Rhetoric, Reality, and Regulation 18B

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"Of great importance to the public is the preservation of this personal liberty, for if once it were left to the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practised by the Crown), there would soon be an end of all other rights and immunities."[1] So wrote Blackstone, and since his time, and of course earlier, the rhetoric of personal liberty has been a standard feature of common law legal culture. You may recall Dicey's discussion of the rule of law, or as he calls it in one passage, the predominance of the legal spirit:

> "In England the right to individual liberty is part of the constitution because it is secured by the decisions of the courts, extended or confirmed as they are by the Habeas Corpus Acts."[2]

And in *Liversidge* v. *Anderson and Morrison*,[3] decided by the House of Lords on 3 November 1941, Lord Wright assured his audience that:

> "All the courts today, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject."[4]

It would be easy to occupy the whole of this lecture with similar acts of obeisance to the spirit, or perhaps I should say the ghost, of eighteenth century English liberty, which are more or less obligatory in cases which do not much further personal freedom. Now as you will know the Second World War was not a period during which there seems, on the face of things, to have been any very close connection between the rhetoric and the reality. For very many people were imprisoned without term, or if you like euphemisms, interned, without any form of trial, in flagrant violation of the ideal known as the Rule of Law. Detainees fell into three categories. The first comprised aliens subject to executive deportation orders

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1. W. Blackstone, *Commentaries on the Laws of England*, Vol.1, Ch.1 at II.
2. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Ch.1V, p.191.
3. [1942] A.C. 206, an appeal from the Court of Appeal, reported [1941] 2 All E.R. 612, affirming a decision by Tucker J in chambers which affirmed an order by Master Mosley.
4. At p.60.

but, for one reason or another, not ripe for deportation. They could instead be detained; I do not know the numbers involved but it was probably small.[5] The second category comprised aliens of enemy nationality. With very few exceptions they were detained under the Royal Prerogative, and under a policy adopted in June of 1940 around 30,000 were locked up, very many being refugee Jews. There is an extensive literature[6] on this bespattered page of British history, to which I do not propose to add, except to say that legal proceedings played no part whatever in the attempts, which succeeded, to reverse the policy. The prerogative was beyond challenge in the courts. Late in the war, and just after it, four enemy aliens did bring suit; predictably it did them no good at all.[7] One of the resulting reported cases, involving "L. and Another", must be the only one in the Law Reports which had been edited before publication by MI5.[8]

The third category comprised people detained under Regulation 18B of the Defence Regulations 1939, a chimerical creature, much amended over time. I shall be concerned with it only insofar as it permitted detention – it, and 18A, also permitted lesser forms of restriction. So it was that my late colleague Dr Egon Wellesz, hardly a sinister figure, was for long unable to remain in the Senior Common Room of Lincoln College to take dessert, for he had to be in by nine. Now although aliens could be, and occasionally were, detained under 18B, the principal function of the Regulation was to legitimise the detention of British subjects, without trial.[9] Only two detainees appear to have been brought to trial for offences whose commission was the reason for detention, but the number detained but never tried was very considerable. In all 1,847 orders were made, some 750 or more relating to members or past members of the British Union, Sir Oswald

5. Art. 12(b) of the Aliens Order 1920 allowed detention if deportation was not practicable, or prejudicial to the efficient conduct of the war, and thought necessary in the interests of public safety, the defence of the realm or the maintenance of public order.

6. P. and L. Gillman's *Collar the Lot* and R. Stent's *A Bespattered Page?* provide full general accounts. See also M. Kochan, *Britain's Internees in the Second World War*, A. Glees, *Exile Politics in Britain during the Second World War*, G. Hirschfeld, (ed.), *Exile in Great Britain*.

7. See *Netz* v. *Ede* [1946] 1 All E.R. 628; *Ex parte Kuechenmeister* [1946] 1 All E.R. 635, 2 All E.R. 434; *Ex parte L. and Another* [1945] K.B. 7; *Hirsch and Another* v. *Somerville* [1946] 2 All E.R. 430.

8. "Buster" Milmo (H. P. J. Milmo, later from 1964-82 a High Court Judge) was involved, but the editing seems to have been done by J. L. S. Hale. Both the Foreign Office and the Alien's section of the Home Office wanted the case reported as a useful precedent. The story may be followed in P.R.O. TS 27/555, though the background is obscure. Leopold Hirsch with his wife Olga and child Diane had been detained in Trinidad in 1941; he was thought to be *en route* to Bahia to establish an espionage network.

9. According to Herbert Morrison in the Commons on 1 May 1941 (Col.552) by then only two detainees had been put on trial for actions leading to their detention. One would be Anna Wolkoff, sentenced to 10 years on 7 November 1940 in connection with the Tyler Kent affair, on which see A. Masters *The Man Who Was M*, Ch.6, and R. Thurlow, *Fascism in Britain*, pp.201-206. The other was probably Christobel Nicholson, wife of Admiral Nicholson, on whom see Thurlow at p.197. She was acquitted on an Official Secrets charge at the same time. I do not know of any later cases.

Mosley's fascist party.[10] Some further figures may convey a notion of scale.[11] The peak number in custody was reached in August 1940, the end of the month figure being 1428. The figure remained above a thousand until the end of 1940, and thereafter fell steadily. At the end of 1942 there were 486 detainees, and, at the end of 1943, 266. By December 31st, 1944, there were 65, and at the end of the war in Europe eleven remained, in due course to be released, with one exception, an alien awaiting deportation. He, the last victim of 18B, was perhaps Leopold Hirsch, a mysterious character whom with his wife Olga, you may find concealed as L, courtesy of MI5 as I have explained, in the Law Reports at [1945] KB 7, and again under his own name the following year.[12]

Regulation 18B generated quite a considerable body of litigation, most of which was handled by one solicitor, Oswald Hickson,[13] who, I hasten to say, was not a fascist but simply a liberal lawyer who took the idea of the Rule of Law seriously. Details of the cases can be discovered from a variety of sources, in particular the reports, the papers, and such files as have been released in the Public Record Office.[14] I should explain that these never include the MI5 files, though quite a deal of MI5 material has, as it were, leaked into other places, and I must also explain that my own investigations are far from complete. So this lecture is in the nature of an interim report only.

Now I fear that the enthusiasm of the courts for liberty cannot have seemed very impressive to our 1,847 detainees, for only one single individual, Captain Charles Henry Bentinck Budd, formerly in the 1914-18 War, of the 5th Dragoon Guards, and 5th Buffs, and in 1939-40 an officer in the Royal Engineers, was actually released by court order, or indeed given any other form of redress by the judges of England. Budd had joined the British Union in 1933 and left in 1939; he had been a paid organiser in West Sussex from 1933 to 1936. He had been detained on 15 June, 1940 and was released by court order on 27 May, 1941. But I fear his triumph was short lived, for he was re-arrested in a little over a week, on 6 June, under a fresh order, and his second attempt to secure liberty through litigation failed, reaching the Court of Appeal on 25 February, 1942. Budd was eventually released on or about 25 May, 1943, and again sued, without success, this time for damages for false imprisonment with respect to the original period of wrongful

10. The total is given in P.R.O. HO45/25758. There is no complete available breakdown into categories, or nominal roll of detainees, so the figure of 750 is an estimate.

11. Monthly returns to Parliament are available in the Parliamentary Papers. The references are: IV, 203 (1.9.39-30.9.40); IV, 247 (1.10.40-30.9.40); IV, 221 (1.10.41-31.8.42); IV, 345 (1.9.42-30.9.43); III, 227 (1.10.43-31.10.44); V, 75 (1.11.44-9.5.45).

12. *Supra* n.7. Olga appears to have ended up in Paraguay; what became of Leopold I do not know. I guess he may during his detention have become a double agent.

13. Oswald Squire Hickson (1877-1944) was Senior Partner in Oswald Hickson, Collier & Co. See *Who Was Who*, Vol. IV. He was described by Sir Norman Kendal, head of the C.I.D., as "the notorious solicitor". See P.R.O. HO 45/2578 (860060).

14. Principally consisting of a number of Treasury Solicitor's files and a very select group of Home Office papers connected with fascist detainees, the so-called "Mosley Papers", discussed by Thurlow, *op. cit.*, *supra* n.9, Introduction.

detention; this action failed before Asquith J in June of 1942.[15] Characteristically the judge explained that he hoped that he was "not lacking in zeal on behalf of the liberty of the subject". As an indirect consequence of the success of Budd's first action Herbert Morrison released some twelve other detainees in like case; the "copy" of the original order served on the detainees had failed to correspond with the original signed by the Home Secretary.[16] But of these happy twelve, eleven were similarly re-arrested.[17] On the face of things at least the courts, and the principle of the Rule of Law, do not seem to have done a great deal for civil liberty so far as Regulation 18B detainees were concerned.

Now to be sure many of the detainees were not nice people, and no doubt too a proportion needed to be locked up. At the other end of the spectrum it is also true that some quite outrageous decisions to detain were taken. Since, for reasons which will continue to excite the curious until a proper disclosure of the records takes place, the release of records connected with 18B has been highly selective, it is quite impossible to form any quantitative estimate on these matters, and so all I can do is to give you an example. It concerned one Harry Sabini, alias Harry Handley, also known as Henry Handley, Henry S. and Harry Roy.[18] You will guess from this that he was not a model citizen, but a citizen he was, being born in London to an Italian father (who died when he was an infant) and an English mother. He had never visited Italy nor did he know any Italian, and his five brothers were in like case. The Metropolitan Police did not like Harry; he apparently belonged to a gang known as the Sabini gang, which ran a protection racket connected with the allocation of bookie's pitches. One brother, Joseph, was indeed a bookie, and had been given a three year sentence back in 1922 for shooting with intent to cause grievous bodily harm. Harry's convictions were more modest. He had in 1922 been fined a total of £8 for assault, and in the same year he had been bound over for threatening behaviour with a revolver. In 1921 he had been fined £2 for obstruction and in 1924 he had been fined £2 for drunkenness. Chief Inspector Green saw him kick one Hutton, when drunk, at Ascot, but no charges were brought. He was hardly, I think you will agree, a major villain. He was detained along with his brother Darby Sabini on 14 June, 1940 under an 18B order based on his hostile origins, which of course he did not have, and placed in

15. In the reports Budd's litigation can be followed in [1941] 2 All E.R. 749; [1942] 1 All E.R. 373; [1943] 2 All E.R. 452, but the first action, in which he succeeded, was not reported. One wonders why not. See however *The Times*, 28 May 1941, 9e. Much material exists in TS 27/506.

16. The order was an omnibus order, on which see below text to n.44. The arresting police held the original order, to be returned endorsed and the copies, one for the detainee and one for the Prison Governor.

17. Statement by Herbert Morrison on 10 June 1941 (see *Hansard* at col.23-24).

18. Sabini's case was not reported, but was regarded as establishing judicial review in cases of mistaken identity. See *The Times*, 21 Jan. 1941 at 2g. My information comes from P.R.O. TS 27/496A and HO 45/25720. The latter, much weeded, was declassified as part of the "Mosley Papers" on 10 June, 1985. It has no relevance to Mosley. Another shocker is recorded by Lord Denning in *The Family Story* at p.130. The individual was probably the Revd. H. E. B. Nye.

Brixton. He was described as Harry Sabini, alias Harry Handley. The initiative was apparently taken by the police, not by MI5, which does not seem to have been at all involved, though one cannot be certain as the Home Office file appears to have been sanitised. He was given in November the reasons for the order, dated 27 November 1940. This document said that the order was based on his hostile *associations*, and gave the following particulars: That the said Harry Sabini

(i) is of Italian *origin* and *associations* (my italics);
(ii) is a violent and dangerous criminal of the gangster type, liable to lead internal insurrections against the country.

Police reports conceded that he had no known interest in politics, but opined that he was:

> a dangerous gangster and racketeer of the worst type and appears to be a most likely person who would be chosen by enemy agents to create and be a leader of violent internal actions against the country.

Sabini brought *habeas corpus* before a Divisional Court on 20 December 1940, his case being primarily presented as one of mistaken identity; by affidavit he denied being ever known as Handley, and Humphreys J indicated at the first hearing that he seemed to have good grounds, adjourning the case until 20 January 1941 for this matter of identity to be cleared up. The Home Office at the adjourned hearing put forward not only an affidavit of normal type from the Home Secretary, but quite a body of evidentiary material – affidavits from police officers showing that he did operate under the alias Handley, and generally that he was a thoroughly bad lot. This satisfied the Court. The application was refused, and this in spite of the bad muddle over the formal grounds for detention, which the Court was prepared to overlook. But on 18 March, presumably because of the report of the Advisory Committee, of 3 December 1940, which is not in the file, Herbert Morrison released him. He was promptly arrested and charged with perjury arising from his affidavit, claiming he did not use the name Handley. For this he got nine months on 8 July 1941. What became of his brother I do not know. It had all been a bad business, and Harry, whatever may be said about his nine months sentence for perjury, had been locked up for some nine months under 18B without any respectable justification whatsoever.

Now how did all this come about, looking at the matter from a legal point of view? The infamous conception of 18B took place at a gathering back in 1937, the bureaucratic equivalent of group sex – I refer of course to an interdepartmental committee. The chairman was Claud Schuster, Clerk of the Crown, Permanent Secretary to the Lord Chancellor, of Winchester, New College and the Inner Temple, father of the Law Revision Committee.[19] He was among the numerous

19. Claud Schuster (1869-1956), later Baron Schuster, is in the *D.N.B.* (1951-60). On his committee see HO 45/20206.

lawyers, one of whom we have already met, who enthusiastically set about the erosion of the Rule of Law. In the 1914-18 War internment of British subjects had been confined to those who, though technically British subjects, were in substance enemy aliens.[20] An example would be the wife of a British subject whose husband had always lived in Germany since childhood, and who herself had never, since marriage, left Germany. Hence the requirement that they be of "hostile origin or associations". But this was not enough for Sir Claud; in the coming war there might be trouble from:

> persons activated, not by sympathy with the enemy, but by "internationalist" affiliations, or by disinterested opposition to the war.

Presumably this meant communists and pacifists. You will note the alarming development from interning the potentially disloyal, to interning the loyal who happen to disagree with the government; it comes as no surprise to know that Sir Claud squabbled continuously with Lord Chief Justice Hewart, author of *The New Despotism* (1929). So a regulation was drafted accordingly, but put on ice, there being no hope of obtaining parliamentary support for the abolition of civil liberty in peacetime.[21] The Regulation, (originally Regulation 20) read:

> The Secretary of State, if satisfied, with respect to any particular person, that with a view to preventing him acting in any manner prejudicial to the public safety, or the defence of the realm, it is necessary to do so, may make an order:

And the draft Emergency Powers Bill included an even wider power to make Defence Regulations by Order in Council:

> for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm

It will be seen that these texts, the first based on *necessity* and the second on *expediency*, do not in any way limit the categories of potential detainees. But there were some concessions to the legal spirit. There was to be an advisory committee or committees, chaired by a real judge or former judge, and a right to legal representation, and a memorandum of October 1938 envisaged two MPs serving with the judge.

As hostilities approached MI5 gave some thought to who would need to be locked up, and on 16 January Brigadier A.W.A. "Jasper" Harker, Vernon Kell's

20. In the 1914-18 war the Regulation was 14B made under S.1(1) of the Defence of the Realm Act of 1914 (c.29 and 63). British subjects could only be detained in view of their "hostile origin or associations" on the initiative of the military or an Advisory Committee. Regulation 14B was upheld as *intra vires* in *Ex parte Zadig* [1916] 1 K.B. 738. About 70 was the maximum number detained at any time in the War.

21. The Schuster committee reported to the Committee of Imperial Defence on 21 April 1937; the latter accepted the extension of the internment power. Sir Samuel Hoare, then Home Secretary, drew attention to the change, which he envisaged as useful against communists.

deputy, sent the Home Office an estimate of fifty. For Ulster the number was, incredibly, just one, a woman. The modesty of MI5's demands is noticeable.[22] Kell wrote to Ernest Holderness at the Home Office on 16 May, asking for orders to be signed in advance, and held by MI5, but this was resisted. The Permanent Under Secretary, Sir Alexander Maxwell, thought it improper to ask the Home Secretary to sign orders "under a power which does not at present exist", and the Home Office wanted to keep control of so important a matter. So Kell did not get his orders. When war became imminent the Emergency Powers (Defence) Bill was, on 24 August 1939, rushed through a docile Parliament.[23] But an attempt was made to amend it so as to make a High Court judge the final arbiter of decisions to detain. Sir Samuel Hoare, then Home Secretary, resisted this; he was adamant that "this must be an Executive Act", though he expressed sympathy with the need for some check, mentioning the possibility of Advisory Committees. So the amendment was withdrawn. He also gave a weird undertaking *not* to "introduce regulations that would affect the liberty of the subject, by which I mean regulations for internment and so on, that was put into force between 1914 and 1918." On 1 September the whole code of Defence Regulations was promulgated by Order in Council, and 18B, in the form I have outlined, was brought to its monstrous birth.[24] At the same time the checks had been reduced – no right to legal representation, and no judicial chairman for the Advisory Committee. Walter Monckton had been lined up for the job; he was neither a judge nor, at this stage, did he want to be one.

Eleven days after the Privy Council was brought to bed of 18B, Robert William Liversidge applied for a commission in the Royal Air Force Volunteer Reserve.[25] He was commissioned Pilot Officer with seniority dating from 20 November, being assigned to Administration and Special Duties, in particular intelligence duties. He was posted to a Bomber Command base at Wyton and then to Wattisham, near Ipswich, as a photographic intelligence officer. In his application he did something which seemed a good idea at the time, but turned out to be a mistake. He claimed to have been born in Toronto on 28 May 1901 of Canadian parents of the name he now bore. In fact he had been born in London on 11 June 1904 and, as Jacob Perlsweig, he was in reality the son of Asher and Sarah Perlsweig. Asher was a Rabbi from Russia who had emigrated to England between 1895 and 1904. Our man had indeed formally changed his name in 1937, and used the name Liversidge well before that. The reason for the mis-statement in 1939 was purely patriotic; he feared that his parentage being both non-British and Jewish might have prevented his being accepted.

22. P.R.O. HO 45/25758. An earlier verbal estimate was thirty. In the event MI5 submitted a list of only 23 names on 22 August 1939. See HO 45/25114/863686.
23. See *Hansard* for 24 August 1939 at col.63 *et seq.*.
24. S.R. & O. 1939 No. 927.
25. Information on R. W. Liversidge is principally from TS 27/501. I am grateful to other correspondents including Air Commodore H. A. Probert, the Earl of Selkirk, Professor R. V. Jones and Professor De Lloyd Guth.

For the moment however let us leave Pilot Officer Liversidge briefing the aircrew of 107 and 110 Squadrons, who had the misfortune to fly Blenheims on very hazardous missions. He, at least for the moment, had kept out of trouble. Regulation 18B had not.

Its publication caused a Commons revolt, led by Dingle Foot, and the new Home Secretary, Sir John Anderson, had a bad time trying to defend it as if it was all his fault, rather than Sir Samuel Hoare's.[26] Dr Edith Summerskill even asked the Deputy Speaker:

> Is it in order for the Home Secretary to treat this as if we were natives of Bengal?

where Sir John had indeed served as Governor from 1932-37.[27] A division, which could have left the country with no Regulations at all, was bought off by a promise to introduce a new 18B after consultations, and on 23 November, by which time some 26 orders had been made (not the fifty Kell had foreseen), the new 18B appeared.[28] As analysed within the Home Office[29] this set out five classes of potential detainees:

(1) people of hostile origin;
(2) people of hostile associations;
(3) people who had recently been concerned in acts prejudicial to the public safety or the defence of the realm;
(4) people who had recently been engaged in the preparation of such acts;
(5) people who had recently been engaged in the instigation of such acts.

Mr L. S. Brass, the assistant legal adviser, who conducted this analysis, seems to me to have got the figure wrong, but let that pass. So far as all categories were concerned the Home Secretary had to have reasonable cause to believe that the individual fell into one or more of the categories, and that by reason thereof it was necessary to exercise control over him or her. The Home Office policy was however to treat the new Regulation as essentially creating two categories of the lockable up. They were:

(1) hostile association detainees, plus, where appropriate, hostile origins;
(2) recent acts prejudicial detainees.

Appropriate forms of order rehearsing the relevant part of the text of the Regulation were therefore prepared, and Sir Alexander Maxwell in due course drafted a letter of instructions to Chief Constables on the procedures to be

26. See *Hansard* for 31 October, 1939.
27. J. W. Wheeler Bennett's *Life* of Sir John gives a sympathetic account of his time at the Home Office. It seems clear that he did favour liberty at a time when it was politically not easy to do so: see esp. pp.237-57.
28. S.R. & O. 1939 No. 1681.
29. P.R.O. HO 45/25758.

followed in making arrests: this, known as "the Maxwell Letter", is available in the accessible material in the Public Record Office.[30]

It was envisaged in late 1939 that the normal use of 18B would conform to the policy adopted in the previous war; it would be used to legitimise the detention of people who were in substance enemy aliens – hostile association or origin cases. It would only be used to lock up real British subjects on the ground of acts prejudicial in I.R.A. cases, and perhaps there would be the occasional reckless fascist. Of course in wartime, more particularly now there was a massive code of Defence Regulations, citizens who went in for acts prejudicial could, if there was proper evidence against them, perfectly well be tried and sentenced for an appropriate offence. There was no need to detain them without trial.

Within the Home Office respect for legality and the spirit in which the law had been changed led in December of 1939 to the conducting of a curious ritual, well known to lawyers, and called "directing one's mind". There were still in detention 24 people interned under the first version of 18B. The officials felt it right for Sir John to continue their detention only if it could be justified under the new 18B.[31] The Home Secretary

> ought now to direct his mind to the question whether, as regards each person detained, he has reasonable cause to believe that such a person is of hostile origin or associations, or has recently been concerned in acts prejudicial. . .

So a brief summary of the case against each detainee was prepared, and this was initialled and presumably read by Sir John. He also initialled a covering memorandum. Twenty four acts of initialling, evidencing, in case evidence be needed in the future, twenty four actions of directing the mind. As matters hotted up in 1940 this rather leisurely mind directing had, of necessity, to go by the board, as we shall see.

In the period of the phoney war the use of 18B was restrained, and there is no reason to doubt that Sir John would see papers of some sort on all the cases, or a summary of them. Surviving and accessible materials do not however enable one to be sure precisely what passed over his desk. Presumably it would consist of the Home Office file with minuted advice from the officials, including that of the Permanent Under Secretary, Alexander Maxwell. By the end of April 1940 only 136 orders had been made, and only 58 individuals remained in detention. Now the principal safeguard or check embodied in the regulations was the right of the detainee to make objections to an advisory committee (as well as representations to the Home Secretary direct), and it was provided that:

> it shall be the duty of the chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such

30. P.R.O. TS/511 has the text in use on 22 May 1940.
31. P.R.O. HO45/25758. All were hostile origin or association cases, twelve involving espionage.

> particulars as are in the opinion of the chairman sufficient to enable him to present his case.

It will be noticed that the "grounds" and "particulars" came from the chairman, not the Home Secretary. There was no explicit provision dealing with the form of the order, but the practice adopted was to serve a copy on the detainee of an original which did rehearse the relevant parts of the regulation, using the two categories I have explained. The detainee had thereafter to wait for some time before he got the "grounds" and "particulars" from the chairman, in a document headed "Reasons for Order". As we have seen in connection with Harry Sabini this document might not provide much in the way of useful information.

The advisory committee first met on 21 September under Walter Monckton;[32] at once it set about eroding the safeguards, by excluding lawyers from appearing before it. Norman Birkett, another lawyer of course,[33] took over and this decision was confirmed on 16 October, though lawyers could assist a detainee in preparing his case.[34] In terms which will ring a bell with historians of the criminal law, Norman Birkett wrote:

> The Committee were satisfied that the absence of legal assistance placed the appellant in no real disability, for they regarded it as a duty to assist the appellant to formulate and express the answers he or she desired to make.[35]

Witnesses against the detainee were rarely seen by the Committee, and never in the presence of the detainee. The Committee proceeded by conducting an inquisitorial examination of the detainee, apparently usually based solely upon material provided to it by MI5 in a document called "Statement of the Case".[36] MI5 recruited a number of lawyers[37] and they normally prepared these documents. They were, it must be noted, prepared retrospectively after initial detention, not before, sometimes long after. Hence the initial decision by the Home Secretary was not based upon the "Statement of the Case". A transcript

32. Walter Monckton instead moved into censorship as Director-General of the Press and Censorship Bureau, and soon became Deputy Director of the Ministry of Information.

33. William Norman Birkett, later Lord Birkett (1883-1962), became a judge in 1941 so that from that date the Advisory Committee was "judicialised". There is an article by Lord Devlin in the *D.N.B.* (1961-70) and a *Life* by H. Montgomery Hyde. This discusses his work in the war at pp.469-72 and on p.541 records that it gave him ulcer trouble. Cmnd.283 of October 1957 on telephone tapping should inhibit any idea that Birkett was in the forefront of liberalism.

34. P.R.O. HO 283/22 is an account of the Advisory Committee by G. P. Churchill, its Secretary until *c.*5 March, 1941 when he was succeeded by Miss J. M. Williams. The Committee originally worked in 6 Burlington Gardens, but on 30 September 1940 moved to the Berystede Hotel at Ascot. The use of Churchill, a retired diplomat, as Secretary, was intended to emphasise the independence of the Committee from the Home Office.

35. Memo of 10 Jan. 1940 in HO 45/25754.

36. Examples will be found in TS 27/501, 513, 514, 542.

37. I have noted S. H. Noakes, E.B. Stamp, H.P.J. Milmo, and G. St. Pilcher, all working at Blenheim Palace, telegraphic address 'Snuffbox'. Other lawyers who worked for MI5, such as H.L.A. Hart and Sir Ashworth Roskill, seem to have been in another division of MI5.

was made of the hearing and some few of these are accessible.[38] Birkett had considerable charm and courtesy, and a somewhat cosy air was achieved; it has been said that proceedings of the committee combined elements of a court martial with a vicarage tea party. But since the "Statement of the Case" was not shown to the detainee and he had only a vague idea of the supposed evidence against him in no conceivable sense was he given a fair chance to exonerate himself. Nor did he see the Report of the Advisory Committee.[39]

It is true that he was, as we have seen, given a document headed "Reasons for Order", embodying the "grounds" and "particulars" as required by the regulation, prepared either by MI5 and transmitted with the approval of the Chairman, or, very rarely, actually drafted by him, or perhaps more usually by the Secretary, Mr G. P. Churchill, a retired diplomat. This was based on the "Statement of the Case", being a highly expurgated version of it, and the reality of the matter was that MI5 controlled the process of expurgation. An even stranger fact was that, as Sir John himself pointed out in a Home Office conference on 9 March 1943, the "grounds" and "particulars" given to the detainee were not the Home Secretary's (or his officials') "grounds" and "particulars" at all; the Advisory Committee was not told why the Home Secretary had decided to detain the individual concerned, so the Chairman did not know. The "Reasons for Order" supplied to detainees were a guess, based upon the MI5 "Statement of the Case"; they might or might not correspond with the considerations which had motivated the Home Secretary.[40] This fact was indeed coyly revealed by the Attorney-General in John Beckett's *habeas corpus* case in the Divisional Court on 17 May, 1943. Beckett's counsel dismissed this as being quite incredible, and the Attorney-General failed to press the matter. No doubt he was delighted. Valentine Holmes had advised against spelling the point out in an affidavit.[41] In none of the cases did any of the judges grasp what was going on.

In January of 1940, with the experience of some thirty 18B cases behind him Birkett set out, in the deeply self satisfied memorandum, from which I have already quoted, the principles which his committee accepted. The following is an extract:

> The paramount consideration at all times has been the national safety and security. Every fact and every circumstance in each individual case has been examined in the light of the supreme necessity. When all the evidence has been heard and considered, if any doubt remained that doubt was resolved in favour of the country and against the individual.

38. Examples in TS 27/514, 513.
39. Examples in TS 27/501, 514, 542, 495.
40. An account of this conference, which was concerned with litigation by Ben Greene, is in TS 27/542. See also TS 27/507.
41. P.R.O. HO45/25754.

So much for the golden thread and the spirit of *Woolmington*! This, let it be noted, was in January of 1940, when we were still, as I recall, singing that,

"We'll hang out the washing on the Siegfried line,
If the Siegfried line's still there."

It may well be however that Birkett's attitude explains the harmonious relationship which existed between the Committee and Sir John Anderson. For during his time, which ended in early October 1940, Sir John never failed to accept a recommendation from the Advisory Committee, whether for continued detention, or for release.[42] In effect it seems that what was going on was that initial detention was effectively determined by MI5, and rubber stamped by the Home Office, though no doubt papers would pass across desks in the Home Office. Occasionally detention would be initiated by the police, by an Aliens Tribunal, or by a Regional Security officer, and perhaps such cases had extra attention. The Advisory Committee then became seised of the case, and decided whether the person *really* ought to be detained, and the Home Secretary delegated this decision to the Committee. So long as the interval between arrest and appearance before the Committee was a short one, this was not so objectionable as it was to become as the delays became more serious.

In the early summer of 1940, in response to German military success and its unfounded explanation by the mythical Fifth Column, the scale of internment increased dramatically. First there were the Italians;[44] between 8-11 May MI5 submitted a list of 300 persons of Italian connections whom they thought needed locking up, and two officials in the Home Office, Mr R. H. Rumbelow and Miss J. M. Williams, devised what was to be known as an "omnibus order" – just one order for Sir John to sign, which rehearsed the text of 18B, with a schedule of names attached. The first schedule listed 275 names. Sir John signed on 13 or 14 May, leaving the date blank, and three further schedules were added later, though whether Sir John ever saw these was never really established. The idea was that detainees, when the order was activated, which happened on 10 June, when Mussolini declared war, would be given a copy by the arresting police officers, appropriately dated; these copies were sent out in advance of course of the

42. This appears from the monthly returns to Parliament. The Committee Reports carefully distinguish "suggestions", which might not be accepted, from "recommendations": P.R.O. HO45/25758 (863044/20).

43. Some files contain a standard form, DR8, used to set out in a summary form, the reasons of MI5 and the Police for wanting the individual detained. Examples are in TS 27/507 (Arthur H. Campbell) and TS 27/514 (Pitt Rivers). It seems impossible to discover whether this document went before the Home Secretary at the outset, or indeed at all.

44. On the Italians and the "Fascio Order" see TS 27/509. The 18B order was of course aimed at British subjects; numerous other enemy alien Italians were detained under the prerogative. The plan was to intern all members of the Italian Fascist Party, and all between 16 and 70 with less than 20 years residence in England. Some 600 were interned under 18B and 4,100 under the prerogative. See P.R.O. HO 45/25758 (863044/59).

retrospective dating of the master omnibus order. On 15 May at Cabinet Winston Churchill expressed the view that "there should be a very large round-up of enemy aliens and suspect persons in this country".[45] This led to the mass arrest of the aliens under the prerogative. Then, on 22 May, the Cabinet decided to employ internment of British subjects for an entirely new purpose – not to detain individuals who, as individuals, were disloyal, but to destroy an institution, Oswald Mosley's British Union of Fascists. The reason was probably the fear, given the risk of invasion, that Mosley, in cahoots with a group of other fellow travellers of the right, who had held secret meetings, would work for a negotiated peace with a view to putting Mosley in Number 10.[46] Hence the decision on 22 May to intern 25-30 leading members of the British Union, and the later decision on 4 June to detain some 350 local British Union officials. In the event around 700 active members were detained; the reasons are obscure. About the same time other supposed members of the group were detained, for example Ben Greene and John Beckett by order of 22 May, and Admiral Sir Barry Domvile somewhat later on 6 July.

All this produced consequences for 18B. At the end of May there were 131 detainees, by the end of June 953 and by the end of July 1,378. The officials and the Advisory Committee, and presumably MI5, became overwhelmed with work. Since there were now long delays before a case reached the Advisory Committee the initial decision to detain mattered more than it had in the past; Domvile for example had to wait over a year. In June Sir John made 826 orders, and, at ten minutes mind directing per order, 137 hours work would be involved; mind directing, especially with the omnibus orders, surely became perfunctory, little more than a fiction. The affidavits submitted in litigated cases by Sir John and his successor vary in form, but a number explicitly state this or something like it:

> Before I made the said order I received reports and information from persons in responsible positions who are experienced in investigating matters of this kind and whose duty it is to make such investigations and to report the same to me confidentially. I carefully studied the reports and considered the information and I came to the conclusion that . . .

This example comes from the Aubrey Lees case, litigated in 1940; the order was signed on 19 June, though dated 18 June, at the height of the pressure, and surely

45. P.R.O. CAB 67/7. At first the Home Office seems to have resisted any considerable increase in internment of British subjects, the candidates being at the time fascists and right wingers of one kind and another, and communists. See CAB 65/7WM 123 (40), 128 (40).

46. For discussion see Thurlow, *op. cit., supra* n.9., Ch.9. It has been suggested that the decision was a condition imposed by the Labour Party on joining the coalition government under Churchill, an explanation Thurlow rejects. Given the current selective release of material the matter cannot be viewed as clear. There is naturally speculation as to what government wishes to hide which would explain the refusal to release all surviving material. A possibility must be the involvement of the Duke of Windsor in schemes for a negotiated peace.

indicates that the tradition of being economical with the truth was not invented by Sir Robert Armstrong. With the increase in scale came formal mistakes. In May and June of 1941 Home Office officials became nervous about the Italian "Fascio" orders of 10 June 1940, partly because it was unclear whether Sir John had ever seen them. A review initiated by a Home Office official revealed an alarming catalogue of mistakes. The grounds of the order provided by the Committee might differ from the order, or the particulars not conform to the grounds. There might be no evidence on file that a copy had ever been served, or that the detainee had been correctly told of his rights. The "copy" of the order might differ from the order, or have the wrong date. It was all very embarrassing.

Furthermore 18B had to be amended again, in fact on 22 May itself. The selected fascists were not "of hostile associations" or "guilty of recent acts prejudicial". So a new 18B 1A was introduced, allowing detention of present or past members of organisations – organisations subject to foreign influence or control, or whose leaders had, or had had, associations with leaders of enemy governments, or who sympathised with the system of government of enemy powers.[47] Of course the British Union was still an entirely legal organisation, and someone must have found this odd, for on 26 June a further Regulation, 18AA,[48] was promulgated allowing the Home Secretary to proscribe organisations. The British Union was indeed proscribed, somewhat belatedly, on 10 July.[49] By that time of course something of the order of 400 members or past members were in detention for belonging to a lawful political party. Why the matter was handled thus I do not know. 18B 1A was never, so far as I know, applied to any other organisation; individuals like Admiral Domvile, founder of The Link, or Ben Greene, one time Treasurer of the British People's Party, were detained by a strained application of either "hostile associations" or "acts prejudicial". And, somewhat strangely, no communists as such were ever detained, but, so Kim Philby assures us, Roger Hollis, the responsible MI5 officer, had assured Herbert Morrison that the party was loyally behind the war. This did not however prevent the banning of the *Daily Worker*, the contents of which were directly available to Herbert Morrison.[50]

It was during this period that Pilot Officer Liversidge was arrested, on 28 May 1940. On this day too his commission was terminated. He was neither an Italian, a Fascist, a fellow traveller of the right nor a pacifist. The order was for "hostile associations", and its background is an intriguing one. On 27 February Liversidge had been posted to Fighter Command Headquarters, which was at Stanmore, but he may have actually worked, at some period, at the Headquarters of 11 Group at Uxbridge. On 26 April he had been placed under close arrest by the Air Force,

47. S.R. & O. 1940 770.
48. S.R. & O. 1940 1078.
49. S.R. & O. 1940 1273. A further 18B amendment (S.R. & O. 1940 No. 1682) took place in September of 1940 to deal with invasion; it was never implemented.
50. Kim Philby, *My Silent War*, pp.103-4.

ostensibly because of his mis-statements back in September 1939, repeated in a document he filled in on 26 April. The R.A.F. had no quarrel with his efficiency; his Commanding Officer, Lord Selkirk, has assured me that he did his job well. The R.A.F. was put up to it by MI5, who also provided derogatory information about him, derived from the Metropolitan C.I.D.. I do not propose to go into this material here except to say that Liversidge seems to have got into bad company as a young man, that he was not a person who had ever been convicted of any offence, and that the activities involved had nothing to do with any foreign power. According to the records available, he had in 1940 come to the attention of Intelligence when they were investigating a fraudulent scheme at Seaton internment camp, in which money changed hands, ostensibly in return for promises to apply pressure in high places to secure the release of alien detainees. Although the details are obscure, he appears to have had contacts with two special branch officers, both probably corrupt and on the make, and he may have acted as intermediary, though not with any wrongful intention. Presumably it was this incident which MI5 learned about. The contacts with the special branch officers had apparently originally been on another matter, to which I shall return.

On 15 May Sir Archibald Sinclair, the Air Minister, wrote to Sir John enclosing the C.I.D. report and saying:

> I am certain you will agree it is most undesirable that a man with the unsavoury and indeed dangerous associations of Perlsweig, who during recent months has had access to information of a most secret character, should be left at large either in the Service or in the Country.

Sinclair pointed out that Liversidge could be proceeded against for the offence for which he was put under arrest, but the D.P.P. had advised him that for this he would probably merely be bound over, or at worst imprisoned for three months. Alternatively he could be kept in the R.A.F., under MI5 surveillance, which he felt would be unsatisfactory. Or he could be interned under 18B, the best solution. The second suggestion is on its face very odd, and my suspicion is that it came from Intelligence, who may have preferred, for their own reasons, to have him at large. Sir John obliged with a "hostile associations" order, but eleven days later, the delay suggesting some level of serious enquiry by the Home Office. So he was conveyed to Brixton Prison, where he remained for the whole period of his detention. Winston Churchill was at this time taking a lively and somewhat malevolent interest in the locking up of important people, and Liversidge's name was included in the list of "Prominent Persons" supplied to him on about 28 June, and updated weekly for some time thereafter.[51] The list also includes the name of Frederick W. Braune, a British subject of German origin, and partner in the law firm of Buckeridge and Braune, who were later to represent Liversidge in litigation. He was an acquaintance of Liversidge's and they no doubt met in

51. P.R.O. HO 45/25747.

Brixton. The use in the order of "hostile associations" was not of course in the original spirit of this category, for Liversidge was not in substance an enemy alien. It was, I suppose, the best fit available, there being no question of his having engaged in acts prejudicial during his R.A.F. service, though a somewhat desperate attempt was made to suggest the contrary to the Advisory Committee.

Now there is an oddity in this story as I have related it, falling into the Silent Nocturnal Dog category, conceived by Sherlock Holmes. Why did MI5 not itself have Liversidge detained, but instead put the R.A.F. up to doing the dirty work? That this was curious is confirmed by a letter in the Treasury Solicitor's file from Norman Kendal, head of the C.I.D., to one Lewis Evans, Deputy Director of Public Prosecutions. It is dated 3 May, before the Home Office had been approached.

> I am told this evening that you have been approached about the Liversidge Perlsweig case. I may be wrong, but I am certain there is danger ahead here. The case is one in which, if MI5 have any real reason, they ought to apply for internment under 18B. This they will not do and tried their best to bounce me into charging him under 1(1)(e).

This is a reference I think to the offence involving the false statement, though I confess that to date I have not tracked it down. The letter goes on to say that such a charge would be ridiculous; only an Air Force offence is involved, and it is up to the Air Force to deal with it. Kendal's letter thus confirms that MI5 was, for some reason, trying to pass the baby. Yet MI5 was prepared to blacken Liversidge's character, as appears from another accessible item. This is a note of a phone call from one Stamp of MI5 to the Home Office:

> Mr Stamp telephoned *re* Liversidge to say that this is a very bad case and he sees no reason why his appeal should have special authority.

"Special authority" may mean expedition through orders from on high. The E.B. Stamp in question was the later judge Sir Blanshard Stamp, who worked for MI5 at this time, and you can make of this what you will.

Liversidge and some of his friends protested to the Home Secretary, and objected to the Advisory Committee, his then solicitors, Messrs Silkin and Silkin, assisting him in preparing his case and in trying to speed up the proceedings. The Committee, as we have seen, had to provide the "grounds" of the order and the "particulars", which was done in a document headed "Reasons for Order". The MI5 officer concerned was Gonne St Clair Pilcher MC, who was to become a judge in October 1942, and he wrote to the Advisory Committee's Secretary at last on 12 September enclosing the "statement of the Case" and adding:

> Presumably the grounds were hostile associations or acts prejudicial or both. The case is rather an unusual one and I think in the circumstances the Chairman of the Committee before whom he appears should draft the "Reasons for Order".

Notice again the passing of responsibility, and curious though typical ignorance of the formal basis for the order. On 2 October at last the "Reasons for Order" were settled, and supplied to Liversidge and his lawyers:

> Reasons for Order Made under Defence Regulation 18B for Detention of Robert William Liversidge alias Jacob Perlsweig.
>
> The Order for the Detention of Robert William Liversidge was made because the Secretary of State had reasonable cause to believe the said Robert William Liversidge to be of hostile associations.
>
> Particulars
>
> (1) The said Liversidge was born of Russian parentage. His father's name was Asher Perlsweig, a Jewish Rabbi.
> (2) The said Liversidge adopted the name of Watkins, and in the year 1927 was associated with one Baumgarten in a conspiracy to defraud.
> (3) In the year 1935 the said Liversidge was using a Canadian passport containing false particulars.
> (4) At or about this time the said Liversidge adopted the name of Stone and was associated with a notorious sharepusher, Shapiro, in attempting to defraud.
> (5) On 12 September 1939, the said Liversidge applied for a commission in the R.A.F. Volunteer Reserve and supported his application by false particulars. By the false particulars so supplied he was successful in being appointed a Pilot Officer and was performing the duties of Intelligence Officer at a Fighter Command in the country and had access to information of a very secret nature.
> (6) The said Liversidge was an associate of swindlers and international crooks.
> (7) The said Liversidge was associated from time to time with Germans and with those associated with the German Secret Service.
> (8) On or about the 26 April 1940 the said Liversidge supplied further false particulars on an official form, and was put under close arrest in respect of this offence.

Now of course only paragraph 7 of this remarkable and offensive document is in any way relevant to "hostile associations". Silkins pointed this out and asked:

> Will you please let us have such particulars, giving names, dates, places and circumstances

This request was, as normal, refused.

On 10 October Liversidge appeared before the Committee under Birkett's chairmanship. The transcript, if it exists, is not available, but the report is, and this admits that the case "caused considerable anxiety to the Committee". It went on:

> The nature of the case is one of a very peculiar character. The ground upon which the order was made was that he was a person of hostile associations and that by reason thereof it is necessary to exercise control over him . . . it appears that this ground is really difficult to substantiate.

The report goes on to say that the real ground was the belief that he was untrustworthy, and had secret information, acquired as Intelligence Officer, which he might reveal. But even this worried the Committee, for they saw no basis for thinking he was a disloyal person who would reveal secret information. The allegations of German associations did not impress the Committee at all. They were that he had associated with one Nussbaum, who was interested in industrial diamonds, and with one Richard Markus, a detainee, said to be a German diamond swindler. Liversidge had in fact had regular business interests in industrial diamonds, and had been Managing Director of the Carbonite Diamond Company from May to November of 1937. Even if he did know some undesirable people his business would inevitably bring him contacts of this type. No business man can avoid them.

Nevertheless the Committee, applying its settled policy, was not prepared to resolve any doubt in favour of the detainee against the Air Force. It therefore recommended continued detention, but added that the passage of time might change the position – the "very secret information" would in time grow stale. On 10 December the Home Office accepted this recommendation, and Liversidge remained in Brixton until his eventual release on 31 December 1941. Perhaps he was kept in Brixton, rather than moved to a camp, because it was easier to restrict his ability to communicate with others.[52] But one year and eight months seems a long time, and in any event what was the very secret information? The reference may simply be to normal intelligence information on Fighter Command operations, but this would rapidly have gone out of date. More plausibly the reference could be to the fact that Liversidge worked in a unit engaged in predicting German raids, and he, with an officer by the name of McCarthy, who had worked at the signal interception station at Cheadle, had apparently succeeded in forecasting a raid on Scapa Flow, which took place on 10 April 1940. I have been unable to form any clear idea of how this was done, though the incident is mentioned in contemporary sources. Liversidge was arrested before Professor R. V. Jones' work on the German beams was carried out, so he could not have known anything about that, and this work would surely by the end of 1940 have made anything Liversidge knew obsolete. So the length of his detention is not easy to explain.

52. Brixton was used for "leaders" like Mosley and "trouble makers" from the camps. The conditions of detention were set out in Cmnd.6162 of 1939-40; the detainees were in theory not there to be punished. But prisons were used as a penal measure. Conditions were in fact dreadful, and Cmnd.6162 another exercise in rhetoric, not reality. Detainees were also put in Walton Prison and even Dartmoor.

I suspect, but cannot at this stage prove, that MI5 had other interests in Mr Liversidge. From humble beginnings he had established himself in business in a considerable way before the war, after working for some time in Hollywood in the film industry, where he had run a recording studio. He also had business interests in other parts of the world. In 1936 he became General Manager of the London Amalgamated Trust, which dealt in house property and financed scrap metal deals. In 1937 he became involved in industrial diamonds and diamond tipped tools, and in 1938 in a company involved in the wholesale brokerage of oil royalties, whose records were apparently of interest to Intelligence, and explained his contacts with the two special branch officers. Of course German access to oil, particularly Rumanian oil, was of major strategic importance at this time. His co-directors included the fourth Earl of Verulam (also a director of British Thomson-Houston), Lt. Col. Cudbert Thornhill and Lt. Col. Norman Thwaites. The fourth Earl,[53] who seems to have been something of a personal friend, had interests in communications; he was an electrical engineer connected with Enfield Cables Ltd. of which he became Managing Director and Chairman.[54] Thornhill had been involved in overseas intelligence work in Russia as Military Attache in Petrograd from 1916-18, where he had been in contact with Samuel Hoare, and worked in the Political Intelligence Department of the Foreign Office from 1940-46. Thwaites[55] was our man in New York in the First War; amongst other things he recruited the celebrated spy Sydney Reilly. In the inter war years Thwaites became interested in fascism and became Chairman of the January Club in 1934, a discussion group on the subject. He was also interested in aviation, and edited *Air*. He may have also been associated with Liversidge's attempt to secure patent rights in the Focke Achgelis F.W.161, the first practicable helicopter, which flew in 1936 (and was publicly demonstrated by Hanna Reitsch in the Berlin Sports Stadium in 1938);[56] material about this was found in Liversidge's flat when he was arrested. Liversidge had also obtained specifications for a secret method of transmitting radio messages, which he said he had supplied to the War Office through Major General John Hay Beith.[57] He knew Compton Mackenzie and was a friend of Sir William Stephenson, known to the public as *A Man Called Intrepid* or *The Quiet Canadian*, our man in America in the Second World War.[58] It all

53. (1880-1949): see *Who Was Who*, Vol. IV.

54. (1883-1952): see *Who Was Who*, Vol. V. He wrote two volumes of memoirs, *Velvet and Vinegar* and *The World Mine Oyster*. They are hard to get and I have not seen the second. See also C. Andrew, *Secret Service*, pp.299-301, 316.

55. (1872-1956): see *Who Was Who*, Vol. V; C. Andrews, *op. cit.*, p.312; R. Griffiths, *Fellow Travellers of the Right*, pp.49-53, 137.

56. See John Fay, *The Helicopters, History, Piloting and How It Flies*, p.141 and K. Munson, *Helicopters and Other Rotorcraft Since 1947*, p.110. In 1938 the Weir W5 Helicopter, of similar design (by C. G. Pullin) flew.

57. The writer Ian Hay; at the time he handled public relations at the War Office.

58. From the titles of books about him by William Stevenson (a different person) and H. Montgomery Hyde. W. Stevenson has also published *Intrepid's Last Case*. On Sir William Stephenson, see also C. Andrew, *op. cit.*, *supra* n.54, pp.507, 650-3, 661.

smells of the Great Game, and if Mr Liversaidge had been providing assistance through his contacts to British Intelligence, perhaps to Sir Claude Dansey's mysterious "Z" organisation, it would do something to explain the curious attitude to his case exhibited by MI5.[59] Dansey collected strategic intelligence, principally through business contacts in Germany and Italy, and there is in *Hansard* for 10 December a curious statement which I think links Liversidge with Dansey. Richard Stokes, Labour MP for Ipswich, continuously campaigned against 18B, and took a personal interest in Liversidge's case, writing to the Home Office on his behalf. In a debate on the matter he set out categories of internees, saying this:

> Then there is another category, which might apply to anybody. They are members of a military intelligence department one of whom seems to be held because he knew too much about the irregular dealings in oil in a particular part of Europe.

Of course this remark is cryptic in the extreme.

Robert Liversidge and Ben Greene,[60] whose actions were determined at the same time were, as we have seen, by no means the only individuals who attempted to use the courts to protect their liberties. Taking *habeas corpus* proceedings determined, not necessarily finally since appeals could have been taken in some of them, before the Lords decision in *Liversidge* and *Greene* in November 1941. I have already given an account of Harry Sabini's case, determined on 20 January 1941; there were at least eleven others (involving only nine people).[61] There was also one action for false imprisonment.[62] For reasons of space I cannot here go into them, but Home Office reaction to legal pressure was always to tender to the courts as little as it seemed possible to get away with. From an administrative point of view the ideal was of course simply affidavits from the current Home Secretary, and his predecessor, which could be reduced to a standard form, in effect merely stating formally, if slightly mendaciously as we have seen, that each Home Secretary had acted conscientiously precisely within the Regulations. Going beyond this would open a Pandora's box, or if you like, lift a flat wet stone, from under which various unpleasant things might emerge to embarrass the officials. But it was not until the

59. On which see A. Read & D. Fisher, *Colonel Z. The Secret Life of a Master of Spies* (1984), C. Andrew, *op. cit.*, *supra* n.54, pp.537-40, 609, 616.

60. *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284, affirming the decision of the Court of Appeal [1942] 1 K.B. 47, which affirmed a decision of the Divisional Court.

61. They involved Mathilde Randall (P.R.O. TS 27/495), Lieutenant Francis Fane (TS 27/513), Captain Charles Henry Bentinck Budd (*supra* n.15), Arthur Harry Campbell (TS 27/507), Sir Barry Edward Domvile, Rita Kathleen Shelmerdine, Harald Henry Alexander de Laessoe, Emily Dorothy Vanessa Durell, William Edric Sherston (TS 27/511, 491 and see *In Re Shelmerdine and Others* [1941] *Solicitors Journal*, at p.11) and Aubrey Lees, on which see *infra*, text to n.63. In TS 27/493 it is noted that on 30 June 1941 there were also in some sense six other suits pending, including actions by the Mosleys.

62. John Roland Smeaton-Stuart (P.R.O. TS 27/493, 491; *The Times* 26 June 1941 6b. and 27 June 6b; [1941] 2 All E.R. 655). There was also an application for *mandamus* and *certiorari* by John Mason: see *The Times* 9 Feb. 1941 9e.

decision in the case of Aubrey Lees[63] that the courts produced, in an opinion of Humphreys J, what might be called a theory of the relationship between the courts and the Home Office, which provided guidance as to how little would suffice to satisfy the judicial custodians of English liberty.

Lees was a colonial civil servant, very right wing indeed and virulently anti-semitic. He was thought by the Special Branch to have formed part of the group which may have been plotting with Mosley to establish a fascist state after a negotiated peace. He was detained on 20 June 1940, under 18B 1A, as a British Union person, and applied for *habeas corpus*. In his affidavit he swore he was not, and never had been, a member of the British Union, which was apparently true.[64] Sir John replied with an affidavit that, on the basis of reports carefully considered, there were clear gounds for believing, and he did believe, that Lees was a member of the British Union, and that it fell within the Regulation. He put in a second affidavit, stating that he thought it necessary to detain him, a point missed in the first affidavit. Since Lees was not a member, and never had been, Sir John could not of course swear that he was, and the Court could hardly have missed the significance of this. Lees said he was not a member, and Sir John said he thought he was, and had good grounds for thinking this. So what was the court to do about it?

This case confronted the court for the first time with the problem that if it seriously went into the justification for Lees' detention, it would have to go into the facts of the matter, see the reports, and settle whether Lees was telling the truth or not. It was one thing to go into the formalities of detention, as in *Budd*'s case, or even to offer redress on so confined a matter as mistaken identity, as suggested in *Sabini*'s case, but quite another to range more widely. So the court backed off. Humphreys J delivered an opinion which began with the usual rhetoric: "the court entertains no doubt that upon an application for a writ of *habeas corpus* the court has power to inquire into the validity of the order for detention, and for that purpose to ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order. So much was frankly admitted by the Solicitor-General . . ." But, somehow or another, this libertarian rhetoric had to be married to reality, reality being a refusal to investigate the basis for the belief. In the same spirit the Solicitor-General had indeed strenuously resisted the idea that investigating it could involve looking at the reports or the evidence – the only way it could be investigated. Humphreys J was himself clear that it was not the business of the court to investigate whether Lees *ought* to be interned, merely whether he was *legally* interned, but he had boxed himself in by conceding that this depended

63. The case is reported in the Divisional Court 57 T.L.R. 26 and [1941] 1 K.B. 72 and in the Court of Appeal in 57 T.L.R. 68. Much further information is in P.R.O. HO 45/25728 and HO 283/45. Morrison resisted a later attempt to reintern Lees.

64. Information on Lees is to be found in R. Thurlow, *op. cit., supra*, n.9, Chs.8 and 9. He is not to be confused with Arnold Leese. The "Reasons for Order" specifically claims him to have been a B.U. member.

upon the basis for the Home Secretary's belief. How was the matter to be investigated in a manner which amounted to not investigating it? He had recourse to that time honoured common law substitute for rational thought, relied on by generations of judges when confronted with an intellectual problem which is beyond them:

> In our opinion no general rule can be laid down and each case must be decided on its own special facts.

So that, empty though it sounds, was the theory, the rhetoric. Now for the reality, the practice. He then said that, having read the affidavits of Sir John, he believed them. Needless to say he makes no further reference to the affidavit of Lees. Lees appealed, but by the time the appeal was considered he had in fact been released, and the appeal was pursued merely because Lees or his counsel thought he should get costs. The Court of Appeal agreed with Humphreys J's opinion. In the course of the hearing Sir William Jowitt assured the court that he had himself seen the reports on which the Home Secretary had acted and he (counsel) "regarded it as obviously against the public interest that the names of the informants should be disclosed." Nothing so brings out the subservience of the judiciary to the executive as the fact that he got away with this devious device for introducing the effect of evidence, without the judges themselves ever seeing it, or even, so far as one can tell, asking to see it. What was fit for the eyes of Sir William was not for the eyes of the judges of England. He did not mention that the Attorney-General had persuaded Birkett to delay submitting the Advisory Committee report until after the Divisional Court hearing; it had found for Lees and recommended release, and was therefore embarrassing.

Now the practical effect of the *Lees* decision was that so long as the formalities were handled correctly, and no mistake as to the person had occurred, all the Home Office had normally to do in *habeas corpus* proceedings was to put in a formal affidavit and the court would accept their assertion that the Home Secretary had acted within the regulations. To put it another way the court had reduced its protection of the liberty of the subject to an insistence upon respect for mere formality, leaving the substance of the matter to the Advisory Committee and Home Secretary. As Gerald Gardiner said when the case was before the Court of Appeal:

> If it were considered sufficient, in order to detain a person under those regulations, merely to make an affidavit of the kind made by the Home Secretary, then it was virtually useless for any person to make application by way of *habeas corpus*. Were such a person as innocent as the day or a true patriot, however wrongfully he was in prison, the Home Secretary had only to make an affidavit saying that, at the time, he reasonably believed certain allegations to be true to prevent the person being released.

65. *Supra* n.11.

The effect of all this was to pass the responsibility for protecting civil liberty back to the Advisory Committee. Its position had somewhat changed since Anderson ceased to be Home Secretary. During his time its recommendations were, as we have seen, always accepted. Under Herbert Morrison this was not the case. The monthly reports to Parliament reveal that in November 1940, for the first time, three recommendations were not accepted. In January of 1941 the figure had risen to 55, that is during that month. By the end of January 1941 there had been Home Office decisions in 1026 cases reviewed by the Committee. 950 had been accepted, 582 for release, and 368 for continued detention; 76 differed, 75 being continued in detention contrary to the recommendation, and one released. Differences continued to occur throughout 1941. Behind the figures lay a serious conflict between MI5 and the Advisory Committee, or we should say now, Advisory Committees.[66] Trouble had first broken out in July, in Anderson's time, over the British Union detainees, and threatened the independence of the Committees that Sir John had nurtured.[67] In reviewing these cases the Committee took the view that they had to decide *both* whether the individual concerned was or had been a member of the British Union, *and* whether it was necessary for control to be exercised over him or her as an individual. The MI5 line was that so long as the first point was established, that was the end of the matter, since a political decision had been taken to cripple the British Union, which was to be implemented not simply by banning the organisation, nor yet by locking up all its members, but by interning all or most of its officials, about 350 or so, to whom were added, in a spirit of overkill, a further three hundred and fifty active fascists. This policy, MI5 argued, would be frustrated if detainees' cases were considered individually, and large numbers, in consequence, released because they appeared harmless to the Advisory Committee. The chief offenders, in the eyes of MI5, seem to have been Chairmen Wallington and Morris. The available papers show this row rumbling on up to November 1940, with the Home Office under Anderson backing the Committee, and Lord Swinton, head of the Home Defence Security Executive, egged on by Messrs Pilcher and Stamp, inclining to favour MI5. A compromise solution was adopted by the Cabinet on 21 November. In the course of the row F. B. Aikin-Sneath, who was the MI5 officer responsible for keeping an eye on the fascists, held a somewhat tense meeting with the Advisory Committee chairmen, coming in particular into conflict with Mr Wallington. At this meeting, according to his note of what took place:

> Mr Wallington emphatically repudiated the idea that a man should be interned merely on the ground of being an active official of British Union. He

66. In response to the great incarceration of 1940 Birkett's committee had been relieved on June 7 of the job of considering cases of enemy aliens, and on June 17 John W. Morris, KC, MC, later a judge, was appointed Deputy Chairman and the Committee sat in two panels, increased, on 11 July to three (Chairman H.J. Wallington, KC, later a judge) and July 22 to four (Chairman A.T. Miller, KC). On 30 September the panels moved to the Berystede Hotel, Ascot, and there sat in three panels, chaired by Birkett, Morris and A.W. Cockburn, KC.

67. What follows is based on P.R.O. HO 45/25754.

> contended that if this principle were accepted the work of the Committee would be a farce. The only task would be to confirm automatically decisions arrived at by MI5.

Aikin-Sneath asked him what principle would he apply? He relied in traditional common law style:

> I have no principles. It is not possible to lay down a general principle.

In fact however he did have one. He argued that, as a man of wide experience, he could tell on all the facts "whether the person before him was likely to be a danger to the country or not." The meeting ended in deadlock, and although it was later strenuously denied that there had been resignations from the Committee[68] it is noticeable that Wallington fades quietly away, leaving more accommodating colleagues to run the ship at Ascot. Similar conflicts arose between Sir Percy Loraine, chairman of the special committee for the Italians, and MI5 in the persons of Brigadier Harker and H. Everett, and although the available documents do not enable one to be sure, I suspect that these troubles rumbled on through 1941. Furthermore the Advisory Committee was under continuous criticism for delay, both from Members of Parliament, individuals and particularly from Oswald Hickson. There was also much criticism of the fact that detainees were never officially told the outcome of their appearance before the Advisory Committee, much less allowed to see the report of the Committee, and also criticism of the inadequate information which the Committee gave them in the "Reasons for Order". Internal documents within the Home Office seem to have conceded that this complaint was sometimes justified. Thus a long memorandum of 14 May 1941 on the case of A. H. Campbell[69] treated the matter as disturbing, one reason being:

> the statement which Campbell received is of the most meagre character and deserves all the criticism which has lately been received that a detainee is put before the Advisory Committee without any proper knowledge of what is alleged against him. All the statement in fact informs him is that he has been guilty of anti-British and pro-German views. There is no apparent reason why a much fuller statement of his actions should not have been brought to his notice on the lines of the statement of the case.

68. See *Hansard* 10 April 1941 (Mr Osbert Peake at col.1676) and 22 April 1941, col.33. The Advisory Committee was formally "reconstituted" in April of 1941 after Churchill had gone, and thirteen members formally left it. They included H.J. Wallington, and A.T. Miller, who had in fact ceased to sit well before this time.

69. Arthur Harry Campbell had been detained under a "hostile associations" order of 19 June 1940; the "Reasons for Order" failed to correspond, giving membership of the British Union as the "grounds". This had been drafted by J.P.L. Redfern of MI5. In truth the order should have been made for "acts prejudicial". Campbell's action failed because he was released as a consequence of Budd's case and then detained afresh under a new order, which was formally correct. The file (P.R.O. TS 27/507) provides much evidence of the nervousness of the officials at this period.

In a somewhat beleaguered state the Home Office understandably reacted in part with the Armstrong solution. Thus we find on 23 July Mr Osbert Peake, Under Secretary of State for the Home Department, assuring members in the Commons, when asked by Mr Stokes to give an assurance that detainees "are themselves given full reasons for their detention":

> That assurance, of course, has been given by my right honourable friend and myself from this Box on many occasions, and it is invariably the practice of the Advisory Committee to put before these persons, as explicitly as they can, all the facts which are known against them.

Notice the small print: "as explicitly as they can".[70] And, when the alarming number of errors over the Italian orders came to light the detainees were not informed nor was any attempt made to rectify the position by issuing new orders, which would of course have called attention to the matter. It was hoped that the outcome of the Ben Greene case in the Lords would throw light on the position, but it did not, and in the end the matter was solved by doing nothing – and of course the detainees were progressively released. So, no doubt to official relief, the problems went away.

I hope I have given you enough information to convey an impression of the context in which the *Liversidge* and *Greene* cases came to be litigated. Now the decision in *Lees* had, as we have seen, preserved the theory that the court *could* review the basis for the Home Secretary's belief. This left open the possibility that, in what might be loosely called a Really Appalling And Apparent Case of Injustice a court, employing the doctrine that the game had no known rules, just might, in *habeas corpus* proceedings, go behind the Home Secretary's affidavit of standard form. To quote an expression much used by my former Vice-Chancellor during students' riots, always as a preliminary to inaction, There Might Be Things Up With Which We Will Not Put. Some of the more chaotic Italian cases perhaps fell into this category, but none were litigated. The case of Ben Greene was another possibility, but missed the boat by poor timing. Given limits of space I cannot give you a full account of the very complicated story of Ben Greene,[71] but only a brief summary. Ben Greene JP, Berkhamsted School and Wadham College, was a Quaker pacifist. At one time he had been a member of the Labour Party, and Private Secretary to Ramsay MacDonald. He became, in 1939, a founder member and Treasurer of the British People's Party, of which Lord Tavistock[72] was Chairman, from which he had in fact resigned on 31 October 1939; he was never a

70. *Hansard* contains numerous examples of replies to questions and statements by Ministers which, to put if softly, do not exhibit a high level of commitment to truth.
71. See P.R.O. TS 27/522; A. Masters, *The Man Who Was M*, Ch.8; R. Thurlow, *op. cit., supra* n.9, Ch.9.
72. Why Lord Tavistock (later the twelfth Duke of Bedford) was not detained under 18B is a mystery. The possibility was considered by the Home Office Defence Security Committee on several occasions. An opinion of the Attorney-General on the matter has not been traced in the available records.

fascist. He was also associated with the British Council for Christian Settlement in Europe. He was one of a somewhat strangely associated group of individuals brought together through disillusion with existing political arrangements, and opposition to the war, and as such had connections of an obscure character with Mosley and others of the right, such as Admiral Domvile. Ben Greene would, of course, have known Mosley from his Labour Party days. He was arrested on 24 May under an 18B order dated 18 May 1940, his name and that of John Beckett being removed from the omnibus order when it was noticed that neither were B.U. Members. The order was for "hostile associations". About 1 June, whilst in Brixton, he received a copy of this order and on 15 July the "Reasons for Order" which stated the grounds as being "acts prejudicial", and set out the particulars in eight paragraphs. Of these paras. 3 and 4 involved accusations of communications with the enemy, if not treason, and para. 5 certainly amounted to an accusation of treason. These three paras. were consequently more obviously relevant to an "acts prejudicial" order rather than a hostile associations order. Of the remaining paras., 6 and 7 could only be relevant to an 18B 1A order, and only para. 1 slightly advanced the case simply for a hostile associations order.[73] Greene's case came before an advisory committee on about 20 July 1940 (Chairman Miller) and continued detention was recommended. Presumably the committee accepted MI5's assurances that their information was from a reliable source.

Now here really was a formal muddle, surely to be condemned under the need, emphasised in the *Sabini* and *Budd* cases, for a meticulous conformity to the regulations. Furthermore Oswald Hickson, who represented Greene, must, from his own investigations, have been convinced that the case against Greene strongly smelled of fabrication. So this looked like a Fairly if not Really Appalling case which might get somewhere in spite of *Lees*, if only it could become Apparent too. In March of 1941 Ben Greene brought *habeas corpus* before the Divisional Court, but there, on 2 May, the Court (Humphreys, Singleton and Tucker, JJ) retreated a little from the defence of liberty. Since Greene had a copy of the original order, which copy was correct, and since, if all that was said in the particulars was true, he was "of hostile associations", whatever else he might be too, he had suffered no prejudice. As for his allegation that the Home Secretary had no reasonable basis for his belief the Court, following *Lees*, simply felt convinced by the Home Secretary's affidavit that he had. But some mild sense of guilt must have hung over the judges, for they thought that the case had better go back to another differently constituted Advisory Committee for a rehearing, and they so suggested.[74] This idea was welcomed by the Home Office, but could not be acted on whilst litigation continued. On 10 June 1941 a new "Reasons for Order" was served, and it would of course have been deeply embarrassing not to stick to the same particulars, so

73. The text of the "particulars" is in A. Masters, *The Man Who Was M*, pp.183-4, but the grounds printed there ("hostile associations") are from the amended "Reasons for Order" of 10 June 1941.
74. The decision is briefly reported in the *Solicitors Journal* for 1941 at p.298; there is a text of the opinion in TS 27/522.

that was done, and the grounds only amended, to "hostile associations", to conform to the order. Hickson enquired whether it was intended to prosecute for the grave offences alleged, and was told "No". Considerable nervousness seems to have existed behind the scenes as to whether the Divisional Court's submissive approach would survive on appeal. The Court of Appeal (Scott, MacKinnon and Goddard, LJJ) however, upheld the refusal of *habeas corpus*, on 30 July 1941.[75] The opinions of the judges in the Court of Appeal moved one step further away from the spirit of legality. For doubt was cast on the *Lees* doctrine – that the Court had power to enquire into the basis of the Home Secretary's belief, and the view was expressed that the customary affidavits from the Home Secretary were not needed. The order alone was an answer to *habeas corpus*, and the burden of proof rested on the applicant to show that there was some reason not to accept the order as valid. Lord Justice Goddard appears to have been the influential judge in the case.

Greene's appeal then went to the Lords, being argued there on 23 and 24 September. Between this time and the delivery of the opinion on 3 November it turned, too late for this round of litigation, into a Really Appalling and Apparent case of Injustice. Hickson managed to obtain the names of the MI5 agents who had set up Greene; one was a devious individual, one Harald Kurtz, said to have been distantly related to Queen Mary, who later established a reputation as a historian. The names were supplied by the Advisory Committee under pressure from the Attorney-General, who feared that the inadequacy of the original particulars would lead to the loss of the *habeas corpus* action begun by Greene. Greene's brother tricked Kurtz into Hickson's office, and Hickson got him to retract what he had told his superior, Maxwell Knight of MI5, about Ben Greene. But as you know it was all too late; Greene lost his case in the House of Lords, and one can only speculate as to what might have happened if Hickson had had, at the outset, this new and deeply embarrassing material. The outcome was that the rehearing before the Advisory Committee, presided over by Birkett in November and December 1941, involved the roasting of Kurtz, to the fury of the new head of MI5, Sir David Petrie. MI5 had been very hostile to the naming of agents, and Kurtz' cover was now destroyed; he moved to a job in the BBC. By January a paper was circulating in the Home Office recommending release and adding:

> This case illustrated vividly the possibility of injustice being caused to persons who are detained purely or mainly on the evidence of agents employed by the security service . . ."

Oswald Hickson and Ben Greene did not give up the legal battle after release was authorised, subject to restrictions, on 9 January. In March 1942, after having succeeded in getting the allegations of treason formally withdrawn, Greene sued for false imprisonment and libel, and there was considerable anxiety over the

75. [1942] 1 K.B. 87.

possible need to produce the MI5 agents involved in court, the other being a Fraulein Stottingen, also known as Friedl Gaertner, code name "Gelatine", a double agent, who features in J. C. Masterman's *The Double Cross System*. But in the event, principally as a result of the decision in the *Liversidge* case, and in *Greene (No. 1)* but also because of the rules governing official disclosure and privilege in defamation, this action failed, without any embarrassing revelations, in April of 1943. The immediate cause for the withdrawal of the action was a devastating cross examination of Ben Greene. It had all been a nervous business, but after the Lords decision of 3 November 1941 it became possible to get away with more or less anything.[76]

And what of *Liversidge* v. *Anderson and Morrison* itself? I do not propose to go over the much trodden ground of the technical law involved, or to comment upon Professor Heuston's fascinating article on its immediate repercussions.[77] The form of the action, which was for false imprisonment, was conceived as an ingenious attempt to get around the practice of the judges in simply accepting the formal affidavits of the Home Secretary in *habeas corpus* proceedings, the reality, that is, of *Lees*. An attempt was made in interlocutory proceedings to obtain an order requiring the defendants to disclose particulars of the grounds upon which the Home Secretary had reasonable cause to believe that Liversidge was of hostile associations, and the grounds upon which he thought it was necessary to exercise control over him. This order was refused, and Liversidge appealed, the House of Lords ruling, by a majority, that so long as the Home Secretary acted in good faith (which was not here impugned) the question whether an individual fell within a category of permissible detainees was exclusively within the discretion of the Home Secretary. Hence the order was refused for it would, if issued, bring before the court material which it was not the business of the court to consider. This Lords view went considerably beyond even the view of the Court of Appeal, which was that once an 18B order, on its face valid, had been produced, the onus of proof that the detention was invalid rested upon the plaintiff, and since, on the facts, this had not been displaced, the order would not be made. Such reasoning still offered a ray of hope to detainees in a Really Appalling Case. The Lords extinguished that ray.

Now what is a little odd about all this is that in the Regulations there was, as we have seen, a duty, not on the Home Secretary, but on the Chairman of the Advisory Committee, to give the "grounds" of the detention and the "particulars". So why did Liversidge in these proceedings ask to receive what he had already been given? The explanation is not that he wanted the Home Secretary's actual reasons, as opposed to those guessed by the Advisory Committee or MI5. Neither D. N. Pritt, his counsel, nor the judges, realised that there could be a difference. What Pritt seems to have thought was that *if* the onus of proof was on the

76. On this litigation see a note by R.F.V. Heuston in (1971) 87 *L.Q.R.* at p.163.
77. "*Liversidge* v. *Anderson* in Retrospect", 86 *L.Q.R.* 33.

defendants the meagre reasons provided to Liversidge by the Advisory Committee would be inadequate to discharge that onus. More information would thus be prised out of the Home Office.[78] The significance of the majority view was essentially negative; the Lords could have used the case to help detainees, without necessarily taking over an appellate function, by requiring a fuller disclosure of the reasons for detention than detainees had been receiving from the Advisory Committee, by developing a more sophisticated analysis of the categories and overriding requirements of the regulations and by "directing their minds" to the conception of the burden of proof in a practical manner which did not make of it an insuperable obstacle. But to have developed this line would have required them to have possessed an understanding of the working of the system which they seem to have entirely lacked, together of course with a commitment to civil liberties which they did not possess, essentially I feel because they belonged to a tradition in which the law is not conceived of as ever applying to them, but rather to other people, lesser breeds, though to their misfortune breeds within the law . . .

Lord Atkin's celebrated dissent is why we now read the case, and to be sure it is as powerful an example of the rhetorical common law judicial opinion as is to be found in the reports. But with some diffidence I think that its significance in terms of reality can easily be misunderstood. In legal terms what he was upset by seems at first glance to have been an intellectual vice, which he calls the virus of subjectivism – the perverse idea that if the Home Secretary says he has reasonable cause, then he does have reasonable cause, which *en passant*, was not what his opponents meant anyway. So the case is seen as a case about false logic, and of course as a case about civil liberties. But if you ask why he felt so strongly about all this, I think it is fairly clear that what he was primarily distressed about was neither logic nor liberty but judicial status – the relationship of courts to the executive. He was genuinely repelled by the idea that, in relation to the most basic of all rights, the courts should simply accept their subservience to *The New Despotism*. For the whole scheme of the Defence Regulations must have brought home the fact that the rise of government and the civil service had, in our system, which lacks either a proper constitution or a jurisprudence of rights, profoundly threatened the status of the judges. Indeed, as we surely now know, judges were by 1941 no longer very important people in the scheme of government, as compared to the mandarins of the civil service and the ministers who are thought to be in charge of them. Here indeed were ministers and civil servants taking over the job of locking people up – what would they take over next? So, like Humphreys J in the *Lees* case, Lord Atkin wanted to deliver an opinion which, at least at a theoretical level, maintained the principle that, over civil liberties, the courts remained the superior partner in government. To use Stable J's memorable expression, he wanted to show that

78. D. N. Pritt in his autobiography does not clearly explain his strategy: see *The Autobiography of D. N. Pritt*, Part One, pp.232-3, 304-7. An alternative technique might have been to use *Mandamus* under the regulations to challenge the adequacy of the "Reasons for Order".

judges were not simply "mice squeaking under a chair in the Home Office"; Stable J too had dissented, in *Budd No. 2*. To this end Lord Atkin's rhetoric is powerfully directed. The rhetoric involved is the rhetoric of fiction.

If, however, you then ask about the realities of what he favoured, it does not seem to amount to very much, and I do not think he actually thought this out. In one passage all he seems to be saying is that a plaintiff in civil litigation should be entitled in court to the same grounds and particulars to which he was entitled before the Advisory Committee, and since Liversidge had already had these the practical effect of Lord Atkin's theory for Liversidge would have been nil, particularly as Lord Atkin was quite happy to allow confidential material to be held back on security grounds. He imagined, quite wrongly, that the "Reasons for Order" came from the Home Secretary, and were merely as it were handed on by the Chairman. Nowhere in his opinion does he grapple with the regular complaint that the information supplied was so meagre as to be quite inadequate. Nobody had really raised the matter, and, like the other judges, he had only a vague idea of how the system worked. It is true that in another part of his opinion he seems to have envisaged that in some cases a court might, under the objective view, enter into an investigation of the merits of detention, but in a world in which the Home Secretary would be able to continue to hold back information, as he had in the past, it is hard to see how a court, under his theory, could go against the executive except in a case which was both scandalous and could without the disclosure of such information be shown to be scandalous. An example would be one of the *Sabini* type, involving error as to identity, which a plaintiff could easily establish without Home Office disclosure, or perhaps something in the nature of a cast iron alibi in an "acts prejudicial" case assuming specific acts had been mentioned in "the particulars". Perhaps Lord Atkin's view would have put the success rate above 1 in 1847, but surely not into double figures. So I am afraid that I think that the opinion of Lord Atkin is an exercise more in rhetoric than in any practical reality; a cynic might say the mouse roared, but remained a mouse. It will be noted too that over the *Greene* case, he agreed with the decision of his colleagues, though not with their reasoning.

Within the world of government the chief problem in winning the *Liversidge* case for the Crown lawyers was thought to be the fact of the amendment of the original 18B, back in 1939, as was agreed at a pre-trial conference with the Attorney-General. They need not have worried. And, as for the officials, the value of the decision, as of course contrasted with a decision which insisted on some form of generous disclosure of information, was neatly put by A. C. Newman of the Treasury Solicitor's Office in a letter of 3 September 1941 to Norman Kendal of the C.I.D.:

> the value of a judgment in our favour in the House of Lords would be that we could avoid in the future this probing into reasons in cases in which it is embarrassing to give them.

It was for them not about civil liberty, but about secrecy. As for Mr Liversidge he vanished from legal history, to reappear momentarily in 1948 and 1949 as a witness before the Lynskey Tribunal, where, after some rough handling by the Attorney-General, which dragged up some of the old stories about him, he was expressly and generously exonerated of any misconduct.[79]

In addition to *habeas corpus* proceedings, all of which failed, a number of other actions were brought or commenced after 1941 which attempted to secure redress for the repulsive conditions under which those detainees who were kept in prisons were held, in particular actions by H. H. A. de Laessoe and one Frank Arbon, arguments being based upon breach of statutory duty by the Home Secretary and those running the prisons.[80] This attempt to secure some form of redress was effectively ended by a decision of Goddard LJ, who seems to have been no friend of 18B detainees, on 11 December 1942; apparently some thirteen actions were then pending, but were abandoned as hopeless.[81] No *ex gratia* compensation appears to have ever been considered.

I began this paper with a quotation from Blackstone expressing a sort of domino theory of civil liberties – once freedom of the person goes, the rest will surely follow. I doubt if that can be said to have happened in quite the simple way Blackstone suggested. What I think clear is that the effect of the two wars on civil liberties was both serious, and in a sense progressive, and I must confess to a feeling that although 18B has gone, though its successor no doubt lies on ice in Whitehall, the position in peacetime conditions has got steadily if not dramatically worse in my lifetime in a progression which does not seem to me to have anything to do with which government is in power. Nor is it my impression that the courts have, since the time of the *Liversidge* case, been any more successful at matching reality to their rhetoric than they were in the 1940's. But that perhaps is a thought which would best be left for you to ponder.

79. See Cmnd.7616 of January 1949, paras. 32-40.
80. P.R.O. TS 27/512.
81. Lord Chief Justice Goddard sat as an additional judge in the Kings Bench Division; the decision is reported in [1943] 1 All E.R. 154.