctity of executive discretion during wartime.

Parliament had given the Home Secretary power on certain material to put a person or persons in prison without trial, and these Courts had no right to interfere. They might or might not think the power too wide, but that was not a matter for them. This was temporary and exceptional legislation passed for the period of the war...The object of these statutes was not to punish persons for acts committed, but to prevent things which might be committed, and which might be dangerous to the State.¹⁰⁰

Regulation 14B was bound up with questions of nationality and naturalisation on

⁹⁷ The Times, 29 Feb. 1916, 7.

⁹⁸ *Ibid.*, 12 July 1917, 2.

⁹⁹ *Ibid.*, 17 July 1917, 4.

¹⁰⁰ *Ibid.*, 24 July 1917, 4.

which public and parliamentary opinion became more intolerant as the war dragged on. The British Nationality and Status of Aliens Act of August 1918, for example, contained powers to revoke certificates of naturalisation which were "the most comprehensive in any legislation to date." The new enactment reflected the spirit, if not the letter, of a special aliens report commissioned by the Prime Minister's office and drafted by hardliners like Butcher, Joynson Hicks, and Sir Henry Dalziel.¹⁰¹ The high pitch of antialien hysteria in the final months of the war was also reflected in a new DORR, 14H, issued on 19 July 1918. This prohibited the use of any names assumed by naturalised subjects since the outbreak of war.¹⁰² The iniquities of 14B are far less striking when situated in this wider context of extreme Germanophobia. Indeed, in view of the routine hounding of naturalised subjects of enemy origin, it is remarkable that, on mainland Britain, so few internment orders were executed under Regulation 14B.

Conclusion

Liberal dismay over the secret trial provisions of DORA and over Regulation 14B might appear disproportionate to the frequency of in camera legal proceedings and to the sum total of internees. For good reason, however, the critics of DORA were animated as much by the potential for abuse as by the actual infringement of civil liberties. Before the intervention of the Home Office late in 1915, the magistracy had, for a short time, been extremely receptive to the Crown's demands for judicial secrecy in DORA cases. Likewise, such moderation as characterised the administration of Regulation 14B did not result from any formal constraints

¹⁰¹ Bird, Control of Enemy Alien Civilians, 259 and *passim*.

¹⁰² This prohibition already applied to enemy alien civilians, by article 25A of the Aliens Restriction Order. The aliens committee was lobbying for its extension to naturalised subjects of enemy origin. The Home Secretary remarked that this change would be "difficult" (CAB 24/57/G.T.5067, Cave, "Enemy Aliens," 9 July 1918), hence all naturalised Britons were ultimately caught in the net of 14H.

upon executive discretion. The DORR had been drawn up in broad terms. It allowed for imprisonment without trial (or the imposition of less onerous restrictions) whenever "expedient in view of the hostile origin or associations of any person." The advisory status of the appeals tribunal limited its authority to challenge executive decisions, but neither did the panel demonstrate any real inclination to do so. Nor did the judiciary interpret Regulation 14B any more generously for the internee.

The twin threats to customary judicial procedure discussed above were not viewed by the critics of DORA in isolation from other wartime developments. The rule of publicity and the law of habeas corpus were not the only traditional British freedoms which had been breached by early 1916. Trials in camera were shocking precisely because of the general insecurity of free speech under DORA. The high court hearings of the Zadig case coincided with the implementation of conscription, which exemplified as much as did internment without trial the novel claims of the wartime state on the individual. The outcome of this legal test of Regulation 14B dramatised for civil libertarians the inherent risk of a broad delegating provision such as DORA's. The circumvention of the courts by executive action and the administrative enactment of controversial regulatory powers were also central to the confrontation between DORA and organised dissent, to which theme our focus shifts in chapters four and five.

Chapter 4: DORA AND DISSENT I: THE USE AND ABUSE OF REGULATION 27

Introduction

In October 1914 a Home Office official minuted that "the question of what language is allowable in war-time and what is not, is so difficult that it is better not to raise it."¹ Yet this question was raised time and again in Britain during the First World War, most frequently in connection with the propaganda work of British dissent. There were three separate strands of opposition to British war policy: Radical-Liberal, Socialist, Nonconformist.² But these disparate

¹ HO 45/10741/263275/20, Simpson (minute), 12 Oct. 1914.

² The term 'dissenter' can imply a political classification, a religious disposition, or a sociological category. It is applied here in the former, political, sense; specifically, to those individuals and organisations who opposed British military intervention in August 1914, or who pressed for a compromise peace at a later stage of the war. Dissenters sought radical changes in the structures and practice of European diplomacy and, ultimately, the resolution of all international conflict by peaceful means. A dissenter might, on religious or moral grounds, rule out the use of force in all circumstances, but most critics of British war policy between 1914 and 1918 did not necessarily do so. The designation 'pacifist' has been attached to the former dissenting orientation, which found a practical expression in conscientious objection to compulsory military service. In contemporary usage, however, the term 'pacifist' covered a broad spectrum of positions, from mild criticism of the rearmament policies of the prewar Liberal Governments to the most uncompromising forms of nonresistance. Not until the 1930s did 'pacifism' acquire its current, more precise, association with nonviolence. Martin Ceadel has illuminated the important additional distinction between 'absolute' and 'collaborative' forms of pacifism. Outside the pacifist tradition there were discrete socialist and liberal perspectives of dissent. Socialists regarded the economic imperatives of capitalism as the mainsprings of war and aggression. Liberal internationalists were divided between the heirs of Cobden, who believed that trade would establish an equilibrium of interests between rival nation states, and the heirs of Gladstone, who approved the controlled use of aggression in support of 'moral' foreign policy ends. These subtle shades of dissenting opinion are less central to the present context than the hostile reactions of British officialdom to the various opponents of militarism and war. For further discussion, however, see Martin Ceadel, Pacifism in Britain, 1914-1945: The Defining of a Faith (Oxford, 1980), chs. 1 and 2; Hinton, Protests and Visions, pp. ix-xi; A.J.P. Taylor, The Trouble Makers: Dissent over Foreign Policy, 1792-1939 (London, 1957), ch. 1 and (especially) the footnote, much cited, on 51; and (for a subtle critique of Taylor) H.N. Fieldhouse, "Noel Buxton and A.J.P. Taylor's 'The Trouble

dissenting forces shared a broad similarity of outlook regarding the causes of the war, the requirements of the peace, and the general conduct of foreign affairs. From the dissenting perspective, the present crisis was a product of binding agreements negotiated between members of the two rival power blocs. Each of the belligerent nations was deeply implicated in this destabilising system of secret diplomacy. The war would have to be ended without the wholesale transfer of territory or populations from one nation state to another. In future, the diplomatists of the Great Powers would have to be made accountable to their publics, and peace maintained by mechanisms of international arbitration.

These dissenting viewpoints clashed head on with the official orthodoxy that Germany alone was responsible for the outbreak of war, that the military might of the Central Powers had to be decisively beaten, and that treaty obligations represented solemn commitments. The basic dissenting outlook was espoused long before war broke out by, amongst others, the Liberal Foreign Affairs Group of the House of Commons. It was sharpened and restated in August 1914 by the founders of the Union of Democratic Control, the first and most influential organisational initiative of British dissent during the First World War. This new pressure group emerged from that "scattered remnant"³ of Edwardian Radicalism which opposed the British decision for war. The rudiments of the UDC's position were adopted by most British opponents of militarism and war, although the small marxist parties emphasised the 'capitalist' causes of the war above the baneful influence of secret diplomacy. By late 1917 even the prowar mainstream of the labour movement had begun to pay lip service to the fundamentals of a dissenting foreign policy.

Organised dissent was from the outset regarded with contempt in official circles but not, at first, as a serious threat to the broad patriotic consensus forged in August 1914. Before

Makers," in *A Century of Conflict, 1850-1950: Essays for A.J.P. Taylor*, ed. Martin Gilbert (London, 1966), 175-98.

³ Taylor, *Troublemakers*, 132.

January 1916, dissent was, arguably, less vulnerable to legal restraint by DORA than to the vilification of 'pro-Germanism' by jingoistic politicians and publicists. Indeed, during this early period of the war, before the liberal influences over its direction weakened, the conscriptionist right-wing press was equally threatened by DORA. But the proponents of a more vigorously prosecuted war effort could easily argue that their sniping was patriotically motivated. Despite the sporadic efforts of certain Liberal ministers, the freedom to criticise and cajole of prowar organs of opinion was never seriously jeopardised. The upholders of unpopular, minority views on militarism and war operated inside distinctly narrower parameters. Indeed, the relationship between DORA and dissent revealed quite dramatically the restrictions which this liberal society at war was prepared to place upon freedom of expression.

The circumscription of British dissent by DORA was one side of a twin-pronged strategy for influencing public opinion, not only on the Home Front but also in neutral, allied, and enemy states. The official approach involved both censorship and propaganda measures. The British propaganda effort touches on several issues which fall outside the scope of this study.⁴ The following two chapters are not even concerned with all aspects of wartime censorship. Attention will be directed to the 'repressive' side of the British system, specifically, to the evolution and administration of those DORRs which constituted the legal foundations of an imposing censorship edifice. These DORRs (and the penalties for their evasion) should be distinguished from the parallel mechanisms of 'preventive' censorship: state control of wireless stations, land telegraphs, and submarine cables; the monitoring of press cablegrams and the mail by naval and military censors; the supervision of war

⁴ For different treatments, see D.G. Wright, "The Great War, Government Propaganda and English 'Men of Letters,' 1914-1918," *Literature and History* 7 (1978): 70-98; Peter Buitenhuis, *The Great War of Words: Literature as Propaganda, 1914-18 and After* (London, 1989); Stuart Wallace, *War and the Image of Germany: British Academics, 1914-1918* (Edinburgh, 1988); J.O. Stubbs, "Lord Milner and Patriotic Labour, 1914-1918" *English Historical Review* 87 (1972): 717-54; M.L. Sanders and Philip Taylor, *British Propaganda during the First World War, 1914-1918* (London, 1982).

correspondents; the voluntary submission of copy to the Official Press Bureau; and the enduringly influential 'D' Notice method of informal instruction to the press.⁵

On top of the distinction between 'repressive' and 'preventive' censorship, there was an important difference between those DORRs which allowed for the suppression of dissent by administrative order and those which required the laying of charges. The prosecution of dissenters elicited a predictably hostile reaction from that swathe of political opinion which hoped to preserve domestic liberalism in the fight against foreign tyranny. The restriction of free speech by executive fiat, rather than judicial sanction, was regarded as a doubly pernicious assault on civil liberties. The contrast between administrative and judicial censorship provides a convenient line of demarcation between chapters four and five. A degree of overlap, however, has been found unavoidable. Partly for this reason, this opening section introduces themes that feature in both these chapters on DORA and dissent. Concluding comments will, similarly, be deferred until the end of chapter five--of the two related case studies the one which most neatly illustrates DORA's contribution to the erosion of executive accountability in wartime Britain.

As early as November 1914, dissenters confronted a theoretically formidable battery of legal restraints. Virtually any criticism of official war policy was potentially subject to legal or administrative action under the DORRs. Yet the British authorities wielded their punitive powers with circumspection. There was a marked reluctance to prosecute dissenters, in order to prevent their exploiting the publicity of court proceedings. This hesitation continued in the face of organised opposition to the Military Service Acts after January 1916 and as the carnage of the Somme, together with the social and economic strains of the war, increased the appeal of a negotiated peace. From mid-1916, however, the seizure and destruction of antiwar

⁵ Lovelace, "Control and Censorship of the Press," passim, 8-9 for a discussion of 'preventive' and 'repressive' censorship, and 205-07 for a reference to a parliamentary review of the 'D' Notice system as recent as 1980. The 2 published studies of wartime censorship are idem, "British Press Censorship," and Deian Hopkin, "Domestic Censorship in the First World War," *Journal of Contemporary History* 5 (1970): 151-69.

material was increasingly viewed as a legitimate alternative to prosecution. This trend was encouraged by Sir George Cave during his term as Home Secretary from December 1916 until November 1918. In addition, during the last eighteen months of the war, the censorship DORRs were supplemented by the Lloyd George Coalition's aggressive promotion of British war policy.

The Evolution of Regulation 27

The prewar discussions of censorship legislation had focused on the potentially harmful military and naval consequences of uninhibited news reporting during wartime. Not surprisingly, therefore, the first batch of DORRs included a prohibition against the communication or publication of military and naval information "such as is calculated to be or might be directly or indirectly useful to the enemy." Regulation 14, or Regulation 18 as it was renumbered in November 1914, was fashioned as an instrument of counter-espionage. Indeed, during 1915, several suspected spies were convicted on charges laid under this DORR.⁶ But Regulation 18 applied to press reporting of the war as much as to clandestine communication with the enemy. The DORR added a novel, punitive element to the "in large part voluntary"⁷ press censorship of wartime Britain. Yet this power was rarely invoked against the dissenting critics of British war policy. Regulation 18 posed more of a problem to the jingoistic, conscriptionist Right. Patriotic editors and journalists generally avoided reckless speculation about strategic developments and accepted the wisdom of anodyne reporting from the Front. But the strident advocacy of conscription, for example, or of complete military control over strategy, could, in certain circumstances, be construed as infringements of Regulation 18.⁸

⁶ See above, 92.

⁷ Lovelace, "British Press Censorship," 307.

⁸ See *ibid.*, 313 and William M. Ryan, Lieutenant Charles à Court Repington: A Study in the Interaction of Personality, Press, and Power (New York and London, 1987), 178-86 for

Before August 1914 there had been little explicit contingency planning for the censorship of dissonant political views during wartime. The first DORA Order in Council nevertheless contained an ominous injunction against the "spread of reports likely to create disaffection or alarm among any of His Majesty's Forces or among the civil population." This language was the earliest statement of the novel restrictions over the written and spoken word which, as Regulation 27,⁹ would confront British dissenters. There was some initial doubt as to the legality of the first, comparatively mild, version of this censorship DORR. But amending legislation of 28 August 1914 added an explicit statutory sanction for DORRs designed "to prevent the spread of reports likely to cause disaffection or alarm." A complementary Order in Council now extended the reach of Regulation 21 beyond "defended harbours" and their immediate surroundings, to where its application had hitherto been restricted. By a succession of amendments, Regulation 27 would become progressively more stringent. After 23 May 1916 it became illegal merely to possess material the publication of which would constitute an offence against the foregoing provisions of the DORR. Henceforth, also, Regulation 27 applied to theatrical performances, cinematographic films, and exhibitions of pictures.

The introduction of the second DORA, late in August 1914, brought forth the first expression of liberal anxiety that the statute might be stretched to proscribe political opinion.¹⁰ The same danger was also sensed by the Liberal administration's right-wing critics. Indeed, Unionist protest in the Commons had, it will be recalled, led to amendment of the censorship provisions in the Defence of the Realm (Consolidation) Bill.¹¹ As a vindication of the right of

discussion of two such cases, involving The Times and the Morning Post.

⁹ Regulation 21, until SRO 1699, 28 Nov. 1914, the same Order in Council by which Regulation 14 became Regulation 18.

¹⁰ PD (Commons), 26 Aug. 1914, 66, col. 88-89.

¹¹ See above, 69-70.

political criticism during wartime, however, this parliamentary success of November 1914 was illusory. Lord Robert Cecil had moved, successfully, for a distinction between false and true reports likely to cause disaffection. By criminalising only the dissemination of such untrue information, Cecil hoped to rule out prosecutions over legitimate political attacks on the Government. Yet Cecil's amendment also contained two new prohibitions: against reports "likely...to interfere with the success of our arms by land or sea, or to prejudice His Majesty's relations with foreign powers."¹² In addition, the injunction against fomenting "disaffection" was shifted to a different part of the same subsection. Thus, the Government's statutory powers of censorship were actually strengthened by the final version of the bill. The extra leeway which DORA now provided for the enforcement of drastic new censorship powers was evidenced by the accompanying Order in Council. Regulation 27 paraphrased most of subsection one (c) and also outlawed statements "likely to prejudice the recruiting, training, discipline, or administration of any of His Majesty's forces."

Regulation 27 and Dissent, August 1914-December 1915

(i) Attitudes: Official and Unofficial

These revamped censorship powers did not escape unnoticed. Regulation 27 in its present form, complained the secretary of the Newspaper Proprietors' Association, might even apply to "an accurate statement...that the troops at a certain camp were badly fed, clothed, and housed."¹³ The fears of the reputable press in this regard were overstated. But Regulation 27 did prove a useful legal weapon with which to penalise dissenting writers and speakers. In particular, the reference to the "prejudice of recruiting" covered a wide variety of antiwar statements. The new Order in Council did not herald an immediate onslaught on the forces of

¹² PD (Commons), 23 Nov. 1914, 68, col. 1251-52.

¹³ HO 139/25/105, Thomas Sanders to Brade, 4 Dec. 1914.

dissent. In March 1915 the Attorney-General, Sir John Simon, appeared to rule out any casual resort to the censorship DORRs. He promised MPs that the Government would distinguish between "expressions of opinion" and "wilful and dangerous misstatements of fact." The DPP, Sir Charles Mathews, thought that prosecuting antiwar voices would only give "a much wider circulation to...mischievous and inaccurate statements."¹⁴ Both Mathews and certain Home Office officials continued to proffer this counsel even after dissenting propaganda was identified as a more serious threat to civilian morale.

Until the advent of conscription early in 1916, Liberal ministers such as Simon were, in any case, exasperated far more by right-wing political criticism than by dissenting propaganda. The voluntarists in the Cabinet accused the conscriptionist lobby of playing down the British contribution to the war effort, of boosting enemy morale, and of exerting the opposite effect on Allied opinion and at home.¹⁵ In the summer of 1915 the Directorate of Special Intelligence, the Law Officers, and the Press Bureau shaped a draft DORR which made evasion of 'D' Notices ipso facto a criminal offence. The indiscreet commentary of a military weekly, as opposed to any upsurge of dissenting activity, had provided the impetus for this strengthening of the Press Bureau's authority. Although the Cabinet approved the DORR in October 1915, it was shelved, largely owing to the opposition of Sir Reginald Brade; the Permanent Secretary to the War Office did not want to alienate the reputable press by the imposition of such a drastic punitive sanction.¹⁶

¹⁴ PD (Commons), 2 Mar. 1915, 70, col. 759; HO 139/23/96(part 1)/1, Mathews to E.T. Cook (Co-Director, Press Bureau), 27 Apr. 1915.

¹⁵ For example, Simon Papers, MSS Simon 51/103-04, Simon to Asquith, 30 Oct. 1915; CAB 37/137/1, "The Northcliffe Press and Foreign Opinion," 1 Nov. 1915. Even some advocates of conscription regarded the campaigning of the Northcliffe Press as counter-productive (Koss, Rise and Fall of the Political Press, 283-84).

¹⁶ Above, 93. On Brade's position, see Lovelace, "Control and Censorship of the Press," 131-32 and WO 32/4893/29, Brade to Kitchener, 21 Oct. 1915. This abortive change to the DORRs would have created a more enforceable prohibition against publishing specified categories of information, and allowed for the trial of Regulation 18 and 27 cases without the detailed examination in court of the allegedly offensive material. To convict it would have

In talking of the need to "take the Press with us,"¹⁷ Brade had had in mind the mainstream organs of opinion. Dissent was, in October 1915, still seen as only a minor irritant inside most official circles. Yet more than a year ago the Home Office had begun receiving complaints from angry citizens and police chiefs about "seditious" and "anti-recruiting" speeches and writing.¹⁸ By mid-1915 the wholesale abuse of this 'pro-Germanism' by the jingo Right had started in earnest. The deteriorating climate of tolerance for dissent coincided with the upsurge of 'popular' Germanophobia, frequently attributed to the sinking of the Lusitania in May 1915 and the publication of Lord Bryce's report on German atrocities in Belgium. The ultra-patriotic press now routinely labelled as 'disloyal' any heterodox view of the war and its origins. On 29 May 1915 the Daily Express lamented that the Press Bureau "has practically confined its activity to the great daily newspapers, and that there has been no sort of check on seditious mischief published in weekly periodicals, both in London and the provinces." The Morning Post advocated stricter legislation to combat 'disloyalty'. Some newspapers went further, all but directly urging the violent disruption of 'antipatriotic' meetings.¹⁹

(ii) Prosecutions

During the second half of 1915 a number of dissenters were prosecuted under Regulation 27. In June a Birmingham pacifist was given three months with hard labour by the local magistrate, for "causing disaffection to His Majesty." The charge arose from a public speech in which the defendant, in criticising the harassment of enemy alien civilians, had

been necessary merely to prove that the Press Bureau instruction had been disobeyed (see WO 32/4893/23, Cockerill to CIGS, 27 Sept. 1915).

¹⁷ WO 32/4893/24, Brade to CIGS, 1 Oct. 1915.

¹⁸ See HO 45/10741/263275/3-24 (miscellaneous items from September-November 1914).

¹⁹ Daily Express, 29 May 1915, 4; "The Pro-German Campaign," Morning Post, 17 July 1915, 8. On the developing backlash against dissent, see Swartz, Union of Democratic Control, 107-15.

mentioned the German antecedents of the Royal Family. At a Stockport ILP meeting in September, one local party member characterised the war as a capitalists' struggle from which the plutocrats were profiting "while British Tommies were being shot down for a shilling a day." For this and other statements the speaker and chair were accused of causing disaffection and prejudicing recruiting; they were fined five pounds on each of the two charges. The following month a Scottish ILPer was charged in connection with a similar speech and fined ten pounds for statements which the Ayrshire Sheriff deemed prejudicial to recruiting.²⁰ On 17 November 1915 John Maclean was found guilty on the same charge, the first of three wartime DORA convictions upheld against the militant Glasgow Socialist. In two separate speeches Maclean was alleged to have said, "God damn the Army, and God damn all other armies," and that "any soldier who shot another soldier in this war was a murderer." Given the harsh treatment which he later received from the courts, Maclean was fortunate to escape in this instance with a five pound fine.²¹

Also in November 1915 the socialist Quaker, J.T. Walton Newbold, was fined twenty-five pounds by Buxton magistrates for attempting "to interfere with the success of His Majesty's Forces by land or sea." This charge under Regulation 27 was brought in connection with a letter of Walton Newbold's to the New York Call, in which he had pleaded for a United States embargo of munitions exports to Europe. Although the letter had been intercepted by the postal censors late in June 1915, proceedings were not instituted until after Walton

²⁰ LL, 3 June 1915, 6; 9 Sept. 1915, 2; 16 Sept. 1915, 2; Forward, 30 Oct. 1915, 5. The Birmingham conviction was quashed on appeal (LL, 8 July 1915, 2).

²¹ Forward, 20 Nov. 1915, 3. The light sentence possibly reflected the Sheriff's doubts about the testimony of the soldiers who appeared for the prosecution. In April 1916 Maclean was sentenced to 3 years penal servitude, released on a ticket-of-leave the following June and then rearrested and sentenced to 5 years penal servitude for sedition in April 1918. Freed again shortly after the Armistice, Maclean was pardoned in December 1918 (David Howell, A Lost Left: Three Studies in Socialism and Nationalism [Chicago, 1986], 172-91).

Newbold had been subjected to scathing attacks in Parliament and in the jingo press.²¹ The stiffest penalties in this first round of DORA cases were the six month sentences handed down to T.H. Ferris and Sydney Overbury by Leeds magistrates in December 1915. The two accused were prosecuted for publishing and distributing the literature of the pacifist and ethical-socialist Brotherhood Church. They were charged under Regulation 42,²² with causing disaffection among the civilian population, and under Regulation 27, with the prejudice of recruiting.²³

According to the return of DORA prosecutions compiled by the fledgling National Council for Civil Liberties²⁴ the following September, only twelve Regulation 27 cases had

²¹ LL, 18 Nov. 1915, 6; 25 Nov. 1915, 2; PD (Commons), 21 June 1915, 72, col. 921-22. Editorials from the Globe and Daily Express are extracted in Forward, 17 July 1915, 7. In his unpublished autobiography, Walton Newbold linked the decision to prosecute with the authorities' interest in discrediting Philip Snowden, a leading dissenter and whose public speeches sometimes made use of Walton Newbold's research on the international armaments trade (Walton Newbold Papers "Social Democracy or American Democracy" [ch. of autobiography], n.d.).

²² Under Regulation 42 (SRO 1699, 28 Nov. 1914) it was an offence "to cause mutiny, sedition, or disaffection among any of His Majesty's forces or among the civilian population." This DORR was invoked less often than Regulation 27. Regulation 42 was reserved for allegedly more serious breaches of the DORRs. The 3 years with hard labour received by John Maclean in April 1916, for example, followed his conviction on an array of charges under both Regulation 42 and 27. As amended by SRO 1134, 30 Nov. 1915, Regulation 42 also applied to attempts "to impede, delay, or restrict the production, repair, or transport of war material, or any other work necessary for the successful prosecution of the war" (see Iain MacLean, The Legend of Red Clydeside, [Edinburgh, 1983], 47-48). This offence was one of several listed in the indictment of Maclean and also those of 2 leaders of the Clyde Workers' Committee, who (just before the Maclean trial) each received a year's imprisonment, and that of the printer of their paper, the Worker, who was given 3 months.

²³ LL, 16 Dec. 1915, 10. The latter charges were dropped once convictions were secured under Regulation 42. As a result of representations by Lillian Ferris, the plight of Ferris and Overbury was raised in Parliament during December 1915 and brought to the attention of the new Home Secretary, Herbert Samuel, early in 1916 (PD [Commons], 22 Dec. 1915, 77, col. 481-82; Courtney Papers, XI/127/267, Lillian Ferris to Courtney, 20 Dec. 1915; XII/5/7-8, Samuel to Courtney, 1 Mar. 1916; CPT 66, Samuel to Trevelyan, 1 Mar. 1916). In March 1916 Mrs. Ferris was herself convicted under Regulation 42 for circulating a pamphlet written by her husband. Refusing to accept the undertaking by which she could be bound over, Mrs. Ferris was sentenced to 3 months imprisonment (LL, 23 Mar. 1916, 2).

²⁴ The NCCL was established in July 1916 for the express purpose of monitoring the executive's abuse of DORA and other emergency legislation (see BLPES col. misc., 179/3,

been heard by the end of December 1915. Magistrates dismissed the charges in only one case and imposed penalties ranging from a two pound fine to the six month imprisonment of Ferris and Overbury. Seven of the prosecutions clearly involved politically motivated opposition to the war. In the remaining five cases, charges were laid for comments made in casual conversation.²⁵ In one such case from June 1915, not documented in this record, a Southampton man was prosecuted for defending both the sinking of the Lusitania and Germany's use of gas in the trenches. In September 1915 two Scottish farm labourers were convicted of prejudicing recruiting and fined two pounds as a result of their heated exchange with the local recruitment officers. The trial of Joseph Fall the following month confirmed that Regulation 27 could, indeed, be infringed in this less wilful manner. On 12 November 1915 a Southsea lodging house keeper was fined five pounds for telling two officers' wives that the Kaiser was a "better man" than the King.²⁶ These convictions were all grist to the mill of the critics of DORA. Far more than the persecution of antiwar activists even, these bizarre cases exposed the manipulation of emergency powers which had not been conceived for such purposes.²⁷

Adrian Stephen [Hon. Treasurer, NCCL] to Affiliated Organisations, 9 Aug. 1916) The new organisation evolved out of the National Council Against Conscription, founded in November 1915 in order to unite the prowar and antiwar opponents of compulsion.

²⁵ International Institute for Social History, Amsterdam (miscellaneous holdings), "Civil Liberties Under the Defence of the Realm Act, 1914-1916." This is not a comprehensive record of prosecutions under Regulation 27, either for the period up to December 1915 or the first 8 months of 1916. There is no adequate breakdown of DORA prosecutions in either the PRO or published judicial statistics.

²⁶ Ibid.; LL, 24 June 1915, 2. Forward, 25 Sept. 1915, 8; PD (Commons), 23 Nov. 1915, 76, col. 177-78; above 96.

²⁷ See LL, 2 Sept. 1915, 9 for the ILP's ironic expression of hope that "the agitation against Prussianism will soon force through Parliament a few Defence of our Liberties (Consolidation) Regulations."

Procedure Under Regulation 27

In October 1915 the Home Secretary was accused by a Liberal MP of breaking his own guidelines for the enforcement of the censorship DORRs.²⁸ This criticism of Sir John Simon was unfair in that most Regulation 27 cases had been brought over alleged verbal infringements of the DORR, and the decision to prosecute this type of offence rested solely with the CMA. Proceedings would be instituted on the basis of evidence from the police who, in many jurisdictions, compiled shorthand reports of local antiwar meetings. The regional military commands were given a free hand in the treatment of antiwar speakers. As regards the written word, however, the administration of Regulation 27 was centralised, and the responsibility for taking action shared between the civil and military authorities. In December 1914 CMAs were instructed to consult the War Office before invoking the DORRs against a possibly errant newspaper. In June 1915 Regulation 56(13) established a special category of "press offence," the prosecution of which was a matter for the judgment of the DPP.²⁹

During Herbert Samuel's tenure of the Home Office during 1916 the focus of official concern over dissenting propaganda came to rest less on periodical publications than on the proliferation of anticonscription and (later) 'peace by negotiation' pamphlets and leaflets. Above all, Samuel wanted the censorship DORRs to be enforced uniformly nationwide. In his view,

the right course in this matter is not to proceed against insignificant local distributors of leaflets, but rather to test the case by taking action against those who are primarily responsible, to take proceedings at the centre against the publishers, or the authors if they are known, of such leaflets, and only after that has been done and the leaflet had been condemned by a Court, only then is local action to be taken to stop any continued circulation if the necessity arises.³⁰

²⁸ PD (Commons), 26 Oct. 1915, 75, col. 28; above, 137.

²⁹ See above, 70, 86-87.

³⁰ PD (Commons), 29 June 1916, 83, col. 1087-88. See also, HO 45/10801/307402/57, Troup (minute), 27 Apr. 1916.

Fortunately for Samuel, the War Office also hoped to avoid haphazard legal or administrative action under the DORRs. In February 1916 CMAs were instructed to observe Samuel's recent parliamentary statement, which promised that only advocacy of outright resistance to conscription law would be prohibited.³¹ From April 1916, CMAs were ordered to refer to the War Office all forms of printed matter whose legality was questionable. The Director of Special Intelligence, General Cockerill, also promised to consult the Home Office whenever broad questions of censorship policy were raised by a particular publication. This assurance was considered vital by Samuel because "a decision given by a local magistrate might have large consequences elsewhere."³²

In December 1916 Cockerill proposed that "civil" and "military" infringements of Regulations 27 and 42 be henceforth demarcated

in such a manner that those of a civil character such as causing disaffection among the civilian population and impeding the production of war material etc. should be designated as summary offences unless there are circumstances of gravity which would render that course undesirable, and military offences such as statements prejudicial to the recruiting, training, discipline or administration of the forces etc. should be left, as now, to the decision of the Competent Naval or Military Authority.³³

The Parliamentary Draftsman responded to Cockerill's memorandum by advising that any potential Regulation 27 and 42 case be dealt with by the procedure for "press offences." That is, the authority of the DPP to prosecute would be substituted for that of the CMA, even if the allegedly prejudicial statement was spread by word of mouth or leaflet, as opposed to a newspaper.³⁴ This second suggestion was ruled out by Cockerill, who hesitated "to transfer so completely the ultimate decision as to whether border line offences under these Regulations

³¹ HO 45/10801/307402/4, War Office to GOCs, 14 Feb. 1916.

³² Ibid., 33, Samuel (minute), 6 May 1916; 29, Cockerill to Troup, 21 Apr. 1916; 33, Troup (minute) 6 May 1916; Troup to Cockerill, 7 May 1916.

³³ HO 45/11007/271672/161A, Cockerill (memorandum), 1 Dec. 1916.

³⁴ Ibid., Liddell to Troup, 8 Dec. 1916.

are civil or military to the DPP." Troup was sceptical even of Cockerill's more limited proposal, although this promised to bring inside his department's purview certain DORA offences that were currently the preserve of the CMAs. He felt that any amendment of these two contentious DORRs would, unnecessarily, "give rise to a good deal of comment and criticism."³⁵

Thus, procedure under Regulation 27 was left unchanged for the remainder of the war. In practice, however, and notwithstanding Samuel's scrupulous legalism, the police sometimes exceeded their authority by seizing literature before its successful prosecution. In addition, Samuel's successor as Home Secretary, Sir George Cave, had no compunction about administrative action under Regulation 51 in advance of a judicial condemnation. In December 1916 Cockerill had sensed "a growing feeling of indignation against the military authorities as the authors of annoying and unnecessary curtailments of the right of free expression of opinion on matters of public interest." Yet, ironically, CMAs were also criticised by zealous Chief Constables for proceeding in too few of the many Regulation 27 cases reported to the military by the police.³⁶

Conscription and the Prejudice of Recruiting

The enactment of the first Military Service Bill on 10 February 1916 was a defining moment in the domestic history of the war. The legislation breached a century long tradition of voluntarism in recruiting and was a stark reminder of the proximity of the war for thousands of men to whom the 'Bachelor's Bill' applied. The critics of the bill anticipated, accurately, the piecemeal extension of this limited measure of compulsion. The labour movement saw the legislation as a prelude to industrial conscription, and only the Prime Minister's adroit

³⁵ Ibid., Cockerill to Troup, 18 Dec. 1916; Troup to Cockerill, 3 Dec. 1916.

³⁶ Ibid., Cockerill (memorandum) 1 Dec. 1916; below, 155.

handling of the issue averted a serious rift with the trade unions. It is also a testament to the Asquith's political skill that he lost only one of the voluntarists from his Cabinet. The departed minister, Sir John Simon, led the rump of Liberal, Labour, and Irish National MPs who voted against the bill.³⁷ Not surprisingly, the most determined opposition to conscription came from the pacifist wing of organised dissent, led by the No-Conscription Fellowship. For those (single) men who had hitherto refused to enlist on religious or political grounds, these private convictions suddenly became "a matter of general concern to the state." Most pacifists were not disarmed by the insertion of a 'conscience clause' into the bill, even though this provision had no parallel in the conscription practices of other belligerent nations.³⁸

Of more direct relevance to the present context, the new law also begged the question of how far anticonscription propaganda could be permitted by Regulation 27. The Law Journal contended that the pertinent section of this DORR had surely been superseded by the Military Service Act. How could recruiting be prejudiced when "nobody could suppose that many recruits, not liable to conscription are likely to be obtained by voluntary recruiting"? A more sombre assessment in the Nation predicted that the "likely consequence of the new Bill will be to make protests against conscription and advocacy of a return to voluntarism fall

³⁷ Adams and Poirier, Conscription Controversy, 138-43. The division on first reading revealed 403 members in favour of the bill, 105 against, with approximately 100 Liberal abstentions. Assured that the bill would not apply to Ireland, Irish MPs abstained on the second reading, when only 39 MPs registered their opposition to the bill in the division lobby.

³⁸ Robbins, Abolition of War, 79 and passim. Established in the spring of 1915, the NCF was a movement predominantly of young men of military age, many of whom (such as founder, Fenner Brockway, and chair, Clifford Allen) were connected with the ILP. Men exempt from conscription on the basis of age, and women, were accredited with associate member status in the Fellowship. The principal roles of the organisation after March 1916 were to defend conscientious objection and, more generally, to force the repeal of the Military Service Acts. Some NCF members adopted what Martin Ceadel has called a "collaborative pacifist" stance. They hoped to attach the movement to the emerging 'peace by negotiation' coalition, while others hesitated to transcend the apolitical pacifism of their individual peace witness (see Ceadel, Pacifism in Britain, ch. 4 and Kennedy Hound of Conscience for the most authoritative account of the politics and policies of the NCF). On the bill's legal protection of conscientious objection, see John Rae, Conscription and Conscience: The British Government and the Conscientious Objector to Military Service, 1916-1919 (London, 1970), ch. 3.

within these regulations." Before conscription was implemented, the Home Office had been unsure of how to deal with an essentially constitutional agitation against a legislative proposal.³⁹ On 17 January 1916 the new Home Secretary, Herbert Samuel, clarified the framework within which his department would act once the bill passed into law. The Home Office, he told the Commons, would only prohibit illegal incitement to resist the provisions of the Military Service Act. By reference to this criterion, Samuel personally declined to prosecute over several anticonscription handbills, pamphlets, and posters which his officials received early in 1916.⁴⁰

Yet Samuel did not hesitate to invoke Regulation 27 if he was confident that the fine line separating legal and illegal forms of protest had been crossed. In May 1916 he approved legal action in respect of two widely circulated NCF leaflets: Repeal the Act and Two Years Hard Labour for Refusing to Disobey the Dictates of Conscience (the Everett Leaflet).⁴¹ On 17 May 1916 eight members of the NCF's National Committee appeared before the Mansion House magistrate in connection with their role in the production of Repeal the Act. The defendants were charged with the prejudice of recruiting, and each was fined one hundred pounds, the maximum financial penalty for a summary offence against the DORRs. During the same month, six NCF members in Liverpool and South Wales were convicted on the same charge for distributing copies of the Everett Leaflet. These provincial prosecutions prompted Bertrand Russell to admit his authorship of the leaflet in a letter to The Times. This admission more or less obliged the Government to prosecute him as well. Russell was tried at the

³⁹ Law Journal, 4 Mar. 1916, 114; Nation, 15 Jan. 1916, 573; HO 45/10782/278537/70, 77.

⁴⁰ PD (Commons), 17 Jan. 1916, 78, col. 15; HO 45/10782/278537/81, Samuel (memorandum), 27 Jan. 1916.

⁴¹ HO 45/10801/307402/33. Repeal the Act affirmed the NCF's "determined resistance to all that is established by the [Military Service] Act." The Everett Leaflet described the passive resistance to military authority, and the subsequent court martial, of this conscientious objector from St. Helens, whose request for absolute exemption from noncombatant duties had been rejected by the local Tribunal.

Mansion House on 5 June 1916, convicted of prejudicing recruiting and also fined one hundred pounds.⁴²

The two condemned pamphlets were, in due course, added to the Home Office "Hostile Leaflets" Circular. This action was consistent with Samuel's stated policy of suppressing (under Regulation 51) only that material which had been prosecuted successfully under Regulation 27.⁴³ By mid-1916 the Home Secretary's legalistic interpretation of the DORRs was far less striking than was the illiberal drift of policy towards dissent. In March 1916 the Law Journal had expressed outrage at the conviction, for prejudicing recruiting, of a London ILP activist called Nellie Best:

It is difficult to avoid the conclusion that her real offence in the eyes of both prosecutor and magistrate consisted in opposition to conscription. But the advocacy of anti-conscription views by constitutional means is not an offence; indeed, the Government expressly promised that no one would be prosecuted for attempting to procure the repeal of the Military Service Act by argument as opposed to force. The prosecution of Mrs. Best certainly seems scarcely consistent with the spirit of this pledge.⁴⁴

The NCCL's fragmentary return of DORA prosecutions documents about seventy persons being charged under Regulation 27 during the first nine months of 1916.⁴⁵ About two thirds of these cases were brought in connection with the distribution of antiwar literature. Fifteen persons were prosecuted for verbal offences of Regulation 27. Only six of these cases related to public speeches; the remainder were brought over the kind of casual remarks that had landed a number of defendants in trouble late in 1915.⁴⁶ There were forty-five separate

⁴² Kennedy, Hound of Conscience, 127-30; R.A. Rempel, ed., The Collected Papers of Bertrand Russell, vol. 13, Prophecy and Dissent (London, 1988), lx-lxi, 370-71; Bertrand Russell Archive, VII/6/1, rec. acqu. 1/805 (file on the Everett Leaflet).

⁴³ HO 158/17/348, "Hostile Leaflets: Circular No. 2," 24 May 1916; 368, "Circular No. 3," 14 June 1916.

⁴⁴ Law Journal, 4 Mar. 1916, 114.

⁴⁵ "Civil Liberties Under the Defence of the Realm Act, 1914-1916."

⁴⁶ See, for example, *ibid.*: On 19 February 1916 L. Line was given 6 months by the Wellingborough magistrate for "language likely to cause disaffection...Defendant was alleged

charges of the prejudice of recruiting. Only a handful of all these Regulation 27 cases were dismissed. Conviction usually resulted in a fine of between ten and fifty pounds, although prison terms of between one and six months were handed down to sixteen guilty parties. Far tougher sentences were imposed in those cases, cited above,⁴⁷ that were linked to the labour unrest on the Clyde. After the Order in Council of 23 May 1916, several persons were charged merely for possessing printed matter which contravened the DORR. These prosecutions exposed Samuel's hollow assurance that Regulation 27 had been amended to eliminate "certain difficulties which might arise where a press was stopped at the moment it was about to publish such leaflets and it was not possible to prove that publication had taken place."⁴⁸

Prosecutions and Publicity

Samuel Hynes has written that the tightening of the "instruments of control" during 1916 had quite the opposite effect from that which was intended.

As control, and the spirit of control, intensified in England, so did the spirit of dissent, and especially in print. The more the government legislated to restrict expression, the more dissenting groups expressed their opposition to restriction.⁴⁹

One can certainly understand the defiance of the 'absolutist' conscientious objectors. Men such as NCF chair, Clifford Allen, who confronted squarely the privations of military custody,

to have said in a barber's shop that the Army and Navy were all scum." At Hendon magistrate's court on 2 March 1916, F. Gurney, a bus conductor, was imprisoned for 2 months for "causing disaffection and prejudicing etc....Defendant entered into conversation on a bus. Said 'We are fighting for royalty' etc." On 31 March 1916 J. Holmes, a district secretary of the National Union of Railwaymen, was fined £25 at Barnsley over the following statement made in the brake van of a train: "None ought to enlist. My advice to any man is and has been not to do it. If I have to go to the front I shall refuse to fight the Germans. Why should I kill Germans who have done me no harm? We should be as well off under German as under British Government."

⁴⁷ See above, 140, n. 23.

⁴⁸ PD (Commons), 1 June 1916, 82, col. 3004. See also LL, 1 June 1916, 1.

⁴⁹ Hynes, A War Imagined, 146.

were unlikely to be "distressed by the thought of punishment for distributing literature."⁵⁰ Indeed, the NCF was not at all displeased by the publicity which had attended the prosecution of its National Committee. Its weekly newspaper was gratified that the message of Repeal the Act had been "made known in every home in the country, and to every soldier who reads a daily paper." It was decided to appeal the convictions, in the words of Russell, "to make it a bigger case than it was before."⁵¹ At the time of his own trial Russell wrote that absolutely the only point of making a speech and defending myself was to have it reported." His 'defence' was a blistering attack on the Government and an impassioned justification of absolute freedom of conscience.⁵²

The authorities were annoyed by the dissenters' exploitation of court reporting. Salford's Chief Constable complained about the Labour Leader's use of verbatim extracts from Repeal the Act in its account of the NCF National Committee trial. The Home Office's legal advisor agreed that the newspaper was "repeating the offence complained of." However, Troup cautioned against further action because the pamphlet had been quoted in open court. The case might have been heard in camera, but the Home Office had instructed magistrates to exclude the public only in exceptional circumstances.⁵³ The Tribunal of 1 June 1916 also ran an

⁵⁰ Clifford Allen, "National Service," Tribunal, 1 June 1916, 1. 'Absolutists' were that small minority of conscientious objectors who refused all forms of alternative service offered by the 'conscience clause'.

⁵¹ Ibid., 25 May 1916, 1; Bertrand Russell Archive, VI/4, rec. acqu. 69, #1375, Russell to Lady Ottoline Morrell, 21 May 1916. The sentences against the National Committee members were upheld on 28 June 1916. Five of the defendants refused to pay their £100 fines and served 61 days in prison instead.

⁵² Quoted in Rempel, ed., Prophecy and Dissent, 377 (and 380-407 for the defence speech). Russell also, unsuccessfully, appealed his conviction. Not wishing to court further controversy by imprisoning a Fellow of the Royal Society, the authorities simply distrained personal effects valued at £100 when Russell refused to pay his fine. On 11 July 1916 Russell received the added shock of being sacked from his lectureship at Trinity College, Cambridge, and shortly after he was refused leave to take up a visiting lectureship in the United States.

⁵³ HO 45/10801/307402/58, Chief Constable, Salford to Home Office, 27 May 1916; Blackwell and Troup (minutes), 29 May 1916. On the latter point, see above, 100.

extract from Repeal the Act, which was mischievously attributed to the Crown Prosecutor, Archibald Bodkin. The NCF's newspaper escaped prosecution, but a charge of prejudicing recruiting was laid against its local distributor in Tonyrefail, South Wales. This became one of the few Regulation 27 cases thrown out of a magistrate's court. When an edited version of the same offending passage was made into a poster ("THE PUBLIC PROSECUTOR ON WAR: 'War will become impossible if all men were to have the view that war is wrong.'"), however, an NCF member from Forest Gate was charged under Regulation 27 for attempting to display it. With a nice touch of the absurd, the ubiquitous Bodkin conducted the successful prosecution.⁵⁴

Early in July 1916 the NCF issued a pamphlet based on Russell's defence at his Mansion House trial. The publication also contained Bodkin's case for the prosecution, which included direct quotation from the Everett Leaflet. The reappearance of this illegal matter, as opposed to Russell's speech, provided the pretext for the suppression of Rex v. Bertrand Russell. This administrative action was ordered on 4 August 1916, and the homes of over twenty NCF members in various locations were raided shortly thereafter. Russell was outraged by these seizures of the NCF pamphlet; he had not anticipated its suppression on these grounds. The speech by Bodkin had, ironically, only been inserted because "we thought it unfair to print it without the prosecution."⁵⁵

By June 1916 Sir Ernley Blackwell had begun to question the wisdom of proceeding judicially under Regulation 27.

Prosecutions of authors as in the NCF case are not much use. They go back to their press and print leaflets which keep within the law but do just as much to

⁵⁴ Tribunal, 1 June 1916, 1; 13 July 1916, 2; 20 July 1916, 4; 5 Oct. 1916, 3. The latter case, heard at Stratford Petty Sessions, was against Edward Fuller; he was fined £100 plus costs and then sentenced to 91 days imprisonment in default of payment. Fuller's plight was raised by C.P. Trevelyan, PD (Commons), 31 Oct. 1916, 86, col. 1578.

⁵⁵ Trevelyan Papers, CPT 68, Russell to Trevelyan, 22 Oct. 1916; Rempel, ed., Prophecy and Dissent, 378-79, 445-47. The suppression of Rex v. Russell was twice defended in Parliament (PD [Commons], 10 Aug. 1916, 86, col. 1248-49; 19 Oct. 1916, 85, col. 879).

instigate active resistance to the Military Service Acts as would leaflets containing one or two expressions which would justify a conviction under R.27.

Blackwell favoured, instead, a more unrestricted application of Regulation 51 and the confiscation of printing machinery as well as the objectionable pamphlets.⁵⁶ The DPP also thought that "the day for the prosecutions of individuals...is past, and that it is to the seizure and destruction of seditious and pro-German 'literature' our efforts ought to be directed in future." Sir Charles Mathews had before him the transcript of a speech by Russell in Cardiff on 6 July 1916. Russell expected further trouble in connection with this address, in which he had pressed upon his UDC audience the paramount importance of an immediate, negotiated peace. Mathews thought that a conviction could be secured but also that a trial would provide free publicity for Russell's insidious views--"a remedy which...is worse than the disease."⁵⁷

'Peace by Negotiation' Propaganda

(i) Background

The crushing military defeat of the Central Powers was, for British dissenters, a most undesirable outcome of the war. Only a 'peace by negotiation' would prevent future German revanchism and the political and economic chaos that was expected to follow dismemberment of the Austro-Hungarian Empire. During 1916 the erosion of civil liberties at home and the huge loss of life on the Somme made an inconclusive end to the fighting an attractive proposition for many hitherto prowar liberal idealists. In April of that year fourteen dissenting organisations established the Peace Negotiations Committee, which began collecting

⁵⁶ HO 45/10742/263275/179, Blackwell (minute), 14 June 1916.

⁵⁷ HO 45/11012/314670/6, Mathews to Blackwell, 28 Aug. 1916; Bertrand Russell Archive, VI/4, rec. acqu. 69, #1395, Russell to Lady Ottoline Morrell, 7 July 1916. On the background to the speech, see Rempel, ed., Prophecy and Dissent, 420-22.

signatures for a Peace Memorial and won the support of some trades councils, local Labour parties, and a few trade union executives. A 'peace by negotiation' was, by the end of the year, the great alternative to the "knock out" blow which Lloyd George and other proponents of a 'fight to the finish' hoped to deliver.⁵⁸

On 1 June 1916 the Home Secretary reminded the Commons that advocacy of a compromise peace was not subject to the same legal restraint which covered incitement to resist the Military Service Acts. Four months later Samuel vetoed legal or administrative action in respect of three such pamphlets, by E.D. Morel, Charles Buxton, and Bertrand Russell.

The policy of the Government is now, as it has been hitherto, not to use the powers of the Executive to prevent people advocating negotiations for peace, inconsistent with the national purpose though such advocacy is. Consequently, they must be allowed to state what they regard as the arguments for peace, both with relation to the origin of the war and to its present objects....⁵⁹

Peace propaganda was seen in a more sinister light by the Foreign Office. This department had a particular objection to E.D. Morel's lengthy critique of prewar Allied diplomacy, Truth and War, and to the overall treatment of British war policy in the ILP's Labour Leader. In September 1916, Lord Newton urged the DPP to institute proceedings against Morel under Regulation 27.⁶⁰ Mathews agreed that Morel's work was "of a most objectionable" character and that it might, indeed, be prejudicial to British relations with foreign powers. Yet he advised against a prosecution because "considerations which affect the conduct of such a case

⁵⁸ Weinroth, "Peace by Negotiation and the British Anti-War Movement," 369-82.

⁵⁹ HO 139/23/96(part 2), Samuel to Troup, 30 Oct. 1916; PD (Commons), 1 June 1916, 82, col. 2999-3000. The pamphlets in question were, Whither is the Nation Being Led (Morel); Peace this Winter (Buxton); Why Not Peace Negotiations? (Russell).

⁶⁰ FO 395/15/169424, Lord Newton (Assistant Under-Secretary, Foreign Office) to Mathews, 20 Sept. 1916.

in a public court neither can nor ought to be ignored."⁶¹ This was the same line as Mathews took in deprecating the prosecution of Russell over the latter's Cardiff speech.

Lord Newton also forwarded to the Home Office a departmental memorandum on the Labour Leader, along with the Foreign Secretary's opinion that the attached clippings were "unpatriotic and harmful and disloyal." The Foreign Office thought that

the whole tendency of each and every issue of the "LL"...is anti-British and pro-German. The intention seems clearly to be to prove that the United Kingdom (and in a lesser measure the Allies) were responsible for the war, that they are responsible for continuing it, and that they are fighting in order to crush the unoffending Central Powers for lust of power and commercial gain and not to establish a lasting peace.⁶²

But the department was simply informed of Samuel's view that "the points at issue are less for the courts of law to determine than for Parliament and public opinion." The Home Secretary was also guided by the same pragmatic considerations that the DPP chose to follow; namely, that a prosecution "would...have the effect of advertising speeches and publications which are now, for the most part, left in obscurity."⁶³

(ii) Sir George Cave at the Home Office

Herbert Samuel's civil liberties record at the Home Office distanced him from erstwhile colleagues in the New Liberal camp.⁶⁴ Yet the Liberal Home Secretary exhibited more scruple about DORA than did his successor in that office, the Unionist Solicitor-General, Sir George Cave. In December 1916 Asquith was manoeuvred from the premiership by Lloyd George and his Unionist collaborators in the famous palace coup against the 'irresolute'

⁶¹ FO 371/2828/3255/202398, Mathews to Foreign Office, 10 Oct. 1916. In the attached Foreign Office minutes, Newton complained that the "Public Prosecutor will always find some excuse for not acting."

⁶² HO 45/10786/297549/50, Newton to Troup (and enclosures), 28 Nov. 1916; FO 395/47/99903/241921, M.N. Kearney (memorandum), 16 Nov. 1916.

⁶³ HO 45/10786/297549/50, Blackwell to Newton, 7 Dec. 1916.

⁶⁴ Wasserstein, Herbert Samuel, 195-96.

incumbent Prime Minister.⁶⁵ The new administration projected an image of grim determination to fight the war to a decisive conclusion. In dissenting circles it was feared that dissonant political viewpoints, along with all other obstacles to outright military victory, would be summarily removed. Samuel, an Asquith loyalist, had decided to follow his leader out of office, but there would probably have been no place for him anyway, inside a reconstructed Coalition dominated by the politicians of the conscriptionist Right.

Sir George Cave was a more than appropriate replacement for Samuel. He soon demonstrated his utter contempt for the dissenting position. The previous Home Secretary had been genuinely hostile only to incitements to resist the law of conscription. Cave was far less disposed than his predecessor to allow the uninhibited public discussion of peace terms. Shortly after assuming his new ministerial position, Cave reviewed the Labour Leader's treatment of President Wilson's December 1916 peace note. He decided that the paper's coverage of this and other questions merited prosecution under Regulation 27. Cave also asked the Prime Minister to sanction an exemplary prosecution of the equally "anti-British" Tribunal. The two dissenting organs were only saved by the intervention of Arthur Henderson, Labour's representative in the new War Cabinet. Henderson was poised to defend Labour's continued participation in government to the Party Conference, and he did not need this delicate task complicated by controversy over censorship and repression.⁶⁶

Despite this intimation of a stricter interpretation of Regulation 27 than under Samuel's more indulgent regime, Cave soon showed that he too was receptive to the shrewd, cautious advice of subordinates such as Blackwell and Mathews. Early in January 1917 the new Home Secretary vetoed a possible prosecution of Philip Snowden for a speech delivered by the ILP

⁶⁵ There is a vast literature on the 'December Crisis', the most recent contribution to which is Turner, British Politics and the Great War, ch. 3.

⁶⁶ Lloyd George Papers, F/6/4/2, 3, Cave to Lloyd George, 12 Jan. 1917; Lloyd George to Cave, 15 Jan. 1917; HO45/10786/297549/ 51A, Henderson to Lloyd George, 13 Jan. 1917. See also, Hopkin, "Domestic Censorship," 160-62.

MP at Clydach on 2 December 1916.⁶⁷ A spate of similar decisions taken by the regional CMA had infuriated the Glamorganshire Chief Constable. This bellicose former army officer, Captain Lionel Lindsay, voiced to his immediate superiors a dissatisfaction with the military's reluctance to prosecute. Lindsay regarded his jurisdiction as a hotbed of "disloyalty" which must be checked by the systematic prosecution of antiwar speakers. Cave was at first concerned about the problem raised by the Chief Constable, but Lindsay soon came to be seen as a maverick who should not be allowed a free hand.⁶⁸ The Home Secretary never tried to nudge the War Office towards a more repressive policy, and the number of Regulation 27 cases in Glamorgan continued to tail off throughout 1917.⁶⁹ Cave had come to share the scepticism of his subordinates and Liberal predecessors about DORA prosecutions. Yet he had few qualms about the circumscription of dissent by administrative measures and, in Regulation 27C, Cave would craft a noteworthy extension of these powers at his disposal.

(iii) The Gathering Momentum of Dissent

The political transformation of December 1916 was extremely disconcerting for British dissent. But this change in the higher direction of the war coincided with the first in a sequence of hopeful peace signals from abroad. On 12 December 1916 the German Chancellor, Bethmann-Hollweg, sent a seemingly conciliatory peace note to the Allies. This was followed, six days later, by President Wilson's request for the warring coalitions to state their war aims

⁶⁷ HO 45/10814/312987/10, Cave (minute), 9 Jan. 1917.

⁶⁸ HO 45/10742/263275/219, Lindsay to Acting Chairman, Standing Joint Police Committee, 18 Jan. 1917; Cave (minute), 10 Mar. 1917; HO 45/10743/263275/274, Troup to Cave, 26 Nov. 1917.

⁶⁹ HO 45/10743/263275/284 has a return of all Regulation 27 cases recommended for prosecution by the Glamorgan constabulary from January until November 1917. This breakdown is the only such record of DORA prosecutions in the Home Office papers. Of the 40 cases reported by the police since 1 January 1917, only 2 prosecutions (against the same defendant) had been authorised by the CMA. The same piece also contains the contrasting returns from August 1914 to December 1916. In this period prosecutions were approved in 49 of the 64 cases reported by the police. All but 7 of these cases had led to a conviction, with sentencing by local magistrates ranging from a £1 fine to 3 months with hard labour.

as a prelude, possibly, to American mediation of the conflict. The dissenters were incensed by the Allied rejection of Wilson's diplomatic initiative and, incorrectly, blamed British and French intransigence for Germany's declaration of unrestricted submarine warfare on 31 January 1917. British dissent remained hopeful that United States financial and economic leverage would enable the much-admired Wilson to forge his compromise peace. Even the setback for many dissenters of American military intervention was minimised by the massive boost for a 'peace by negotiation' of the March Revolution in Russia. It was soon apparent that the Provisional Government, pushed by the Petrograd Soviet, had neither the means nor the inclination to pursue Tsarist war aims. The result was the enunciation in April 1917 of the famous 'Petrograd formula' for a peace without annexations or indemnities. Dissenters were understandably jubilant that an Allied Government had embraced one of their keynote demands.

A brief summary hardly conveys the true import of these momentous developments.⁷⁰ The key point here is that, by the spring of 1917, arguments for peace could no longer be dismissed as the preserve of a small but troublesome minority of cranks. As A.J.P. Taylor has written, dissenters felt that they were no longer "battling against the moral current."⁷¹ The Russian Revolution had, at the same time, made the War Cabinet fearful that industrial strife at home, occasioned by the extension of 'dilution' to private firms and the conscription of skilled workers, heralded a similar crisis of legitimacy for the British war effort. Nationwide strikes in the engineering sector during May 1917 were followed, ominously, by a gathering of labour and peace groups at Leeds. Yet these revolutionary-pacifist portents were chimerical.

⁷⁰ For their impact on British dissent, see R.A. Rempel et al., eds., The Collected Papers of Bertrand Russell, vol. 14, Pacifism and Revolution (London, forthcoming), especially parts 1 and 3. It is not intended to analyse the assumptions of the British peace movement about German intentions. The classic critical interpretation of Germany's wartime diplomacy remains Fritz Fischer, Germany's Aims in the First World War (New York, 1967), 295-98 (on Bethmann-Hollweg's December 1916 peace note).

⁷¹ Taylor, Trouble Makers, 149.

The May Strikes were simply "a massive battle in defence of craft privilege." Although Bertrand Russell, for example, eagerly awaited the conjunction between labour militancy and peace sentiment, most dissenters were ambivalent about such a confluence of forces. According to Stephen White, the Leeds Convention was a characteristically dissenting, rather than revolutionary, initiative. The spirit of Leeds was not captured by the infamous demand for the creation of Workers' and Soldiers' Councils in Britain, but by the resolution for peace along the lines of the Petrograd formula. But the War Cabinet, without the advantage of hindsight, became decidedly edgy and adopted new strategies to counteract the influence of dissent.⁷²

(iv) From Censorship to Propaganda

In December 1916 Sir Ernley Blackwell had minuted that if "the [peace] movement remains small, prosecution would do more harm than good. If the movement grows to considerable dimensions prosecutions will not repress it."⁷³ Over the next six months the wisdom of this judgment was increasingly sensed at the highest levels of government. Inside the War Cabinet, Lord Milner was the most thoughtful advocate of constructive measures to buttress the patriotism of the working class. Authoritarian to the core, Milner was also a pragmatist and appreciated the necessity of securing mass consent for modern, industrialised warfare. Milner was a patron of the British Workers' National League and transformed this independent 'patriotic labour' organisation into a quasi-official body after entering government in December 1916. During May 1917 Milner stressed to Lloyd George that counter-propaganda was the only effective antidote to pacifism and labour unrest, not a policy of repression. Two days after the Leeds Convention, on 5 June 1917, the War Cabinet decided

⁷² Hinton, First Shop Stewards' Movement, 212; Rempel et al., eds. Pacifism and Revolution, parts 5 and 7 passim; Weinroth, "Peace by Negotiation and the British Anti-War Movement," 386-87; Stephen White, "Soviets in Britain: The Leeds Convention of 1917," International Review of Social History 19 (1974): 166 and passim.

⁷³ HO 45/10786/297549/50, Blackwell (minute), 15 Dec. 1916.

that, henceforth, British war policy must be projected with much greater vigour. The outcome of this resolution was the inauguration in August 1917 of the National War Aims Committee, which, in cooperation with the British Workers' National League, began to impress upon British public opinion the paramount national importance of prevailing militarily over Germany and its allies.⁷⁴

Although there was a shift in emphasis from censorship to public persuasion from mid-1917, the British Government's more purposeful approach to propaganda was still fortified by DORA. More than ever, the authorities favoured the proscription of dissent by the extra-judicial means discussed in chapter five. The weapon of prosecution was wielded very selectively during the last eighteen months of the war. An important exception to this rule was the imprisonment for six months in September 1917 of E.D. Morel, a huge setback at a vital moment for the 'peace by negotiation' forces. Another notable case was the trial and imprisonment in February 1918 of Bertrand Russell, over an ill-judged editorial aside in the Tribunal about the strike breaking propensities of the American military.⁷⁵ Far more characteristic of official attitudes towards dissent, though, was the Law Officers' earlier recommendation that the most inflammatory speakers at Leeds not be prosecuted. By mid-November 1917 Cave was advising that "prosecutions for seditious speeches are seldom advisable."⁷⁶

⁷⁴ CAB 23/3/154(22), 5 June 1917; Stubbs, "Lord Milner and Patriotic Labour," 723-40. On the organisational aspects of domestic and foreign propaganda before mid-1917, see Sanders and Taylor, British Propaganda, ch. 1.

⁷⁵ On the Morel case, see below, 161-63; on the prosecution and imprisonment of Russell, see Jo Vellacott, Bertrand Russell and the Pacifists in the First World War (Brighton, 1980), 224-28 and the unpublished paper of Beryl Haslam, "Rex v. Russell: Privilege and Imprisonment in Britain during the First World War." The Bow Street magistrate imposed the same sentence on Russell as that which had been handed to Morel, but the former ultimately served his prison term in the less rigorous confines of the first, as opposed to the second, division of the British penal system.

⁷⁶ CAB 24/4/G.173, Sir George Cave, "Pacifist Propaganda," 13 Nov. 1917; HO 45/108010/311932/40A, "Opinion of the Law Officers of the Crown: The Leeds Conference," 18 Aug. 1917.

Late in 1917 the Government was even rebuked over the infrequent trial of the Regulation 27 offences reported by the Glamorganshire constabulary to the regional CMA. Primed with information by an exasperated local Chief Constable, the Lib-Lab MP for South Glamorgan twice complained about the licence of antiwar speakers in South Wales.⁷⁷ Perplexed by evidence of deteriorating civilian morale in this vital industrial area, however, the Home Office was more forthrightly opposed than ever to the sledgehammer approach favoured by the police.⁷⁸ Several other police chiefs were dissatisfied with the inaction of the CMAs and the caution of the Home Office. To no avail, they pressed for the elimination of the military's sole discretion to institute or veto proceedings over alleged verbal infringements of Regulation 27.⁷⁹ The sporadic prosecution of dissenters continued until the end of the war. Sylvia Pankhurst, whose Worker's Dreadnought had for over a year been regularly harried by the authorities, was, as late as 28 October 1918, convicted and fined fifty pounds for "causing disaffection."⁸⁰ Both Regulation 27 and the other censorship DORRs remained in place long after the Armistice.

Regulations 24, 24B and the Export Embargo of Peace Propaganda

As a coda to the preceding discussion of Regulation 27, the concluding section of this chapter will examine those DORRs which affected the dissemination of dissenting propaganda

⁷⁷ PD (Commons), 26 Nov. 1917, 99, col. 1655; 11 Dec. 1917, 100, col. 962-63. For confirmation of the Chief Constable's 'leak', see HO 45/10743/263275/284, Lindsay to Troup, 30 Nov. 1917.

⁷⁸ HO 45/10742/263275/295, Lindsay to Troup, 14 Dec. 1917; 313A, Blackwell (minute), 1 Feb. 1918.

⁷⁹ HO 45 11007/271672/228, "Extract from Minutes of Conference of Chief Constables for District No. 1 held on 6th March, 1918." See also the attached minute by Troup, 20 Mar. 1918: "Though some of the CCs, particularly the CC of Glamorganshire, would like to have a freer hand, it does not follow that this would be an advantage."

⁸⁰ LL, 31 Oct. 1918, 2.

overseas. One of these powers, Regulation 24, provided a pretext for the notorious DORA conviction of E.D. Morel in September 1917. Both this prosecution and the export embargo of antiwar literature attest, in different ways, to the remarkable elasticity of DORA. Regulation 24 was one of the bona fide counter-espionage measures put in place by the early DORA Orders in Council. Issued on 14 October 1914 (as Regulation 16C), this DORA prohibited the transmission abroad, other than by post, of letters or written messages. Although Regulation 24 was not conceived as weapon in the battle against dissent, it was considered for this use after the public appeals for a negotiated peace of two prominent dissenters were smuggled to the United States late in 1916. On 5 December 1916 the New York Times printed extracts from an open letter by C.P. Trevelyan to the American people. The co-founder of the UDC was implying that the British people would be amenable to peace if only someone of President Wilson's stature gave a lead. Trevelyan's communication had been sent covertly to the American Neutral Conference Committee, which had then released it to the press. On 23 December 1916 the New York Times published a similar letter from Bertrand Russell, addressed directly to the recently reelected American President.⁸¹

The Foreign Office asked the Home Office whether Trevelyan might be prosecuted under the DORRs. Cave minuted that "if the letter was sent...otherwise than through the post,

⁸¹ Trevelyan's letter was later published in full under the heading "Hands Across the Sea: An Open Letter to Americans," Survey, 9 Dec. 1916, 261-62. The press release had been accompanied with a note that this peace appeal had also been submitted to the American President. Wilson was annoyed by this indiscretion, but it was an accurate statement of fact. A copy of the published letter is also in FO 395/74/194280; the Foreign Office response in HO 144/1459/316786/2-3. The department was correct in assuming that the Trevelyan letter had reached its destination through secret channels. There is some mystery, however, as to its bearer, although there is conclusive proof that a similar, but private, peace appeal from Trevelyan to Wilson (dated 23 November 1916) reached the President shortly afterwards, via one of British dissent's sympathisers in the American embassy in London. On the background to both the Trevelyan missives, see Arthur S. Link, ed., The Papers of Woodrow Wilson, vol. 40, November 20, 1916-January 23, 1917 (Princeton, 1982), 124-25, 164, 178-80 and, more generally, Laurence W. Martin, Peace without Victory: Woodrow Wilson and the British Liberals (New Haven, 1958), 116-22. On the Russell letter, see Rempel et al., eds., Pacifism and Revolution, 5-11. The British authorities were justified in suspecting that Russell too had evaded the postal censorship, but they mistook the identity of his messenger.

there is a breach of Regulation 24; but at present we have no proof of this."⁸² Russell certainly anticipated that "probably I shall get into trouble over my letter to Wilson," but there was insufficient evidence to support the laying of charges against either him or Trevelyan. On 20 January 1917 Sir Ernley Blackwell reviewed the case against both men. He had "little doubt that the letter was written by Russell and sent by special messenger in contravention of R.24. The same is probably true of Trevelyan's letter." Blackwell advised against 'domiciliary visits' in search of the necessary proof because the contents of neither letter warranted prosecution under Regulation 27.⁸³ In the face of strong right-wing criticism, particularly of the already 'disgraced' Russell,⁸⁴ Blackwell's counsel was accepted by both Troup and Cave and, in the middle of February, by the Foreign Office as well. Cave's Commons statement of 12 February 1917 also intimated that a prosecution of Russell had been declined on more general grounds than those of evidence.⁸⁵

Russell's fate was certainly consistent with the informal policy of restraint applied to the prosecution of prominent peace campaigners. E.D. Morel was one such dissenter fortunate to have avoided prosecution thus far. The UDC secretary's writings were viewed as profoundly offensive in official circles. The Foreign Office was particularly keen to prosecute Morel over his critical account of prewar diplomacy, Truth and War, but this course of action was ruled out in October 1916 and again in February 1917. The DPP was afraid that "in Morel a defendant might be discovered to whom, provided he could secure a larger publicity for his

⁸² HO 144/1459/316786/2, Cave to Blackwell, 23 Dec. 1916; Lord Newton to Troup, 22 Dec. 1916.

⁸³ Bertrand Russell Archive, VI/4, rec. acqu. 69, #1513, Russell to Lady Ottoline Morrell, 11 Jan. 1917; HO 45/11012/314670/30, Blackwell (minute), 20 Jan. 1917.

⁸⁴ See Morning Post, 6 Dec. 1916, 6; 10 Jan. 1917, 6; 11 Jan. 1917, 6; 15 Jan. 1917, 6, 8.

⁸⁵ HO 45/11012/314670/30; HO 144/1459/316786/4, Sir Walter Langley (Assistant Under-Secretary, Foreign Office) to Troup, 16 Feb. 1917; PD (Commons), 12 Feb. 1917, 90, col. 263-65.

mischievous propaganda, a prosecution might not be unwelcome."⁸⁶ On 1 September 1917, however, Morel appeared before Bow St. magistrates, accused of inciting a colleague (the niece of Foreign Secretary Balfour) to convey one of his pamphlets to a French pacifist in Switzerland. He was charged under Regulation 24 which, since mid-July 1917,⁸⁷ had prohibited the covert conveyance to neutral states of published material, as well as private communications. The additional, incitement charge against Morel was laid under Regulation 48.

The close political surveillance of Morel and his contacts had enabled the authorities to proceed against him in this underhand manner. The advantage of these trumped-up charges from the official perspective was that Morel could not, as in a Regulation 27 case, subject British foreign policy to a potentially embarrassing court room examination. Yet Morel's published work was, according to Catherine Cline, "patently the cause of the Government's determination to prosecute him."⁸⁸ British authorities were certainly disturbed by the possibly baneful influence of UDC literature on foreign opinion.⁸⁹ It was Morel's skill as a publicist, however, not the propensity for subterfuge implied by the Bow St. trial, which was the root cause of official disquiet. Morel actually pleaded guilty on both counts, although he later denied having made this plea. On 4 September 1917 he was handed down the stiff sentence of six months imprisonment in the second division.⁹⁰ Morel's removal from organised peace

⁸⁶ FO 371/2828/3255/202398, Mathews to Newton, 10 Oct. 1916. See also FO 395/15/169424, Newton to Mathews, 20 Sept. 1916 and minutes by C.H. Montgomery, 11 Sept. 1916, Lord Robert Cecil, 14 Sept. 1916, and J.D. Gregory, n.d.; FO 395/140/25424/33266, M.N. Kearney and Montgomery (minutes), 13 Feb. 1917; Newton (minute), 25 Feb. 1917. Truth and War is discussed in depth by Swartz, Union of Democratic Control, 120-27.

⁸⁷ SRO 736, 17 July 1917.

⁸⁸ Catherine Cline, E.D. Morel, 1873-1924: The Strategies of Protest (Belfast, 1980), 111.

⁸⁹ For example, FO 395/140/25424/33236, Maurice de Bunsen to Troup, 13 Mar. 1917.

⁹⁰ Cline, E.D. Morel, 111-13. Morel's own views of the case were set down in a lengthy private memorandum, Morel Papers, F1/5, "Rex v. E.D. Morel," 28 Mar. 1918.

work was a devastating blow for dissent, both real and symbolic, at a critical juncture of the 'peace by negotiation' campaign. The case against Morel also demonstrated the lengths to which the DORRs could, if necessary, be stretched in order to muzzle dissent.

Regulation 24 governed the illicit conveyance abroad of written messages and, after July 1917, published material. The distribution of printed matter by post was covered by Regulation 22B, issued on 6 November 1915. From 30 November 1916 a separate measure, 24B, was introduced which applied specifically to the transmission of postal packets overseas. This DORR created an export permit system and a set of rules for publishers and distributors. The War Office regarded this supervision not as censorship, but as a deterrent to the concealment of secret communications inside consignments of printed matter headed abroad.⁹¹ Indeed, no DORR prohibited explicitly the export of publications on grounds of content, unless, of course, the items in question had been suppressed at home. As late as September 1917, General Macdonogh, Director of Military Intelligence, conceded that:

The regulations at present in force empowered the Authorities to stop printed matter from going out of the country, but there was no prohibition of export, and if any person succeeded in smuggling an undesirable publication out of the country, he committed no offence. There was a power to stop export but not to prohibit it.⁹²

In fact, Macdonogh even overestimated the limited scope of the powers conferred by DORA. Although the distribution abroad of a range of dissenting publications had already been curtailed, the legal supports for this executive action were distinctly shaky.

In October 1915 several ministers had contemplated restricting the overseas circulation of the Northcliffe Press. They frowned on The Times and Daily Mail for misrepresenting British opinion in Allied and neutral states and for allowing the enemy to depict Britain as politically divided and doubtful of military victory. If the "export of home-made libels" had

⁹¹ FO 395/47/99903/180579, General Cockerill to Newton (enclosure), 12 Sept. 1916.

⁹² CAB 27/13, "Proceedings of the First Meeting of the Committee on the Export of Printed Matter," 27 Sept. 1917.

been thus controlled, much liberal opinion would have applauded the Asquith Coalition.⁹³ The moment passed, however, and the first embargoed newspapers, in July 1916, were the easier, dissenting targets of the Tribunal and Labour Leader.⁹⁴ These bans were justified on the grounds that the NCF and ILP weeklies had published material which had been exploited for propaganda purposes by the enemy. Philip Snowden wondered why, then, the sales of the Northcliffe Press and Morning Post had not been similarly restricted. The War Office spokesman, however, merely acknowledged assent with the observation of the Liberal War Committee's Sir Arthur Markham, that these patriotic papers had not published "a single word except for the prosecution of the war with the utmost vigour."⁹⁵

The Labour Leader also criticised its unequal treatment but did not, surprisingly, challenge the tenuous legal basis of the War Office order.⁹⁶ Indeed, this uncertainty was acknowledged tacitly by the department itself. A memorandum of September 1916 advised that, in communicating with errant newspapers, "it is preferable to omit reference to the DORRs because the Regulations make no distinction between matter published in this country and matter sent abroad." A policy of judicious silence would enable the authorities to deal with publications "which would not be held to contravene the DORRs and the circulation of which in the United Kingdom cannot therefore be prohibited, but which should not be allowed to leave the United Kingdom."⁹⁷ The War Office acted in accordance with these

⁹³ The quotation is from a speech by J.A. Spender, editor of the Liberal Westminster Gazette. The address was delivered at a meeting of the National Union of Journalists in Manchester on 9 November 1915. A press report was filed with the Press Bureau memorandum, HO 139/30/118/1, "Northcliffe Press Propaganda and its Effects on Foreign Opinion," 19 Oct. 1915. See also, above, 137.

⁹⁴ HO 45/10817/316469/7, Directorate of Special Intelligence to Home Office, 29 June 1916.

⁹⁵ PD (Commons), 19 July 1916, 84, col. 1007.

⁹⁶ LL, 3 Aug. 1916, 6.

⁹⁷ FO 395/47/99903/180579, Cockerill to Newton (enclosure), 12 Sept. 1916.

guidelines in dealing with the UDC towards the end of the year. On 16 November 1916 the latter organisation was informed that it had been denied a Regulation 24B export licence and that a blanket ban had been placed on the overseas distribution of all UDC literature. The explanation was that postal censors had recently stopped several outgoing items which had "contained matter which might have been used by the enemy for the purpose of his propaganda." When C.P. Trevelyan requested clarification of this charge, he received an evasive reply which "regretted that no further information can be given concerning the reasons for prohibiting the export of the publications of the UDC."⁹⁸

Seventeen dissenting publications were placed on a list of export-embargoed items drawn up by Foreign Office and Military Intelligence officials in February 1917. This prohibited material included (along with the Tribunal and Labour Leader) such stalwart organs of dissent as Forward, the Cambridge Magazine, and the Herald, plus the writings of prominent dissenters such as Morel, Goldworthy Lowes Dickinson, and Charles Buxton. Twenty-one other items were on this proscribed list, mostly Irish Republican literature and technical journals. By early August 1917 the export of thirty-two dissenting publications had been prohibited. In addition, all literature issued by the NCCL, ILP, NCF, British Socialist Party, Fellowship of Reconciliation, and National Labour Press had by this later date to be passed by military censors before its distribution overseas.⁹⁹

The most noteworthy addition to the list of embargoed publications was that of the Nation. Early in 1917 the Liberal weekly's 'defeatist' coverage of the war began to cause growing annoyance to the Foreign Office.¹⁰⁰ Yet punitive measures were delayed until the

⁹⁸ Morel Papers, F6/8, B.B. Cubitt to Secretary, UDC, 16 Nov. 1916; Trevelyan to Cubitt, 20 Nov. 1916; Cubitt to Trevelyan, 2 Dec. 1916.

⁹⁹ FO 395/141/27898/194280, "Publications which should not be allowed to leave the United Kingdom for any destination," 3 Feb. 1917; FO 395/144/47254/155686, Directorate of Special Intelligence to Department of Information, 9 Aug. 1917.

¹⁰⁰ FO 395/141/27898/56304, Colonel John Buchan (Director of Information) to Lloyd George, 15 Mar. 1917; Montgomery (minute) 6 Mar. 1917. See also departmental minutes in

interception of a German propaganda message, quoting a bleak prognosis of Allied strategy from the issue of 3 March 1917. The Nation's editorial embrace of a negotiated peace clearly underlay the export ban that was instituted on 29 March 1917. An ensuing War Cabinet discussion complained about the "objectionable" tendency of recent articles and the "continual suggestion that peace, however inconclusive, would be better than a continuation of the war."¹⁰¹ Even such 'tainted' Liberals as Winston Churchill came out in defence of free speech. Supporters of the Nation saw the paper as a victim of its disagreement with official war policy. During the lengthy Commons debate of 17 April 1917, Lloyd George was forced into a now rare parliamentary appearance, in support of a War Office order which, in spite of the lingering controversy, remained in effect until the end of October 1917.¹⁰²

Although the export embargo of the Nation was treated by liberal opinion as an outrageous example of British Prussianism, the ban had not been imposed solely at the behest of the military.¹⁰³ There were, however, other grounds on which the restricted circulation of the paper was open to attack. Regulation 24B certainly did not provide the requisite legal authority for the War Office order. Export permits had never been granted to publishing companies in respect of individual publications. Besides, this DORR only affected the transmission of printed matter to neutral and enemy states, not to the Allies or the Dominions. The restraints imposed on the Nation and other papers, by contrast, were not so

FO 395/140/24102, 1-4 Feb. 1917.

¹⁰¹ CAB 23/2/119(24), 16 Apr. 1917. See also, Havighurst, Radical Journalist, 250-56.

¹⁰² PD (Commons), 17 Apr. 1917, 92, col. 1509-12, 1607-14. See also 26 Apr. 1917, col. 2710-24; 1 May 1917, 93, col. 300-06; 9 May 1917, col. 1160-1200; CAB 23/4/253(3), 19 Oct. 1917; Nation, 27 Oct. 1917, 112-13.

¹⁰³ Despite a brief statement to this effect in the Daily Chronicle, which the Nation suspected as having emanated from the Prime Minister's office (Daily Chronicle, 11 Apr. 1917, 2; Nation, 14 Apr. 1917, 28). General Cockerill had been far less enthusiastic than the Foreign Office officials about the proposed export ban (FO 395/141/27898/58192, Directorate of Special Intelligence to Foreign Office, 19 Mar. 1917; Samuel Papers, A/60/7, Cockerill to Samuel, 13 June 1917).

discriminating. The Nation itself hit on the lack of explicit authorisation for the prohibition in the DORRs but had "little doubt that some weapon can be forged from that overflowing armoury of repression." The Law Journal too voiced its uncertainty about the legality of the ban but concluded that, if challenged in court, the department could probably fall back on Regulation 50.¹⁰⁴ This little-noticed DORR included a sweeping prohibition of "any act of such a nature as to be calculated to be prejudicial to the public safety or the defence of the Realm and not specifically provided for in the foregoing regulations."

Shortly after the Nation ban was imposed, a Foreign Office official complained that "that it is impossible to prevent copies of export-banned papers from getting to foreign countries occasionally." According to another, "one or two copies reaching a neutral contiguous country supply the Germans with all they need if they happen to get hold of them."¹⁰⁵ The Foreign Office had already tried to secure a more effective method of enforcement. In February 1917 a departmental legal advisor had recommended outright suppression of any material which, if circulated abroad, the Secretary of State anticipated would be prejudicial to relations with a foreign power. In sounding the Home Office, the Foreign Office played down the draconian implications of their proposal.

The fact that the suggested power was placed in the hands of the Secretary of State for Foreign Affairs would make it clear that its object was not to suppress the right of citizens of this country to criticise their own Government, but merely to ensure that publications were not exported which would have a detrimental effect on the Allied cause in foreign countries.¹⁰⁶

Yet the suggested amendment to the DORRs implied a significant extension of domestic censorship. The Home Office ruled out any formal changes but promised, if necessary, to activate itself, and without necessarily prosecuting the offender first, the search and seizure

¹⁰⁴ "The War Office Ukase," Nation, 14 Apr. 1917, 31; Law Journal, 21 Apr. 1917, 148.

¹⁰⁵ FO 395/141/27898/79190, Keane and Montgomery (minutes), 18 Apr. 1917.

¹⁰⁶ FO 395/140/25424/33266, de Bunsen to Troup, 13 Mar. 1917; C.J.B. Hurst (Assistant to Legal Advisor), (minute), 23 Feb. 1917.

provisions of Regulation 51.¹⁰⁷

Export bans had not stopped either the Nation or Labour Leader from continuing to surface in neutral Holland. On 17 July 1917 Regulation 24 was extended to the non-postal conveyance of all types of printed matter to neutral and enemy states. But neither this amendment nor Regulation 24B prohibited the dispatch of uncensored postal packets to Allied France for reexport to Holland. Nor could the revamped DORR be invoked to scrutinise the diplomatic bag of the Dutch legation, which Military Intelligence reckoned to be a second likely conduit for export-prohibited material.¹⁰⁸ These difficulties had already persuaded the Department of Information to press for the complete withdrawal of restrictions on the export of printed matter. The favourable impression of this decision on the British press and American public opinion, its Director believed, would outweigh any encouragement to enemy propagandists. In any case, experience had demonstrated the futility of attempting to prevent material published in Britain from eventually reaching enemy hands.¹⁰⁹

The Department of Information peddled this line to the Committee on the Export of Printed Matter, appointed in September 1917. The two War Office representatives, however, and the chair of this War Cabinet Committee, Sir Edward Carson, wanted a more effective form of control.¹¹⁰ As Carson later reported:

Under the Defence of the Realm Regulations 24 and 24B, while there is power to stop injurious publications leaving the country, providing they can be intercepted, the despatch of such publications under a general permit to export is not illegal...Moreover, the present regulations apply to export only to enemy and neutral countries, and not to Allied countries...Consequently it is impossible to secure that no copies of undesirable publications shall leave the

¹⁰⁷ Ibid., 60439, Troup to de Bunsen, 21 Mar. 1917.

¹⁰⁸ FO 395/141/27898/106678, Colonel G.S. Pearson (Chief Postal Censor) to Montgomery (Foreign Office), 27 May 1917.

¹⁰⁹ FO 395/141/27898/126638, "Draft Minutes of Conference," 13 June 1917.

¹¹⁰ CAB 27/13, "Proceedings of First Meeting of the Committee on the Export of Printed Matter," 27 Sept. 1917. See also, CAB 23/4/232(13), 13 Sept. 1917.

country and ultimately find their way to the enemy.¹¹¹

The upshot of the committee's deliberations was a draft DORR, allowing government departments to embargo for export to any destination a wide range of published statements. This DORR might also oblige blacklisted publications, as Carson had urged, to submit each issue for censorship approval prior to their transmission abroad. The most significant departure from existing practice was to make the evasion of an export ban a criminal offence.¹¹² Ultimately the committee decided to effect the necessary changes by amending Regulations 24 and 24B, a decision approved by the War Cabinet on 14 February 1918. The upshot of these revisions (which took effect on 27 April 1918) was "to make it an offence to export publications, the export of which has been prohibited, and to extend the regulations to allied countries as well as to enemy countries."¹¹³ These changes did not, however, result in a flurry of Regulation 24 and 24B cases.

¹¹¹ CAB 24/4/G.191, "Report of the Committee on the Export of Printed Matter," 21 Jan. 1918.

¹¹² The draft DORR, dated 13 Dec. 1917, is CAB 27/13/EPM 4. See also, CAB 27/13, "Proceedings of Second Meeting," 31 Oct. 1917.

¹¹³ CAB 24/4/G.191, "Report of the Committee on the Export of Printed Matter," 21 Jan. 1918; CAB 27/13, "Proceedings of Third Meeting," 9 Jan. 1918; CAB 23/5/346(14), 14 Feb. 1918.

Chapter 5: DORA AND DISSENT II: CENSORSHIP BY ADMINISTRATIVE ORDER

The Power of Search and Seizure

(i) Regulation 51A

At the first Cabinet of the Asquith Coalition, on 28 May 1915, it was decided that "power should be taken to suppress by executive action offending newspapers without previous prosecution."¹ It was actually possible already to execute such action under DORA. The twelfth DORR of the initial batch equipped CMAs with broad powers of search and seizure. By the Order in Council of 28 November 1914 these provisions resurfaced as Regulation 51. The DORR now gave express authorisation for the removal and destruction of printed matter which contravened Regulation 27, along with any type-setting machinery or plant used in its production. In reviewing Regulation 51 in June 1915, however, the DPP averred that it was far too draconian a measure. Mathews proposed an alternative regulation, issued on 28 July 1915 and which granted a right of appeal to the owners of confiscated material or plant.² In practice, this new DORR, 51A, afforded the executive almost as much leeway as had its precursor, which was not, significantly, superseded by the latest Order in Council. The entitlement to restitution under Regulation 51A was distinctly flawed; injured parties were obliged "to show cause why the articles so seized should not be destroyed." That is, they appeared before the magistracy carrying an a priori presumption of guilt. On one level 51A tried to harmonise novel powers of search and seizure with the rule of law. On

¹ CAB 41/36/23, 28 May 1915.

² See HO 45/10741/263275/51, Liddell to Troup, 14 June 1915.

another it signified a strengthening of DORA against a backdrop of intemperate press agitation against 'pro-Germanism'.

On 18 August 1915 Regulation 51A was activated for the first time. The Attorney-General, Sir Edward Carson, had authorised police raids on the Manchester offices of the Labour Leader and its publisher, the National Labour Press. A separate raid was carried out the same day on the ILP's head office in London. The peace work of the ILP and its Manchester-based weekly had been brought to the attention of the Government by angry backbenchers.³ In Manchester, the 5 and 12 August 1915 issues of the paper were seized, along with several pamphlets printed by the National Labour Press. A much larger quantity of pamphlets was confiscated by the City of London Police.⁴ On 25 August 1915 Fenner Brockway and Edgar Whiteley, respectively, editor of the Labour Leader and manager of its publishing company, appeared in court to show cause why their confiscated material should not be destroyed. The Salford magistrate could find nothing illegal in the two allegedly offensive back issues. Although he did order the destruction of the five pamphlets listed in the summons, the magistrate declared the defence "substantially successful."⁵

After their scrutiny by the DPP's office, it was decided early the next month to proceed under Regulation 51A against nineteen of the pamphlets seized from the ILP's London office.⁶ The confiscated material included copies of roughly eight hundred UDC pamphlets. But these were returned after the organisation complained of inconsistency between the actions of the police in London and those in Manchester, where its publications had been left

³ PD (Commons), 28 June 1915, 62, col. 1455-57; 15 July 1915, 63, col. 986.

⁴ MG, 19 Aug. 1915, 7; LL, 26 Aug. 1915, 2; Ramsay MacDonald Papers (Rylands), Fenner Brockway to Ramsay MacDonald, 20 Aug. 1915.

⁵ MG, 27 Aug. 1915, 3.

⁶ These titles included; Is Germany Right and Britain Wrong?; Letter from an ex-Pacifist; Franco-Russian Militarism; and Persia, Finland and our Russian Alliance.

untouched.⁷ The DPP had actually been instructed by the Home Secretary to distinguish between political argument and material containing "express or implied incitements to do or omit to do particular acts which are forbidden or commanded by the authorities."⁸ The UDC material was judged to fall inside the former, permissible, parameters. Of the condemned material, the ILP chose to challenge the order served on the pamphlets printed in its name, as did several individual authors. However, none of the plaintiffs succeeded, and, after three adjournments, the City of London magistrate ordered the destruction of all pamphlets in the summons.⁹

Both the Labour Leader and ILP head office cases had raised serious issues about the administration of DORA. In these proceedings under Regulation 51A, certain pamphlets had been destroyed automatically because the persons responsible for them did not appear in court. The in camera hearing was the "ugliest feature" of the case against it, according to the Labour Leader. But switching the burden of proof from the prosecuting authority to the injured party constituted "a second repudiation of British traditions."¹⁰ One ILP MP pointedly reminded the Home Secretary of his March 1915 promise that DORA would not be used to root out discordant political viewpoints. Simon replied that the crucial distinction between opinion and misstatement of facts had been maintained in these proceedings under Regulation 51A. Ignoring the vindication in court of the Labour Leader, the chief instigator of action against it, Sir Edward Carson, said that the offending passages amounted to "a great deal more

⁷ HO 45/10741/263275/88, Morel to S.W. Harris (Simon's Private Secretary), 2 Sept. 1915; Morel Papers, F6/8, Arthur Ponsonby to Simon, 7 Sept. 1915; Simon to Ponsonby, 10 Sept. 1915.

⁸ HO 45/10741/263275/88, Simon to Mathews (and enclosure), 25 Aug. 1915.

⁹ Ramsay MacDonald Papers (Rylands), Francis Johnson (General Secretary, ILP) to National Advisory Council, ILP, 23 Sept. 1915; LL, 16 Sept. 1915, 6; 30 Sept. 1915, 5; 28 Oct. 1915, 6.

¹⁰ LL, 2 Sept. 1915, 1; 16 Sept. 1915, 6.

than the expression of opinion."¹¹

C.P. Trevelyan had responded to the August 1915 police raids with angry letters to two former Cabinet colleagues. Although he was not naive about the possibility of a wartime threat to free speech, he told Walter Runciman, he had thought "that it would be left to Toryism when completely triumphant to adopt a Prussian system."¹² Trevelyan also complained to the Home Secretary, Sir John Simon, about Liberal complicity in a policy of reaction. Stifling discussion of issues thrown up by the war was particularly craven given the double standard applied to dissent.

You have not lifted a finger to suppress the intolerable campaign of exaggeration and hatred which is carried on every morning by the jingo press. You have never prevented their discussing the future and terms of peace in their own way, enunciating their monstrous creed of vengeance and their policy of dismemberment of Germany. Are you then going to come down on us who try to preach saner ideals?¹³

In a similar vein, the Nation contrasted the petty persecution of the Labour Leader with "the licence yielded to 'The Times' and the Northcliffe newspapers." This refrain echoed in much of the Liberal (and Labour) press; privately at least one minister agreed that "the worst cases of injury to the national interests by newspapers have been ignored."¹⁴ Generally tolerant of

¹¹ PD (Commons), 16 Sept. 1915, 74, col. 149; 26 Oct. 1915, 75, col. 28. On Simon's statement of March 1915, see above, 137.

¹² CPT 76, Trevelyan to Walter Runciman (President of the Board of Trade), 23 Aug. 1915.

¹³ Ibid., Trevelyan to Simon, 22 Aug. 1915. Trevelyan held Simon personally accountable for the raids, which was somewhat unfair in view of the unilateral action of the Attorney-General's office. The Home Office resented its obligation to defend a policy over which they had not been properly consulted (HO 45/10741/263275/88, Troup [minute] 31 Aug. 1915). The Cabinet, which "divided along party lines over the incident," had also been kept in the dark (Swartz, Union of Democratic Control, 119-20).

¹⁴ Nation, 21 Aug. 1915, 659; CPT 76, Runciman to Trevelyan, 23 Aug. 1915; DN, 25 Aug. 1915, 4; Economist, 21 Aug. 1915; New Statesman, 21 Aug. 1915, 459; LL, 26 Aug. 1915, 5. The final citation is to an ironic piece under the heading "There's been no Raid on Associated Newspapers," drawing attention to the cavalier disregard for the DORRs of The Times and Daily Mail.

dissent, many liberals oversaw the freedom of the jingo press with rather less vigilance.¹⁵

(ii) Regulation 51

Regulation 51A was never a favoured instrument in the control of dissenting propaganda. The seizure of material under Regulation 51, meanwhile, could be challenged in court only with great difficulty. From the official perspective, there would be less likelihood of a setback such as the failed Labour Leader case, or of the troublesome (although unsuccessful) appeals that followed the ruling in the ILP head office case.¹⁶ The search and seizure provisions of Regulation 51 could be activated and justified simply by reference to the suspicions of a CMA. The DORR bypassed the courts completely. Yet, during September 1915, the DPP had stated that these powers were still "of so drastic a character as too closely to approach the application of martial law...to enable me to advise the putting of the provisions of the Regulation into force." Additional censorship powers were currently the subject of an interdepartmental review, but the Director of Special Intelligence at the War Office had also ruled such extreme action as "out of the question." The Home Secretary, by contrast, had concluded that "the only really effective penalty for a bad case would be temporary suspension of publication."¹⁷

In November 1915 Simon showed no compunction in deploying Regulation 51 against the Globe, the ultra-patriotic evening paper that almost fell afoul of DORA as early as September 1914.¹⁸ In the face of an authoritative Press Bureau denial, the newspaper had persisted with rumour-mongering that Kitchener was on the verge of resigning, owing to

¹⁵ Lovelace, "Control and Censorship of the Press," 160 and passim.

¹⁶ See above, 100-2.

¹⁷ HO 45/10786/297549/10, Mathews, "Anti-War Literature," 11 Sept. 1915; WO 32/4893/23, Cockerill to CIGS, 27 Sept. 1915; CAB 37/136/34, Simon, "Press Censorship," 27 Oct. 1915.

¹⁸ See above, 68.

exasperation with the 'politicians'.¹⁹ After hurried consultations between the Home Secretary and the Law Officers, a warrant was drawn up in the name of the CMA for the London district. The Metropolitan Police were then dispatched to dismantle the presses of the Globe. The warrant referred to suspected breaches of the DORRs, but no definite charges were preferred. The editor was informed neither of the likely duration of the ban, nor of the possibility of challenging the order. The Globe simply disappeared from the newsstands.²⁰

The Prime Minister's wife accurately forewarned Simon of insinuations that he and his colleagues were "afraid of The Times but not of the Globe."²¹ W.M.R. Pringle, one of two Scottish Radicals who forced an emergency debate on the suppression, did, indeed, counterpose the victimisation of this comparatively uninfluential paper against the Government's reluctance to penalise Lord Northcliffe, "the Napoleon of modern journalism."²² Yet both Pringle and his colleague, J.M. Hogge, also attacked the casual supersession of law by administrative fiat. Pringle asked if

the editor and publishers of the 'Globe' are guilty of an offence under Regulation 27, why have they not been brought to trial in open Court...? If you are going to out-Prussianise the Prussians, out-Prussianise them in efficiency and not in tyranny...We seek to re-establish against the dominion of force the dominion of law and justice, and we can only do that if throughout this war and its conclusion we in this country preserve those great traditions

¹⁹ For the 'D' Notice of 5 November, see HO 45/10795/303412. There was, in fact, a very real Cabinet conspiracy against the Secretary of State for War. This did not succeed in forcing his resignation, but Kitchener's authority over strategy and supply was greatly reduced over the next couple of months (Wilson, Myriad Faces of War, 210).

²⁰ HO 45/10795/303412, Troup (minute), 6 Nov. 1915; Thomson, Scene Changes, 272; The Times, 8 Nov. 1915, 10. The paper resumed publication on 22 November 1915, after promising to print an unconditional retraction of, and apology for, its Kitchener story (HO 45/10795/303412, Parker, Garrett and Co. to Simon, 17 Nov. 1915). See also, Lovelace, "Control and Censorship of the Press," 136-37.

²¹ Simon Papers, MSS Simon 51/106, Margot Asquith to Simon, 10 Nov. 1915.

²² PD (Commons), 11 Nov. 1915, 75, col. 1402 and passim. Pringle's charge was not unfounded. Northcliffe's Evening News was among at least 5 other papers that had speculated about impending changes at the War Office.

of justice untrammelled, undimmed, and unimpaired.²³

In December another organ of maverick right-wing opinion was penalised by Regulation 51. Britannia, edited by Christabel Pankhurst, was the newspaper of the patriotic wing of the Women's Social and Political Union. It had achieved some notoriety for hostile criticism of British strategy and diplomacy in the Balkans. On 10 December 1915, the paper published a leaked War Office memorandum, speculating that Serbian defeat might benefit Allied strategy in the long term. The next issue accused Sir Edward Grey (under the heading "JUDAS") of conspiring to hand over Serbia to Austria-Hungary. The Home Office thought that Pankhurst was deliberately courting prosecution "in order to obtain an advertisement and to save her 'Britannia' from a natural death." As there was now precedent for administrative suppression under Regulation 51, however, the Union's premises were raided instead and its printing press removed.²⁴ The paper continued its anti-Foreign Office tirades and was suppressed on two further occasions, forcing for a short time its clandestine publication on a small duplicating machine.²⁵

Herbert Samuel, Executive Suppression, and the Rule of Law

The first two victims of Regulation 51 were representatives of the jingo press, but both suppressions anticipated the targeting of dissent by this DORR.²⁶ Herbert Samuel, Home

²³ Ibid., col. 1404-05.

²⁴ HO 45/10796/303883/5, Troup (minute), 20 Dec. 1915; FO 371/2577/164274, Lord Robert Cecil to Mathews, 3 Nov. 1915; The Times, 17 Dec. 1915, 7; 18 Dec. 1915, 5.

²⁵ Wasserstein, Herbert Samuel, 190 and also the papers in HO 45/10796/303883 and FO 371/2844/76178).

²⁶ An especially notorious suppression was that of the socialist-pacifist Glasgow Forward in January 1916. This incident and its aftermath have been discussed at length in connection with government labour policy and revolutionary politics and craft unionism on the Clyde. See Terence Brotherstone, "The Suppression of the 'Forward,'" The Journal of the Scottish Labour History Society 1 (1972): 5-23; James Hinton, "The Suppression of the 'Forward': a Note," The Journal of the Scottish Labour History Society 7 (1973): 24-29; Iain

Secretary during 1916, regarded Regulation 51 as a supplement to Regulations 27 and 51A. He believed that administrative action under the former, more draconian, power was justified only in respect of antiwar literature that had been condemned in court. In March 1915 Samuel was informed that the pamphlets against which the City of London magistrate had ruled last October were still being distributed by the ILP's publishers in Manchester. Samuel did not hesitate to order the seizure and destruction of stocks of some eight thousand copies and provided a brisk defence of this action in the House of Commons. In addition, the first version of a regularly updated "Hostile Leaflets" Circular was sent out to each constabulary, instructing them to seize and destroy any copies of listed material circulating in their jurisdiction.²⁷

It is not precisely clear at whose original prompting action was to be taken under Regulation 51. The authority to search and seize was, formally, vested in the CMAs.²⁸ But responsibility for the execution of orders under the DORR rested with the police, acting in accordance with the Home Office guidelines. In April 1916 the Special Intelligence branch of the War Office promised to consult the Home Office on matters of censorship but sometimes deployed Regulation 51 without informing the latter.²⁹ After South Wales constabularies carried out a wave of search and seizure orders on local ILP and NCF branches during May and June 1916, it became obvious that policemen too sometimes ignored Samuel's strict

McLean, "The Ministry of Munitions, the Clyde Workers' Committee, and the Suppression of the 'Forward': an Alternative View," The Journal of the Scottish Labour History Society 6 (1972): 3-25. For a useful summary of the points at issue in this historiographical debate, see Jose Harris, William Beveridge: a Biography (Oxford, 1977), 215-27.

²⁷ HO 45/10786/297549/23, Chief Constable, Salford to Troup, 13 Mar. 1916; Troup (minute), 3 Apr. 1916; PD (Commons), 6 Apr. 1916, 81, col. 1351-52; HO 158/17/293, Troup to Chief Constables, 12 Apr. 1916. This directive provides an illuminating example of the centralisation of policing discussed in Morgan, Conflict and Order, especially 65-66.

²⁸ CNAs were similarly empowered but appear to have been uninvolved with the administration of Regulation 51.

²⁹ HO 45/10801/307402/33, Troup (minute of conversation with General Cockerill), 28 Apr. 1916.

interpretation of Regulation 51. Both Snowden and Ramsay MacDonald complained to the Home Secretary about the confiscation of material which had not been brought before the magistracy. On 26 June 1916 Arthur Ponsonby drew the attention of MPs to two egregious examples of excessive police behaviour: the removal from a private residence in Penarth of copies of the Sermon on the Mount and the seizure from the ILP's Port Talbot branch of a Women's Labour League pamphlet called The Need for Baby Clinics.³⁰

Sir Edward Troup was forced to concede in private that "the action of the Police and Military authorities is very haphazard," and on 29 June 1916 Samuel admitted to the Commons that some perfectly unobjectionable material had been seized during the recent police raids.³¹ This statement was preceded by the conveyance to the police of a revised Home Office directive.

In order to secure proper and uniform action in this matter, the Secretary of State desires that in future, except in a serious case where immediate action is necessary, you should not proceed under Regulation 51 or 51A against pamphlets not included in the Home Office Circulars without referring first to the CMAs, who have received instructions in the matter from the War Office....³²

The above proviso, concerning any "serious case," certainly invited arbitrary police measures. In any case, Samuel alone did not dictate the ground rules for the use of Regulation 51. In June 1916, for example, mountains of documentation were removed from the London offices of the NCF and the National Council Against Conscription. This action was taken by order of the security services and, in the latter instance, with no prior knowledge on the part of the

³⁰ HO 45/10786/297549/35, Snowden to Samuel, 10 June 1916; HO45/10801/307402/57 (for Ramsay MacDonald's [undated] list of "Literature Recently Seized by Police"); PD (Commons), 26 June 1916, 83, col. 509-10. The police raids were covered in LL, 13 May 1916, 2; 25 May 1916, 1; 8 June 1916, 6; 15 June 1916, 1.

³¹ HO 45/10801/307402/57, Troup (minute), 10 June 1916; PD (Commons), 29 June 1916, 83, col. 1087.

³² HO 158/17/373, Troup to Chief Constables, 27 June 1916.

Home Office.³³

The reference to Regulation 51A in the Home Office circular was possibly included because of the dubious circumstances in which South Wales police had recently invoked this DORR. The chair of the ILP's Cwmavon branch, Mr. Harry Davies, had been served a summons threatening destruction of certain UDC pamphlets to which Sir John Simon had taken no exception last September. E.D. Morel advised Davies to raise this point in court and even furnished him with a copy of the letter he had received from the then Home Secretary. The Port Talbot magistrate, however, ignored this evidence and, on 12 June 1916, ordered destruction of the UDC material regardless.³⁴ Also in June 1916, the parliamentary critics of DORA coordinated two protests against the proscription of dissenting political activity.³⁵ A phalanx of about twenty Radical Liberals and Labour men could always be counted upon to defend free speech from executive or judicial interference. This informal civil liberties group was more or less coterminous with the anticonscription lobby that tried to keep at the forefront of MPs' attention the plight of conscientious objectors. The NCF ensured that sympathetic MPs were primed with information about tribunal decisions and the maltreatment of 'absolutists' in military custody. The organisation sometimes adopted the same strategy to publicise the petty persecutions of magistrates and 'domiciliary visits' by the police.³⁶

Another pressing civil liberties issue was the challenge to the rule of law posed by measures such as Regulation 51. J.A. Hobson raised this point in a more general overview of the impact of war on freedom of speech.

³³ Hiley, "Counter-Espionage and Security," 651.

³⁴ CPT 77, Francis Johnson (Secretary, ILP) to Morel, 7 June 1916; Morel to Harry Davies, 8 June 1916; Davies to Morel, 19 June 1916.

³⁵ PD (Commons), 1 June 1916 82, col. 2977-3013 passim; 29 June 1916, 83, col. 1093-1174 passim.

³⁶ Ramsay Macdonald Papers (Rylands), Catherine Marshall (Secretary, NCF) to Radical MPs, 16 May 1916. On the NCF's links with the anticonscription/civil liberties lobby in Parliament, see Kennedy, Hound of Conscience, 109-10.

By the terms of this Act as interpreted by the courts, Parliament in effect ceded to the Executive its legislative function, empowering it to make and unmake the laws of England by the operation of its unchecked will. By Administrative Orders of the Privy Council, or other departments of the Executive, numerous invasions upon the legal and customary rights of the subject have been created, new tribunals set up, and new modes of punishment brought into operation.³⁷

The 'suppression' of Bertrand Russell, although it was not carried out under Regulation 51, provides an illuminating case study in the abuses of executive power identified by Hobson. It will be recalled that Russell had been spared a second DORA prosecution over his compromise peace speech in Cardiff on 6 July 1916. Yet, on 1 September 1916, he was subjected to a much more novel imposition: an order under Regulation 14 denying him access to all "prohibited areas" scheduled to the Aliens Restriction Act.

This action had been taken at the behest of the Military Intelligence branch of the War Office. The "prohibited areas" comprised Britain's coastal regions and centres of munitions manufacture. These specially designated zones were placed out of bounds only to enemy alien civilians. Hence, it looked as if the authorities were impugning Russell's loyalty, but the real reason for the ban was, according to Colonel Kell, to prevent Russell from "airing his vicious tenets among dockers, miners and transport workers." Although Russell complained to Lady Ottoline Morrell that the War Office had used against him "a power conferred on them for dealing with spies," he understood that the suspicions articulated by the head of MI5 underlay the use against him of Regulation 14.³⁸ This DORA had already been employed at the height of the 'dilution' struggle around Glasgow, to deport from that city six members of the militant Clyde Workers' Committee.³⁹ Regulation 14 was another useful tool of emergency executive discretion which, like Regulation 51, sidestepped ordinary judicial procedures.

³⁷ J.A. Hobson, "The War on British Liberties." I: "The Suppression of Free Speech," Nation, 15 Apr. 1916, 68-69.

³⁸ HO 45/11012/314670/6, Kell to Blackwell, 3 Sept. 1916; quoted in Rempel, ed., Prophecy and Dissent, 453. See also, Wasserstein, Herbert Samuel, 192-95.

³⁹ McLean, Legend of Red Clydeside, 81-83.

Russell had little chance of successfully challenging the authorities in court. In the recent case of Rex v. Denison, it had been held that "honest" (as opposed to "reasonable") suspicions of a CMA provided adequate grounds for the use of Regulation 14. The Law Journal acknowledged the force of the Lord Chief Justice's ruling but complained that it "does not, however, go to the length which appears to have been assumed in Mr. Russell's case."⁴⁰ Nothing yet sanctioned by DORA produced quite the unanimity of civil libertarian outrage as did this hounding of Russell.⁴¹ Herbert Samuel had deprecated the restriction of Russell's freedom of movement. But he soon became an entrenched upholder of the Government's position.⁴² On 18 October 1916 Lloyd George defended the treatment of Russell by the War Office, on the grounds, inter alia, that "prevention is better than prosecution." The next day one of Russell's parliamentary supporters, Philip Morrell, turned on Lloyd George's use of this constitutionally dubious dictum.

The right hon. Gentleman the Secretary for War said that it was easier to prevent than to prosecute...Of course in a certain way it is much easier to govern by administrative order than by process of law. It is much easier to say: "Oh, no, we shall give an order to stop it beforehand rather than prosecute afterwards, and after treasonable utterances." It is easier, but is it the way to allow fair freedom of opinion in this country? Is it carrying out the undertaking which the Government gave when the Defence of the Realm Act was passed that they would not do anything to suppress fair political opinion?⁴³

⁴⁰ Law Journal, 9 Sept. 1916, 447; Times Law Report, 2 June 1916, 528-29.

⁴¹ Russell ensured that sympathetic MPs were supplied with the necessary information and told his confidante that "we mean, if we can, to get up a great agitation to have the order rescinded" (Bertrand Russell Archive, VI/4, rec. acqu. 69, #1432, Russell to Lady Ottoline Morrell, 9 Sept. 1916). These efforts proved fruitless (Rempel, ed., Prophecy and Dissent, lxiv-lxvi).

⁴² HO 45/11012/314670/6, Samuel (minute), 1 Sept. 1916; PD (Commons), 19 Oct. 1916, 86, col. 878-82.

⁴³ PD (Commons), 18 Oct. 1916, 86, col. 539; 19 Oct. 1916, col. 830. On the refusal to prosecute, see also, DN, 2 Sept. 1916, 4.

Sir George Cave and the Regulation 51 Advisory Committee

Samuel's successor as Home Secretary soon came to appreciate the drawbacks associated with prosecuting dissenters under Regulation 27. But Sir George Cave interpreted Regulation 51 more loosely than had his Liberal predecessor. Cave's ready use of this DORR is difficult to square with his recollections of discomfort in the exercise of arbitrary powers and that he had never acted "otherwise than for the protection of the country."⁴⁴ During March 1917 the Foreign Office was informed that Cave was quite prepared to suppress offensive material without the sanction of the courts. Cave later defended this stricter policy after suppressing an issue of the Worker's Dreadnought. "If we do not seize the paper until after a prosecution," he told MPs, "it is too late, because the paper is already published."⁴⁵

Towards the end of 1917 the Home Secretary was stung by criticism of Regulation 51, attacks which were linked to the furor sparked by Regulation 27C. As a result Chief Constables and CMAs were, from 21 December 1917, instructed to obtain the prior assent of the War Office and Home Office before destroying material seized under Regulation 51. This minor amendment of the DORR merely regularised existing practice, but Cave wanted to eradicate any suspicion that subordinate authorities might act unilaterally.⁴⁶ Perhaps a similar intent lay behind the appointment in January 1918 of a Home Office Advisory Committee to adjudicate on antiwar literature seized under Regulation 51. This body was, more likely, constituted in order to clear the backlog of dissenting propaganda that had accumulated from

⁴⁴ Sir Charles Mallet, Lord Cave: A Memoir (London, 1931), 203-04.

⁴⁵ PD (Commons), 29 Oct. 1917, 98, col. 1178-79; FO 395/140/25424/60439, Troup to de Bunsen, 21 Mar. 1917. During Cave's first year of office several items were added to the "Hostile Leaflets" circular in this underhand fashion. Among the pamphlets and leaflets so prohibited was Siegfried Sassoon's famous statement—originally read in the Commons on 30 July 1917—of his refusal to serve further in the army (see HO 158/19/35, "Hostile Leaflets: Circular No. 10," 2 Aug. 1917).

⁴⁶ PD (Commons), 12 Dec. 1917, 100, col. 1264-99 passim; HO 45/10888/352206/128, Troup to Brade, 14 Dec. 1917; SRO 1348, 21 Dec. 1917.

a spate of recent police raids. On 17 January 1918 Cave admitted that twenty-four such seizures had taken place from September to November of the previous year.⁴⁷ The Metropolitan Police especially had gathered large stocks of confiscated peace literature. The fate of most of this material was still unsettled in the new year.⁴⁸

The Regulation 51 Advisory Committee was to be chaired by the High Court judge, Mr. Justice Shearman, and to include the proprietor of the Daily Telegraph and Unionist peer, Lord Burnham, and the Unionist MP for Greenock, W.E. Hume Williams. Cave was soon disabused of any notion that the appointment of this tribunal would appease the critics of DORA. UDC supporter and Liberal MP, Corporal Hastings Lees Smith, regarded this quasi-judicial body as clinching proof of the Home Secretary's disregard for the rule of law. The Advisory Committee merely provided cover for the suppression by administrative order of material which Cave "dare not prosecute before a Court of law."⁴⁹ Philip Snowden was disturbed that the Committee would deliberate in private and not necessarily hear the evidence of persons affected by the DORA. This complaint was similar to those which were directed at the Home Office's Regulation 14B tribunal. Snowden was also perplexed by the illiberal composition of the Advisory Committee; Hume Williams was an inveterate opponent of dissent and had delivered a spirited parliamentary defence of executive discretion in a

⁴⁷ PD (Commons), 17 Jan. 1918, 101, col. 482-83.

⁴⁸ Although on 17 February 1918 Arnold Lupton was convicted under Regulation 27, and sentenced to 6 months imprisonment, in connection with his pamphlet Every Day at the Present Time. This had been seized, along with other literature, during the police raid on Lupton's premises in mid-November 1917. The decision to proceed against this former Liberal MP and veteran pacifist was taken jointly by the Home Office and Directorate of Special Intelligence. Lupton was also a founder of the minuscule International Free Trade League, which called for the restoration of an unrestricted commerce with postwar Germany. Basil Thomson described, with characteristic hyperbole, a prewar business agreement between Lupton and 2 German colliery owners as "the nearest approach to what has been termed 'Boloism' that has yet come to light in this country" (CAB 24/42/G.T.3674 Thomson, "Pacifist Propaganda," 18 Feb. 1918. See also, The Times, 4 Feb. 1918, 3; 18 Feb. 1918, 2; HO 144/1459/316284/9, Cockerill to Troup, 3 Dec. 1917; Blackwell (minute), 11 Dec. 1917).

⁴⁹ PD (Commons), 24 Jan. 1918, 101, col. 1134.

December 1917 debate of DORA.⁵⁰

The Advisory Committee liaised with the Press Bureau which, from November 1917, scrutinised all new pamphlets and leaflets submitted to it in accordance with Regulation 27C. The Home Office stressed the importance of coordination, and a Press Bureau official was attached to the newer body in order to minimise the risk of conflicting judgments.⁵¹ But the Advisory Committee's mandate stretched beyond pamphlets and leaflets; occasionally it recommended destruction of individual issues of leading antiwar papers, such as the Call, Ploughshare, Worker's Dreadnought, and Tribunal.⁵² The latter publication was pursued relentlessly by the authorities during 1918. The issue of 14 February included a critical piece on the Army's indifference to the patronage by British soldiers of state-regulated brothels in France. Although a range of women's and 'social purity' organisations had lodged similar protests,⁵³ the Tribunal article was used by the Home Office as a pretext for the paper's suppression. On 15 February 1918 the police tried to track down all circulating copies of the latest issue; they also removed a large quantity from the publishing offices of the NCF. In addition, the London branch of the National Labour Press was raided and the press used for the print-run of the Tribunal dismantled and confiscated.

The newspaper was undeterred by this Home Office show of strength. Its production was taken on by a sympathetic independent operator, Mr. S.H. Street, and the Tribunal actually stepped up its attacks on conscription and the continuation of the war. This editorial defiance only increased the likelihood of further harassment, and, on 22 April 1918, police

⁵⁰ Ibid., 12 Dec. 1917, 100, col. 1289-92; LL, 24 Jan. 1918, 1.

⁵¹ HO 45/10891/356800/1, Brass (minute), 8 Feb. 1918.

⁵² Respectively, the organs of the British Socialist Party, the Socialist Quaker Society, the East London Federation of Suffragettes, and the NCF.

⁵³ See below, 236, n. 77.

immobilised Street's printing machinery as well.⁵⁴ This police raid coincided with further action against the National Labour Press, which printed a variety of dissenting publications. Essential machine parts were removed from its London print shop, along with the 20 April 1918 issue of Sylvia Pankhurst's Worker's Dreadnought. In Manchester the upcoming issue of Satire was targeted, plus three items from the Home Office "Hostile Leaflets" circular.⁵⁵ The Regulation 51 Advisory Committee allowed representations from the injured parties, but they did not really receive a fair hearing. The National Labour Press was simply coerced into pledging that no further copies of Worker's Dreadnought or Satire would be produced on its premises. S.H. Street was less compliant and his printing equipment was retained by the police. This latest setback for the Tribunal prompted an editorial riposte that "there is no limit to the power of the DORA...no act of suppression or oppression which cannot be committed in her name."⁵⁶

The Advisory Committee met nine times from 8 February to 22 November 1918. The tribunal had first to review existing stocks of confiscated material. Thereafter, the panel was usually convened after police raids on dissenting organisations or their publishers. To a certain extent, the Committee merely confirmed earlier departmental decisions. The record of its deliberations includes several references to literature which had long been proscribed by the Home Office. The Advisory Committee delivered judgment on a total of 179 publications,

⁵⁴ Kennedy, Hound of Conscience, 247-49 and passim for the travails of the NCF generally, and the Tribunal in particular, during the final year of the war.

⁵⁵ LL, 2 May 1918, 2. Satire was a monthly paper which, from December 1916 until its suppression in April 1918, was managed and edited by 2 deaf-mute working class anarchists, Leonard Motler and George Scates (Ken Weller, 'Don't be a Soldier!': The Radical Anti-War Movement in North London, 1914-1918 [London and New York, 1985], 48, n. 10). The 3 pamphlets were, Tom Llewelyn Thomas, An Open Letter to the Right Honourable David Lloyd George; T.D. Hutchinson, The Mesopotamia Scandals; Miles Malleon, Second Thoughts.

⁵⁶ Tribunal, 25 Apr. 1918, 1; HO 45/10891/356800/8, Troup to Mr. Justice Shearman, 2 May 1918; T.M. Snagge (Press Bureau) to Blackwell, 3 May 1918; 10, L.S. Brass (minute), 9 May 1918. See also, Forward, 8 June 1918, 1, for representations to the Home Office on Street's behalf from the editors of a number of dissenting publications.

recommending destruction in 121 cases. At least a hundred copies were usually seized by the police. The Committee was probably responsible, therefore, for the destruction of several thousand individual items.⁵⁷ The Home Office invariably acted on the tribunal's advice. The "Hostile Leaflets (Consolidation) List," issued on 1 July 1918, featured all publications recently condemned by the Advisory Committee.⁵⁸ As the upholders of free speech had predicted, the lion's share of this prohibited material had never been judged illegal in any court of law.

Regulation 9A and the Right of Public Meeting

Dissenters often contrasted the legal uncertainty which surrounded the expression of antiwar views with the licence of the jingo press. By mid-1915 several such metropolitan newspapers had begun to publicise forthcoming peace meetings and to urge 'loyal' citizens to attend in protest. Yet the right of public meeting was just as hallowed a liberal principle as freedom of speech. There were, as Deian Hopkin states, "a multitude of laws that governed conduct in public places and defined the slender boundary between meeting and mob." But the essence of this common law precept, as distilled by the still influential Dicey, was that no legal assembly became illegal merely because of unlawful opposition to it, or because of a breakdown of public order.⁵⁹ Local authorities could skirt their limited legal powers to ban public meetings by refusing to let municipal buildings to dissenting organisations. In addition, Metropolitan Police approval was necessary in order to march or assemble on a number of public spaces in London. The requisite permits could easily be withheld, as they

⁵⁷ The recommendations of the Committee are contained in the ledger in HO 45/10888/356800.

⁵⁸ Ibid., 3, Home Office to Commissioner, Metropolitan Police, 9 Mar. 1918; HO 158/20/3, "Hostile Leaflets: Circular No. 21," 1 July 1918.

⁵⁹ Hopkin, "Domestic Censorship," 164; Dicey, Law of the Constitution, ch. 7.

were from the sponsors of a peace rally in Hyde Park planned for May 1915.⁶⁰

On 23 July 1915, E.D. Morel warned Trevelyan that the jingo press was excoriating dissent "in language calculated to inflame passions and lead to rioting." The UDC secretary held the Daily Express directly accountable for the disruption of the organisation's recent public events around London.⁶¹ Trevelyan then asked Sir John Simon to investigate these instances of intimidation, which had culminated in the assault at Kingston of the Liberal MP, Arthur Ponsonby, and two fellow UDC speakers. The Home Secretary's residual liberalism was offended by this orchestrated campaign of abuse, but he took no steps either to constrain the patriotic press or to reinforce public order at peace gatherings. Nor did Simon seek to allay the civil libertarian disquiet of C.H. Norman when this abrasive pacifist personality protested recent incitements to violence in the popular press. The Home Secretary chose, instead, to remind the treasurer of the Stop the War Committee about his own legal position in relation to Regulation 27.⁶² Late in November 1915 the Daily Express was again implicated in the break-up of a UDC meeting. After this incident at London's Memorial Hall, Simon stated publicly that the police would strive to maintain order, but that antiwar speakers would not necessarily be guaranteed a fair hearing.⁶³ Any greater protection for dissent would surely have antagonised prowar public opinion.

Although antiwar speakers had been prosecuted after the fact under Regulation 27, the

⁶⁰ International Institute for Social History, "Civil Liberties under the Defence of the Realm Act, 1914-1916" (Prohibition of Meetings, &c.); HO 45/10741/263275/28, 30, 31, 34.

⁶¹ CPT 74, Morel to Trevelyan, 23 July 1915. Among the other culprits identified by Swartz, Union of Democratic Control, 107, were Northcliffe's Evening Standard, the Daily Sketch, and Horatio Bottomley's notoriously scurrilous John Bull.

⁶² CPT 74, Simon to Trevelyan, 29 July 1915. The latter's meeting with the Home Secretary, 3 days before, was discussed at the UDC Executive Committee of 27 July 1915 (Ramsay MacDonald Papers [Rylands], envelope 10); HO 45/10741/263275/67, C.H. Norman to Simon, 25 July 1915; Simon to Norman, 29 July 1915. This correspondence was published in The Times, 14 Aug. 1915, 8.

⁶³ HO 45 10742/263275/110, Trevelyan to Simon, 26 Nov. 1915; PD (Commons), 2 Dec. 1915, 76, col. 871-72.

right of public meeting was not yet circumscribed by DORA. Herbert Samuel's January 1916 injunction against incitement to resist the provisions of the impending Military Service Act,⁶⁴ however, applied equally to public meetings as to the written word. The new Home Secretary reviewed the question of unlawful peace meetings more closely after he received notification of a proposed Stop the War Committee rally in Trafalgar Square for 20 April 1916. Organisations were ordinarily granted access to the square automatically, as long as they were the first to inform the Office of Works about their plans for the date in question. On 14 March 1916 Troup ventured that the rules which governed the right of assembly in Trafalgar Square might be altered so as to prohibit meetings which advocated stopping the war. He then conceded that such action "would be open to much criticism," a viewpoint shared by the Liberal Home Secretary.

The Executive ought not to suppress a public meeting for the reason that it is held in opposition to their policy. There have been occasions in history, and it is possible that there may be others in the future, on which patriotic citizens would be rendering the best service to the country by advocating the ending of a war in which it had been engaged. It is not for the Government of the day to determine whether such an occasion has arisen or not.⁶⁵

Samuel was trying to maintain a liberal stamp on his key office of state, even as he accepted the inevitable delay of the social reform which, as a New Liberal, he would have liked to carry forward. Yet on the issue of freedom of assembly, as on others pertaining to DORA, Samuel was unable to protect even those liberal fundamentals to which he was also committed.⁶⁶ The Home Secretary had kept alive the possibility of more drastic action by agreeing with Troup's other recommendations. Both men felt that the Trafalgar Square demonstration might be dispersed legitimately in the event of serious disorder or after the

⁶⁴ See above, 146.

⁶⁵ HO 45/10511/130791/22, Troup and Samuel (minutes), 14 Mar. 1916.

⁶⁶ On this point, see Wasserstein, Herbert Samuel, 165 and Samuel's own view of the Home Office as a great reforming ministry, whose contribution to social progress was regrettably, but necessarily, curtailed during the war (Lord Samuel, Memoirs, [London, 1945], 114).

commission of an offence against Regulation 27. According to the Commissioner of the Metropolitan Police, Sir Edward Henry, both these outcomes were likely. The Stop the War Committee had issued the resolution for discussion--a possibly 'prejudicial' call for an immediate peace and for MPs to withhold financial appropriations. This document had been reproduced in the patriotic press, which hinted, ominously, that public feeling was "aroused." Henry anticipated the "unedifying spectacle" of police scuffling with the angry soldiers likely to be in attendance. He also ventured that even five hundred of his men might be unable to maintain public order. The Commissioner appreciated that Regulation 27 could not apply until after the resolution was put, so he asked for a ruling on the legality of an outright prohibition.⁶⁷

Samuel was by now prepared to contemplate this alternative. He suggested to the Attorney-General, Sir F.E. Smith, the possibility of a new DORR banning public meetings "likely to give rise to grave disorder, making undue demands on the Police or the Military." Smith advised that the meeting could be banned by reference to the common law alone, but that a DORR was perhaps the most "prudent" way of proceeding. On 18 April 1916 Samuel duly announced that he intended to prohibit the Trafalgar Square rally under a new DORR, 9A, issued the next day. The Home Secretary repeated to MPs his private stricture that no assembly could be banned merely for opposing the war.⁶⁸ The language of Regulation 9A certainly reflected his paramount concern for the preservation of public order. Yet there was an element of special pleading in Samuel's attempt to reconcile this new power with his liberal solicitude for freedom of expression. Given the unpopularity of the peace forces, the question of public order at antiwar gatherings was inextricably tied to the question of domestic

⁶⁷ HO 45/10511/130791/23, Sir Edward Henry to Home Office, 15 Apr. 1915; The Times, 18 Apr. 1915, 5. The legality of the Stop the War Committee had also been the subject of parliamentary questioning the previous summer (PD [Commons] 28 June 1915, 72, col. 1456-57 and 30 June 1915, col. 1796-97).

⁶⁸ Ibid., Samuel to Smith, 18 Apr. 1915; 26, Smith to Samuel, 18 Apr. 1915; PD (Commons), 18 Apr. 1916, 81, col. 2247.

censorship.

At least Regulation 9A had been drafted in response to the specific circumstance of the Trafalgar Square meeting. Despite its more general applicability, the measure was used sparingly by Samuel's department during 1916. Indeed, up to the middle of October 1916, all seven local authority requests for action under Regulation 9A had been turned down by the Home Office. This moderation did not protect Samuel from liberal criticism over the minor revisions to 9A effected on 3 October 1916. Whereas the original DORR applied only to public places, the revised version omitted this limiting provision. This change was introduced not at the behest of Samuel, but of the Chief Secretary for Ireland. The Irish authorities were perplexed by the inflammatory nationalist rallies of the Gaelic Athletic Association, which generally took place on private property and, hence, could not be stopped under 9A. In addition, after the amending Order in Council, Regulation 9A could be invoked "where there appears to be reason to apprehend...grave disorder," instead of "where there is [underlining mine] reason." Samuel dismissed this looser criterion as an insignificant "drafting alteration." He also assured the House that only the Home Office, not any subordinate authority, was empowered to suppress public meetings.⁶⁹

This centralisation was frustrating for those Chief Constables and representatives of the jingo lobby who regarded 9A as a useful weapon.⁷⁰ It was over the objections of both that Samuel refused to intercede against the NCCL, sponsors of a peace conference in Cardiff on 11 November 1916. The leader of the successful jingo counter-protest even sent the Home Office a mocking telegram after the dissenters were, predictably, routed. As Samuel had "delegated power under the Defence of the Realm Act to the citizens of Cardiff, they have smashed up the pro-German conference." In response to a Home Office query about police inaction during

⁶⁹ PD (Commons), 12 Oct. 1916, 86, col. 302 and passim. See also, HO 45 10810/311932/12A, H.E. Duke to Samuel, 9 Sept. 1916.

⁷⁰ See PD (Commons), 19 Dec. 1916, 88, 1327.

this near-riot, the local Chief Constable alluded to his acute shortage of manpower. But there is also evidence of the Cardiff City constabulary's bias against dissent. Although the Chief Constable had anticipated problems in connection with the planned patriotic demonstration as well, he requested only that the NCCL conference be banned.⁷¹

Regulation 9A was not suddenly enforced more strictly after Cave's succession of Samuel at the Home Office in December 1916, but in the last year of the war the department did prove more amenable to prohibiting peace gatherings. It was perhaps surprising that the famous Leeds Convention of June 1917 even took place, given the consternation which this planned event spread through official circles. Leeds police were granted permission to prohibit two outdoor meetings scheduled by the organisers of the conference. The "strong feeling" in the city and the promise of counter-demonstrations by 'patriotic labour' groups had persuaded the Chief Constable that only indoors could police supervision be effective.⁷² These precautions did not prevent a serious breakdown of public order on the weekend of the meeting, although the violence was directed at the Leeds Jewish community rather than conference delegates.⁷³

One of the Leeds Convention's resolutions had called for the formation of local 'soviets' in Britain. By late June 1917 the thirteen 'districts' into which the country was divided by the provisional committee of Workers' and Soldiers' Councils had arranged to hold follow-up conferences. Although these initiatives made little impact on the wider labour movement, the Government and various local authorities were disturbed by this self-conscious imitation of the Russian Revolutionaries. Shaky police and municipal officials in Glasgow were alarmed at the prospect of a joint conference of the two Scottish 'soviets' on 11 August

⁷¹ HO 45/10810/311932/19, Chief Constable, Cardiff City Police to Home Office, n.d. and to Troup, 10 Nov. 1916 (the telegram is enclosed in the above piece).

⁷² Ibid., 35, Chief Constable, Leeds to A.L. Dixon (senior clerk, Home Office), 31 May 1917 and 1 June 1917; Troup (minute), 1 June 1917.

⁷³ See Holmes, *Anti-Semitism in British Society*, 130-32.

1917. They requested the Secretary of State for Scotland to cancel this event. The latter agreed with the public order case for an order under 9A; the War Cabinet went further, declaring as illegal the objects of any such meeting. The 'district' conference in Birmingham was banned as well, and the booking of premises in Southampton, Manchester, and Leeds, suddenly rescinded.⁷⁴ The London 'district' meeting at the Brotherhood Church, Southgate, on 28 July 1917, was allowed to proceed. The head of Metropolitan Police Special Branch, however, gave advance notice of the event to the Daily Express and then awaited the "rude awakening" of the participants by the patriotic mob.⁷⁵

Also in August 1917 an outdoor ILP meeting in Barrow was prohibited.⁷⁶ Late in November a North London Herald League meeting in Finsbury Park was banned. This event usually attracted a hostile prowar crowd, and Cave justified the order by reference to the threat of "grave disorder." In addition, Basil Thomson had earlier voiced his concern that serving soldiers, "whipped up" to attend these meetings, had begun to insist on a fair hearing for the speakers, as it became obvious that they were not the blatant 'pro-Germans' portrayed by the jingo press.⁷⁷ In May 1918 the Home Office cancelled a proposed North London labour

⁷⁴ White, "Soviets in Britain," 186-189; Iain McLean, "Popular Protest and Public Order: Red Clydeside, 1915-1919," in Popular Protest and Public Order, ed. J. Stevenson and R. Quinault (London, 1974), 222-23.

⁷⁵ Thomson, Scene Changes, 383. See also, Rempel et al., eds., Pacifism and Revolution, xxxix, for a view of this antipacifist riot as an episode of massive symbolic import in the wartime odyssey of British dissent: the 'peace by negotiation' forces never regaining their buoyant optimism of the early summer, and the War Cabinet demonstrating thereafter an increased resolve to combat organised dissent.

⁷⁶ HO 45/10786/297549/56.

⁷⁷ PD (Commons), 29 Nov. 1917, 99, col. 2210; HO 45 10743/263275/249, Thomson (minute), n.d. This socialist organisation and about 20 similar groups nationwide were formed in association with George Lansbury's Daily Herald during the prewar labour unrest. Most Herald Leagues collapsed after the outbreak of war, but the North London body became a focus of metropolitan antiwar radicalism, not to mention ultra-patriotic hostility (see Weller, 'Don't be a Soldier', 36-59).

demonstration against the continuation of this "capitalistic war."⁷⁸ On 4 June 1918 the Lord Mayor of Birmingham was authorised to ban a Women's Peace Crusade rally for a 'peace by negotiation'.⁷⁹ The Home Office not only responded to harassed local police chiefs. The department was also swayed by the very 'patriotic labour' spokesmen who engineered the disruption of peace meetings. On 11 June 1918 Victor Fisher, associate of Lord Milner and secretary of the British Workers' National League, notified Cave about the British Socialist Party's announcement of a Sunday peace demonstration at Tower Hill. Fisher observed that the area was usually deserted at weekends and that unpatriotic resolutions carried by "East End aliens" would be misconstrued as the authentic voice of the City. He threatened a simultaneous protest by his organisation at the same place unless this "inappropriate" meeting was banned.⁸⁰

Regulation 9A was invoked only once on mainland Britain before August 1917 and used only sporadically thereafter. It was a comparatively insignificant weapon in the Government's antidissenting armoury. Indeed, this DORR was far less of a hazard to the public expression of antiwar views than was organised rowdiness, drummed up by the jingo press with the tacit consent or, on at least one occasion, the connivance of the authorities. The ill-fated Brotherhood Church meeting of July 1917 was a stark illustration that dissenters were not only vulnerable to the formal mechanisms of control such as Regulation 9A. A politician

⁷⁸ This order was served after the Daily Express called for the prohibition of the rally, stressing that "it is essential that this 'celebration' shall not be allowed to misrepresent patriotic British Labour" (Daily Express, 2 May 1918, 3; HO 45/10810/311932/59, Henry to Troup, 2 May 1918; Home Office [unsigned minute], 2 May 1918). An alternative event was planned but staged only after the peace resolution had been replaced by a less contentious civil liberties motion and another protesting the ban of the original meeting (HO 45/10810/311932/62-65).

⁷⁹ HO 45/10744/263275/368, Simpson (minute), 3 June 1918.

⁸⁰ *Ibid.*, 373, Victor Fisher to Cave, 11 June 1918; Troup (minute), 26 June 1918. Also at Fisher's urging, Cave prohibited a Hyde Park rally of the Women's International League, scheduled for 26 July 1918, the same date and location as a planned show of patriotic support for Britain's French ally (*ibid.*, 379, Fisher to Cave, 7 May 1918; Henry to Troup, 10 July 1918; PD [Commons], 11 July 1918, 108, col. 486-87).

such as Samuel, meanwhile, could soothe his tender liberal conscience by the restrained use of 9A. Given the overt hostility to dissent of ultra-patriotic politicians and publicists, however, not to mention an overwhelmingly prowar public, it is hardly surprising that the DORR was infrequently deployed. On the few occasions that meetings were banned, the Home Office was guided both by its own and the popular animus towards dissent, and by depleted local constabularies' genuine concern to preserve public order.

The Regulation 27C Controversy

(i) The Search for the British Bolo

Sir George Cave's preference for the containment of dissent by administrative as opposed to judicial action was manifest in his support for Regulation 27C, drafted by his department in November 1917. This controversial addition to the DORRs was bound up with attempts to discredit the peace movement by exposing the enemy influences behind it. The search for a 'British Bolo' was itself a reflection of growing high-level concern about the wider appeal of a negotiated peace. By autumn 1917 the Allied strategic picture was unusually grim. On 6 November 1917 the Passchendaele offensive was finally halted, with little to show for the 300,000 casualties incurred. Shortly after, the Italians were routed at Caporetto. In the east, the Bolshevik Revolution installed a Soviet Government that was unequivocally committed to making peace.

During August 1917 Sir Edward Carson had been instructed to coordinate official propaganda initiatives on the Home Front.⁸¹ The Unionist War Cabinet member's roving commission also allowed him to investigate the activities of organised dissent. Carson was convinced that behind peace propaganda lay some "powerful driving force." He suggested a more detailed inquiry, to ascertain whether dissent was, indeed, sponsored by the enemy. The

⁸¹ CAB 23/3/221(13), 21 Aug. 1917.

alarmist note struck by Carson in his memorandum of 3 October 1917 was not matched by the more even tenor of the Ministry of Labour's report. This department attributed the healthy financial position of dissent to the patronage of certain groups by Quaker businessmen. In addition, other labour intelligence appeared to confound Carson's belief that peace propaganda was stimulating industrial unrest.⁸² Yet, at the War Cabinet of 19 October 1917, Carson's conspiratorial viewpoint prevailed, and the Home Secretary was asked to oversee a thorough investigation of dissenting organisations.⁸³

This decision coincided with an upsurge of press speculation about the links between British pacifism and 'German gold'. The loyalties of dissent had been thus imputed periodically by the jingos ever since the summer of 1915. The latest allegations were lent a spurious credibility by revelations of treachery from across the channel. These were being skilfully exploited by Clemenceau to isolate the peace party in France. However, the actual charges against the principal scapegoat, Paul-Marie Bolo, concerned his alleged use of German money to promote an expansionist French war policy in two jingo newspapers, Le Journal and Rappel. British dissent could hardly stand accused of steeling the enemy's resolve by soliciting support for a punitive peace. Lloyd George, however, encouraged this insinuation against the peace movement in Britain, warning a patriotic audience at the Albert Hall, on 22 October 1917, "to look out for Boloism in all shapes and forms." A week later, on 29 October 1917, Bonar Law promised MPs that the Government was determined "to identify and get hold of 'Boloism.'" With heavy irony, the dissenters suggested that the authorities were completely

⁸² In the aftermath of the Leeds Convention, the War Cabinet had been assured by the Commission of Enquiry into Industrial Unrest that the rising cost of living, profiteering, and fatigue, not inchoate pacifism, were the mainsprings of working class discontent (see Rempel et al., eds., Pacifism and Revolution, 173).

⁸³ CAB 24/4/G.157, Carson, "Memorandum on Pacifist Propaganda," 3 Oct. 1917; CAB 24/28/G.T.2274, G.H. Roberts (memorandum), 10 Oct. 1917; CAB 23/4/253(1), 19 Oct. 1917. See also, Swartz, Union of Democratic Control, 178-83.

off track in searching for the 'British Bolo' inside the peace camp.⁸⁴

It is not at all clear whether even Sir George Cave believed in the dissenting-German connection, but he willingly exploited the 'Bolo' hysteria to tighten Home Office control over dissenting propaganda. The Home Secretary had just commissioned Basil Thomson to undertake a separate inquiry into the peace movement. Thomson was not inclined to play down threats to the realm, real or imagined, but he was certain that the peace movement was not funded by the enemy. Yet, apprised of the War Cabinet's contrary suspicions (probably by Cave), Thomson adjusted his own assessment accordingly. His revised report did not incriminate dissent falsely but talked vaguely about Germany's prewar penetration of British institutions and suggested a detailed examination of peace movement accounts.⁸⁵ During the week of 12 November 1917, thirteen dissenting organisations and individuals were raided by the police who, acting in cooperation with the security services, seized financial and membership records and large quantities of peace literature. Subsequent scrutiny of the books of the NCF, NCCL, Peace Negotiations Committee, and Fellowship of Reconciliation yielded no evidence of tainted funding. In fact, with the partial exception of the latter organisation, the peace movement's finances were in a somewhat parlous condition. The NCF especially, concluded Thomson a month later, "is conducted in an unbusinesslike way by cranks."⁸⁶

Although the search for a 'British Bolo' had proven fruitless, the police raids had

⁸⁴ For the quotation from Lloyd George's speech and the 'Bolo' phenomenon generally, see Rempel et al., eds., Pacifism and Revolution, xlv, 341-43. Bonar Law's statement is from PD (Commons), 29 Oct. 1917, 98, col. 1191. On the dissenting response, see, for example, BLPES col. misc. 179/23, NCCL newsletter, Nov. 1917; Bertrand Russell, "Who is the British Bolo?" Tribunal, 22 Nov. 1917, 2.

⁸⁵ Thomson, Scene Changes, 392 (diary, 23 Oct. 1917); Swartz, Union of Democratic Control, 183-84; CAB 24/4/G.173 (appendix), Basil Thomson, "Pacifist and Revolutionary Organisations in the United Kingdom", n.d. Along with Kell of MI5, the head of Metropolitan Police Special Branch was the major influence behind the wartime growth of internal security operations in Britain.

⁸⁶ CAB 24/35/G.T.2980, Thomson, "Pacifism," 13 Dec. 1917. On the police raids, see idem, Scene Changes, 394-95 (diary, 12 Nov. 1917); Tribunal, 22 Nov. 1917, 2.

created the right atmosphere for Cave's new censorship proposals, which were attached to Thomson's earlier report and submitted to the War Cabinet on 13 November 1917. The Home Secretary was unhappy with the available means for the containment of dissent. He was especially dissatisfied with the lack of any legal mechanism for the suppression of antiwar literature prior to its publication. Neither prosecutions nor seizures corrected the damage inflicted by the wide circulation which offensive material quickly achieved. Cave's answer was a DORR necessitating all pamphlets and leaflets about the present war or future peace terms to be approved by the Press Bureau before publication. A draft was approved at the War Cabinet of 15 November 1917, after which meeting Cave delivered a brief Commons statement about the imminent introduction of this further constraint on freedom of the written word.⁸⁷ The new DORR, 27C, was implemented by Order in Council the following day.

(ii) The Order in Council of 16 November 1917

Regulation 27C added a compulsory, preventive component to the machinery of censorship in wartime Britain. Hitherto there had existed for dissent the very real threat of administrative or legal action after publication. But there had been no obligation to submit material to the censors beforehand. The Press Bureau was quickly instructed to send the Home Office a daily list of all leaflets passed or stopped. Chief Constables were to be supplied with a weekly update of prohibited material. The police were also authorised to initiate appropriate administrative or legal action against any literature which transgressed the new DORR. To this end, the Order in Council also amended Regulation 51, to allow for the seizure and destruction of material printed or distributed in contravention of 27C.⁸⁸ In addition, 27C also required all future pamphlets and leaflets to bear the name and address of

⁸⁷ CAB 24/4/G.173, Cave, "Pacifist Propaganda," 13 Nov. 1917; CAB 23/4/274(17), 15 Nov. 1917; PD (Commons), 15 Nov. 1917, 99, col. 556-57.

⁸⁸ HO 45/10999/352206/2, Blackwell (minute), 20 Nov. 1917; HO 158/19/153, Troup to Chief Constables, 23 Nov. 1917.

the author and printer. The latter stipulation added to the DORRs a provision of the 1869 Newspapers, Printers, and Reading Rooms Repeal Act. The Daily Express applauded this attempt to root out the "pestilential anonymity under which writer and printer of seditious pamphlets hid themselves." The critics of 27C, meanwhile, began to suspect the mandatory imprint of discouraging commercial printers from accepting 'dubious' contract work from dissenting organisations.⁸⁹

The Victorian statute had already been invoked against the publishers of antiwar material. In April 1917 Bow St. magistrates had fined the National Labour Press for producing a pamphlet without an imprint of its name and address. The company had printed this item, The Knock-Out Blow for the New Order Press, which had incorrectly identified itself as the printer. The ILP's publishers had been found guilty of an essentially technical offence which surely would not have been prosecuted had the pamphlet in question been less provocative. But The Knock-Out Blow urged the British people to stop the war by acts of revolutionary defiance. It had been placed on the Home Office "Hostile Leaflets" circular in February 1917, and three representatives of the New Order Press had been convicted and fined on separate charges laid under Regulation 27. On 30 May 1917 two other items were added to the "Hostile Leaflets" circular for their omission of the requisite publishing information.⁹⁰ The following February S.H. Street, printer of the Tribunal briefly before it was forced to publish clandestinely in April 1918, was convicted under this Victorian legislation and fined £72 10s plus costs. The charges resulted from Street's printing of the pacifist pamphlet which led to the imprisonment for six months of Arnold Lupton at the same Bow St. hearing. Also in February 1918, a Bingley ILP member was fined £105 with £30 costs by Bradford magistrates, for producing without imprint C.H. Norman's pamphlet, Some Secret Influences Behind the

⁸⁹ Daily Express, 16 Nov. 1917, 2; Nation, 16 Feb. 1918, 624; Tribunal, 21 Feb. 1918, 2.

⁹⁰ The Times, 2 Apr. 1917, 5, 30 Apr. 1917, 5; HO 158/18/225, "Hostile Leaflets: Circular No. 5," 20 Feb. 1917; 304, "Circular No. 8," 30 May 1917.

War.⁹¹

The old law of imprint was not superseded by Regulation 27C. For example, after the Tribunal went underground, the police tried to ascertain the identity and location of the new printers from Violet Tillard, Acting Honorary Secretary of the NCF. When Tillard refused to disclose this information she was fined a hundred pounds under Regulation 53 for refusing to cooperate with the police.⁹² The authorities then closed in on Joan Beauchamp, the nominal publisher of the Tribunal. They could not use 27C as a locus standi against Beauchamp because newspapers were not covered by the DORR. The Newspapers, Printers, and Reading Rooms Repeal Act was invoked instead. Specifically, it was alleged that the Tribunal's publishing imprint was inaccurate, that Beauchamp was not its real printer, and that the newspaper was not produced at the London publishing offices of the NCF. At Beauchamp's Bow St. trial on 22 August 1918, she again refused to divulge the whereabouts of the Tribunal's press. Her silence led to the laying of vindictive contempt charges, long after the initial conviction and two hundred pound fine were overturned on appeal in October 1918.⁹³

(iii) The Critical Responses to Regulation 27C

Regulation 27C had, along with the police raids and official and unofficial pronouncements on 'Boloism', placed the peace movement on the defensive. On 24 November 1917 Basil Thomson noted with obvious satisfaction that "the newspaper outcry about 'Boloism' has had the effect of hardening public opinion against them [the pacifists]." The December 1917 newsletter of the NCCL referred to an upsurge of violence and intimidation at

⁹¹ See above, 183, n. 48; The Times, 5 Feb. 1918, 3. The last 2 charges were probably brought under the older statute rather than Regulation 27C because they related to pamphlets which had been published before the DORR took effect.

⁹² Kennedy, Hound of Conscience, 249-50. After Tillard's conviction was upheld on appeal and in lieu of her refusal to pay a fine, she was sent to Holloway Prison for 61 days on 6 August 1918. The NCF saw the Tillard case as evidence of DORA being "extended and distorted far beyond its original function" (Tribunal, 25 July 1918, 4).

⁹³ *Ibid.*, 250-51.

antiwar meetings.⁹⁴ Several extraneous developments late in 1917, however, provided some much-needed encouragement for dissent. On 29 November 1917 the Daily Telegraph published Lord Lansdowne's famous appeal for a negotiated end to hostilities. The dissenting camp was profoundly stirred by the Lansdowne Letter, despite the avowedly conservative thrust of its argument. Surely the desire for peace was widespread, they reasoned, if such a pillar of the establishment as this former Foreign Secretary was prepared to abandon pursuit of a "knock-out" blow. Dissenters felt similarly vindicated by the Bolsheviks' release of the Allied secret treaties during December 1917. Translations of these texts in the Manchester Guardian confirmed dissenting fears about grasping Allied war aims. Of still greater import was Labour's Memorandum on War Aims, ratified by a special Party Conference on 28 December 1917. The document demonstrated that keynote dissenting ideas—democratisation of foreign policy, armaments limitation, a League of Nations—had filtered down to the labour mainstream.⁹⁵

After future military assistance from Russia was apparently ruled out by the Soviet-German armistice of 15 December 1917, some ministers seriously entertained the idea of an early peace at the expense of Britain's former eastern ally. Although Lloyd George briefly contemplated such a course, he was not convinced of Germany's willingness to negotiate.⁹⁶ But the threat of a compromise peace being forced by the domestic strains of the war could not be discounted. There was abundant evidence late in 1917 of working class grievances over price inflation, food shortages, and inequality in its distribution. The looming "crisis of

⁹⁴ CAB 24/34/G.T.2809, Thomson, "Pacifism," 24 Nov. 1917; BLPES col. misc. 179/24, NCCL newsletter, Dec. 1917.

⁹⁵ Robbins, Abolition of War, 149-53; Swartz, Union of Democratic Control, 165-69; J.M. Winter, "Arthur Henderson, the Russian Revolution and the Leadership of the Labour Party," Historical Journal 15 (1972): 767-73.

⁹⁶ David R. Woodward, "The Origins and Intent of David Lloyd George's January 5 War Aims Speech," The Historian 24, 4 (1971): 26-35; W.B. Fest, "British War Aims and German Peace Feelers during the First World War, December 1916-November 1918," Historical Journal 15, (1972): 303-05.

defeatism" deepened in January 1918 with the start of a fresh 'comb-out' of skilled workers for the army. Potential disaster was averted, however, by the engineering workers' withdrawal into their customary posture of militant craft sectionalism. In addition, the Government eased the food problem by stabilising prices, extending rationing, and increasing labour representation on the local agencies of control.⁹⁷ The interplay of strategic and domestic considerations shaped Lloyd George's decision finally to issue a coherent statement of British war aims. It was no coincidence that the Prime Minister chose as his audience a conference of trade union executives. His clever speech of 5 January 1918 echoed the Labour Party's recent foreign policy statement, anticipated the liberal spirit of Wilson's 'Fourteen Points', but did not discard as an ultimate objective the unconditional surrender of the German Army.⁹⁸

It was against this cluttered backdrop of events at home and abroad that the controversy over Regulation 27C smouldered during the winter of 1917-1918. The parliamentary assault on the new DORR was led by dissenting MPs. They bombarded the Home Secretary with questions designed to expose the unworkability of 27C and the anomalous censorship of material in pamphlets that had already appeared in the press.⁹⁹ There were also fundamental civil liberties issues at stake. The Government had not raised the spectre of a 'British Bolo' to root out imaginary enemy influence, it was contended, but to marginalise all heterodox thinking about the war. Likewise, 27C served the same discreditable purpose. At the very moment, according to the Nation, when the country at last had a realistic choice between the "covenanted peace" of President Wilson, and Lloyd George's "peace of unconditional surrender", the Government had narrowed the parameters of

⁹⁷ Bernard Waites, A Class Society at War: England, 1914-1918 (Leamington Spa, 1987), 232 and passim; Hinton, First Shop Stewards' Movement, 254-67; L. Margaret Barnett, British Food Policy during the First World War (London, 1985), 141-50.

⁹⁸ Woodward, "Origins and Intent," 35-38, is more useful on the international, as opposed to the domestic, context of the primeministerial address.

⁹⁹ PD (Commons), 26 Nov. 1917, 99, col. 1630-31; 27 Nov. 1917, col. 1820-22; 29 Nov. 1917, col. 2205-08.

meaningful discussion. These strictures were anticipated by Philip Snowden, for whom this new form of censorship completed "the establishment of an uncontrolled Government dictatorship." Snowden's outrage was matched by that of Bertrand Russell, whose hastily composed critique of the latest assault on British freedom was pointedly entitled "The New Dictatorship of Opinion."¹⁰⁰

The extra-legal nature of this new threat to free speech was also open to censure. Not for the first time, the Nation detected a sinister "attempt to set up an administrative law which is entirely foreign to our jurisdiction." British law was supposedly administered by judges, as opposed to governmental officials, yet it was the Press Bureau alone which determined the legality or otherwise of the printed matter covered by 27C. Snowden took a similar line in the Labour Leader.

There is no objection to the Government retaining the power to prosecute the writers and publishers of leaflets which are clearly seditious, but our objection is to a Government official or a police officer having the power to determine whether a leaflet is or is not illegal. That is a matter which should be decided by a court of law, and agitation against the new Regulation empowering the police to seize and destroy leaflets on their own authority, must be vigorously continued until they are revoked.¹⁰¹

Regulation 27C was rendered even more objectionable by the exemption from its provisions of all official publications and, especially, by the simultaneous opening of the public purse to promote government war policy. On 13 November 1917 Lloyd George's Chief Whip had asked MPs to sanction a large subsidy for the National War Aims Committee. This funding was necessary "to resist insidious influences of an unpatriotic character." The introduction of 27C, a mere three days after the Commons duly issued the Committee with this virtual blank cheque, only added to the outrage of the few MPs who had voted against this "corrupt

¹⁰⁰ "A Muzzling Order for the Mind," Nation, 1 Dec. 1917, 292-93; LL, 22 Nov. 1917, 1. On Russell's response, see Rempel et al., eds., Pacifism and Revolution, paper 82.

¹⁰¹ Nation, 1 Dec. 1917, 291; LL, 6 Dec. 1917, 1.

expenditure of public funds."¹⁰²

Ironically, some of the patriotic papers behind the 'Bolo' campaign shared the dissenters' hostility towards the new DORR. They feared an extension of its mandatory censorship to newspapers. One has to understand that the acute political divisions within the mainstream British press concealed a common corporate identity. Hence, newspapers of radically different political colours harboured identical fears about excessive governmental interference with the press. The Daily Express and The Times, for example, drummed up opposition to dissent, yet they harboured misgivings similar to those of their Liberal rivals about the preventive censorship provisions of Regulation 27C. Both papers welcomed 27C as a sign of the Government's determination to root out defeatism and disloyalty. Yet they were also suspicious of any compulsory censorship being exercised by a Press Bureau which had administered the system of voluntary controls with little expedition or consistency.¹⁰³ The jingo press was far too powerful to be hoist by its own petard. By opposing additional censorship controls, however, they provided unwitting assistance to their dissenting opponents.

The anxieties of the newspaper world were far from irrational. At the same War Cabinet which had approved Regulation 27C, a separate draft DORR of Cave's had also been discussed. This measure would have entitled the Home Secretary to suspend for a specified time any peccant newspaper. It was rejected on the grounds that "solidarity of the press was so strong...it was practically impossible to prevent an almost unanimous outcry by all newspapers in the event of any further interference." But further press control was not completely ruled out. Sir Edward Carson suggested that censorship officials might usefully be

¹⁰² PD (Commons), 13 Nov. 1917, 99, col. 286, 335-36. See also, *ibid.*, 23 Nov. 1917, col. 1532 and Nation, 24 Nov. 1917, 262-63.

¹⁰³ Daily Express, 16 Nov. 1917, 2; The Times, 29 Nov. 1917, 7. For a demonstration of wholehearted jingo support for 27C, see Daily Mail, 16 Nov. 1917, 2. On the opposition of two Liberal dailies, see DN, 16 Nov. 1917, 2; MG, 16 Nov. 1917, 4.

attached to offending newspapers and given unlimited discretion to prohibit the publication of material which breached the DORRs. Cave and Sir Reginald Brade were then instructed to "sound the press" about such a scheme.¹⁰⁴ At the ensuing meeting of the Joint Admiralty, War Office and Press Committee, on 5 December 1917, the newspaper representatives "were evidently nervous about any change being made." Brade had stressed that only "persistent and consistent advocacy of peace" would be affected by the contemplated restrictions. Yet the newspaper men remained adamant that existing DORRs were adequate. They were apprehensive already about 27C, and a resolution deprecated its extension to the press.¹⁰⁵

Cave did not yet lose hope of a sterner regimen of censorship over dissenting newspapers. When a relaxation of 27C was mooted early in December, he suggested that Regulation 27 might simultaneously be strengthened. By prohibiting all statements intended or likely "directly or indirectly to impede or interfere with the successful prosecution of the war", the combined impact of both amendments "would be to increase and not to diminish our powers of dealing with objectionable literature." Only after this recommendation was turned down by the War Cabinet did Cave resolve "to let the matter of newspapers rest where it is for the present."¹⁰⁶ The Home Secretary had also to contend with labour movement opposition to 27C. On 5 December 1917, he received a joint deputation of trade union and Labour Party delegates. It was hardly surprising that Ramsay MacDonald, a leading dissenter, should have defended the right to publish, without interference, on any aspect of the war or the peace settlement. But the delegation also represented the prowar Labour mainstream, which was itself moving towards a quasi-dissenting foreign policy position. Cave defended 27C by reference to the "poisonous stuff" he believed it was imperative to stop before going into

¹⁰⁴ CAB 23/4/274(17), 15 Nov. 1917.

¹⁰⁵ HO 45/10888/352206/128, Brade to Cave, 5 Dec. 1917.

¹⁰⁶ CAB 24/34/G.T.2865, Cave, "Censorship of Leaflets," 5 Dec. 1917; HO 45/10888/352206/128, Troup to Brade, n.d.; CAB 23/4/294(1), 17 Dec. 1917.

circulation. He was not pressured into withdrawing the DORR but did promise to relax the mandatory submission requirement that evidently aroused so much ire.¹⁰⁷

Although the parliamentary attack on Regulation 27C was launched by the small 'civil liberties' group of MPs who usually protested DORA, a somewhat broader cross-section of backbench opinion was energised on this occasion. By the end of November 1917 about seventy MPs had signed a resolution of protest against 27C.¹⁰⁸ These names included Herbert Samuel's and those of other Asquithian-Liberal ex-ministers. The former Home Secretary was prepared to accept the suppression of literature which breached the DORRs. But Regulation 27C had gone much further, making censorship evasion alone a criminal offence. The executive was now equipped, for the first time, with "powers of censorship in political matters which cannot be questioned at law." Samuel wanted the DORR to reflect the scrupulous legalism with which he had regarded this sphere of the Home Office's extra-judicial authority. He advocated elimination of the Press Bureau's right of veto, but retention of obligatory submission ahead of publication.¹⁰⁹ The combination of newspaper, labour, and parliamentary pressure made some change inevitable. Samuel's compromise formula enabled Cave to mollify his critics without restricting unduly his department's freedom of action.

(iv) Regulation 27C Amended

The amendment of 27C was agreed at the War Cabinet of 17 December 1917 and effected by Order in Council four days later.¹¹⁰ Pamphlets and leaflets no longer needed the imprimatur of the Press Bureau, but material still had to be forwarded to this office seventy-

¹⁰⁷ HO 45/10888/352206/92, "Joint Deputation from the Trades Union Congress Parliamentary Committee and the Executive of the Labour Party to the Secretary of State for Home Affairs," 5 Dec. 1917.

¹⁰⁸ LL, 29 Nov. 1917, 2.

¹⁰⁹ CAB 24/34/G.T.2820, Samuel to Cave, 27 Nov. 1917.

¹¹⁰ CAB 23/4/294(1), 17 Dec. 1917; SRO 1348, 21 Dec. 1917.

two hours ahead of publication. The altered procedure continued to allow for the suppression before publication, under Regulation 51, of any allegedly objectionable literature, a discretionary power which many critics of 27C had wanted to curb. The Chief Constables were furnished with revised guidelines for the enforcement of both Regulation 27C and 51. Pamphlets or leaflets could no longer be seized merely for failing to pass muster at the Press Bureau. Instead, the police were instructed to revert back to the pre-27C arrangement of confiscating only those items judged by the courts (or sometimes by the Home Secretary alone) to be in contravention of Regulation 27.¹¹¹ There was one significant difference, however; the compulsory submission provisions of Regulation 27C enabled the authorities to monitor the output of dissenting propaganda more closely than before 16 November 1917.

On 10 December 1917 Hastings Lees Smith had greeted Cave's parliamentary announcement of impending change to Regulation 27C with the objection that the Home Office would still be able to suppress dissonant political views independently of the courts. Hence, the modified DORR would be "just as bad as it was before."¹¹² Two days later Lees Smith forced an emergency debate on Regulation 27C. On this occasion he concentrated his fire on the older Regulation 51, and other speakers discussed the wider, constitutional implications of DORA. Philip Snowden employed the familiar argument that MPs had not sanctioned these uses of DORA when they enacted the legislation in August 1914. William Llewelyn Williams, the Liberal barrister who had defended Arthur Zadig, warned of the potential for abuse inherent in the substitution of legislation by Orders in Council.

These Regulations are given the force of law. They are drafted by certain people, and we do not know whether these people are competent to draft them. They are passed hurriedly...without due inquiry, without discussion and without debates such as we have here. Individual liberty is therefore bereft of the safeguards which you have in public discussion in Parliament...That is a position which has never been occupied before by any

¹¹¹ HO 45/10888/352206/83, Blackwell to Chief Constables, 1 Jan. 1918.

¹¹² PD (Commons), 10 Dec. 1917, 100, col. 857.

Government in the whole history of this Kingdom.¹¹³

In the Forward, Ramsay MacDonald blamed the Asquithian-Liberal leadership for an unsatisfactory compromise which had substituted "the reign of Tweedledum, when you could neither print nor circulate...[for] that of Tweedledee, when you can print but cannot circulate" The Nation was also miffed by the tepid response of organised Liberalism. It was in the direction of Labour, wrote the editor, H.W. Massingham, about 27C, that the "younger and finer spirits" now looked for the "Risorgimento of British Democracy."¹¹⁴

(v) Regulation 27C and the Friends Service Committee

There was no sudden spate of prosecutions under Regulation 27C after its introduction in November 1917. Yet, just over two months later, Basil Thomson stated his confident belief that the DORR had exerted a salutary effect. After the war, Troup recalled the measure as having been "very useful" in controlling antiwar literature.¹¹⁵ Most dissenting organisations complied with 27C,¹¹⁶ but the Friends Service Committee quickly announced its intention to defy the DORR. On 6 December 1917 this Quaker pacifist group affirmed that "the declaration of peace and goodwill is the duty of all Christians, and ought not to be dependent upon the permission of any Government official."¹¹⁷ This promise of resistance typified the FSC's categorical rejection of all governmental interference with civil or religious liberties. The FSC

¹¹³ Ibid., 12 Dec. 1917, col. 1269-70 and passim.

¹¹⁴ Forward, 15 Dec. 1917, 1; Nation, 1 Dec. 1917, 297-98. On the broader issue of Radical dissent's drift to Labour over the Liberal Party's careless guardianship of civil liberties, see Clarke, Liberals and Social Democrats, 194-202.

¹¹⁵ CAB 24/40/G.T.3424, Thomson, "Pacifism," 22 Jan. 1918; HO 45/10888/352206/158, Troup (minute), 1 Apr. 1919.

¹¹⁶ Before the partial relaxation of 27C, the UDC had even begun to stamp all new pamphlets "Passed by Cer. sor." This tactic elicited wry amusement in dissenting circles, although Cave was understandably perplexed by the UDC's mischievous use of the Press Bureau's imprimatur (Swartz, Union of Democratic Control, 191-92).

¹¹⁷ See Tribunal, 10 Jan. 1918, 4.

demonstrated its resolve almost immediately by issuing their new leaflet, A Challenge to Militarism, behind the back of the Press Bureau.

The FSC had been established by the policy-making forum of the Society of Friends, the Yearly Meeting, in May 1915. Its purpose was to bolster the pacifism of Friends of military age and to oppose the drift towards compulsory military service. Although never exceeding a membership of forty, the FSC became the main focus of opposition to conscription inside the twenty thousand or so strong Society. The uncompromising pacifism of the FSC caused constant irritation, not only to the authorities but also to other conscientious objectors. Several FSC members belonged to the Socialist Quaker Society, which gave them a certain affinity with the nonreligious socialists of the NCF. The two organisations even settled a basis for cooperation before conscription began in February 1916. By the middle of that year, however, gaping tactical and temperamental divisions had opened up between the FSC and the NCF, and inside the Quaker camp as well. These differences went beyond the damaging split between 'alternativists' and 'absolutists', although the FSC certainly had little regard for conscientious objectors who were prepared to accept civil employment in lieu of military service. Disagreement stemmed from the FSC's detached view of the plight of 'absolutists' in military custody. The FSC deprecated all efforts on behalf of imprisoned war resisters as distractions from the higher struggle for peace, to which end the stoicism of the individual's witness was seen as a vital contribution. But the majority of both Quaker and nonreligious pacifists regarded the practical support of all conscientious objectors (including the 'alternativists') as at least of equal importance to peace propaganda.¹¹⁸

This pacifist sectarianism had subsided by late 1917, and the rifts were unlikely to be reopened by the FSC's stand on 27C. This civil liberties issue was peripheral to the questions of tactics that had proven so divisive. Yet the FSC's contempt for 27C does convey the

¹¹⁸ Thomas C. Kennedy, "The Quaker Renaissance and the Origins of the Modern British Peace Movement, 1895-1920," Albion 16 (1986): 253-72; idem, Hound of Conscience, ch. 10.

fervour, indeed fanaticism, which so alienated its members "from their less spiritually minded socialist colleagues on the one hand and from some of the older, politically liberal leaders of their own Society on the other."¹¹⁹ The day after the FSC stated its opposition to 27C, the executive body of the Society of Friends issued a similar pledge of defiance. As Christians it was their "paramount duty to be free to obey, and to act and speak in accord with the law of God, a law higher than that of any state, and no Government official can release men from this duty."¹²⁰ This position was later endorsed at the sparsely attended Yearly Meeting in May 1918. As on other issues, the Society's formal policy commitments reflected those of the far smaller FSC. This did not prevent some Friends from questioning the wisdom of civil disobedience to Regulation 27C, just as they had earlier frowned upon the FSC's apparent indifference to the maltreatment of the 'absolutists'.¹²¹

In December 1917 Sir Ernley Blackwell minuted that Quakers would not be exempt from prosecution if they wilfully flouted Regulation 27C.¹²² Yet no legal action immediately followed the FSC's publication of A Challenge to Militarism, notwithstanding the rapid distribution of some seventy thousand copies. In February 1918 two non-Quaker associate members of the NCF were arrested for handing out the illegal leaflet near Parliament. These women later appeared at a Westminster magistrate's court on charges laid under Regulation 27C. Proceedings were then deferred, pending the trial of those persons directly responsible for the leaflet. The magistrate's decision nudged the authorities towards a prosecution of the

¹¹⁹ Kennedy, "Quaker Renaissance," 263.

¹²⁰ HO 45/10888/352206/98 (the Society sent the Home Office a copy of their resolution on 7 December 1917).

¹²¹ The Friend ran some lively correspondence on 27C during the first half of 1918. Some contributors attacked the FSC for stretching to inordinate lengths the Quaker conceptions of conscience and resistance to the claims of the state. A slightly larger number stressed the paramount importance of uninhibited freedom of expression (Friend, 4 Jan. 1918, 14; 11 Jan. 1918, 31; 18 Jan. 1918, 50; 25 Jan. 1918, 55, 67; 24 May 1918, 328; 7 June 1918, 379; 5 July 1918, 431).

¹²² HO 45/10888/352206/98, Blackwell (minute), 12 Dec. 1917.

FSC, and the following month three of its officials were duly summonsed. After the two day Guildhall hearing, Harrison Barrow and Arthur Watts were sentenced to six months in the second division; Edith Ellis was fined one hundred pounds plus fifty pounds costs.¹²³

To one of the defendants, the case was eerily reminiscent of the persecution suffered by the founders of Quakerism. As in the seventeenth-century struggle for religious and civil freedom, testified Barrow, the central issue was the higher allegiance owed by a Christian to the laws of God.¹²⁴ Liberal newspapers were disturbed by the treatment of these earnest and devout Quaker pacifists and echoed the melodramatic historical notes struck in court. The trial recalled for the Nation the circumstances in which Milton had penned his classic defence of free speech, the Areopagitica. Continuing its condemnation of the FSC prosecution, the paper accused the Government of embracing the malignant "German ideal" of exalted state power as the ultimate source of authority.¹²⁵ The FSC hoped to transform the Challenge to Militarism trial into the focus of a broader agitation. Yet, in spite of these isolated expressions of liberal outrage, "the case seemed to have less impact as propaganda for peace and civil liberties than as an illustration that Quakers were an odd lot—brave but rather strange."¹²⁶

At the unsuccessful appeal hearing, Barrow complained that more influential organisations and individuals had been able to ignore 27C with impunity.¹²⁷ There was some substance behind this allegation of inconsistent enforcement. The Labour Party's December 1917 statement of war aims, for example, had achieved a wide circulation in pamphlet form without being deposited at the Press Bureau. Cave knew that this oversight constituted a

¹²³ Tribunal, 28 Feb. 1918, 3; 2 May 1918, 3; 30 May 1918, 1.

¹²⁴ BLPES col. misc. 179/31, NCCL newsletter, June 1918 ("The Government and the Society of Friends").

¹²⁵ "Silencing the Word," Nation, 1 June 1918, 222-23. See also, MG, 25 May 1918, 4.

¹²⁶ Kennedy, "Quaker Renaissance," 269.

¹²⁷ Tribunal, 11 July 1918, 1, 4. Edith Ellis was later sentenced to three months imprisonment for refusing to pay her fine (ibid., 18 July 1918, 2).

breach of 27C, but no legal steps had been taken, he told MPs, because the pamphlet complied in all other respects with the censorship DORRs. The Home Secretary's explanation, however, left a distinct impression that special treatment had been extended to the political arm of organised labour.¹²⁸

The critics of 27C resented even more its evasion by the more forthright supporters of the British war effort. During June 1918 both Lord Grey and C.D. McCurdy, the Liberal MP for Northampton, issued pamphlets without submitting them to the censors. The National War Aims Committee had then assisted in the distribution of this material, although the two items were not government publications and, therefore, exempt from 27C on those grounds.¹²⁹ On 16 July 1918 Cave was asked by a sardonic Joseph King whether "supporters of the Government...are allowed to break the law, whereas poor persons, who are critics and opponents of the Government are pursued with ferocity?" Cave's reply, that "people who break the law are prosecuted, and those who do not are not," was pathetically lame in view of the unequal treatment to which the FSC had been subjected.¹³⁰

Conclusion

DORA was presented to Parliament in August 1914 as a measure for protecting the nation from such direct threats to the British war effort as espionage and sabotage. Yet, before long, it was obvious that the statute could be stretched to cover behaviour which simply did not promote official war policy with the requisite enthusiasm. Dissenters felt the brunt of the

¹²⁸ PD (Commons), 21 Jan 1918, 101, col. 686-87; 31 Jan. 1918, col. 1717-18.

¹²⁹ A Home Office spokesman contended that Grey's League of Nations pamphlet fell outside the terms of the DORR because it did not pertain "to the present war or to the making of the peace" (PD [Commons], 27 June 1918, 107, col. 1223 and HO 45/10888/352206/146A). This was a dubious assertion, given the subject matter of the pamphlet and numerous references to the war included therein. The McCurdy pamphlet was a critique of the dissenting view of the Allied secret treaties.

¹³⁰ PD (Commons), 16 July 1918, 108, col. 876-77.

novel restrictions over the written and spoken word which were implemented soon after war was declared and which became progressively more stringent. The additions to, and amendments of, these censorship DORRs were frequently made with at least one eye turned towards the opponents of militarism and war. Partly owing to the problems posed by prosecuting dissenters and also, to the transition from censorship to propaganda after mid-1917, at no stage of the war was dissent ever silenced. The questionable civil liberties record of successive wartime governments notwithstanding, British dissenters enjoyed greater licence than did their counterparts in other belligerent states. A huge weight of peace propaganda was produced and circulated throughout Britain,¹³¹ and the prowar Labour Party was not deterred from eventually adopting a foreign policy similar to that of the UDC. Moreover, dissent clearly exerted sufficient influence for its views on the war and its origins to become the standard interpretation of events during the interwar period.

Before 1916 organised dissent was regarded as irksome, but as little more than this, by the authorities. Official attitudes hardened with the implementation of conscription. During Herbert Samuel's occupation of the Home Office, draconian executive powers, hitherto kept in reserve, were directed at the opponents of compulsory military service. The harassment of dissent was profoundly offensive to those orthodox liberals who deplored the transformation of the nation in arms into the model of a militarism that Britain was pledged to vanquish. The suppression of peace literature by administrative order was viewed as an affront not only to freedom of expression, but also to due process. The containment of dissent by these means paralleled a more general enhancement of executive discretion under DORA. The civil liberties crisis for dissent intensified in 1917, when the flood of 'peace by negotiation' propaganda became the chief focus of governmental concern. Strategic stalemate, peace signals from the neutral and enemy camps, revolution in Russia, and domestic discontent: all

¹³¹ Hopkin, "Domestic Censorship," 166 cites a police report on a Lancashire man who, after voicing an interest in pacifism during July 1915, was inundated with pamphlets, books, and leaflets.

added to the plausibility or appeal of this fundamental dissenting proposition. Regulation 27C was the most vivid illustration of the War Cabinet's deep-seated anxiety about the possible ramifications of unrestricted publicity for a compromise peace.

Despite this manifestation, and several others, of a heightened "spirit of control"¹³² under the Lloyd George Coalition, there was also continuity, from before December 1916, in the administration of the censorship DORRs. Sir George Cave exhibited the same reluctance to prosecute dissenters as had his Liberal predecessors at the Home Office. Similarly, few peace meetings were prohibited outright after Regulation 9A took effect, although intimidation by patriotic crowds remained a perennial hazard for platform speakers. The authorities had no principled objection to the use of these powers. The hostility towards organised dissent of the jingo press and prowar public opinion rendered Regulation 9A, for the most part, superfluous. Legal action under Regulation 27 was, likewise, avoided more to starve the dissenters and their 'prejudicial' viewpoints of any gratuitous publicity from court proceedings. Indeed, these considerations underscored the preference of officialdom for the far more contentious search, seizure, and destruction provisions of Regulation 51.

¹³² Hynes, A War Imagined, 146.

Chapter 6: THE CD ACTS REVISITED? DORA AND THE VENEREAL DISEASE QUESTION

Introduction

During the First World War several DORRs were issued or adapted with a view to reducing the venereal disease rate among Allied troops in Britain. These measures spread consternation that the Government was reintroducing, under cover of the national emergency, the discredited Contagious Diseases legislation of the 1860s. These Victorian statutes had been enacted in response to a wave of alarmist publicity about the high incidence of venereal diseases in the forces. The first CD Act (1864) had empowered magistrates in eleven garrison towns and ports to order any woman suspected of prostitution to undergo medical examination. A diagnosis of venereal disease could then lead to forced detention of the allegedly infected woman for up to three months. Amending legislation in 1866 and 1869 extended the legislation to seven more towns and ports and increased the maximum period of detention for medical treatment to nine months. A long and acrimonious campaign against the CD Acts, led by Josephine Butler, was waged until they were suspended in 1883 and repealed three years later.¹

In October 1916 the Nation recalled this 'abolitionist' agitation as a significant liberal achievement now jeopardised, like other hard-won freedoms, by the interpositions of the

¹ E.M. Sigsworth and T.J. Wyke, "A Study of Victorian Prostitution and Venereal Disease", in Suffer and be Still, ed. Martha Vicinius (Bloomington, 1972), 78-99; Judith R. Walkowitz, Prostitution and Victorian Society: Women, Class, and the State (Cambridge, 1980); Edward J. Bristow, Vice and Vigilance: Social Purity Movements in Britain since 1700 (Dublin, 1977), 75-85.

wartime state.² Yet wartime governments handled the venereal disease issue with greater caution than the leading liberal weekly perhaps cared to admit. The War Office and Home Office were moved less by the civil libertarian case against coercive measures than by the scruples of a broader constituency, opposed to 'state regulation of vice'—the tacit legal support for a double standard of sexual morality. At the same time, however, these two departments were steered towards drastic action by Dominion Governments and by the domestic proponents of the compulsory detention and treatment of venereal disease sufferers. As a result of the moral and political complications, the British Government never adopted a settled approach to the problem of venereal disease in the forces.³

Historical accounts have emphasised a war-induced seachange during the First World War in attitudes towards issues of sexuality and public morality.⁴ Yet Jeffrey Weeks has rejected the notion of "an automatic ascent towards sexual liberalism" beginning in August 1914.⁵ The ramifications of the venereal disease question in wartime Britain certainly demonstrate the enduring influence of the middle class morality promoted by influential prewar 'social purity' movements and enforced by the law.⁶ Indeed, the war intensified these diffuse anxieties about the erosion of conventional moral standards. Considerations of military efficiency or public health could not be disentangled from the wider moral context, integral to

² "The CD Acts Again," Nation, 28 Oct. 1916, 141-42.

³ Administrative confusion and buck-passing are the major themes in the important study of Suzann Buckley, "The Failure to Resolve the Problem of Venereal Disease Among the Troops in Britain during World War I," in War and Society, vol. 2, ed. B. Bond and I. Roy (London, 1977), 65-85.

⁴ Marwick, Deluge, 105-09 and Bristow, Vice and Vigilance, 146, for a succinct statement of this view: "With the unusual intensity of personal experience, the undermining of old religious standards by the carnage, the dislocation of family life and the distribution of condoms to the forces it could hardly have been otherwise."

⁵ Jeffrey Weeks, Sex, Politics and Society: The Regulation of Sexuality since 1800 (New York, 1981), 92.

⁶ On the late-Victorian and Edwardian agencies of, and campaigns for, moral reform, see *ibid.*, 81-93.

which was the still prevalent conviction that venereal diseases were a "divinely assigned punishment for sin."⁷ As Austen Chamberlain explained to the Imperial War Conference in April 1917:

People are not guided solely by reason on these matters, but by sentiment, and by the religious feeling, and I think, having regard to our past history in this country, you could not find a more thorny question than that which surrounds the old CD Acts or any fresh attempt to exercise control.⁸

Yet "sentiment" obviously clashed with military manpower requirements. The prevalence of venereal diseases in the British Army had actually declined since the repeal of the CD Acts.⁹ But the outbreak of war revived the Victorian concern about the threat posed by these afflictions to the fighting capacity of the nation. With the mass enlistments to Kitchener's New Army and the influx of thousands of Dominion soldiers from Canada, and after 1916, Australasia, a relatively low infection ratio nevertheless implied a huge number of venereal disease cases. A forceful governmental response appeared likely. The punitive

⁷ From Lord Sydenham's 1916 presidential address to the National Council for Combating Venereal Diseases (Sydenham lamented the tendency to which the quotation refers). First Annual Report of the National Council for Combating Venereal Diseases (London, 1916), 16. The NCCVD became an important and quasi-official organisation after its foundation in November 1914. Sydenham was appointed President in February 1916, after winding up the Royal Commission on Venereal Diseases, of which body he had been chair. The former colonial administrator (and, as Sir George Clarke, the first secretary of the CID) had influence in official circles and attended some of the many interdepartmental conferences which addressed the issue of venereal disease during the First World War.

⁸ CAB 32/1, "Minutes of Proceedings of Imperial War Conference, 1917," 24 Apr. 1917.

⁹ In 1885 the admission rate for venereal disease cases in the British army was 275 per 1000 per annum. Since then, there had been a steady decline, interrupted only by the Boer War, to 90.5 per 1000 in 1905 and 50.9 in 1913. This improvement was attributed to the better instruction of the soldiers about the hazards of the diseases and to the provision of improved accommodation and recreation facilities. Perhaps more important were the superior methods of diagnosis and treatment which were developed in the 1900s and which were more likely to benefit enlisted men under military discipline than the population at large. Of particular importance in this regard were the bacteriological test for syphilis (the Wasserman test) introduced in 1906, although this remained a controversial procedure over which much of the medical profession had great doubts, and the development by the German chemist, Ehrlich, of salvarsan, an arseno-benzol compound, which rapidly became the standard treatment for secondary syphilis after it was patented in 1909 (see Claude Quétel, History of Syphilis [Cambridge, 1990], 139-43. The figures are from WO 32/11401/3A).

treatment of women under DORA became the preferred official approach. This method, so redolent of the CD Acts and 'state regulation of vice,' was undoubtedly contentious. It was, however, more easily defended than preventive measures of prophylaxis. The authorities in Britain had no wish to be accused of promoting promiscuity by providing troops with prophylactics. Although the medical officers of Allied forces became gradually more convinced of the wisdom of prophylaxis, time and again "morality won over efficiency."¹⁰

Initial Responses

Shortly after war broke out, the rival factions of Edwardian suffragism took some tentative steps towards confronting the threat which the national crisis was perceived to pose to sexual morality. Both the moderate National Union of Women's Workers and the militant Women's Social and Political Union began operating special female patrols around the burgeoning military encampments and in the seedier districts of the big cities. These initiatives were conceived as the beginnings of a permanent policing role for women. Although there was little official enthusiasm for this ambitious feminist objective, the patrols were nevertheless endorsed by the Government and enjoyed the tacit (sometimes begrudging) support of the police and the CMAs. The women's patrols were not directly concerned with the prevention of venereal disease in the forces or even with the control of prostitution. Their objective was to exercise a measure of social control and moral suasion over the young, working class women who were consorting with the soldiery and were identified as peculiarly susceptible to what was soon labelled as 'khaki fever'.¹¹

¹⁰ Bristow, Vice and Vigilance, 149.

¹¹ For a skilful treatment of this phenomenon and some useful material on the institutional development of, and gender specialisation in, female police work, see Angela Woolacott, "'Khaki Fever' and its Control: Gender, Class, Age and Sexual Morality on the British Home Front in the First World War," Journal of Contemporary History 29 (1994): 325-47. By October 1915, 2,301 women's patrols had been established in 108 British and Irish locations. See also the more detailed study of Philippa Levine, "Walking the Streets in a Way

This moral policing was of a piece with the general pattern of 'voluntarism' that characterised initial social and political responses to the British declaration of war.¹² Yet, as on other pressing issues, there soon emerged a growing impatience with 'business as usual' in the handling of a potentially disastrous venereal disease problem among the troops. In October 1914 the Plymouth Watch Committee recommended the reenactment of CD-type measures by police bye-law. Early in November, the fledgling National Council for Combating Venereal Diseases pressed the Home Secretary for legislation allowing the removal of prostitutes from military areas. In the Commons, the Liberal MP Sir Ivor Herbert complained, euphemistically, about "abnormal wastage" in the ranks, owing to "avoidable disease." In support, Unionist backbencher Lord Claud Hamilton asked the Government to authorise the magistracy to detain "women of bad character" in hospitals or reformatories for the duration of the war.¹³

These outbursts were viewed with trepidation by women's organisations. The Women's Freedom League demanded a pledge from Asquith that the CD Acts would not be revived. They were disturbed by the use of DORRs to impose

restraints on liberty thought to be for the public good...The granting of wide and undefined powers to military authorities, who advise the police under threats of putting towns under military law if the arrangements be not satisfactory for military purposes, is a source of perpetual danger to women, and leaves not a loophole but a broad channel through which such regulations as those under discussion may be introduced....¹⁴

The Prime Minister's office assured the League that no such action was contemplated and that

no Decent Woman Should': Women Police in World War I," *Journal of Modern History* 66 (1994): 34-78, which is particularly illuminating on the ambiguous feminist context of women's policing.

¹² See, for example, Peter Cahalan, *Belgian Refugee Relief in England during the Great War* (New York and London, 1982), chs. 2-3 *passim*.

¹³ HO 45/10724/251861/35, Sir Thomas Barlow (President, NCCVD) et al. to McKenna, 7 Nov. 1914; PD (*Commons*), 16 Nov. 1914, 68, col. 285-86, 177.

¹⁴ HO 45/10724/251861/26B, C. Nina Boyle to Mark Bonham-Carter (Asquith's private secretary), 15 Oct. 1914; Boyle to Asquith, 13 Oct. 1914.

it could, in any case, only be effected by statute, not by DORR.¹⁵ The administration of the DORRs in South Wales, however, appeared to confirmed the organisation's worst fears. In November 1914 the GOC for the Severn District imposed on several Cardiff women, under Regulation 24,¹⁶ a 7:00 P.M. to 8:00 A.M. curfew. In the month up to 28 December 1914, thirteen women were charged with infringing these curfew orders. All were convicted, the first five by courts martial tribunal. Ten of the women were detained for sixty-two days; three were imprisoned with hard labour for fifty-six days. On behalf of the East London Federation of Suffragettes, Sylvia Pankhurst protested to the War Office the harsh and unfair treatment of these women. The CMAs, she demanded, should enforce stricter discipline on the troops.¹⁷

Yet this bizarre scheme of controlling prostitution by curfew was not a settled military policy. The CMA had acted independently of War Office direction. Furthermore, in January 1915, the convictions were quashed as *ultra vires* DORA.¹⁸ By the new year the War Office and Home Office were aware of a venereal disease problem in the military, but they were unsure of how best to tackle it. The War Office had considered using Regulation 24A¹⁹ to keep individual women from the vicinity of military camps, but the Home Office doubted the legality of this procedure. For Troup, Asquith's promise to the Women's Freedom League, which the organisation had publicised, precluded any ill-judged use of the DORRs.²⁰ In

¹⁵ Ibid., Bonham-Carter to Boyle, 14 and 20 Oct. 1914.

¹⁶ After 28 November 1914, Regulation 13.

¹⁷ WO 32/5526/13A, "Return of Civilians Tried under the Defence of the Realm Regulations, from September, 1914 to January, 1915"; *Woman's Dreadnought*, 5 Dec. 1914, 150. See also *LL*, 17 Dec. 1914, 4: "ugly and sinister...from day to day one cannot tell what further powers the militarists may arrogate to themselves."

¹⁸ HO 45/10724/251861/89, Blackwell, "Report of a Conference at the War Office," 24 Sept. 1915; *Woman's Dreadnought*, 9 Jan. 1915, 175.

¹⁹ After 28 November 1914, Regulation 14.

²⁰ HO 45/10724/251861/29A, Dixon, Blackwell (minutes), 7 Nov. 1914; 35, Troup (minute), n.d. (Nov. 1914).

December 1914 the War Office backed a number of mild preventive steps but argued against any further "exceptional" (i.e., legislative or regulatory) measures. Specifically, they recommended restriction of drink sales to military personnel, improved accommodation and recreational facilities at the camps, lectures on venereal disease by medical or lay experts, and the continuation of cooperation between the military and the NUWW's Women's Patrols.²¹

Regulation 13A

The above communication from the War Office did not shake the Home Office conviction that existing legal powers were inadequate. The department's senior legal advisor favoured the forced confinement of women with venereal disease and was confident that Regulation 14 could be stretched for this purpose. Infected women were "certain to do far more mischief if allowed to go at large than many alien enemies dealt with under that Regulation." Troup agreed and remarked that "a concentration camp for syphilitic prostitutes...would be infinitely more useful than an aliens camp." The Home Secretary also thought that additional powers were necessary, although he added the limiting proviso that DORA could not be used "in a way which could even be represented as amounting to the re-enactment of the Contagious Diseases Acts."²²

The Home Office suggested a new regulation authorising the removal from a specified area of women previously convicted of prostitution-related offences. Troup favoured this approach because it focused on habitual prostitutes, rather than venereal disease per se. Thus, the DORR would not be construed as a breach of the primeministerial pledge regarding the

²¹ Ibid., 48, Cubitt to Troup, 8 Dec. 1914.

²² Ibid., 63, Blackwell (minute), 15 May 1915; Troup to Simon, 15 May 1915; 86, Home Office to Chief Constable, Kent, 23 Aug. 1915.

CD Acts. The War Office then circulated a draft DORR to this effect.²³ At an interdepartmental conference on 23 September 1915, however, the Parliamentary Under-Secretary for War, H.J. Tennant, appeared to favour the more indeterminate powers of removal in Regulation 14. These might also be invoked against the rarely convicted 'amateur' who, according to Lord Sydenham and others, was more likely to be infected with a venereal disease. The chair of the Royal Commission on Venereal Diseases also favoured action—the medical examination of women prisoners and their compulsory detention for treatment—which appeared to Blackwell "to trench upon the domain of the CD Acts and...certainly could not be carried out by Regulations for the Defence of the Realm."²⁴

The conference decided to assess the relative merits of both Regulation 14 and the new draft DORR, but two months later the War Office announced its opposition even to the more limited powers of the latter.²⁵ The Home Office was infuriated, partly because of the pressure being exerted by local authorities in towns such as Folkestone, around which a larger contingent of troops were quartered. In August 1915 the town clerk reported "strong feeling in the town as to the urgent necessity for some strong action being taken to stop this very serious evil."²⁶ At a meeting between Home Office and council officials in December 1915, Troup advised a revision of local bye-laws on public nuisance and disorder. The town council wanted a more definite authority to expel suspected prostitutes. A petition signed by six thousand indignant women articulated local anger, and a special council meeting of 22 December 1915 also voiced dissatisfaction with the inaction of the authorities. The meeting did approve the suggested change to the bye-laws but also passed a resolution stating that "in

²³ Ibid., 78, Troup to Simon, 13 Aug. 1915 and 88 for a copy of the draft DORR, dated 7 September 1915.

²⁴ Ibid., 89, Blackwell, "Report of a Conference at the War Office."

²⁵ Ibid., 96, Cubitt to Troup, 5 Dec. 1915.

²⁶ Ibid., 87, Town Clerk, Folkestone to Troup, 20 Aug. 1915.

the case of all persons suffering from a venereal disease there should be power to detain such persons until they are cured of the complaint."²⁷

There was as yet no likelihood of this draconian option being enforced. But early in January 1916, the War Office reversed its position on the aborted draft DORR.²⁸ Support for strong action did exist in the military, especially among officers of the Second Canadian Division at Shorncliffe, Kent.²⁹ There were proportionately far more venereal disease cases among Dominion soldiers than in the British Army. The infection rate at Shorncliffe in mid-1915, for example, was a staggering 287 per 1,000, compared to the last prewar figures for the British Army of 50.9 per 1,000. The disparity was gradually reduced but the infection rate in Canadian forces during 1917 was still 114 per 1,000, and in 1918, 81.6 per 1,000.³⁰ Dominion soldiers were often portrayed by their officers and government representatives as "innocents abroad," unfairly exposed to the temptations of unscrupulous women. A War Office conference in 1917 put forward several more prosaic reasons for the higher incidence of venereal disease in Dominion armies: better rates of pay, absence of family, and the taking of leave in the big cities.³¹ Whatever the explanation of the problem, Dominion concern about its prevalence in their overseas armies exerted a powerful pressure on British authorities for the adoption of drastic solutions.

²⁷ Folkestone Express, Sandgate, Shorncliffe and Hythe Advertiser, 25 Dec. 1915, 9; HO 45/10724/251861/104, Troup to Town Clerk, Folkestone, 16 Dec. 1915; 112, Mayor of Folkestone to Home Office, 24 Dec. 1915.

²⁸ See HO 45/10724/251861/114, Blackwell (minute), 11 Jan. 1916.

²⁹ See the report of the Assistant Provost Martial in *ibid.*, 78, 12 July 1915 and, 86, Canadian Garrison Adjutant, Shorncliffe to Clerk to the Justices, Hythe, 86, n.d. (Aug. 1915).

³⁰ The corresponding figure in 1917 for all troops stationed in Britain was 36 per 1,000 (statistics from *ibid.*, 89; PP, Note on Prophylaxis Against Venereal Disease, 1919, Cmd. 322, xxx: 427). The infection rates for Australian and New Zealand troops in 1917 were, respectively, 144 and 134.2 per 1,000 (see WO 32/11401/3A).

³¹ Buckley, "Failure to Resolve the Problem of Venereal Disease," 68-70; WO 32/11401/3A, 3 Aug. 1917.

The new regulation, 13A, came into force on 27 January 1916. It had been redrafted to apply to men as well as women. For the first month that 13A was in force, the CMA for Folkestone ordered the removal of thirty-seven women from the borough.³² Yet both the War Office and Home Office were ambivalent about these new powers. The former department insisted that 13A only supplement the "social work" of the Women's Patrols and educational instruction to the troops.³³ Even the Home Office, although not ultimately responsible for 13A, was worried about its indiscriminate use. Thus Troup instructed the Chief Constables of Kent and Maidstone to report to the CMA only those women who had drifted to the area since the war began. Known local offenders against the 'public morality' legislation specified in the DORR were to be let off with a caution. Following the Grimsby CNA's request (backed by the local Chief Constable) for the enforcement of 13A in that locality, the Home Office proffered the same advice to the Admiralty, along with a reminder "to proceed with great caution."³⁴

Sir Ernley Blackwell recalled Regulation 13A as an ineffective measure because "it merely gave power to turn the woman out of one district, and of course she could go on to another."³⁵ Yet, as Suzann Buckley observes, neither Blackwell's department nor the War Office had wished to be saddled with the opprobrium of enforcing CD-type legislation. The Home Office placed the onus of administrative responsibility on the War Office, on the grounds that military necessity provided the principal inducement to act on the venereal disease question. The War Office could argue with equal force that, as long as the legal focus fell upon female civilians, the issue remained inside the Home Office's domain.³⁶ The reticence

³² HO 45/10802/307990/7, Chief Constable, Folkestone to Troup, n.d. (Mar. 1916).

³³ HO 45/10724/251861/114, Cubitt to Troup, 7 Jan. 1916.

³⁴ HO 45/10802/307990/5, Troup to Greene, 11 Mar. 1916; 1, Troup to Chief Constables, 9 Feb. 1916.

³⁵ PP, Report from the Joint Select Committee on the Criminal Law Amendment Bill and Sexual Offences Bill (House of Lords), 1918, (142), iii: 313, para. 131.

³⁶ Buckley, "Failure to Resolve the Problem of Venereal Disease," 70 and passim.

of the authorities, as much as any practical problems posed by Regulation 13A, militated against its rigorous enforcement.

The Royal Commission on Venereal Diseases

An important development, contemporaneous with Regulation 13A, was the publication in February 1916 of the final report of the Royal Commission on Venereal Diseases. After the CD legislation controversy began to fade in the 1880s, public concern about venereal diseases focused less on the military than on the civilian population. Both reports of the famous 1909 Royal Commission on the Poor Law alluded to the high incidence of venereal diseases among the urban poor and to the woeful inadequacy of treatment facilities. The Royal Commission appointed in 1913 set out to address these problems. As its final report appeared, an extra piquancy had been added to the issues by the crisis of war. The principal public health measures recommended by the Commission were free treatment centres attached to general hospitals, the creation of diagnostic laboratory facilities, and the provision of free supplies of salvarsan to doctors. Local authorities would administer these changes, but 75% of the funding would come from the Exchequer.³⁷ By March 1917 treatment centres had been opened in some thirty hospitals, and an additional eighty-six local authorities had submitted draft schemes for the approval of the Local Government Board--significant reforms which contributed to the gradual elimination of venereal disease as a social problem.³⁸

The commissioners also reviewed more drastic options of treatment and prevention. Testimony was collected from many proponents of 'compulsory notification'. This forcible detention and treatment of sufferers was an accepted public health response to outbreaks of

³⁷ PP, Final Report of the Royal Commission on Venereal Diseases, 1916, Cd. 8189, xvi: 1, para. 230.

³⁸ PP, Prevention and Treatment of Venereal Disease, 1917-18, Cd. 8509, xxxviii: 363; Weeks, Sex, Politics and Society, 215-16.

such infectious diseases as typhus, cholera, and diphtheria. But the commissioners rejected 'compulsory notification' as a way of protecting the wider community against the spread of venereal diseases. This form of coercion would, they believed, encourage the concealment of disease and the resort to harmful quack remedies, thereby defeating the main objective of their report—to promote free, early, and accessible treatment.³⁹ Besides, 'compulsory notification' impinged on the territory of the CD Acts, and the revival of this legislation had been excluded from the Commission's brief in 1913. The Royal Commission was on safer ground in emphasising the importance as preventive measures of education and moral exhortation. Several such educational initiatives had, in fact, already been launched by the NCCVD, an organisation which deserved greater official recognition and support, according to the Royal Commission.⁴⁰

The NCCVD's Civilian Committee targeted the nation's social workers and elementary school teachers, and the Council was particularly active as regards the army. By June 1916 NCCVD speakers had lectured over 800,000 troops. The gist of these talks is conveyed by this syllabus, sent by the Council to the War Office in November 1914:

- (a) Description of the two diseases, gonorrhoea and syphilis, with their complications, sequela, and effects on the offspring.
- (b) Insistence on the need of early and efficient treatment, and the danger of concealment or use of quack remedies.
- (c) Prevention guaranteed only by keeping out of the way of possible infection; exposure of the fallacy that only professional prostitutes are dangerous; in

³⁹ PP, Final Report of the Royal Commission on Venereal Diseases, para. 156-70. In April 1917 the Local Government Board's Venereal Diseases Bill was enacted, prohibiting anybody except qualified medical practitioners from prescribing treatment for venereal diseases. The chair of the Commission was rather more enthusiastic about compulsory notification in private (see above, 221). The NCCVD, of which organisation Sydenham became President in 1916, was also prepared to reconsider 'compulsory notification' after the establishment of adequate treatment facilities: "Notification must be futile unless accompanied by police measures for enforcing treatment, which could not be given until full facilities have been made available to all classes. When these facilities have been provided, the question of compulsion can be considered" (Daily Telegraph, 24 Oct. 1916, 10).

⁴⁰ *Ibid.*, para. 236.

many cases the "amateur" is equally or more dangerous.

(d) Denunciation of the idea that continence is ever harmful, and that incontinence is an essential attribute of "manliness."

(e) The contributory effect of alcoholic indulgence by diminishing self-control.

(f) The importance of each man keeping fit from the point of view of efficiency of the Army.⁴¹

E.B. Turner, described as "a sort of prophet engaged in a holy war in this matter,"⁴² accorded the patriotic injunction an especially high priority. Turner, who had lectured a million men by 1920, remembered that he always "put it up to them how much better they would be employed pumping lead into the Hun rather than lying in hospital having '606' [salvarsan] pumped into them."⁴³

Turner also noted that he was "distinctly directed and ordered by the authorities not to introduce into the lectures any description of chemical personal prophylaxis, or in any way advocate its use."⁴⁴ The whole question of prophylaxis was fraught with moral complications. The Royal Commission had discussed the matter in private but had ruled out any recommendations in this sensitive area. The eminent gynaecologist, Mary Scharlieb, recalled that she and the other commissioners had "thought that the offer to make unchastity safe was a blow to the country's morals."⁴⁵ According to P.S. O'Connor, the term 'prophylaxis' denoted both pre- and post-coital measures against infection.⁴⁶ However, there existed a crucial

⁴¹ First Annual Report of the National Council for Combating Venereal Diseases, 40.

⁴² *Ibid.*, 25.

⁴³ Quoted in Bristow, Vice and Vigilance, 150.

⁴⁴ British Medical Journal, 16 Feb. 1918, 208.

⁴⁵ Quoted in Bristow, Vice and Vigilance, 148.

⁴⁶ P.S. O'Connor, "Venus and the Lonely Kiwi: The War Effort of Miss Ettie A. Rout," New Zealand Journal of History 1, (1967): 32. Although some allied soldiers were furnished with rubber sheaths towards the end of the war, the standard prophylactic methods were more rudimentary: the external application of calomel lotion, either before or after intercourse, or the post-coital flushing of the urethra with a potassium permanganate solution. In spite of

distinction—moral rather than clinical—between "self-treatment," administered by the soldier from prophylactic "packets" distributed in advance of leave, and medically supervised "early treatment," after exposure to possible infection. Although there was a credible medical argument against the unsupervised use of post-coital disinfectants, the authorities favoured "early treatment" because it was less easily interpreted as condoning illicit sexual activity.⁴⁷

Strong Measures

(i) Problems with the DORRs

One obvious drawback to Regulation 13A was the restriction of its coverage to places "where any bodies of His Majesty's forces are assembled or the vicinity thereof." Regulation 13A did not apply to Central London, but from mid-1916 the receiving points for soldiers on leave from France and Flanders, Waterloo and Victoria Stations, had become the foci of official and public concern about venereal diseases in the forces.⁴⁸ At a War Office conference early in August 1916, Lord Derby promised "to do what he could in order that further legislation might be passed so as to shut up every woman with the disease." The chief thrust of the Parliamentary Under-Secretary for War's concrete proposals—the stricter enforcement of soliciting law and the institution of more women's patrols—was, however, to burden the Home Office with more administrative responsibilities. Yet the Commissioner of the Metropolitan Police told the Home Office that, if his men acted more vigorously against soliciting, there was

the questionable reliability of these methods, infection rates of venereal disease in allied armies tailed off as prophylactic "packets" were distributed more freely (but often 'unofficially') after 1916, and as "early treatment" facilities also improved (PP, Note on Prophylaxis Against Venereal Disease).

⁴⁷ On the NCCVD's insistence, for reasons of morality, on the necessity of distinguishing between "early treatment" and preventive prophylaxis, see WO 32/5597/15A, Sydenham to Lord Derby, 27 Feb. 1918.

⁴⁸ See HO 45/10837/331148/1, Troup to Sir Edward Henry (Commissioner, the Metropolitan Police), 13 July 1916 for a reference to "strong representations" received by the Home Secretary on this matter.

a risk of wrongful arrest and the damaging publicity that had surrounded the notorious Cass case of 1887.⁴⁹

The War Office conference had also considered combining the powers of Regulations 13A and 14. The consolidated DORR could then have been used to force women expelled from a particular locality to undergo medical treatment in a place specified in the order. Yet Troup doubted the legality of such a measure, and like Regulation 13A, it could not apply to Central London. A new regulation, 40C, issued on 7 September 1916, was scrutinised with some interest by Home Office officials. Part of this DORR penalised any person who "wilfully produces any disease or infirmity in, or maims or injures" any member of His Majesty's forces or reserves. Regulation 40C was really aimed at the punishment of self-inflicted injury by 'malingerers' in the reserves. Troup thought that the above language might also extend to the communication of venereal disease by prostitutes to soldiers. The Home Secretary agreed, but the Prime Minister himself vetoed this suggestion. According to Troup, Asquith approved of 40C but was "averse to its being specially used for cases of venereal disease."⁵⁰

(ii) The Criminal Law Amendment Bill, 1917

The Home Secretary was convinced by this further setback of the need for fresh legislation, as opposed to more regulatory schemes under DORA. Sir Ernley Blackwell had earlier stressed the advantage of introducing strong measures with the sanction of

⁴⁹ HO 45/10802/307990/15A, "Conference on Venereal Disease," 2 Aug. 1916; 15B, Troup, "Measures for Dealing with Prostitution," 16 Aug. 1916. The soliciting laws and the Cass case are discussed in *ibid.*, 1, "Measures for Dealing with Prostitutes," 23 Aug. 1916. This further Home Office memorandum was drawn up for the benefit of the Queen, who had also expressed her concern at the situation in Central London. Cass was a young woman wrongfully arrested for solicitation in 1887. She denied the charge and presented character evidence in support of her innocence. The magistrate neither fined nor exonerated her, but an ensuing enquiry greatly embarrassed the police and led to the conviction of an officer for perjury.

⁵⁰ *Ibid.*, 15D, Troup to Samuel, 6 Sept. 1916; Samuel to Troup, 7 Sept. 1916; (on Asquith's view) Troup to Samuel, 14 Sept. 1916.

Parliament.⁵¹ But this attempt to act "above board," it soon transpired, also backfired. Samuel outlined his position to a NCCVD-sponsored public meeting at the Mansion House on 24 October 1916. His speech coincided with the publication in the Daily Telegraph of two demands for the 'compulsory notification' of venereal diseases; the first by a group of prominent women, including Emmeline Pankhurst; the second, by eminent lay and medical experts.⁵² Samuel could not agree to 'compulsory notification' but nevertheless expressed surprise that someone might

knowingly and deliberately do that which was calculated to transmit this disease to another person, and yet commit no offence against the law...It was morally a crime to do such a thing knowingly and it ought to be legally a crime.⁵³

The Home Secretary's plan of action was embodied in clause two of the Criminal Law Amendment Bill,⁵⁴ introduced in the Commons by Samuel's successor, Sir George Cave, on 19 February 1917. A conviction under this clause carried a maximum penalty of two years imprisonment. A proviso was also attached, protecting persons who could show reasonable cause for believing themselves uninfected at the time of the alleged offence. At the same time, however, the courts could order the medical examination of any suspect previously convicted of a range of offences scheduled to the bill. There was heated protest against clause two, particularly the misleading imputation that it applied equally to both sexes. The Liberal MP Josiah Wedgwood saw the Bill as "of the usual type" which "in practice will apply to women only." Sylvia Pankhurst saw behind the measure the corruption of a military tradition which preferred to regulate prostitution rather than promote chastity. The bill was also attacked for

⁵¹ HO 45/10802/307990/15A, "Conference on Venereal Disease," 2 Aug. 1916.

⁵² Daily Telegraph, 23 Oct. 1916, 10; 24 Oct. 1916, 10.

⁵³ *Ibid.*, 25 Oct. 1916, 10.

⁵⁴ "2 (1). A person who is suffering from venereal disease in a communicable form shall not have sexual intercourse with any other person or solicit or invite any other person to have such sexual intercourse" (PP, Criminal Law Amendment Bill, 1917-18, [7], i: 315).

being too solicitous of such concerns. Several MPs pressed for a guarantee of efficiency promised only by compulsory detention and treatment. One Unionist suggested hiving off clause two into a separate bill, to be presented as a war measure which could brook no delay. As it turned out, however, the entire bill was held up by a Standing Committee of the House of Commons.⁵⁵

(iii) Dominion Intervention

The fate of the Criminal Law Amendment Bill was still uncertain when, at the Imperial War Conference of April 1917, the New Zealand Prime Minister drew attention to the "Temptations of Overseas Soldiers in London." Both W.F. Massey and his Canadian counterpart, Sir Robert Borden, were critical of the British Government's failure to control prostitution in Central London. Borden did not hesitate to recommend internment of women with venereal diseases, lest "the future of our race [be] damaged beyond any comprehension." Along with the New Zealand Minister of Finance, Sir Joseph Ward, Borden implied that official inaction was damaging the war effort in the Dominions. Melodramatically, they hinted at a possible reluctance to send troops overseas in a future conflict if the British continued to prevaricate. Although supportive of coercive measures against women, Massey refused publicly to endorse the provision of prophylactics to troops. He understood the harmful association of prophylaxis with promiscuity, although one Canadian delegate expressed his surprise that assistance in the avoidance of disease could be interpreted as "encouragement to vice." The option of prophylaxis was, in any case, firmly ruled out by the

⁵⁵ See PD, (Commons), 19 Feb. 1917, 90, col. 1114-15, 1120, 1116; Sylvia Pankhurst, "The Sexual Crimes Bill," Woman's Dreadnought, 24 Feb. 1917, 680. See also, "Notes on the Criminal Law Amendment Bill," Woman's Dreadnought, 10 Mar. 1917, 693 and the amendments tabled by Sir Frederick Banbury and Aneurin Williams in PP, Report from Standing Committee A on the Criminal Law Amendment Bill, 1917-18 (58), iii: 287. The amendments accepted by this forum reflected the sentiments of clause 2's liberal critics: the withdrawal of the compulsory medical examination provision, and the insertion of a requirement for more rigorous corroboration of evidence against an accused.

War Office owing to the political ramifications of the "so-called moral problem"⁵⁶

The punitive treatment of women, by contrast, was somewhat easier to justify, although still problematic, as the faltering progress of the Criminal Law Amendment Bill duly confirmed. Yet, when the adjourned conference debate resumed on 27 April 1917, the Commissioner of the Metropolitan Police reminded the conference that, under existing law, police could not counteract soliciting more forcefully. Some conference delegates were not appeased by this explanation of the difficulties associated with strong measures. If existing powers were inadequate, they should be strengthened, as the resolution of the Dominion representatives clearly implied.

That the attention of the authorities concerned be called to the temptations to which our soldiers on leave are subjected, and that such authorities be empowered by legislation or otherwise (1) to protect our men by having the streets in the neighbourhood of camps, and other places of public resort, kept clear, so far as practicable of women of the prostitute class, and (2) to take any other steps that may be necessary to remedy the serious problem that exists.⁵⁷

Dominion Governments might, indeed, have expected more from the Lloyd George administration. The second, predominantly Unionist, Coalition was dominated by avid conscriptionists for whom the strict social regimentation implicit in some Dominion proposals was perfectly acceptable. On 23 April 1917 the Coalition Liberals' Chief Whip, F.E. Guest, told the Commons that, at the official infection rate of 43.5 per 1000, there must have been about 107,000 cases of venereal disease in the military during 1916, or roughly 70,000 men incapacitated at any given moment. These figures signified "a very serious loss...in these days when you are combing out industries, when you are hunting among funk-holes in different parts of the City to get men in hundreds."⁵⁸ Although the Lloyd George Coalition was

⁵⁶ CAB 32/1, "Minutes of Proceedings of the Imperial War Conference, 1917," 24 Apr. 1917. The final quotation is from Brigadier-General Sir Wyndham Childs, Director of Personal Services, the War Office.

⁵⁷ *Ibid.*, 27 Apr. 1917.

⁵⁸ PD (Commons), 23 Apr. 1917, 92, col. 2090-91.

avowedly committed to the more effective management of the war effort, the proponents of an 'efficient' solution to the problem of venereal disease in the forces made surprisingly little headway. Sir George Cave was a tough, unsentimental presence at the Home Office, but by mid-1917 he was fully aware of the obstacles to decisive action on the venereal disease question.

The truth is that our existing powers are quite inadequate to meet the situation, but when legislation is proposed we are up against a very obstinate and irreconcilable body of hostile opinion. It is almost impossible to frame a Bill or new regulation which does not at once raise the cry that the Contagious Diseases Acts are being revived....⁵⁹

The Genesis of Regulation 40D

The Colonial Secretary, Walter Long, hoped that the weighty resolution of the Imperial War Conference might induce the Commons to pass the Criminal Law Amendment Bill. But the recommitted bill was obstructed by a flood of additional amendments and made no further progress during 1917.⁶⁰ The domestic supporters of the bill described its withdrawal as a "moral disaster." Cave promised an angry deputation that the bill would not be shelved, but this assurance overlooked the legislative stalemate.⁶¹ The parliamentary situation added to the possibility of further action by DORR. In April 1917 the CMAs and CNAs had been empowered by Regulation 35C to make rules for the preservation of order in special military, naval, or munitions areas. Cave suggested to Lord Derby that 35C might, "without exciting

⁵⁹ HO 45/10802/307990/22A, Cave to Derby, 12 June 1917.

⁶⁰ Buckley, "Failure to Resolve the Problem of Venereal Disease," 73; PD (Commons), 30 Apr. 1917, 93, col. 61-180. Clause 2 had been renumbered clause 5.

⁶¹ HO 45/10837/331148/385, "Criminal Law Amendment Bill, 1917: Deputation from Various Religious Bodies and Organisations of Social Workers to the Home Secretary, 6th July, 1917." The comment was the Rev. John Scott Lidgett's, latterly of the Royal Commission on Venereal Diseases.

hostile opinion," also be used to keep women from the environs of military encampments.⁶² The latest DORR was more versatile than 13A because it applied also to persons without prior conviction of immorality or indecency offences. Yet 35C could still not be invoked in Central London, as General Childs informed an interdepartmental conference in August 1917. In addition, complained the sceptical War Office representative, soldiers would still consort in adjacent towns with women expelled from the camp surroundings.⁶³

The conference did not endorse additional DORA powers but simply restated the importance of educational work, "early treatment," and more surprisingly, the provision of prophylactics to soldiers on leave. A record of the meeting was dispatched to the Dominions, so as to impress on their governments that steps were being taken to implement the Imperial War Conference resolution.⁶⁴ Given the acute displeasure of the Dominions, to which that of the United States Army was added in November 1917,⁶⁵ the pressures for more resolute action were unlikely to ease. For Cave, DORA provided the only way out of the legislative impasse. The Home Secretary favoured a power similar to that of clause five in the revised Criminal Law Amendment Bill. But his draft DORR applied only to soldier, sailors, and women, and not civilian males. Having earlier stated his preference for legislation, Blackwell nevertheless defended the draft DORR as in the interest of military efficiency.⁶⁶ The Admiralty then proposed an additional clause, enabling the CMA or CNA, first, to expel a woman from any

⁶² See above, n. 59.

⁶³ WO 32/11401/3A, "Report of Proceedings of Conference," 3 Aug. 1917."

⁶⁴ Ibid., 15A, Long to Dominion Premiers, 19 Oct. 1917. On the insistence of General Childs, however, this communication excluded all favourable reference to prophylaxis: "the Army Council cannot under any circumstances countenance the issue of prophylactics to the troops" (ibid., Childs to Troup, 15 Sept. 1917).

⁶⁵ HO 45/10802/307990/39, (copy of telegram from British military attaché, Washington), 3 Nov. 1917.

⁶⁶ WO 32/11401/22A, "Draft Minutes of an Inter-Departmental Conference held at the Colonial Office on December 7th, 1917 to Consider the Question of the Protection of Overseas Troops from Venereal Disease."

specified area on sworn information from a soldier or sailor that she had a venereal disease and, second, to order the medical examination of any woman so accused.⁶⁷

General Childs called this last "an impossible proposal," which would oblige War Office spokesmen to defend compulsory medical examination. Yet the General also disapproved the less stringent Home Office draft because it discriminated unfairly between servicemen and civilian males. Childs's other objection was to the DORR's tendency to devolve onto his own department and the Admiralty the administrative and legal duties of the Home Office.⁶⁸ The Colonial Office, which had borne the brunt of Dominion criticism, was infuriated by the prospect of further delay. Long urged Derby to "overcome any opposition to the suggested Regulation which may exist in the minds of the military authorities." But the War Office only agreed to an amended draft, which now applied exclusively to women and which omitted the compulsory medical examination provision. The Colonial Secretary would have preferred the draft to apply to all persons, like clause five of the Criminal Law Amendment Bill, but such a DORR would, he felt, "be outside the scope of the Defence of the Realm Act."⁶⁹

The draft DORR was approved at the War Cabinet of 22 February 1918 but kept back because Cave and Derby could not agree on the appropriate division of departmental responsibility. Derby insisted that the enforcement of the new powers should rest with the Home Office, to which argument Cave made the following reply:

If the matter is to be dealt with from the point of view of civil administration it is plain that the Regulation cannot be defended in its present form, and that the rule if made should be imposed by statute upon the whole population. It is only as a military measure and from the point of view of the defence of the

⁶⁷ Ibid., 26A, Sir Oswyn Murray (Permanent Secretary, Admiralty) to Troup, 30 Dec. 1917.

⁶⁸ Ibid., 27A, Childs to Adjutant-General, 26 Jan. 1918.

⁶⁹ Ibid., 27C, Long to Derby, 28 Jan. 1918; CAB 24/41/G.T.3598, 12 Feb. 1918. See also, CAB 24/44/G.T.3824, Long, "Venereal Diseases," 6 Mar. 1918.

country that the proposal is capable of being defended.⁷⁰

Long was exasperated that this dispute could hold up a measure "which the War Cabinet have formally approved." He complained directly to the Prime Minister and on 13 March 1918 a compromise was reached. The War Office would defend the DORR in Parliament (with the assistance of the Home Office and Colonial Office); the CMAs and CNAs would initiate legal proceedings, and prosecutions would actually be handled by the police.⁷¹

The Campaign Against Regulation 40D

Regulation 40D came into force on 22 March 1918. It was greeted by a predictable chorus of protests. An impressive range of organisations began to exert pressure on the Government for its revocation. Suffrage and other women's organisations, religious and 'social purity' groups, the NCCL; all were involved in the agitation. In Parliament, Liberal MPs Hastings Lees Smith and Joseph King were particularly vocal in their criticisms of the DORR, bombarding government spokesmen with a barrage of awkward questions about the maladministration of 40D. By early in June 1918 the War Office had received over three hundred protest resolutions; the Home Office, about two hundred.⁷² The War Office was pressed to receive a joint deputation, representing agencies opposed to the DORR, but the department repeatedly declined these requests. A meeting between sympathetic MPs and the delegates of some fifty-six anti-40D organisations was arranged instead for 13 June 1918. At this gathering a resolution was carried, promising determined opposition to a regulation "unequal between the

⁷⁰ CAB 24/44/G.T.3812, Cave, "Venereal Disease," 5 Mar. 1918; CAB 23/5/352(10), 22 Feb. 1918; WO 32/11401/34B, Derby to Cave, 4 Mar. 1918.

⁷¹ Lloyd George Papers, F/32/5/11, Long to Lloyd George, 5 Mar. 1918; CAB 23/5/365(14), 13 Mar. 1918; HO 158/19/285, Troup to Chief Constables, 4 Apr. 1918.

⁷² PD, (Commons), 6 June 1918, 106, col. 1732; 11 June 1918, col. 2023. The Home Office had received an additional 400 resolutions by the end of October (31 Oct., 110, col. 1586).

sexes, unjust in its operation, and ineffective for the purpose of controlling venereal disease in His Majesty's Forces."⁷³

The most familiar aspect of the anti-40D campaign was the allegation that, by penalising women alone, the DORR legitimated 'state regulation of vice', just like the CD Acts. According to one organisation, Regulation 40D

encourages the acceptance of the idea that sexual indulgence is necessary for men, that it is the business of the State merely to remove the more dangerous women from the streets, and that a double standard of morality for men and women is a permanent part of our civilization.⁷⁴

Sylvia Pankhurst predicted that innocent women would again be victimised and blackmailed over false accusations of solicitation and communication of venereal disease.⁷⁵ The most detested feature of the CD legislation, compulsory medical examination, was, admittedly, absent from 40D. However, the critics argued that refusal to undergo the procedure voluntarily would be taken as an admission of guilt.⁷⁶ Regulation 40D was seen in the same light as official collusion in the running of the maisons tolérées--the French state regulated brothels--in Cayeux and Le Havre.⁷⁷ The Liberal MP Henry Chancellor argued that behind

⁷³ The meeting was reported in WO 32/11403, Association of Social and Moral Hygiene to War Office, 14 June 1918. The piece contains many of the anti-40D resolutions sent to this department in 1918, along with a list of the societies opposed to the DORR.

⁷⁴ "History of the Attempt to Introduce State Regulation," Independent Women's Social and Political Union circular, July 1918 (in HO 45/10894/359931/88A).

⁷⁵ Sylvia Pankhurst, "State Regulation of Vice," Worker's Dreadnought, 6 Apr. 1918, 980.

⁷⁶ Nation, 20 Apr. 1918, 63, and the speech of Sir Willoughby Dickinson, a noted Edwardian Suffragist, in PD (Commons), 19 June 1918, 107, col. 459-61. Lees Smith claimed that suspects were sometimes not informed of their right to refuse the medical examination (9 May 1918, 105, col. 2301; 24 June 1918, 107, col. 720; 30 July 1918, 109, col. 228).

⁷⁷ The maisons tolérées had recently been placed out of bounds to British troops as a result of a hostile campaign led by the Association for Social and Moral Hygiene. The War Office agreed to this move only reluctantly, arguing that the more frequent resort to 'non-regulated' women would exacerbate the venereal disease problem in the military (CAB 24/45/G.T.3932, Derby, "The Army and Maisons Tolérées in France," 16 Mar. 1918; CAB 23/5/366[13], 18 Mar. 1918). The Association was in direct line of organisational succession to Josephine Butler's Ladies National Association for Repeal of the Contagious Diseases Acts and

40D lay "the old and exploded fallacy held by military men ever since the time of Napoleon and probably before, that indulgence in sexual intercourse is necessary to the health of the soldier." Not only did the DORR foster the dangerous illusion that sexual indulgence was safe, he continued, it also tainted the entire war effort.

To sanction a practice of this kind and to encourage sexual vice amongst our soldiers and sailors by this illusive safeguard, and then to pray that God will bless our arms, and to claim that we are conducting a holy war, is the rankest blasphemy.⁷⁸

The controversy engendered by Regulation 40D also prompted renewed attacks upon the abuse of executive power under DORA and the challenge posed by delegated legislation to the authority of Parliament. Walter Long had warned that "it would be difficult from a Parliamentary point of view" to issue a DORR which duplicated clause five of the stalled Criminal Law Amendment Bill. In fact, if anything, 40D signified a constitutional course of action even more suspect than the Colonial Secretary acknowledged. The DORR created powers which were still more stringent and inequitable than those in the bill about which some MPs had expressed such grave doubts. Quite apart from the exemption of all males from 40D, the DORR omitted two safeguards in the revised clause of the Criminal Law Amendment Bill. The first of these promised to protect defendants who could demonstrate ignorance of infection when their offence was supposedly committed; the second required the evidence of hostile witnesses to be corroborated by a third party. Both stipulations were included in an early draft of 40D but withdrawn when the Parliamentary Draftsman advised they would render the regulation a "dead letter."⁷⁹

Regulation 40D was, not surprisingly, viewed as a particularly insidious piece of

one of the most vocal lobbyists against Regulation 40D.

⁷⁸ PD (Commons), 19 June 1918, 107, col. 455-56. The last part of the quotation is an ironic reference to Lloyd George's recent speech to the Free Church Council.

⁷⁹ HO 45/10802/307990/52, Liddell to Blackwell, 1 Feb. 1918. On the discrepancies between the regulation and the bill, see Lord Parmoor in PD (Lords), 4 July 1918, 30, col. 631-33.

delegated legislation. The latitude afforded the executive by DORA was inherently objectionable to civil libertarians. But 40D had been issued not only behind the back of Parliament, but also in outright defiance of the supreme legislative body. The Women's Freedom League called for the withdrawal of a DORR that had been implemented "without the knowledge of the representatives of the People, and in spite of the opposition both inside and outside the House of Commons in the face of which the Criminal Law Amendment Bill was dropped last session." Lees Smith ultimately forced an emergency debate on 40D, during which he attacked the Government's "very unfair use of its powers under the Defence of the Realm Act to pass, without the assent of Parliament, a provision identical with that which it had to withdraw because of the opposition of Parliament."⁸⁰

Executive detention by regulation had led to the questioning of what Parliament had intended by the passage of DORA in August 1914. The threatened punitive treatment of women by 40D had a similar effect. The veteran Irish National MP John Dillon could not recall "a more scandalous act of executive government...Nobody who voted for the Defence of the Realm Act ever dreamed that it would be perverted to such uses as that."⁸¹ These strains of constitutional criticism, however, did not go unchallenged. In the Commons debate of 19 June 1918, the Parliamentary Under-Secretary for War, Ian Macpherson, stated not only the official case for Regulation 40D, but also for a broad measure of executive freedom of action under DORA generally.

My hon. Friends very often seem to forget that we are in the midst of a great crisis and that they were among those who gave Parliament power in great emergencies, to pass Regulations of this sort in this way. Now they are the first to come forward and accuse us of employing the powers which were unanimously given to us by the House at the beginning of the War. The Government, rightly or wrongly, came to the conclusion that this was a case not for the more dilatory methods of statutory legislation, but for the exercise

⁸⁰ WO 32/11403, Women's Freedom League to Derby, 9 Apr. 1918; PD (Commons), 19 June 1918, 107, col. 449

⁸¹ PD (Commons), 24 July 1918, 108, col. 1957.

of those powers given to it unanimously by the House.⁸²

The Official Response

Macpherson was generally more emollient in countering the criticism of Regulation 40D. The DORR did not encourage illicit sexuality by making it safer; rather, it was designed simply to protect servicemen, "the defenders of the realm, who must be kept healthy and strong."⁸³ Regulation 40D would have covered civilian males as well had this been *intra vires* DORA. Diseased soldiers did not escape punishment, although this was carried out under the King's Regulations rather than the disputed DORR. The concealment of venereal disease by soldiers was a military offence which carried a maximum penalty of two years imprisonment with hard labour. Soldiers who reported their infected condition forfeited certain emoluments (including, if married, the wife's separation allowance) and were required to contribute to the cost of their own treatment and convalescence. Macpherson urged women infected with a venereal disease by a soldier to inform the appropriate commanding officer, whereupon the man would be examined and possibly tried by court martial.⁸⁴ Several times Lees Smith disputed this particular justification of 40D, by challenging the War Office's presumptions that women would lodge complaints with the army and that there was a rough equality of treatment between men and women.⁸⁵

Military men expected little improvement in venereal disease rates from Regulation 40D. The Australian Surgeon-General, Sir Neville Howse, thought that the focus on the civilian population was misguided and impractical. Where could the legions of venereal

⁸² Ibid., 19 June 1918, 107, col. 470.

⁸³ CAB 24/62/G.T.5507, Macpherson, "Defence of the Realm Regulation 40D," 26 Aug. 1918.

⁸⁴ PD (Commons), 16 Apr. 1918, 105, col. 237; 1 May 1918, col. 1552.

⁸⁵ Ibid., 11 June 1918, 106, col. 2022-3; 19 June, 107, col. 446; 23 Oct. 110, col. 763.

disease victims be lodged, he asked a special conference at the War Office, if they were suddenly detained en masse. Yet Howse had noticed significant improvement in the Australian army since the informal institution of prophylactic measures two years previously. The commander of New Zealand forces in Britain, General Richardson, agreed. His army's educational initiatives had yielded minute dividends in comparison to the distribution of prophylactic packets to the troops.⁸⁶ These views were endorsed by the United States naval representatives, but majority opinion of the conference was better reflected in the draft public statement prepared by Macpherson. This communiqué promised improved "early treatment" facilities but withheld official support from preventive measures taken before exposure to possible infection. The NCCVD's Lord Sydenham agreed; "early treatment" was much more palatable than the furnishing of men with prophylactics in advance of leave.⁸⁷

In spite of the furor over Regulation 40D, some conference delegates felt quite comfortable in pressing for more draconian measures against infected women. For example, Sydenham thought it appropriate to reconsider 'compulsory notification', although this option had been rejected by his Royal Commission only two years previously. Sir Thomas Mackenzie, the New Zealand High Commissioner, referred to his own country's enforcement of something close to 'compulsory notification' and urged the British authorities to adopt this expedient. The next month New Zealand's Governor General asked why infected women could not be segregated until they were "no longer a menace to the community." In a second telegram to the Colonial Office he requested a revision of 40D, to make solicitation by women ipso facto an offence, irrespective of whether defendants were "suffering from venereal disease

⁸⁶ General Richardson was a relatively late convert to preventive prophylaxis. Only two years previously, he had viewed such steps as "tantamount to encouraging immorality" (O'Connor, "Venus and the Lonely Kiwi," 24).

⁸⁷ WO 32/11404, "Minutes of Proceedings at a Conference Regarding Venereal Disease and its Treatment in the Armed Forces at the War Office Friday, 10 May, 1918." This meeting was attended by religious leaders, lay and medical experts, and political and military representatives from Britain, the Dominions and the United States.

in a communicable form."⁸⁸ The latter recommendation was instantly rejected by Blackwell, who minuted that the Home Office "could not concur in making 'solicitation' by any woman a criminal offence: and that if it is made an offence for a prostitute to solicit a man it should also be made an offence for a man to solicit a prostitute."⁸⁹

Yet there were renewed calls for both tighter soliciting legislation and compulsory detention and treatment at the reconvened War Office conference, on 11 July 1918. Several representatives also lamented the absence from 40D of a mandatory medical examination requirement. General Childs complained that, without this power over the accused, convictions would be difficult to secure.

In these cases...the news very rapidly spreads among this class, and it means simply that prostitutes if they keep their mouths shut will not be let in for a conviction, and the magistrates in London in these cases require more than the word of a man who says "I have got such and such a disease from this woman," because probably on cross-examination the fact is elicited that he has gone with more than one woman and the problem is which woman has he got the disease from. That is what the prostitutes have come to know and therefore I think that Section 40D becomes a washout.

However, Macpherson stressed that the medical examination provisions could not be changed, owing to parliamentary assurances that women would not be examined without their consent.⁹⁰

The police also identified the voluntary examination arrangement as one of several problems with the DORR. Even when forthcoming, medical evidence was often inconclusive. Chief Constables reported difficulty in proving the existence of an infective condition at the

⁸⁸ Ibid.; HO 45/10802/307990/74 and 75A Lambert (Permanent Secretary, Colonial Office) to Troup, 8 and 27 June 1918 (telegrams enclosed). The second quotation is from the text of 40D.

⁸⁹ HO 45/10802/307990/75A, Blackwell (minute), 13 July 1918. The law on soliciting had long been criticised for its unequal application between sexes (see, for example, Woman's Dreadnought, 10 Mar. 1917, 693).

⁹⁰ WO 32/11404, "Minutes of Proceedings at an Adjourned Conference Regarding Venereal Disease and its Treatment in the Armed Forces at the War Office. Thursday, 11th July, 1918"; PD (Commons), 9 May 1918, 105, col. 2301; 11 July 1918, 108, col. 485-86.

time of the alleged offence and in establishing which party was its original source. In addition, soldiers were often reluctant to give evidence in open court.⁹¹ By late June 1918 the police had investigated 163 40D cases; charges had been brought against 74 women, resulting in 44 convictions and 26 acquittals.⁹² The Home Office Assistant-Secretary who examined these returns made light of the difficulties encountered by the police. He blamed the military for the lax enforcement of 40D. Twenty of these prosecutions had been instituted independently of the CMAs. "If the military authorities want a larger proportion of offenders against the DRR punished," he reported, "they must be more active in giving information to the police."⁹³ The War Office had always been conscious of the wider issues raised by measures such as 40D. The department had striven to evade ultimate responsibility for legal action under this DORR. Having been saddled with this burden under duress, the CMAs did not discharge these duties with much enthusiasm.

The impact of Regulation 40D was muted by administrative problems, a lack of political will, and an effective protest campaign. At the second Imperial War Conference, however, the Home Secretary cited the DORR as evidence of a successful attempt to act on the previous year's conference resolution. In order to dispel lingering dissatisfaction among Dominion representatives, Cave also referred to Local Government Board initiatives, based on the recommendations of the Royal Commission on Venereal Diseases. The Parliamentary Under-Secretary for War, meanwhile, pointed to a recent drop in venereal disease cases in the army. Macpherson attributed this encouraging sign to the improved "early treatment" facilities which had just been approved at the War Office conference. Given the distaste for

⁹¹ A few convictions were secured without even the servicemen being cross examined, a dubious practice to which Lees Smith drew attention in PD (Commons), 30 Apr. 1918, 105, col. 1377-79; 1 July 1918, 107, col. 1402.

⁹² HO 45/10894/359931/79A, "Proceedings under Regulation 40D of the Defence of the Realm Regulations: Précis of Observations and Suggestions," n.d. (July 1918). There were 4 cases still pending when these figures were compiled.

⁹³ Ibid., Simpson (minute), 18 July 1918.

prophylaxis of some conference delegates,⁹⁴ Macpherson took care to emphasise that

the soldier is not encouraged to take this early treatment with him before he leaves barracks, but by means of lectures and by means of very careful organisation, he can when he comes into barracks procure for himself, without the knowledge of anybody, a certain form of early treatment after the exposure.⁹⁵

The usual extreme proposals also featured in the Imperial War Conference discussion. But the rejection of both stronger soliciting legislation and 'compulsory notification' suggests the British Government's greater sensitivity to its domestic, as opposed to Dominion, critics. The former had a useful ally in George Barnes, patriotic Labour's representative in the War Cabinet. Barnes was opposed in principle to the DORR but cited the practical difficulties experienced by police as the most compelling reasons for its withdrawal. In view of its obvious limitations, the repeal of 40D would not disadvantage the authorities. This concession would, however, subdue a potentially damaging agitation. On 1 August 1918 Barnes presented this case to the War Cabinet's Committee on Home Affairs. He was countered by Macpherson, who defended the DORR as a necessary sop to the Dominions and the United States.⁹⁶ After Macpherson prevailed, Barnes raised the matter at War Cabinet level. He repeated his demand for either repeal or the immediate extension of 40D to both sexes. He was again opposed by Macpherson, who argued that excessive haste in the suspension of 40D

⁹⁴ See, for example, the strictures of the New Zealand Prime Minister, W.F. Massey: "If that sort of thing is to be encouraged, we are soon going to get into the position that other people have got into in days gone by, prior to the downfall of the country to which they belonged. Whenever an Empire has fallen, the downfall has always been preceded by an orgy of immorality, and I am afraid, judging by what we hear now and again, we are getting perilously near that state of things in the larger centres of Great Britain" (CAB 32/1, "Minutes of Proceedings of Imperial War Conference, 1918," 19 July 1918).

⁹⁵ Ibid.

⁹⁶ CAB 24/59/G.T.5216, G.N. Barnes, "Defence of the Realm Act: Regulation 40D," 26 July 1918; CAB 26/1/7(1), 1 Aug. 1918. The United States had just secured the application of 40D to American troops in Britain (SRO 934, 19 July 1918). The Home Affairs Committee was "the domestic counterpart of the War Cabinet," established in mid-1918 at the behest of Minister of Reconstruction, Christopher Addison, who hoped that this forum might increase the political momentum of his health reforms (Kenneth and Jane Morgan, *Portrait of a Progressive: The Political Career of Christopher, Viscount Addison* [Oxford, 1980], 77-78).

might imperil clause five of the Criminal Law Amendment Bill.⁹⁷

The War Cabinet postponed a final decision on 40D but did instruct Cave to suggest improvements in its administration. Macpherson was deputed to issue a statement "suitable for general propaganda" to the Imperial War Conference, and the Law Officers were asked to investigate the possibility, hitherto ruled out, of applying 40D to the civilian population as a whole.⁹⁸ Cave's memorandum applauded the "beneficial deterrent effect" of 40D, but its chief thrust was towards a relaxation of the DORR. He advocated the insertion of the safeguards for suspects and against blackmail contained in clause five of the Criminal Law Amendment Bill. The Home Secretary also advised that written consent be obtained before the medical examination of suspects, just as Lees Smith and others had been demanding. Finally, he suggested that magistrates should instruct the press to respect the privacy of possibly innocent women charged under 40D.⁹⁹

The War Cabinet of 28 August 1918 failed to act upon this memorandum. The advice of the Solicitor-General, Sir Gordon Hewart, that 40D might, indeed, be extended to civilian males was also ignored. The political calculations of Lord Robert Cecil carried greater weight. The Foreign Office's Parliamentary Under-Secretary warned of a possible electoral fiasco should Regulation 40D prejudice newly enfranchised women against the Coalition. The Government had certainly been attacked, on both Regulation 40D and clause five, for taking

⁹⁷ The Government had not yet given up hope on this measure. The bill had been reintroduced, in the Lords, on 7 May 1918. It had then been referred, with Lord Beauchamp's Sexual Offences Bill, for the consideration of a Joint Select Committee of both Houses. In the summer of 1918, the committee was still in the process of accumulating the expert testimony on which to base its recommendations (PD [Lords], 7 May 1918, 29, col. 952-91; 23 July 1918, 30, col. 1000).

⁹⁸ CAB 23/7/461(13), 20 Aug. 1918.

⁹⁹ CAB 24/62/G.T.5504, Cave, "Memorandum of the Home Secretary as to Proposed Improvements in the Administration of Regulation 40D," 26 Aug. 1918.

precipitous action in an area of special interest to prospective women voters.¹⁰⁰ Cecil proposed the appointment of a Royal Commission on 40D as a signal of good faith to the female electorate. Macpherson questioned the wisdom of such a move. A Royal Commission would only duplicate the work of the Joint Select Committee on the Criminal Law Amendment Bill and the Sexual Offences Bill. If the former reported against the DORR, clause five of the bill would probably also have to be dropped. Nevertheless, the War Cabinet decided to establish a Royal Commission on 40D, to consider "what amendments of it (if any) were desirable, and particularly the advisability of extending it to the civilian population." The DORR was to remain in force during the interim.¹⁰¹

Aftermath

To expedite the investigation of 40D, a small committee was substituted for the promised Royal Commission of inquiry.¹⁰² This body met only five times before the Armistice. At this juncture, the chair, Lord of Appeal Moulton, advised the immediate withdrawal of the DORR.

It is of so special a kind that the justification put forward for its enactment is based upon the necessities created by the existence of a state of war. Its provisions are strongly objected to by a large portion of the civil population on account of its affecting women only and for other reasons, and this state of feeling will become more acute if it is kept in force after the state of war has ceased...

The Regulation deals only with a small part of a very much wider question which can alone be dealt with by General Legislation and the solution of that question would not be assisted, in their opinion, by the Regulation being maintained in force any longer.¹⁰³

¹⁰⁰ See WO 32/11403, Women's Freedom League to War Office, 25 Apr. 1918; LL, 23 July 1918, 5; PD (Commons), 19 Feb. 1918, 103, col. 602; 29 July 1918, 109, col. 40-41.

¹⁰¹ CAB 23/7/465(4), 28 Aug. 1918.

¹⁰² See Lloyd George Papers, F/6/4/15, G.G. Whiskard (Cave's Private Secretary) to J.T. Davies (Prime Minister's Office), 5 Sept. 1918.

¹⁰³ HO 45/10894/359931/130, Moulton to Cave, 15 Nov. 1918.

Regulation 40D was duly revoked on 26 November 1918.¹⁰⁴ Yet Lord Sydenham was insisting that demobilisation would require even greater vigilance against this "most insidious enemy to national vigour." The President of the NCCVD wanted all servicemen tested for venereal disease and, if necessary, detained in the forces for treatment.¹⁰⁵

This suggestion had been first mooted by Sydenham the previous spring, when the British Army's senior medical officer ruled out mass testing during demobilisation because of the strain it would impose on manpower and hospital resources. The War Office also resented the implication that venereal disease was primarily a military phenomenon.¹⁰⁶ In November 1918, Sydenham was promised only the swift release of military personnel qualified to treat venereal disease and the encouragement of local authorities to establish more and improved treatment centres.¹⁰⁷ The "very much wider question" to which Lord Moulton had referred was also left unsettled. Pending the report of the Joint Select Committee on the Criminal Law Amendment Bill and the Sexual Offences Bill, the Government was still committed to clause five. The NCCVD had hoped that agitation against 40D might somehow smooth the passage of a short piece of legislation embodying this still stringent, but more equitable, measure. But this hope was soon dashed by the Home Office,¹⁰⁸ and in November 1918 the bill was still

¹⁰⁴ By the end of October 1918, prosecutions had been brought in 203 of the 396 cases reported to the police by CMAs or CNAs since 40D took effect. Of these women, 101 had been convicted (49 on pleas of guilt), 91 acquitted, 5 dealt with under the Probation Act. There were still 5 cases pending (*ibid.*, 116).

¹⁰⁵ PD (Lords), 20 Nov. 1918, 32, col. 297; CAB 24/70/ G.T.6335, Sydenham to Hankey, 19 Nov. 1918.

¹⁰⁶ WO 32/11402, Sydenham to Derby, 18 Mar. 1918; WO 32/11402/3, Lieutenant-General T.H. Codwin (Director-General, Army Medical Service) to H.J. Creedy (Derby's Private Secretary), 27 Mar. 1918. See PD (Commons), 17 Apr. 1918, 105, col. 469-71 for Macpherson's public comment that "it would be highly improper to make the Army practically a segregation camp."

¹⁰⁷ PD (Lords), 20 Nov. 1918, 32, col. 300-01.

¹⁰⁸ HO 45/10837/331148/447, Sydenham to Cave, 12 Apr. 1918; Home Office to Lord Sandhurst, 6 May 1918 (Sandhurst was about to be appointed chair of the Joint Select Committee).

before the parliamentary committee. There was no chance of its being rushed through at the end of a long session. With the dissolution of Parliament imminent, the Joint Select Committee was wound up before completing its inquiry. The NCCVD pressed for its immediate reconstitution after the General Election, but their forceful advocacy notwithstanding, clause five never did become law.¹⁰⁹

In 1919 an interdepartmental committee recorded its "unanimous view that the true safeguard against these diseases is individual continence and a high standard of moral life." This conclusion flew in the face of the increasingly conventional military wisdom that only systematic prophylaxis reduced venereal disease in the forces. The committee also questioned its own statistical evidence of declining infection rates in Allied armies since mid-1916, when prophylactic measures were first informally implemented. The report attributed the undoubted improvement since then to better social and recreational amenities for soldiers and to the close supervision of men subject to military discipline. The committee therefore opposed the adaption for civilian life of military methods of prophylaxis whose benefits had not been proven. Alluding to the associated "social difficulties" in this last regard, they clearly grasped the still contentious nature of the subject under review.¹¹⁰ A vocal segment of public opinion recoiled just as instinctively from incipient 'state regulation of vice'. When Manchester City Council set up experimental "ablution centres" in public toilets during 1920, the resulting moral outcry forced the hasty abandonment of this local initiative.¹¹¹

¹⁰⁹ CAB 24/70/G.T.6335, "Demobilisation and Venereal Disease: Resolutions passed by the Executive Committee of the National Council for Combating Venereal Diseases, November 18th, 1918." The weighty interim report of the parliamentary committee, dated 19 November 1918, is PP, Report from the Joint Select Committee on the Criminal Law Amendment Bill and Sexual Offences Bill (House of Lords).

¹¹⁰ PP, Note on Prophylaxis Against Venereal Disease, para. 10-13.

¹¹¹ See Weeks, Sex, Politics and Society, 216.

Conclusion

In July 1918 General Childs told one of the many wartime conferences on venereal disease that "if the country were under military government the question would be settled in a week."¹¹² The British Government did at least have DORA at its disposal, but this theoretically formidable power did not prevent venereal disease policy from being hesitant and uncertain. Disputes over the appropriate spheres of departmental action were partly to blame.¹¹³ But one doubts whether the concentration of administrative responsibility, in either the Home Office or War Office, would have made the opposition to 'state regulation of vice' any less effective. Free treatment for sufferers was probably the only measure which did not unduly affront contemporary sensibilities. Expedients which had been ruled out unequivocally after the outbreak of war, soon came to receive serious consideration. But the early DORRs were ineffective, and truly drastic action was postponed until the spring of 1918. Even after Regulation 40D came into force, the hostility it elicited in civil libertarian and 'social purity' circles helped to mute its impact.

The libertarian critics of official policy appeared to influence the political calculations of departments more than did the domestic and Dominion proponents of 'compulsory notification'. Both this and other extreme proposals were never likely to be implemented. Yet government officials were really no more solicitous of civil liberties on this contentious issue than on others raised by the administration of DORA. But their venereal disease policies not only risked the antagonism of a small, relatively uninfluential, civil liberties lobby. There was the added danger that "the goodwill of a most respectable part of the community to the national cause would be alienated." The authorities were caught in the predicament of not knowing whether "to provide proper prophylaxis, and risk immorality, or to urge moral

¹¹² WO 32/11404, "Minutes of Proceedings at an Adjourned Conference," 11 July 1918.

¹¹³ Buckley, "Failure to Resolve the Problem of Venereal Disease," *passim*.

restraint and risk disease."¹¹⁴ Notwithstanding serious implications for military manpower of the first formula, government departments usually chose the second, politically safer, course. The authorities had to be seen to do something, hence the coercive and punitive treatment of women by DORR.

¹¹⁴ CAB 23/5/366(13), 18 Mar. 1918; Weeks, Sex, Politics and Society, 216.

Chapter 7: EPILOGUE

For the Duration and Beyond

Three days after the signing of the Armistice, C.P. Trevelyan asked the Prime Minister

whether all restrictions on liberty of speech and the Press will be at once removed; all the regulations with such tendency made under the Defence of the Realm Act rescinded; all British subjects imprisoned without trial released; and all penalties for offences connected with the political speech or writing remitted?¹

This was surely a reasonable request from this inveterate parliamentary critic of DORA. The standard justification for DORA was, after all, that it would remain in force only for the duration of the conflict. Moreover, the opening sentence of the statute restricted its use to "the continuance of the present war." These germane considerations notwithstanding, Trevelyan probably knew that the Government had no immediate intention of rescinding either these or any other of the powers vested in them by DORA.

As early as December 1917 a committee of judicial experts had been appointed by the Attorney-General to clarify the legal meaning of "the continuance of the present war" and similar phrases embodied in other emergency statutes. The committee's first published report ventured that British courts would probably adjudge a state of war to exist until after the exchange of all ratified peace treaties. However, the committee also favoured a statutory definition of the 'end of the war' so as to dispel any lingering uncertainty as to the validity of emergency legislation in the period immediately prior to such a date. The Minister of Reconstruction, Christopher Addison, was not sure whether to proceed with a short general

¹ PD (Commons), 14 Nov. 1918, 110, col. 2868.

bill, authorising each department to prolong the necessary legislation or regulations by Order in Council, or to seek a detailed measure which would specify those powers to be continued.² A Commons Select Committee on Emergency Legislation, appointed in July 1918, preferred the convenience of the first option. Two months later, at the behest of Addison, the Home Affairs Committee of the War Cabinet ordered a bill to be drafted along these lines and introduced as soon as possible.³

This legislation was enacted the same day as Parliament dissolved, 25 November 1918.⁴ Yet this Termination of the Present War (Definition) Act addressed only one aspect of a much broader question. Far more perplexing was to determine which emergency laws and regulations should be continued on grounds of policy. The Ministry of Reconstruction had already coordinated departmental investigations of which DORPs would be needed after the war. These discussions had centred on the plethora of economic controls for which DORA provided the statutory authority.⁵ In official circles it was taken for granted that this wartime

² PP, Reports of the Committee appointed by the Attorney-General to consider the Legal Interpretation of the Term 'Period of the War', 1917-18, Cd. 9100, xvi: 691, "First Interim Report," 12 Jan. 1918; Cave Papers, ADD MS 62476, Addison to Cave, 22 Mar. 1918, with Enclosures A and B ("Memorandum by the Minister of Reconstruction, 20 Dec. 1917"; "Notes on Conversation with Sir Courtenay Ilbert").

³ PP, Report from the Select Committee on Emergency Legislation, 1918, (108), iii: 535, 5 Aug. 1918; CAB 24/68/G.T.6111, Christopher Addison, "Definition of the Phrase 'End of the War' and Other Similar Phrases," 23 Oct. 1918; CAB 26/1/16(1), 30 Oct. 1918.

⁴ Public General Statutes 8 & 9 Geo. 5, c. 59.

⁵ By November 1918 there were some 58 DORRs pertaining to the "Occupation and Control of Land and Buildings, Control of Food Supplies, Securities, War Material, and Means of Production." There were also 25 regulations affecting shipping and navigation, and separate regulatory schemes of coal and canal control. The foundation for much of this 'war collectivism' was clause 1 (3) of the DORA of November 1914 ("Powers for expediting production of war material"), as amended by the Defence of the Realm (Amendment No. 2) Act of 16 March 1915. Its central pillars were Regulations 2B, 2E, 7, 8, and 8A. Regulation 2B allowed for the compulsory requisition of raw materials (including foodstuffs) and established a price mechanism for their purchase by the state. Regulation 2E enabled the state to "regulate, restrict, or prohibit the manufacture, use, purchase, sale, repair, delivery of or payment for, or other dealing in, any war material, food, forage, or stores of any description or any article required for or in connection with the production thereof." This broad power of securing essential supplies for the forces was augmented by the requisitioning powers of

economic regulation would ultimately lapse after the cessation of hostilities. But those departments which oversaw the system of supply, production, pricing, and distribution controls also favoured the temporary retention of many DORRs, to ensure a smooth transition of the economy to its peacetime footing.⁶

The Armistice immediately altered the terms of this hitherto closed debate of DORA's postwar role. The frosty reception of Addison's Termination of the Present War (Definition) Bill provided an early sign of a growing (and predominantly Unionist) desire promptly to 'liberate' the economy from its wartime shackles. The parliamentary attack on the bill was led by Richard Holt. This long-standing Radical critic of both DORA and the Lloyd George Coalition was worried about the implications for civil liberties of enforcing war legislation in peacetime. Several supporters of the Government were more disturbed by the prospect of a prolonged bureaucratic interference with trade and industry. Addison reminded these critics that his measure also provided for the withdrawal of emergency legislation prior to the perhaps distant moment alluded to in the bill.⁷ Bonar Law had taken note of the mood in Parliament. The Unionist chief requested the recently ennobled Lord Cave to assess which DORRs might safely be revoked. Advised by a separate committee, the Home Secretary

Regulation 7. These were similar to Regulation 2B but applicable to manufactured output instead. Regulation 7 also mirrored 2B's 'costs-plus-prewar-profits' system of pricing. Regulation 8 entitled the Admiralty, War Office, or Ministry of Munitions to take possession of any factory or of any plant contained therein. This DORR represented the most direct method of state control over war production, and the Ministry of Munitions operated a number of establishments along these lines. The more frequently used legal basis of state intervention in the area of war production was Regulation 8A, which empowered the 2 service departments and the Ministry of Munitions to direct, regulate, or restrict production, but without subjecting the enterprise in question to full state control. For the text of these DORRs as they stood near the end of the war, see Defence of the Realm Manual, 6th ed. (London: HMSO, 1918), 44-85 passim. See also Lloyd, Experiments in State Control, 50-64.

⁶ The views of the Board of Trade, the Ministry of Munitions, the War Office, Ministry of Shipping, and Ministry of Food are presented in CAB 24/67/G.T.6051, Ministry of Reconstruction, "Memorandum on the Continuance of Emergency Legislation," 19 Oct. 1918. On the broader context, see Paul Barton Johnson, Land Fit For Heroes: The Planning of British Reconstruction, 1916-1919 (Chicago, 1968), chs. 9, 11, 13.

⁷ PD (Commons), 15 Nov. 1918, 110, col. 3127-46.

recommended the immediate repeal of forty-one regulations and the partial relaxation, or possible revocation, of another sixteen.⁸

The ensuing Order in Council, of 25 November 1918, significantly reduced the 260 DORRs still in force. Most of the forty-seven DORRs that were to lapse, however, had obviously been rendered obsolete by the cessation of hostilities.⁹ With the sole exception of Regulation 40D, the restrictions over civil liberties, on which preceding chapters have focused, together with the principal levers of 'war collectivism', all survived intact. On 28 November 1918 Addison told the War Cabinet that some of these economic controls would be necessary even after the interim period defined in his Termination of the Present War (Definition) Act.¹⁰ Although Addison was anticipating a prompt ratification of the peace treaties, as opposed to a protracted extension of the DORRs, this position conflicted with the burgeoning spirit of 'decontrol'. After the notorious 'coupon' election of November 1918, parliamentary pressure for a rapid return to economic normality, exerted by Unionist predominance in the Commons, increased steadily.¹¹ For six months or so the reelected Coalition sought to absorb this

⁸ CAB 24/69/G.T.6294, Bonar Law (note) and Cave to Bonar Law, 15 Nov. 1918 (Cave had been created Viscount with his appointment as a Lord of Appeal after the Armistice. He remained at the Home Office until January 1919); Cave Papers, ADD MSS 62746, Secretary, the Defence of the Realm Regulation Amendment Committee (memorandum), 19 Nov. 1918; CAB 24/70/G.T.6350, Cave, "Defence of the Realm Regulations," 22 Nov. 1918.

⁹ For example, contingency plans for the destruction of harbour facilities (Regulation 16) and air raid precautions (Regulations 17A and 17B). One might also point to the withdrawal of the power to remove inhabitants (Regulation 9) and vehicles, foodstuffs and fuel (Regulation 6) from particular areas, both of which had been drafted originally with the possibility of a hostile invasion in mind. The infrequently used curfew DORR (13) was withdrawn, as were some of the controls over lights and sounds (Regulations 12, 12B, 12C) and signalling (Regulations 25, 25A, 25C, 26). In addition, the apparently petty restriction of recreational meetings and events was relaxed (Regulation 9B: horse racing, 9BB: coursing, 9D: fairs, 9DD: dog shows). For the text of these DORRs, see Defence of the Realm Manual, 6th ed., 77-126 passim.

¹⁰ CAB 24/70/G.T.6397, Christopher Addison, "Continuance of Emergency Legislation after the Termination of the War," 28 Nov. 1918.

¹¹ The political explanation for the 'failure of reconstruction', first assayed by J.M. Keynes in The Economic Consequence of the Peace, surfaces in Johnson, Land Fit For Heroes. For alternative interpretations highlighting, respectively, ideological stasis, sociological factors,

pressure, in order to minimise the risks of economic dislocation and social unrest. But the inflationary spiral that accompanied the brief postwar revival of trade left the Prime Minister both less willing and less able to withstand mounting backbench, Treasury, and City pressure for a policy of retrenchment and 'decontrol'.

After the election of November 1918, a new Continuance of Emergency Legislation Committee was established. Lord Cave was again in the chair and individual departments were represented by the influential permanent officials, such as Troup and Brade, who had helped administer the DORRs during the war.¹² Cave's committee acknowledged

that all emergency legislation, and especially all exceptional administrative powers, ought to be dispensed with as soon as it is possible to do so consistently with safeguarding the national security and public interests of a distinctively emergency character.

At the same time, however, this report also recommended the extension by legislation of some 117 DORRs for another year after the 'official' end to the war.¹³ These DORRs included both the major and minor mechanisms of economic control, although most were to be restricted to those establishments, products, or raw materials already subject to state regulation. In addition, the much-disputed regulatory schemes of search, seizure, internment, and censorship would be prolonged by this legislation.¹⁴ The committee was quite prepared to perpetuate

civil service inertia and shifting wartime expectations of Britain's economic future, see R.H. Tawney, "The Abolition of Economic Controls, 1918-1921," Economic History Review 13 (1943): 1-30; Philip Abrams, "The Failure of Social Reform," Past and Present 24 (1963): 43-64; Rodney Lowe, "The Erosion of State Intervention in Britain, 1917-24," Economic History Review 31 (1978): 270-86; Peter Cline, "Winding Down the War Economy: British Plans for Peacetime Recovery, 1916-19," in War and the State: The Transformation of British Government, 1914-1918, ed. Kathleen Burk (London, 1982), 157-81.

¹² CAB 24/72/G.T.6502, Lord Cave, "Extension of Powers under Defence of the Realm Acts," 17 Dec. 1918; CAB 26/1/18(1), 18 Dec. 1918.

¹³ CAB/24/5/G.233, Lord Cave, "Report to the Committee of Home Affairs of the War Cabinet by the Continuance of Emergency Legislation Committee," 5 Feb. 1919.

¹⁴ Sir William Ryland Adkins, veteran Radical MP and the lone dissident on the Committee, had pressed for certain DORRs to be discontinued after 6 months, "on the ground that they specially affected the liberty and private rights of individuals" (Cave Papers, ADD MSS 62477, Committee on Continuance of Emergency Legislation, Minutes of Second Meeting,

many powers which had been conceived during a military emergency and which derived their authority from a statute for "securing the public safety and the defence of the realm."

Anticipating an unfavourable parliamentary reaction, the Home Affairs Committee instructed Lord Cave to pare down schedule three of the draft bill.¹⁵ His committee resolved to drop seven more DORRs¹⁶ and to set a specific date, 31 August 1920, after which all remaining regulations would lapse automatically. This revised report was endorsed by the Home Affairs Committee on 23 May 1919,¹⁷ but the War Emergency Laws (Continuance) Bill did not become law until the following year. The bill encountered such hostility when it was presented to Parliament in July 1919 that it was withdrawn even before second reading. The Attorney-General, Sir Gordon Hewart, advised further deletions from schedule three, which had been whittled down to sixty-one DORRs when the bill finally passed in March 1920. The legislation was stalled at the committee stage until this date by a combination of Asquithian-Liberal, Labour, and antistatist Unionist criticism.¹⁸

6 Jan. 1919). This view prevailed as regards Regulations 14, 14B, 27, 27B ("power to prohibit importation of publication contravening Regulation 27") and Regulation 42 as well as 3 of the controls that affected licensed premises, intoxicants, and places of public entertainment (Regulations 10, 10A and 10C). DORRs which were to be extended for only 6 months after the 'end' of the war (8 in all) have to be added to the original 117. The draft bill is in CAB 24/76/G.T.6981.

¹⁵ CAB 26/1/24(2), 24 Mar. 1919 (the first 2 schedules specified the other statutes which were to remain in force; a total of 190 laws enacted since August 1914 had been designated war legislation by the 1918 Commons Select Committee).

¹⁶ Including, in the economic sphere, the strategically vital Regulations 7 and 8A (CAB 24/5/G.242, Cave, "Second Report to the Committee of Home Affairs of the War Cabinet by the Continuance of Emergency Legislation Committee, 12 May 1919).

¹⁷ CAB 26/1/29(1), 23 May 1919.

¹⁸ CAB 24/90/G.T.8384, Sir Gordon Hewart (memorandum), 19 Oct. 1919; Public General Statutes 10 & 11 Geo. 5, c. 5; PD (Commons), 28 Oct. 1919, 120, col. 541-622 *passim*. The bill's Liberal critics were particularly concerned about its different application in Ireland, which they saw as tantamount to the legislation of a 'coercion' policy through the back door (4 Mar. 1920, 126, col. 695-6). Clause 2 (2) circumscribed completely the already shrunken sphere of military jurisdiction over civilian offenders against the DORRs on the mainland. However, the Irish Executive had insisted upon the retention of courts martial procedure in Ireland, where a proclamation suspending the Defence of the Realm (Amendment) Act had been in

An air of unreality had surrounded the tortuous progress of this bill. Although Parliament was being asked to extend the life of the DORRs, the state had already begun to shed in a piecemeal fashion the diverse economic responsibilities assumed during the war. The winding up of the key wartime bureaucracies and the destruction of the legal basis of control were only the final acts in the protracted drama of 'decontrol'.¹⁹ The War Emergency Laws (Continuance) Act, especially the extension of wartime regulation implicit in this measure, conflicted with the *laissez-faire* drift of government economic policy as a whole. However, the bill was necessary, first, in order to safeguard the Government from expensive litigation in the event of a sudden 'end' to the war. The gravity of the Irish situation provided a second motivating factor. Third, DORA provided an *ad hoc* legal basis for the strikebreaking machinery developed by the Coalition after February 1919. Yet the provisions of the War Emergency Laws (Continuance) Act never did take effect because 31 August 1920 elapsed with Britain still, technically, in a state of war with Turkey. Hence, the emergency legislation which remained in force stayed valid by reference to the earlier Termination of the Present War (Definition) Act, until the war 'ended' exactly one year later.

force ever since the Easter Rising of 1916. If these or any other of their extraordinary powers were withdrawn at the present critical juncture, they argued, it would be taken by Sinn Féin as a sign of weakness (CAB 26/1/29[1], 23 May 1919). A new subsection was added to the bill, allowing all currently valid DORRs to remain in force in Ireland until 12 months after the 'end' of the war. The legality of the April 1916 proclamation (to which this part of the bill referred) was challenged early in 1920. But this plea was thrown out of court, and Dublin Castle continued to exercise these additional DORA powers until 31 August 1921, the date at which the war ended officially. A separate tier of emergency regulations was created by the Restoration of Order in Ireland Act of 13 August 1920. These duplicated many of the existing DORRs and endured up to the signing of the Anglo-Irish Treaty on 6 December 1921. In addition, civil jurisdiction was suspended completely for 8 months over that roughly one third of Irish territory to which the December 1920 proclamation of martial law applied (see Simpson, *In the Highest Degree Odious*, 27-33; Townshend, "Military Force and Civil Authority," 287-90).

¹⁹ A point made in R.H. Tawney's influential study, first published over 50 years ago ("Abolition of Economic Controls," 7-8).

DORA and the Postwar Labour Unrest

In November 1918 the British labour movement had optimistic expectations, not only of sustaining wartime wage rates and employment levels, but also of transforming the entire fabric of industrial relations. The restive mood of British labour was, inevitably, judged against a backdrop of revolutionary turbulence in Europe. Indeed, with an outbreak of unrest in the forces after the Armistice, Britain itself seemed to be experiencing one of the classic symptoms of impending political upheaval.²⁰ There was much public speculation about a looming challenge to the state and frequent expressions of ministerial anxiety, especially in the early months of 1919 when strike action was widespread. Long before the Armistice, 'bolshevism' displaced 'pacifism' as a catch-all epithet of official disapprobation. Yet, in spite of his sometimes questionable sources of labour intelligence, Lloyd George was not panicked into an ill-judged policy of repression. Government labour policy was characterised by considerable tactical finesse. The postwar Coalition avoided direct confrontation with organised labour even as it dispensed with wartime economic regulation, fudged on its social reconstruction promises, and caved into the votaries of budgetary orthodoxy.²¹ DORA was occasionally deployed against labour militants and provided legal support for administrative arrangements intended to minimise the disruption of industrial action. The wartime statute was superseded only by the enactment of peacetime civil emergency legislation in October 1920.

On 4 November 1918 Basil Thomson reported to the War Cabinet that "many people

²⁰ For an assessment of these disturbances as decidedly unrevolutionary in intent, see David Englander and James Osborne, "Jack, Tommy and Henry Dubb: The Armed Forces and the Working Class," Historical Journal, 21 (1978): 593-621.

²¹ The most detailed account is Chris Wrigley, Lloyd George and the Challenge of Labour: The Post-War Coalition, 1918-1922 (New York, 1990). See also the contrasting perspectives of Kenneth Morgan, Consensus and Disunity: The Lloyd George Coalition Government 1918-1922 (Oxford, 1979), ch. 3 and the concise summary of James Hinton, Labour and Socialism: A History of the British Labour Movement, 1867-1974 (Brighton, 1983), 108-17.

are wondering why the Government cannot deal drastically with persons who are attempting to stir up internal strife in this country by revolutionary propaganda." The head of the Metropolitan Police Special Branch had already built up an impressive civil intelligence fiefdom by magnifying the pacifist and revolutionary threats. He continued to feed the War Cabinet the same diet of alarmist reports and extreme proposals, barely distinguishing between the grievances of British labour as a whole and the political objectives of the small 'pro-Bolshevik' organisations. Thompson anticipated serious problems in the immediate postwar period, a note of alarm that was echoed a week later by Alfred Mond, the prominent Liberal industrialist and First Commissioner of Works in the Coalition. The latter was perturbed by the "considerable amount of inflammable literature of a dangerous character", and believed that, unless the DORRs were retained, "a political possibility which appears to be doubtful, the danger will grow rather than diminish."²²

Mond was no doubt alluding to the political problem of perpetuating wartime measures of censorship now that the hostilities had ceased. It was not just stalwart civil libertarians such as C.P. Trevelyan who pressed for the immediate and unconditional restitution of free speech after the Armistice. The mainstream press, which had grumbled persistently about the iniquities of wartime control, was equally keen to see the censorship DORRs disappear.²³ On 19 November 1918 Lord Cave announced the withdrawal of all current 'D' Notices and the exemption of inland press cables from scrutiny by the Press Bureau. Playing on a fanciful variant of the 'Bolo' theme, however, the Home Secretary also informed his fellow peers that DORA's punitive censorship powers were to be maintained.

²² CAB 24/69/G.T.6201, Thomson, "Fortnightly Report on Revolutionary and Pacifist Organisations in the United Kingdom," 4 Nov. 1918; CAB 24/69/G.T.6270, Alfred Mond, "Suggestions to Prevent the Spread of Revolutionary Ideas in the United Kingdom," 12 Nov. 1918. See also, McLean, "Popular Protest and Public Order," 233-35 for some egregious examples from Thomson's oeuvre and other evidence of official disquiet in the aftermath of the war.

²³ Cave Papers, ADD MSS 62476, Sir George Riddell to Home Office, 14 Nov. 1918.

I believe there is a close alliance between Bolshevism and Germany, and that most, possibly all, of those who call themselves Bolsheviks today are either the conscious agents or the unconscious tools of our enemies...It is only in that sense, and because I hold that view, that I do believe that we may fairly and properly use, and indeed ought to use, the instrument given to us by the Defence of the Realm Act for checking Bolshevik propaganda in this country until peace is concluded.²⁴

On 3 December 1918 the Home Office cancelled the current "Hostile Leaflets" circular. But this lengthy catalogue of predominantly pacifist material was supplanted by a revised list, admittedly much smaller, of eleven prohibited pro-Bolshevik publications. The ongoing suppression of the Glasgow-based Socialist Labour Party Press was another indication of the Government's willingness to continue invoking its powers of control over the written word. This small marxist party's publishers had been instrumental in the production and distribution of revolutionary tracts by Lenin and Trotsky. For these activities the organisation had been raided and its printing press confiscated in July 1918. With the appearance of the September 1918 issue of the party's monthly organ, Socialist, the authorities also decided to shut down the private printer who had assumed responsibility for the paper's production.²⁵ On 13 November 1918 Joseph King raised this matter in the Commons. But his representations were to no avail, leading the NCF's Tribunal to wonder "How long is DORA's reign to continue?"²⁶

The suppression of the Socialist ended in January 1919, but late in the same month the War Cabinet contemplated the use of DORA against the leadership of the forty hours strike in Glasgow. Four local labour militants were later convicted on slightly different charges, of riot and incitement to riot, after a serious breakdown of public order at a strike demonstration in the city, on 31 January 1919.²⁷ The London DORA prosecution of a Socialist Labour Party

²⁴ PD (Lords), 19 Nov. 1918, 32, col. 233.

²⁵ HO 158/20/141, "Hostile Leaflets Circular No. 25," 3 Dec. 1918; Raymond Challinor, The Origins of British Bolshevism (London, 1977), 188-90.

²⁶ Tribunal, 21 Nov. 1918, 2; PD (Commons), 13 Nov. 1918, 110, col. 2670-72.

²⁷ See McLean, "Popular Protest and Public Order," 224-33; Wrigley, Lloyd George and the Challenge of Labour, 105-11. Late in 1918 the craft unions in engineering and shipbuilding

activist in February 1919 was also bound up with events on the Clyde. David Ramsay was an Edinburgh shop steward had gone south to drum up support for the forty hours movement.²⁸ On 26 January 1919 he delivered an incendiary speech to a Herald League audience in Croydon, which included an injudicious incitement to British workers to follow the Bolsheviks' lead. The police record of Ramsay's address was brought to the attention of Troup at the Home Office. He deplored its content and tone but, in keeping with past departmental policy, advised against any such "sporadic" prosecution. On this occasion, however, the Permanent Under-Secretary was overruled by his new departmental chief, Edward Shortt. The latter welcomed the trial of Ramsay as "the beginning of a general policy of prosecuting for similar speeches." The present situation was so grave, he continued, "that it removes to a great extent the objection to prosecuting under a regulation which was passed as a temporary war measure."²⁹

On 7 February 1919 the War Cabinet agreed to both recommendations of the Home Secretary. Shortt argued further that stern measures against seditious speeches might persuade the public that revolutionary agitation, rather than legitimate grievances, underlay the industrial unrest. Great care should be taken, it was suggested, to act only against "persons not directly associated with the trade unions."³⁰ Extremists such as Ramsay made ideal scapegoats; Shortt's memorandum had already mentioned the possibility of prosecuting

had negotiated a 47 hour work week. Although the membership of the unions affected ratified this national agreement, it rankled with many Glasgow workers. Both the militant Clyde Workers' Committee and the moderate leadership of the Scottish Trades Union Congress joined the local campaign for a further reduction in hours. Unwilling to renege on a settlement that had been endorsed by a majority of their members, the national trade union executives (except for the electricians) withheld their support from the week-long unofficial strike which began on 27 January 1919.

²⁸ Challinor, *Origins of British Bolshevism*, 208.

²⁹ HO 45/10744/263275/454, Troup (minute), 30 Jan. 1919; CAB 24/74/G.T.6755, Shortt, "Prosecution of Seditious Speeches," 5 Feb. 1919.

³⁰ CAB 23/9/529(7), 7 Feb. 1919.

John Maclean, another militant, who had three previous DORA convictions against his name. Although the hapless Ramsay was duly tried, convicted, and sentenced to five months imprisonment, Shortt's proposed "general policy" was not implemented. In April 1919 the Home Office instructed Chief Constables to continue forwarding details of "seditious" speeches worthy of prosecution and to furnish Basil Thomson with any other intelligence about labour unrest or revolutionary propaganda.³¹ But an outburst of legal action under the censorship DORRs did not ensue. Likewise, nothing came of Troup's tentative suggestion of amendments to Regulation 27C "so as to make it apply to bolshevist literature."³² In fact, with the closure of the Press Bureau on 30 April 1919, 27C effectively lapsed. The Coalition had chosen to combat the challenge of labour not with overt repression, but with an admixture of heavy-handed propaganda, flexible negotiating, and civil emergency planning.

The Emergency Powers Act, 1920

The Clydeside troubles were the most serious of several labour problems which erupted simultaneously early in 1919. The shipyards and workshops of Belfast also struck for a shorter work week. Electrical power workers also threatened strike action, not only in these two cities but in London as well. Just as the Glasgow strikers began returning to work on 3 February 1919, the London Underground workers came out and forced the Government into an embarrassing climbdown a week later. Against this turbulent industrial relations backdrop, the War Cabinet³³ appointed an Industrial Unrest Committee on 4 February 1919. The committee's first task was the arrangement of alternative public transportation facilities for the

³¹ HO 158/20/350, Troup to Chief Constables, 22 Apr. 1919. Thomson had just been appointed Director of Intelligence, a new office under Home Office control.

³² HO 45/10888/352206/158, 1 Apr. 1919.

³³ The War Cabinet was not replaced by the customary, larger Cabinet until October 1919 (John Turner, "Cabinets, Committees and Secretariats: The Higher Direction of the War," in War and the State, ed. Burk, 76-77).

duration of the Tube strike. After this dispute was resolved, its mandate was extended to preparation for the maintenance of essential supplies and services in any future stoppages.³⁴

Deflationary policies and the collapse of the postwar 'restocking' boom early in 1920 gradually undermined the assertiveness of British labour. But the prospect of a crippling national strike, involving Britain's three most powerful trade unions, could not be discounted until the virtual collapse of the Triple Alliance in April 1921.³⁵ The most likely source of further labour-management strife throughout 1919 was the coal industry. In March of that year the miners were persuaded to postpone their planned strike by the appointment of a Royal Commission of inquiry into wages, conditions, and the possible permanent nationalisation of the industry. The Government was also ready to confront the miners, if necessary. A Strikes (Exceptional Measures) Bill was drafted, authorising the arrest of strike leaders and the sequestration of trade union assets. In addition, Lloyd George personally contemplated using the DORRs to restrict the supply of food to isolated mining communities during coal disputes.³⁶

The main rationale for the Industrial Unrest Committee was to render industrial action ineffective. Its planning did not bear fruit until the nine-day long rail strike of September 1919, during which a skeleton state-run road haulage network was put in place. The Government was able to use DORA to commandeer private vehicles and to control food and fuel distribution. Lord Milner later told the Lords that without this statutory power "the

³⁴ Ralph Desmarais, "Lloyd George and the Development of the British Government's Strikebreaking Organisation," *International Review of Social History* 20 (1975): 4-6.

³⁵ The Triple Alliance, established in 1912, comprised the National Union of Railwaymen, the Transport Workers Federation, and the Miners Federation of Great Britain. Its 'collapse' was precipitated by the transport and railway workers' last-minute failure to redeem their pledge of sympathetic strike action on behalf of the miners, which had been scheduled to begin on 15 April 1921, or 'Black Friday' in the annals of labour movement betrayals.

³⁶ Desmarais, "Development of the British Government's Strikebreaking Organisation," 5, 7.

strike...could not have been successfully got over." Yet the strike was really an unsettling reminder of the Railwaymen's capacity quickly to wreak havoc with the economy. Massive commercial disruption had only been averted by the hasty negotiation of a settlement which promised to sustain the union's existing wage levels for another year. In the aftermath of this stoppage, civil emergency planning was continued under the supervision of the new Supply and Transport Committee.³⁷ The DORRs could not be extended indefinitely, and these deliberations resolved that a legislative sanction more appropriate than DORA was necessary to support an emergency executive response to any future strike.

In May 1920 the Home Secretary concluded that there were two tacks which fresh legislation might take. The DORRs could be validated each year by revisions to the annual Expiring Laws (Continuance) Bill. Alternatively, the Government might frame a measure which included "a power to make regulations 'for the public safety' on lines similar to the Defence of the Realm Regulations." Shortt's second suggestion was soon embodied in draft legislation. This bill authorised the Government to proclaim and define a national emergency and to issue regulations for the preservation of public order, the regulation and supply of fuel, food and other essentials, and for the maintenance of transportation facilities.³⁸ Sir Eric Geddes, the chair of the Supply and Transport Committee appreciated the "very drastic character" of a proposal shaped "with the object of giving the Government full powers to meet a situation which would amount practically to revolution." On 14 June 1920 a ministerial conference referred the bill to the Home Affairs Committee, for the express purpose of its consideration "from a political point of view."³⁹

³⁷ PD (Lords), 28 Oct. 1920, 42, col. 107; Desmarais, "Development of the British Government's Strikebreaking Organisation," 10-13; Morgan, Consensus and Disunity, 56-62.

³⁸ CAB 24/108/C.P.1575 (Appendix), Shortt (memorandum), 14 May 1920. The draft bill is in CAB 24/109/C.P.1659.

³⁹ CAB 24/108/C.P.1575, Sir Eric Geddes, "Emergency Powers Bill," 6 July 1920; CAB 23/21, "Conclusions of a Conference of Ministers," 14 June 1920.

The chair of this body, H.A.L. Fisher, grasped that the wider industrial relations picture added to the sensitivity of the matter. By introducing this legislation, the Government might even "precipitate the crisis which it is desired to avoid." Yet there were equally compelling arguments for immediate action:

The powers under the Defence of the Realm Act may expire before Parliament meets again in the Autumn and in any case they do not invest the Executive Authority with the power of using the armed forces of the Crown to supply the labour withdrawn by the Trade Unions.

At a subsequent Cabinet it was even ventured that a major strike might actually assist the parliamentary passage of the bill.⁴⁰ The 1911 Official Secrets Act and DORA had both been enacted at moments of crisis. But industrial conflict was not nearly so conducive to parliamentary consensus building as had been international tension and the outbreak of war. When the Emergency Powers Bill was introduced on 25 October 1920, ten days into a national miners' strike, it was condemned roundly by Labour MPs as an overtly antiunion measure. Even some supporters of the Coalition regretted the unfortunate timing. The Prime Minister tried to disarm the critics by claiming that the legislation was less provocative than continued use of "powers [i.e., the DORRs] that were given us for the prosecution of the War, for the purpose of peace."⁴¹

A temporary wages agreement favourable to the miners settled this coal dispute before the Emergency Powers Bill passed. But with its enactment on 29 October 1920 the Coalition was now fully prepared should any such compromise solution prove neither so attainable nor so expedient in future. The very name of the statute recalled the abortive draft legislation of the prewar years from which DORA had evolved. The Emergency Powers Act departed

⁴⁰ CAB 24/109/C.P.1659, H.A.L. Fisher, "Emergency Powers," 21 July 1920; CAB 23/22/45(20), 4 Aug. 1920.

⁴¹ PD (Commons), 25 Oct. 1920, 133, col. 1453 and *passim*. Labour disquiet persuaded the Government to accept an amendment which stipulated that no emergency regulations "shall make it an offence for any person, or persons to take part in a strike or peacefully to persuade any other person or persons to take part in a strike."

further from Dicey's maxim that the indeterminate powers of martial law were the only constitutionally acceptable executive responses to civil or military emergency. The Secretary of State for War, Winston Churchill, "could not see the distinction between the war and a civil emergency."⁴² But the Emergency Powers Act cannot be classified too glibly as the peacetime successor of DORA. The former statute posed a less direct threat to civil liberties than had DORA. For example, the new legislation ruled out categorically the two wartime challenges to civil jurisdiction: courts martial and internment without trial. Executive discretion generally was to be constrained by a modicum of parliamentary control; any regulations that accompanied an emergency proclamation would lapse automatically after seven days unless they were authorised before then by resolution of both legislative chambers.⁴³

Yet, conversely, the statute did sanction the employment of the military for the maintenance of essential supplies and services. Nor would the *ex post facto* parliamentary review of regulatory schemes seriously hamper executive freedom of action during a crisis. The narrower delegating provisions of the Emergency Powers Act were still dangerously vague, applicable as they were to "the preservation of the peace" and "any other purposes essential to the public safety and the life of the community."⁴⁴ When the new law was first activated on 1 April 1921, the eve of the doomed three month miners' strike,⁴⁵ several stringent regulations were issued. Regulation 20 was redolent of DORA 9A, which had authorised the prohibition of meetings or demonstrations on public order grounds. Regulation 19 prohibited "any act calculated or likely to cause mutiny, sedition, or disaffection" among members of the

⁴² Quoted in Desmarais, "Development of the British Government's Strikebreaking Organisation," 12.

⁴³ Gillian Morris, "The Emergency Powers Act 1920," *Public Law* (1979): 331-32.

⁴⁴ *Public and General Statutes* 10 & 11 Geo. 5, c. 75.

⁴⁵ The strike was launched to protest wage cuts that were expected to follow the long-delayed 'decontrol' of the industry on 31 March 1921. On this defeat for the union and the steady deterioration of industrial relations in coalmining during the previous two years, see M.W. Kirby, *The British Coalmining Industry, 1870-1946* (London, 1977), 36-62.

armed forces, the police, fire brigade, or the civilian population. By the end of May 1921 the DPP had authorised twenty-one prosecutions for infringements of this regulation, lifted more or less straight from DORR 42.⁴⁶

The civil emergency legislation of 1920, as well as the expedients which preceded it, were justified as the legitimate attempts of a neutral state to protect the wider community from hardship and privation.⁴⁷ During the postwar labour unrest, however, government was just as interested a party in most disputes as were the employers and trade unions. The Coalition had continued to exercise its wartime control over key sectors of the economy. A victory for the miners in 1921 would, at the very least, have meant a sizeable subsidy to the industry at a huge cost to the Exchequer. In this dispute and others, the Government occasionally forfeited even the pretence of impartiality, by denouncing strikers in the most inflammatory terms. Indeed, according to Gillian Morris, the 1921 strike established a pattern for the eleven future occasions on which emergency proclamations have been issued in Britain. Incumbent governments have invariably had a direct or indirect interest in the terms of settlement. They have judged their own executive response as in the 'public interest' and denounced the strikers for attempting to usurp the constitutional authority of the state.⁴⁸

The Next War

One strain of opposition to the Emergency Powers Bill complained about the iniquitous

⁴⁶ This 'incitement' provision was strengthened at the start of the General Strike in 1926. It became an offence to print, produce, distribute, or even possess any document "likely to cause mutiny, sedition, or disaffection." During this dramatic week-long stoppage and the protracted coal strike thereafter, there were a total of 3304 prosecutions for breaches of the emergency regulations (Morris, "Emergency Powers Act," 338-40).

⁴⁷ See, for example, Lloyd George's speech in PD (Commons), 25 Oct. 1920, 133, col. 1452-56 and his later recollections, quoted in Wrigley, Lloyd George and the Challenge of Labour, 114.

⁴⁸ Morris, "Emergency Powers Act," 320, 345-52.

recourse to methods "similar to those used under the Defence of the Realm Act." To the upholders of civil liberties, the Official Secrets Act of December 1920 was another regrettable reminder of the tenacious hold of the "war habit" on the official mind.⁴⁹ This amending legislation also incorporated several provisions from the DORRs, which the War Office believed "in the light of past experience...necessary for preserving the safety and interests of the State after the war."⁵⁰ Wartime experience was an even more central reference point in the contingency planning for future military emergencies. This process was initiated by the appointment of a special War Office committee in January 1922. The department adopted unhesitatingly the recently lapsed DORRs as the starting point for discussion. "This code," reported the committee, "was the fruit of experience; it gave the powers needed at that time; it was, on the whole, loyally if unwillingly accepted by the public, and in view of these circumstances it proved workable and effective."⁵¹

Before this inquiry was concluded, in December 1923, the Cabinet instructed other departments to ascertain the powers they deemed necessary in the event of war. In addition,

⁴⁹ PD (Commons), 27 Oct. 1920, 133, col. 1785; 2 Dec. 1920, 135, col. 1537.

⁵⁰ CAB 24/65/G.T.5807 (Appendix), "Third Interim Report of the War Office Emergency Legislation Committee," 16 July 1918. The 1911 act had been used only infrequently as a counter-espionage weapon during the war. The security services had relied instead on DORA, the Aliens Restriction Act, and, on occasion, the august machinery of high treason. There were several prosecutions brought under Regulation 18A (SRO 715, 28 July 1915), which prohibited communication with enemy spies. Colonel Kell of MI5 called this DORR "literally our only safeguard against persons of this class" and insisted upon its permanent retention after the war (WO 32/4896/4C, Kell [minute], 10 Nov. 1919). A modified version of 18A was written into the draft of a War Office National Security Bill in September 1918. This measure also contained the prohibitions against forgery, false representations, and impersonation, of Regulation 45 (SRO 715, 28 July 1915) and under which several 18A suspects had been apprehended. On 2 October 1918 this legislative proposal was vetoed by the Home Affairs Committee, which favoured changes to the Official Secrets Act instead (CAB 26/1/13[2]). Regulations 18A and 45 were both retained in a draft amending bill, approved by the Home Affairs Committee in May 1919 but not passed until December 1920. In anticipation of a hiatus between the expiry of the DORRs and the enactment of this legislation, 18A and 45 were tacked onto the schedule of the War Emergency Laws (Continuance) Bill. The postwar discussion of both these DORRs and the amendment of the Official Secrets Act can be charted from WO 32/4896. See also, Hooper, Official Secrets, 32-38.

⁵¹ CAB 52/2, 18 Dec. 1923.

different subcommittees of the CID were already examining some specific issues, such as censorship and the treatment of enemy aliens. These assorted efforts were later coordinated by a War Emergency Legislation Subcommittee of the CID, set up in June 1924 and chaired by the first Labour Lord Chancellor, Lord Haldane.⁵² One historian has commented upon the "purely administrative" role of this subcommittee and "that it did not consider, as a matter of general policy, the sort of regulations that ought to be available, or which restrictions on civil liberties, might be reasonable in a major emergency."⁵³ Yet these questions of principle had obviously been settled in the official mind by the diverse wartime uses of DORA and by the adoption of a detailed statutory code for peacetime civil emergencies. There was now no prospect of a return to executive 'ad hocery' under the common law, although before August 1914 this approach had been favoured by a broad swathe of legal and political opinion, including Lord Haldane. It would have been curious if Haldane had not decided that "the basis of all such [emergency] powers would...be Regulations corresponding to the late Defence of the Realm Regulations."⁵⁴

At a leisurely pace the subcommittee drew up a supposedly definitive code of draft emergency regulations. Their December 1928 report listed 180 DORRs that would have to be reissued during any subsequent military emergency.⁵⁵ Additions and revisions to these regulations were made at each of the subcommittee's infrequent meetings during the early 1930s. Not until the Abyssinian crisis of 1935 was a note of urgency added to these deliberations. At this juncture a new interdepartmental committee was formed, which

⁵² Ibid.; CAB 52/2/WEL 9, "Interim Report of Sub-Committee Appointed to Consider the Question of Emergency Powers Required in the Event of Another War," 11 Feb. 1925.

⁵³ Stammers, *Civil Liberties in Britain*, 8.

⁵⁴ CAB 52/1, "Minutes of the First Meeting of the War Emergency Legislation Sub-Committee," 23 Jan. 1925.

⁵⁵ CAB 52/2/WEL 27, War Emergency Legislation Sub-Committee: Second Report, 11 Dec. 1928.

submitted an updated set of regulations, along with their legislative sanction, during April 1937. The draft bill replicated the formidable ordaining powers of DORA but at least gave explicit statutory authorisation for two of the most contentious regulatory schemes of the First World War: the powers of search and seizure and those of internment without trial. The regulations contemplated bold measures of economic control and civil defence, as well as serious restrictions on the liberty of the subject. Both proposals were approved at the 295th meeting of the CID, on 1 July 1937, but obscured from the public's view until the outbreak of war just over two years later. As regards emergency legislation at least, the National Government was far better equipped for war (and far sooner) than its Liberal predecessor in August 1914. Not for the first time, however, emergency planning was concealed from the public "until the crisis had arisen and 'national unity' became the political order of the day, rather than any serious discussion of the issues involved."⁵⁶

A New Despotism?

The various postwar expedients for prolonging the life of DORA had sparked additional criticism of the practice of delegated legislation. According to Richard Holt, the Termination of the Present War (Definition) Bill was "another example of what is so objectionable—legislation by Order in Council."⁵⁷ This Liberal MP would have preferred the bill to specify those emergency statutes and regulations whose extension was envisaged. That method would have enabled Parliament properly to assess the Government's intentions. The War Emergency Laws (Continuance) Bill addressed Holt's concern, but the same discordant voices were raised in opposition to this measure. Josiah Wedgwood, a former Liberal and now the ILP member for Newcastle-under-Lyme, wanted a separate piece of legislation in respect of

⁵⁶ Stammers, Civil Liberties in Britain, 12 and passim. See also, CAB 52/1, (note), 17 Sept. 1937.

⁵⁷ PD (Commons), 15 Nov. 1915, 110, col. 3130.

each DORR scheduled to the bill.

Because I am a Parliament man, I like to see legislation by Parliament. Our principal objection to the Bill today is that it involves, not government by Parliament, but government by the executive...the sooner we remove out of the way all this legislation by Regulations under DORA and substitute statutory and substantive law, the better it will be for the government of the country. A Government, in perpetuating this sort of government by the Executive, are inventing a very dangerous precedent which may be used hereafter against the liberties of the people in a most disastrous way.⁵⁸

Similar constitutional arguments were used in support of the case for rapid decontrol of the war economy.⁵⁹ Commercial enterprise, it was argued, no less than other hallowed safeguards of individual freedom, had to be protected against bureaucratic tyranny. These sentiments were fashioned into a coherent right-wing critique of executive discretionary authority in general. The attack was led by conservative jurists and Justices who were appalled by the accumulated weight of delegated legislation since the outbreak of war and saw in this ongoing trend a challenge to the sovereignty of Parliament and the jurisdiction of the courts over executive acts. A huge slice of the state's vastly expanded sphere of administrative responsibility was being discharged by regulations that carried almost the full force of statutory law but lacked any direct parliamentary sanction.⁶⁰ The legal establishment's antipathy towards delegated legislation reproduced the case against DORA mounted by civil libertarians in the First World War. Only after this war, revealingly, did the courts set limits on the executive's discretion under DORA.⁶¹ They had evinced little sympathy for legal challenges to the DORRs during wartime, when the balance of judicial opinion had been heavily weighted towards the view that constitutional norms should, indeed, be suspended

⁵⁸ Ibid., 16 Feb. 1920, 125, col. 596-97.

⁵⁹ See, for example, *ibid.*, 15 Nov. 1918, 110, 3139-40; 28 Oct. 1920, 133, 555-61.

⁶⁰ Among several critical works of legal scholarship, see Sir John Marriott, *Mechanism of the Modern State* (Oxford, 1927); Allen, *Bureaucracy Triumphant* and, most notably; Lord Hewart, *The New Despotism* (London, 1929).

⁶¹ See above, 13, n. 26 and the detailed contemporary account of *Attorney-General v. de Keyser's Royal Hotel* in Scott and Hildesley, *Case for Requisition*, especially 1-9.

temporarily.

The most celebrated of these postwar critics of delegated legislation and bureaucratic rule, Lord Hewart, had been implicated, as Solicitor-General in Lloyd George's wartime Coalition, in the consolidation of governmental practices he came to deplore. In 1929 the now Lord Chief Justice Hewart published The New Despotism, a renowned tirade against the inherent dangers of excessive administrative discretion. Hewart depicted a growing legion of bureaucrats conspiring "to subordinate Parliament, to evade the Courts and to render the will, or caprice, of the Executive, unfettered and supreme."⁶² The appearance of this polemic roughly coincided with Lord Chancellor Sankey's appointment of a special committee to review the whole question of ministerial freedom of action. The majority report of the Donoughmore Committee shared Lord Hewart's delusion, inherited from A.V. Dicey, that the excessive delegation of legislative power was incompatible with British legal traditions. A sceptical legal scholar noted later that the committee had merely been investigating "whether Britain had gone off the Dicey standard and, if so, what was the quickest way to return."⁶³

Civil libertarians of the right were not exclusively, or even primarily, worried by executive freedom of action during wartime. They were more perplexed by the presumption "that the kind of 'urgency' which gave birth to DORA is any reason for the wholesale surrender of legislative power in normal conditions."⁶⁴ Delegated legislation per se did not rankle with conservatives as much as did the increased scope of governmental activity which this administrative practice supported. The postwar reaction against government by decree also developed at least in part due to the Labour Party's embrace of an ideology which presupposed the existence of a strong state as the key agency of economic restructuring and

⁶² Hewart, New Despotism, 17.

⁶³ Quoted in Cosgrove, Albert Venn Dicey, 96. See also, PP, Report of the Committee on Ministers' Powers.

⁶⁴ Allen, Bureaucracy Triumphant, 82.

social change. These apprehensions were only intensified by the political outcome of a second World War during which sweeping emergency powers were again bestowed upon the executive. Ominously, the Labour Party was elected to office in July 1945 on a platform of thoroughgoing social and economic change and still in command of a battery of wartime controls. Labour would stand accused of prolonging this war legislation unnecessarily, in order to minimise parliamentary and judicial interference with its peacetime policy commitments. In 1945 the distinguished jurist, C.K. Allen, reiterated a warning he had first sounded after the First World War.

No word written here is intended to cast the least doubt on the necessity for stern measures, nor on the obvious fact that sacrifices and inconveniences which would be intolerable in peace are not only justifiable but imperative in war. It is, however, necessary to realize exactly what those sacrifices and inconveniences are, not for the hardships which they inflict at a time when all accept hardships, but for the constitutional implications if they come to be regarded as a normal and desirable form of government.⁶⁵

⁶⁵ Idem, Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law, (London, 1945), 209. A similar tone pervades F.A. Hayek's influential critique of economic planning and state power, The Road to Serfdom (London, 1944), especially chs. 5 and 6.

CONCLUSION

According to the American political scientist, Clinton Rossiter, British government was transformed during the First World War into what he labelled "constitutional dictatorship"; a system of rule characterised by the military's enhanced role in civilian affairs, by the delegation of legislative power to executive authorities, and by the abridgment of political and economic freedoms. The methods of a constitutional dictatorship are similar to those of outright dictatorships, but the former is a mere temporary expedient that must lapse with the emergency or when the future of liberal-democratic rule has been secured.¹ Rossiter's study, which was published in the aftermath of the Second World War and just as the Cold War was heating up, accepted that "in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions."² Yet, serious questions are raised by such unequivocal justifications for the resort of democratic governments to emergency methods during times of crisis. Who is to determine the gravity of the "peril"? To what extent must existing constitutional norms be "altered"? How is the necessity for a particular measure to be decided? Will all such powers automatically disappear when the crisis ends?

After 4 August 1914 these questions began to gnaw at many supporters of a British war effort that was widely seen as part of an international struggle for 'freedom' and against 'militarism'. Some prowar liberals lamented the effects of the war on civil liberties in Britain. They felt that the moral authority of the fight against militarism was being sapped by the

¹ Rossiter, Constitutional Dictatorship, ch. 1.

² *Ibid.*, 5.

consolidation of a home-grown 'Prussianism'. Other liberal voices, however, resolved that coordinated state direction of the war effort was essential if Britain was to prevail over a thoroughly militarised German state. "Unless this country...submits to something not unlike a Prussian organisation for the period of the war," wrote the editor of the Liberal Manchester Guardian in May 1915, "the war may be almost indefinitely prolonged, [and] the issue possibly even jeopardised."³ Herbert Samuel later comforted himself by thinking that the sacrifice of British freedom would not be permanent. The Liberal former Home Secretary looked forward to that moment when "the Defence of the Realm Acts, with all their prolific offspring of Orders in Council and Regulations, will disappear into the limbo of forgotten things to the profound relief of a long-suffering nation."⁴

This assumption, that the emergency measures of the wartime state would not affect constitutional principle and practice in the long term, was commonplace. J.A. Hobson, by contrast, dismissed as a dangerous delusion such blithe confidence "that when the war is over, the steel trap will automatically open, and the caged peoples will emerge with all their ancient liberties intact."⁵ The historian of civil liberties in Britain during the Second World War, Neil Stammers, appears more inclined to agree with the judgment of Hobson. Stammers contends that, aside from Rossiter, few political thinkers have even attempted to reconcile the central place of civil liberties in democratic theory, with the facility by which they can be suspended during civil or military emergencies. He argues that the presumed polarity between periods of crisis and periods of normality is false. Two World Wars and the pervasive national security ethos of the Cold War era have made crisis government a recurrent phenomenon, as

³ Trevor Wilson, ed., The Political Diaries of C.P. Scott (London, 1971), 123 (Scott to L.T. Hobhouse, 7 May 1915).

⁴ Herbert Samuel, The War and Liberty and an Address on Reconstruction (London, 1917), 58-59.

⁵ Hobson, Democracy after the War, 16.

opposed to an isolated one, of twentieth-century political life.⁶ Indeed, even Rossiter concedes as much in his chastening concluding remark that "the instruments of government depicted here as temporary 'crisis' arrangements have in some countries, and may eventually in all countries, become lasting peacetime institutions."⁷

These brief reflections aside, this thesis has not confronted directly the implications for democratic polities of crisis government. The principal objective of this study is a more modest one; to shed some light on the origins and administration of the Defence of the Realm Act—the keynote instrument of constitutional dictatorship during the first protracted phase of crisis government in twentieth-century Britain. The introduction and chapter one attempted to situate DORA inside a broader historical context. One contemporary legal authority designated DORA as "a form of statutory martial law," and, to a limited extent, DORA did represent a refinement, or modernisation, of this existing means of emergency executive discretion.⁸ These older, common law powers comported with the norms of Irish 'coercion' and colonial rule, but, for all intents and purposes, were quite alien to the government of mainland Britain long before 1914. Besides, the statutory emergency code that was enforced and extended during the First World War signified a radical departure from the ad hoc methods of martial law.

By November 1914 DORA approximated quite closely the versatile instrument towards which, with limited success before the war, the supporters of emergency powers legislation had been striving since the 1880s. DORA enabled the wartime state to intrude on traditionally sensitive areas of social, political, and (beyond the purview of this thesis) economic and commercial life. Successive chapters have examined DORA in relation to the legal rights of the subject, to freedom of speech, and to the moral and political complexities of the venereal

⁶ Stammers, Civil Liberties in Britain, 1-2.

⁷ Rossiter, Constitutional Dictatorship, 313.

⁸ Quoted in Townshend, "Legal and Administrative Problems of Civil Emergency," 183.

disease question. The thesis has reviewed only a small proportion of the 260 or so DORRs that were issued during the First World War. A more comprehensive treatment of the subject might integrate the civil liberties issues raised above with, for example, the legal aspects of war production and war finance, or the contact between war legislation and the British people at the community or neighbourhood level. A quite different methodological approach and evidential basis, however, would be necessary to enter the last of these promising avenues of further inquiry, to assess the local impact of the legion of controls, minor and major, which emanated from DORA.

The substitution of courts martial for trial by jury; the internment of British subjects without trial; the prosecution of antiwar speakers and writers; censorship by administrative order; DORRs reminiscent of the CD Acts: the indisputably drastic nature of these measures is attested to by the language of their legal supports, extracted in Appendix B. These contentious regulatory powers appeared particularly menacing because of their embodiment in subordinate legislation, drafted by government officials and issued behind the back of Parliament. The delegating provisions of DORA created a wide loophole through which civil liberties could easily have been curbed more systematically than ever they were in wartime Britain. Yet the ultimate source of the threat posed by the wartime state was not so much DORA as the customary nature of the rights which the statute undermined, and a Parliament that was fully entitled to legislate away its own authority.

DORA was certainly responsible for a great many depredations, but the civil liberties picture in wartime Britain is not singularly grim when set alongside those of the other combatant nations. All the case studies included above demonstrate throughout the whole period under review a degree of caution or hesitancy in the employment of DORA. Chapter two shows that the courts martial controversy was out of all proportion to the small number of British civilians who were actually tried in this summary fashion. The unsuccessful court challenge to Regulation 14B, discussed in chapter three, resolved the legal doubt surrounding

delegation of legislative authority for the controversial purpose of internment without trial. But comparatively few executive detentions were sanctioned by this DORR, far less than by the equivalent provision (Regulation 18B) of the emergency legislation enacted at the start of the Second World War. The resort to judicial secrecy was infrequent after the fleeting political controversy engendered by the hearing of DORA cases in camera was settled late in 1915. Chapters four and five demonstrate that British dissent was subject both to the legal restraints of DORA, and also to the 'unofficial' restraints imposed by patriotic newspapers and crowds. But none of the three wartime administrations sought to repress out of existence the dissenting opposition to its war policies. Perhaps no DORR provoked an opposition so broadly based as Regulation 40D, the most draconian of several proposals discussed in chapter six. Yet this measure did not come into force until March 1918, some three-and-a-half years after coercive solutions to the venereal disease problem in the forces were first advocated.

The moderation of British officialdom was, in part, a product of instrumental considerations such as those which underlay the reluctance to prosecute dissenters. The upholders of liberal principle even succeeded in squeezing the odd concession from the authorities, but only when their interests intersected with those of more influential constituencies. In such circumstances a right of civil trial was established for DORA cases in March 1915, an amendment to Regulation 27C secured in December 1917, and Regulation 40D delayed for so long and then hastily withdrawn after the Armistice. At most other times, the critics of DORA constituted an isolated minority of publicists and parliamentarians. Conversely, the bulk of patriotic opinion generally regarded DORA as a by no means disproportionate legal response to the crisis of war. If the Parmoors, Trevelyan and others had been less vigilant in defence of liberty, one might speculate, DORA might well have been employed more indiscriminately. Their critique of DORA is integral to the overall context in which regulations were drafted, modified, and enforced. The harshest liberal condemnation was often reserved for the displacement of statutory law by delegated legislation. DORA was

not only inflicting untold damage upon British freedoms, it was argued, but upsetting the very balance of the constitution.

Although DORA did not start a drift towards bureaucratic and unaccountable British government, the statute in particular, and the pressures of 'total' war generally, both hastened these tendencies. Regulatory powers, bearing the same relation to statutory law as had the DORRs, became a standard instrument of policy implementation in a whole host of areas. By the mid-1920s conservative legal authorities were bemoaning this development. DORA's liberal critics had been prescient in predicting that wartime trends would not easily be reversed. Of more sinister import, flexible delegating powers were written into peacetime civil emergency legislation passed in 1920. DORA was also the model adopted for the contingency planning of future military emergencies. More generally, four years of stretching the law in defence of the realm had left an indelible imprint on government in Britain. It is in DORA's relation to this lasting shift in the character of British government, as much as in its diverse wartime uses, that the significance of this remarkable emergency legislation lies.

Appendix A: THE DEFENCE OF THE REALM ACTS, 1914-1918

<u>Statute (Date)</u>	<u>Public General Statutes</u>	<u>Main Clause(s)</u>
Defence of the Realm Act (8 Aug. 1914)	4 & 5 Geo. 5, c. 29	Power to make regulations
Defence of the Realm (No. 2) Act (28 Aug. 1914)	4 & 5 Geo. 5, c. 63	Extension of power to make regulations
Defence of the Realm Consolidation Act (27 Nov. 1914)	5 Geo. 5, c. 8	Power to make regulations as to the defence of the realm
Defence of the Realm (Amendment) Act (16 Mar. 1915)	5 Geo. 5, c. 34	Right of British subject charged with offence to be tried in civil court
Defence of the Realm (Amendment No. 2) Act (16 Mar. 1915)	5 Geo. 5, c. 37	Powers for expediting the production of war material
Defence of the Realm (Amendment No. 3) Act (19 May 1915)	5 & 6 Geo. 5, c. 42	State control of liquor trade in certain areas
Defence of the Realm (Acquisition of Land) Act (22 Dec. 1916)	6 & 7 Geo. 5, c. 63	Continuation of possession of land occupied for the purposes of the defence of the realm Power to remove buildings and works Power to acquire land permanently
Defence of the Realm (Food Profits) Act (16 May 1918)	8 & 9 Geo. 5, c. 9	Forfeiture of excess profits from over-charging for food
Defence of the Realm (Beans, Peas, and Pulse Order) Act (27 June 1918)	8 & 9 Geo. 5, c. 12	Application of orders to original consignees

Appendix B: DEFENCE OF THE REALM REGULATIONS CITED IN TEXT*

<u>DORR No+</u>	<u>SRO No. and Date#</u>	<u>Description@</u>
1 [1]	1231, 12 Aug. 1914 1699, 28 Nov. 1914	Directions as to non-interference with persons and property
2 [2]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 296, 10 May 1916	Power to take possession of land, &c.
3 [3]	1231, 12 Aug. 1914 1699, 28 Nov. 1914	Access to land, &c.
9A	251, 19 Apr. 1916 702, 3 Oct. 1916	Power to prohibit holding of meeting or procession

Where there is reason to apprehend that the holding of a meeting in a public place will give rise to grave disorder, and will thereby cause undue demands to be made upon the police or military forces, it shall be lawful for a Secretary of State, or for any mayor, magistrate, or chief officer of police who is duly authorised for the purpose by a Secretary of State, or for two or more of such persons so authorised, to make an order prohibiting the holding of the meeting, and if a meeting is held, or attempted to be held, in contravention of any such prohibition, it shall be lawful to take such steps as may be necessary to disperse the meeting or prevent the holding thereof (from SRO 251, 19 Apr. 1916)

12 [23]	1231, 12 Aug. 1914 1699 28 Nov. 1914 551, 10 June 1915	Power of naval or military authority to require extinguishment of lights
13 [24]	1231, 12 Aug. 1914 1699, 28 Nov. 1914	Power to require inhabitants to remain in doors
13A	22, 27 Jan. 1916 31, 3 Feb. 1916 367, 22 Mar. 1918 934, 19 July 1918	Power to prohibit persons convicted of offences against morality, decency, &c., from frequenting vicinity of camps

14 [24A]	1307, 1 Sept. 1914 1699, 28 Nov. 1914 235, 23 Mar. 1915 933, 24 Sept. 1915 656, 28 June 1917	Power to remove suspects from specified areas
14B	551, 10 June 1915 359, 8 June 1916 792, 16 Nov. 1916 462, 20 Apr. 1918	Restrictions on or internment of persons of hostile origin or association

Where on the recommendation of a competent military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety or the defence of the Realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person, forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order:

Provided that any such order shall, in the case of any person who is not a subject of a state at war with His Majesty, include express provision for the due consideration by one of such advisory committees of any representations he may make against the order...

Nothing in this regulation shall be construed to restrict or prejudice the application and effect of regulation 14, or any power of internment of aliens who are subjects of any state at war with His Majesty (from SRO 551, 10 June 1915).

14H	934, 19 July 1918 997, 2 Aug. 1918	Restriction on assumption of new name by a person not being a natural born British subject
18 [14]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 551, 10 June 1915 998, 14 Oct. 1915 765, 25 June 1918	Prohibition on obtaining and communicating naval and military information
19 [15]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 417, 27 June 1916	Prohibition against photographing, sketching, &c., naval and military works
20 [16]	1231, 12 Aug. 1914 1699, 28 Nov. 1914	Prohibition against tampering with telegraphic apparatus, &c.

21 [16]	1307, 1 Sept. 1914 1405, 17 Sept. 1914 1699, 28 Nov. 1914	Prohibition against possession of carrier pigeons
22B	1134, 30 Nov. 1915	Registration and regulation of persons receiving for reward, letters, telegrams, &c.
24 [16C]	1543, 14 Oct. 1914 1699, 28 Nov. 1914 736, 17 July 1917 496, 27 Apr. 1918	Prohibition against non-postal communications to or from the United Kingdom
24B	767, 6 Nov. 1916 475, 19 May 1917 736, 17 July 1917 496, 27 Apr. 1918	Restriction on transmission from United Kingdom of postal packets
27 [21]	1231, 12 Aug. 1914 1307, 1 Sept. 1914 1699, 28 Nov. 1914 317, 23 May 1916 501, 28 July 1916 806, 23 Nov. 1916 886, 22 Aug. 1917 1348, 21 Dec. 1917 267, 4 Mar. 1918	Prohibition against spreading of false or prejudicial reports and against prejudicial performances or exhibitions

No person in, or in the neighbourhood of, a defended harbour shall by word of mouth or in writing spread reports likely to create disaffection or alarm among any of His Majesty's Forces or among the civilian population (SRO 1231, 12 Aug. 1914)

No person shall by word of mouth or in writing or in any newspaper, periodical, book, circular, or other printed publication,

(a) spread false reports or make false statements; or

(b) spread reports or make statements intended or likely to cause disaffection to His Majesty or to interfere with the success of his Majesty's forces or of the forces of any of His Majesty's Allies by land or sea or to prejudice His Majesty's relations with foreign powers; or

(c) spread reports or make statements intended or likely to prejudice the recruiting, training, discipline, or administration of any of His Majesty's forces, or the discipline of any police force; or

(d) spread reports or make statements intended or likely to undermine public confidence in any bank or currency notes which are legal tender in the United Kingdom or any part thereof

and no person shall produce any performance on any stage or exhibit any picture or cinematograph film or commit any act which is intended or likely to cause any such disaffection, interference or prejudice as aforesaid, and if any person contravenes any of the above provisions he shall be guilty of an offence against these regulations.

If any person without lawful authority or excuse has in possession or on premises in his occupation or under his control any document containing a report or statement the publication of which would be a contravention of the foregoing provisions of this regulation, he shall be guilty of an offence against these regulations, unless he proves that he did not know and had no reason to suspect that the document contained any such report or statement, or that he had no intention of transmitting or circulating the document or distributing copies thereof to or amongst other persons (Regulation 27, as amended up to 23 Nov. 1916).

27C	1190, 16 Nov. 1917 1348, 21 Dec. 1917	Printing and circulation of leaflets
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It shall not be lawful for any person to print, publish, or distribute any leaflet relating to the present war or to the making of the peace unless—

(a) There is printed on every copy of the leaflet the true name and address of the author and of the printer thereof; and

(b) The contents thereof have previously been submitted to and passed by the Directors of the Official Press Bureau, or some other person authorised in that behalf by the Secretary of State (from SRO 1190, 16 Nov. 1917).

...(b) Copies thereof have, seventy-two hours at least before such printing, publication or distribution, as the case may be, been submitted in manner hereinafter mentioned to the Directors of the Official Press Bureau or some other person authorised in that behalf by the Secretary of State (Regulation 27C, subsection [b], as amended by SRO 1348, 21 Dec. 1917).

33 [20]	1231, 12 Aug. 1914 1699, 28 Nov. 1914	Prohibition against the possession of firearms, &c.
35C	370, 14 Apr. 1917 938, 19 July 1918	Rules for naval, military, or munitions areas
40C	614, 7 Sept. 1916 1092, 23 Oct. 1917	Malingering &c., by men of reserve forces or holders of certificates of exemption from military service
40D	367, 22 Mar. 1918 934, 19 July 1918	Prohibition on sexual intercourse by diseased women

No woman who is suffering from venereal disease in a communicable form shall have sexual intercourse with any member of His Majesty's forces or

solicit or invite any member of His Majesty's forces to have sexual intercourse with her.

If any woman acts in contravention of this regulation she shall be guilty of a summary offence against these regulations.

A woman charged with an offence under this regulation shall if she so requires be remanded for a period (not less than a week) for the purpose of such medical examination as may be requisite for ascertaining whether she is suffering from such a disease as aforesaid (from SRO 367, 22 Mar. 1918).

42	1699, 28 Nov. 1914 1134, 30 Nov. 1915 71, 15 Feb. 1916 367, 22 Mar. 1918	Prohibition against causing mutiny, &c., or impeding production of war material
48 [26]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 656, 28 June 1917 806, 8 Aug. 1917	Aiding and abetting
50	1699, 28 Nov. 1914	General prohibition against assisting enemy
51 [12]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 551, 10 June 1915 253, 22 Apr. 1916 1190, 16 Nov. 1917 1348, 21 Dec. 1917	Power to search premises, &c.

The competent naval or military authority, or any person duly authorised by him or any police constable may, if he has reason to suspect that any house, building, land, vehicle, vessel, aircraft, or other premises or any things therein are being or have been constructed used or kept for any purpose or in any way prejudicial to the public safety or the defence of the Realm, or that an offence against these regulations is being or has been committed thereon or therein, enter, if need be by force, the house, building, land, vehicle, vessel, aircraft, or premises at any time of the day or night, and examine, search, and inspect the same or any part thereof, and may seize anything found therein which he has reason to suspect is being used or intended to be used for any such purpose as aforesaid, or is being kept or used in contravention of these regulations (including, where a report or statement in contravention of Regulation 27 or Regulation 27A has appeared in any newspaper or other printed publication, or where a leaflet has been printed in contravention of Regulation 27C, any type or other plant used or capable of being used for the printing or production of the newspaper or other publication or of the leaflet), and the competent naval or military authority, with the consent of the Admiralty or Army Council, or a chief officer of the police with the consent of a Secretary of State, the Secretary for Scotland, or the Chief Secretary in Ireland (as the case may be), may order anything so seized to be destroyed or otherwise disposed of (Regulation 51, as amended up to 21 Dec. 1917)

51A	715, 28 July 1915 253, 22 Apr. 1916	Power to authorise search of premises and seizure of prohibited documents
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If a justice of the peace is satisfied by information in writing upon oath laid before him by a competent naval or military authority or any person duly authorised by him, or by an officer of police of a rank not below that of inspector, that any document containing any information, report or statement, the publication whereof would be an offence against Regulation 18 or Regulation 27, is about to be issued for publication or dispersion from, or that copies thereof are upon, or that preparations are being made on any such premises for the publication of any such information, report, or statement, the justice may issue a warrant authorising a constable to enter at any time, and if need be by force, and search the premises and to seize any such document, and any written or printed copies thereof, and any type or other appliance which has been or is in a condition adapted for use in the production of such copies and bring them before a court of summary jurisdiction.

The court before which they are brought may issue a summons calling upon the owner to show cause why the articles so seized should not be destroyed, and if he does not appear in obedience to the summons, or if upon appearance he does not satisfy the court that the articles in question are not of such a character or so adapted as in this regulation herein-before mentioned, the court may order them to be destroyed or otherwise disposed of, and in any case shall order them to be restored after the expiration of seven clear days to the owner (from SR0 715, 28 July 1915).

53	1699, 28 Nov. 1914 1092, 23 Oct. 1917 1348, 21 Dec. 1917	Powers of questioning
55 [13]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 22, 27 Jan. 1916 124, 29 Feb. 1916 231, 12 Apr. 1916	Powers of arrest
56	1699, 28 Nov. 1914 235 23 Mar. 1915 302, 13 Apr. 1915 532, 2 June 1915 (Regulation 56[13] :Press Offences) 22, 27 Jan. 1916 71, 15 Feb. 1916 124, 29 Feb. 1916 417, 27 June 1916 702, 3 Oct. 1916 897, 22 Dec. 1916	Trial of offences
56A	235, 23 Mar. 1915 551, 10 June 1915 345, 1 June 1916	Trial and punishment by civil courts

57 [27]	1231, 12 Aug. 1914 1699, 28 Nov. 1914 235, 23 Mar. 1915 998, 14 Oct. 1915 127, 6 Feb. 1917 240, 13 Mar. 1917	Trial and punishment by courts martial
58	1699, 28 Nov. 1914 551, 10 June 1915 124, 29 Feb. 1916	Trial and punishment by courts of summary jurisdiction

In addition to an without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings, if, in the course of proceedings before a court of summary jurisdiction against any person for an offence against these regulations or the proceedings on appeal, application is made by the prosecution, in the public interest, that all or any portion of the public shall be excluded during any part of the hearing, the court may make an order to that effect, but the passing of sentence shall in any case take place in public (SRO 551, 10 June 1915).

59 [28]	1231, 12 Aug. 1914 1699, 28 Nov. 1914	Saving of other powers
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* DORRs referred to in footnotes alone are not included in the appendix.

+ Numbers in parentheses in column 1 refer to DORRs issued before 28 November 1914 and which were renumbered by the Order in Council of this date.

Second and subsequent references and the dates in column 2 pertain to Orders in Council by which DORRs were amended.

@ The descriptions in column 3 are taken from the Manual of Emergency Legislation and the Defence of the Realm Manual.

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