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SPIES, SUBVERSIVES, TERRORISTS AND THE BRITISH GOVERNMENT: FREE SPEECH AND OTHER CASUALTIES

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INTRODUCTION

I invite you to follow me for a moment into a fantasy world and imagine, if you will, a state in which the following description holds true: It is a criminal offence, punishable by imprisonment, for any state official to disclose to anyone, even a politician, certain categories of information acquired in the course of the official's work, even if it reveals wrongdoing by others; and it is an offence for a newspaper to receive such information and publish it, even if it uncovers illegality in government. In general the government declines to answer questions about the secret service and the service is subject to no legislative supervision. The service's officers may be authorised by the Minister of the Interior to break into private

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property, remove papers, plant bugs and so on. They similarly may be authorised to tap telephones or intercept mail. The government, without prior consultation, has instructed those public servants who work in the department that monitors international radio communications to resign from their trade union or face dismissal. The Interior Minister recently directed both state and independent radio and television that certain political parties in the country, and those who support them, not be allowed to speak on radio or television on behalf of their party on any subject whatever. The government also has powers of internal exile over those citizens judged to be dissidents and suspected of engaging in subversive activities, and can arrest them and hold them without charge, on ministerial authority, for seven days. The Deputy Interior Minister recently said that the press was "on probation": It had a year or two to clean up its act, or else the government would introduce legislation.

Do I have a vivid imagination, or do I speak perhaps of some nameless South American tyranny, authoritarian Eastern bloc nation, or repressive Middle East state? Let us not trouble to locate this place, whether in my imagination or geographically, for the moment, but return to the United Kingdom. We can revert to this mythic country later.

I devote this Article to four British statutes: the Interception of Communications Act 1985,¹ the Official Secrets Act,² the Security Service Act³ and the Prevention of Terrorism Act,⁴ all 1989. I shall begin, however, with two government decisions, one bearing on the media, the other on a group of civil servants.

The Article focuses on the British Government's powers and the use it makes of them, rather than on the courts, which I have considered elsewhere.⁵ Inevitably, I shall advert to judicial decisions, but not as a central theme. Consequently, the government's pursuit of retired intelligence officer Peter Wright through the world's

1. Interception of Communications Act 1985, ch. 56.

2. Official Secrets Act 1989, ch. 6.

3. Security Service Act 1989, ch. 5.

4. Prevention of Terrorism (Temporary Provisions) Act 1989, ch. 4.

5. See Zellick, *Official Information, National Security and the Law in Britain*, XCVIII STUD. SENESI 303 (1986).

courts—the celebrated *Spycatcher*⁶ saga that culminated in a House of Lords judgment in October 1989⁷—will feature here only incidentally, and I shall not, therefore, take the opportunity to venture an extended exegesis of the courts' role in that sorry tale.⁸

I. BROADCASTING BAN ON NORTHERN IRISH TERRORIST SUPPORTERS

On October 19, 1988, the Home Secretary made the following order:

1. . . . I hereby require the Independent Broadcasting Authority [IBA] [and the British Broadcasting Corporation (BBC)] to refrain from broadcasting any matter which consists of or includes:

any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where—

(a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below, or

(b) the words support or solicit or invite support for such an organisation,

other than any matter specified in paragraph 3 below.

6. P. WRIGHT, *SPYCATCHER: THE CANDID AUTOBIOGRAPHY OF A SENIOR INTELLIGENCE OFFICER* (1987).

7. *Attorney General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 All E.R. 545, 638. See *THE SPYCATCHER CASES* (M. Fysh ed. 1989) for the texts of the judgments of the English, Australian, Hong Kong and New Zealand courts. The European Commission of Human Rights has declared admissible and is now considering on the merits applications by three British national newspapers alleging breaches of the European Convention on Human Rights. COUNCIL OF EUROPE, *PRESS COMMUNIQUÉ—HUMAN RIGHTS NEWS*, No. 112 (May 10, 1989) (announcing admissibility of two cases: *Times Newspapers Ltd. and Neil v. U.K.*, *Applic. No. 13166/87* and *The Observer Ltd. and Guardian Newspaper Ltd. v. U.K.*, *Applic. No. 13585/88*).

8. See, e.g., Barendt, *Spycatcher and Freedom of Speech* [1989] *PUB. L.* 204; Bradley, [1988] *ALL E.R. ANN. REV.* 55; Burnet and Thomas, *Spycatcher—The Commodification of Truth*, 16 *J.L. & Soc'y* 210 (1989); Pannick, *Spycatcher: Two Years of Legal Indignations*, in *ECONOMICAL WITH THE TRUTH: THE LAW AND THE MEDIA IN A DEMOCRATIC SOCIETY* 17 (1990) (Kingsford-Smith & Oliver eds.); see also *Lord Advocate v. Scotsman Publications Ltd.* [1989] 2 All E.R. 852; Birks, *A Lifelong Obligation of Confidence*, 105 *L.Q. REV.* 501 (1989).

2. The organisations referred to in paragraph 1 above are—

a. any organisation which is for the time being a proscribed organisation for the purpose of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and

b. Sinn Fein, Republican Sinn Fein and the Ulster Defence Association.

3. The matter excluded from paragraph 1 above is any words spoken—

(a) in the course of proceedings in Parliament, or

(b) by or in support of a candidate at a parliamentary, European Parliamentary or local election pending that election.

The Home Secretary was acting under section 29(3) of the Broadcasting Act 1981⁹ and clause 13(4) of the BBC's Licence and Agreement,¹⁰ the former of which reads: "[T]he Secretary of State may at any time by notice in writing require the [Independent Broadcasting] Authority to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice."¹¹ Clause 13(4) of the Licence and Agreement is in virtually identical terms. The IBA and BBC are entitled to announce that they are subject to such an order.¹²

Neither the BBC nor IBA sought to challenge the order in the courts. Instead, a group of distinguished journalists, with the backing of the National Union of Journalists, applied for judicial review, seeking a declaration that the notice was *ultra vires* and void, and an order of *certiorari* to quash it.

A unanimous Divisional Court and Court of Appeal declined to hold the Home Secretary's orders unlawful.¹³ The Court of Appeal,

9. Broadcasting Act 1981, ch. 68, § 29(3).

10. HOME OFFICE, BROADCASTING: COPY OF THE LICENCE AND AGREEMENT DATED THE 2ND DAY OF APRIL 1981 BETWEEN HER MAJESTY'S SECRETARY OF STATE FOR THE HOME DEPARTMENT AND THE BRITISH BROADCASTING CORPORATION 9, CMND. 8233 (1981) [hereinafter LICENCE AND AGREEMENT].

11. Broadcasting Act 1981, ch. 68, § 29(3).

12. *Id.* § 29(4); LICENCE AND AGREEMENT, *supra* note 10, cl. 13(4).

13. *R. v. Secretary of State for the Home Department, ex parte Brind* [1990] 1 All E.R. 469; *Convention limits on minister's power*, The Times (London), May 30, 1989, at 30, col. 1; 139 New L.J. 1229 (1989) (D.C.); see de Smith, *Broadcasting and Northern Ireland: con-*

differing from the Divisional Court, rejected the contention that, in exercising his powers, the Home Secretary was required to be mindful of and conform to article 10 of the European Convention on Human Rights, which guarantees freedom of expression, including the right "to receive and impart information and ideas without interference by public authority."¹⁴ The Divisional Court had held that the Home Secretary had not infringed article 10, because article 10(2) permitted restrictions on freedom of expression "in the interests of national security . . . public safety . . . [and] for the prevention of disorder or crime."¹⁵

In the judgment of the Court of Appeal, the Home Secretary's orders were in no way vulnerable to challenge. As Lord Donaldson of Lynton, M.R., summed up:

A decision whether or not to give directives . . . involves the Home Secretary in making a delicate and difficult political judgment. . . . [I]t is a judgment to be made by the Home Secretary and not by the courts, whose right and duty to intervene only arises in the event that the Home Secretary reaches an untenable decision in the sense that he can be shown to have taken account of matters which are irrelevant or failed to take account of matters which were relevant or in which the decision is manifestly wrong as falling outside the wide spectrum of rational conclusions.¹⁶

The government has given only five previous directions under these powers,¹⁷ two of which remain in force: One prohibits matter that uses subliminal techniques;¹⁸ the other prevents the BBC from broadcasting its own opinion on current affairs or matters of public policy.¹⁹ In 1928, the government withdrew a 1927 direction not to broadcast matters of political, industrial or religious contro-

stitutional issues? 139 New L.J. 1240 (1989); Thompson, *Broadcasting and Terrorism* [1989] Pub. L. 527.

14. European Convention on Human Rights, § 1, art. 10(1).

15. *Id.* art. 10(2); see 139 New L.J. 1229, 1230 (1989); [1990] 1 All E.R. 469, 477-78.

16. [1990] 1 All E.R. 469, 481.

17. See REPORT OF THE COMMITTEE ON THE FUTURE OF BROADCASTING, para. 5.10, CMND. 6753 (1977) (Chairman: Lord Annan) [hereinafter ANNAN REPORT].

18. *Id.*

19. *Id.*

versy;²⁰ cancelled the so-called "14-day Rule," which prohibited the broadcast of programmes dealing with matters to be debated in Parliament during the ensuing fourteen days;²¹ and cancelled a prohibition on controversial party political broadcasts otherwise than arranged by agreement with the major parties.²²

In retrospect, all three of these seem outrageous. They emasculated the broadcasting media and represented a gross and unpardonable interference by government. Of course, television was then a new medium whose novelty undoubtedly aroused fears and anxieties. It had yet to establish itself as an essential part of the press. But today, television has achieved that status and for many people is their principal and often only source of news and information. How should the Home Secretary's ban be judged?

"Those who practise and support terrorism and violence should not be allowed direct access to our radios and television screens,"²³ the Home Secretary told the House of Commons, emphasising that broadcasters remained at liberty to *report* the actual words like their newspaper counterparts—only direct access was prohibited—and that the ban did not apply to parliamentary proceedings or election campaigns. (A similar ban has been in force in the Irish Republic since 1960.²⁴) The government justified the ban on the grounds that appearances on radio and television by supporters of terrorism in Northern Ireland caused offence and outrage, especially in the immediate aftermath of a terrorist incident, added to the terrorists' authority and standing, attracted support to their cause and spread fear in the community.²⁵ The objections, put with force in Parliament by the Opposition and even some Conservative members, cannot be so shortly stated, although in the home of the first amendment where such a ban must seem extraordinary, they may seem supererogatory.

20. *Id.*

21. *Id.*

22. *Id.*

23. 139 PARL. DEB., H.C. (6th ser.) 1073, 1075 (1988).

24. Irish Broadcasting Authority Act 1960, § 31(1); see *State (Lynch) v. Cooney* [1982] I.R. 337 (Ir. Sup. Ct.).

25. See 139 PARL. DEB., H.C. (6th ser.) 1073, 1079-80 (1988); 138 PARL. DEB., H.C. (6th ser.) 893, 893 (1988); see also, O'Brien, *Freedom to peddle murder*, *The Times* (London), Sept. 16, 1989, at 10, col. 3; McKittrick, *Ban denies Sinn Fein its oxygen*, *The Independent* (London), Oct. 18, 1989, at 21, col. 1.

The government has not argued seriously that the ban will materially damage the terrorists or promote security. It serves largely to protect feelings. Was there a real problem? In the year preceding its introduction, independent television apparently broadcast eight minutes of material now covered by the ban. The ban applies only to terrorism with an Irish flavour; yet the United Kingdom has also been home to terrorist outrages emanating from far-flung parts of the world. What allows the government to discriminate between Sinn Féin, which is not itself a terrorist organisation and whose words would not be outside the law, and, for example, the Palestine Liberation Organization or spokesmen for foreign governments that sponsor, support, facilitate or practise international terrorism? Will the ban be extended at some point to such persons? And if it extends to them, why not to other parties or groups that cause offence, outrage or spread fear? Sinn Féin after all is not, as the Irish Republican Army is, a proscribed organisation; it plays a prominent role in the political life of Ulster, with fifty-nine elected councillors, one Member of the Westminster Parliament and sizeable public support. As a result of this ban, Sinn Féin is no longer treated like any other political party in the United Kingdom. In depriving it of one weapon, Sinn Féin has been handed a more powerful one: It and the terrorists will now be able to claim—not least in the United States—that they are denied access to the broadcast media and the opportunity to present their case, and that they are the victims of state repression by being explicitly excluded from the full democratic process. Such an argument will help rather than hinder the terrorists' case. On this ground alone, the ban is profoundly misconceived. In short, in the words of a senior television executive, "To permit a party to stand for a democratic election and then outlaw its access to the media puts a dangerous strain on the laws governing broadcasting which were never designed for such a purpose."²⁶

Such a ban also lends itself as a justification for repressive and authoritarian regulation and controls elsewhere, and was indeed used for that purpose by the President of South Africa. It is also likely to be seen abroad, even if wrongly, as damaging a priceless

26. Forgan, *A gag hurts us all*, *The Times* (London), Nov. 5, 1988, at 10, col. 2 (Forgan is Director of Programmes, Channel 4 Television).

commodity—the independence and integrity of the BBC; and it undermines the Foreign Office's insistence, in the face of frequent complaints by other governments, that the BBC is independent and not subject to government control or direction. Finally, the actual scope and wording of the ban may be criticised. The ban is not limited to words that express support for terrorism or terrorists: The actual subject matter of the words is irrelevant. According to the government, however, a Sinn Fein councillor speaking about some local matter as a member of the council and not as a member of the party would be outside the ban.²⁷ The ban permits visual images with the words spoken by someone else, although it is not immediately apparent in what way the outrage or offence is lessened simply because a broadcast journalist reads the words. Is it not possible that the words thereby acquire greater authority? The ban also covers material filmed years before that could shed light on the history of and background to the contemporary scene. It must also be asked what evidence suggests that exposing people to the public on television necessarily enhances their standing or authority.

I find the government's case weak and unpersuasive, and what little merit lay in the proposal is overwhelmed by the contrary arguments. In any case, so gross and flagrant an interference with freedom of the press requires compelling justification. As the Deputy Director-General of the BBC wrote:

British broadcast journalism is the latest victim of terrorism. After two decades of terrorism in Northern Ireland, our government has finally adopted a measure which may or may not counter terrorism but which inflicts certain damage on some of the most cherished elements of a democratic society—freedom of expression and the independence of the media.²⁸

The English courts may have been correct in holding that, in view of the amplitude of the power given, the Home Secretary's decision was not so perverse, irrational and unreasonable as to make it unlawful.²⁹ But it is doubtful that his order satisfies the test under

27. This was made clear to the BBC in a letter from the Home Office dated Oct. 24, 1988.

28. John Birt, *Gagging the Messenger*, *The Independent* (London), Nov. 21, 1988, at 21, col. 4; see Michael, *Attacking the Easy Platform*, 138 *NEW L.J.* 786 (1988).

29. See *supra* notes 13, 16 and accompanying text.

the text and jurisprudence of the European Convention on Human Rights that there must be a "pressing social need" in a democratic society to impose such a ban in the interests of national security or for the prevention of crime.³⁰ Even if the ban is lawful under English law, in my view, it violates the European Convention. This view is shared by Geoffrey Robertson, Q.C.: "[A] total prohibition on television and radio appearances by representatives of a lawful political organisation, for example where they are elected local councillors speaking about domestic issues, can hardly be justified on the grounds of national security or prevention of public disorder."³¹ I also take the view that there is no longer any place for section 29(3) of the Broadcasting Act or its BBC counterpart, which treats broadcasting differently from newspapers and which gives the government a power that no government in a democratic society should have. Such a power is unnecessary and dangerous. It is capable of being used to prohibit particular programmes that the Home Secretary finds objectionable, although in the two known cases in which Ministers have communicated their concerns, the formal power has not been invoked.³²

Of course, some things are better not televised. Editorial judgments must be made every day, in television as in the press; television is subject to internal controls and regulatory authorities that represent the public interest. If an occasional mistake or error of judgment is made, so be it: The walls will not fall in. But such decisions are forbidden territory to government. This, of course, is axiomatic in the United States, but not in Britain. The Home Secretary has said that his ban will make broadcasters' tasks easier: They will be relieved of difficult decisions and will know precisely where they stand. But it is not the government's business to make the life of programme-makers easier. The ban was ill-judged, and the failure of the broadcasting authorities and companies to mount any challenge—either in the British courts or under the European

30. European Convention on Human Rights, § 1, art. 10(2), 213 U.N.T.S. 221; see e.g., *The Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A), 2 E.H.R.R. 245, 277, para. 62 (1979).

31. G. ROBERTSON, *FREEDOM, THE INDIVIDUAL AND THE LAW* 94 (6th ed. 1989).

32. See *id.* at 229; ANNAN REPORT, *supra* note 17, para. 5.11.

Convention—is regrettable,³³ especially because the Divisional Court attached some significance to this failure. Freedom is only safe if those who have custody of it treat it as a solemn trust and fight to vindicate it whenever and however it is threatened.

II. THE TRADE UNION BAN AT GCHQ

The Government Communications Headquarters (GCHQ) is a civilian security and intelligence agency with 7,000 staff concerned with military and official communications, and signals intelligence around the world.³⁴ From its establishment in 1947, its staff were permitted to join trade unions, and more than sixty percent did so.³⁵

The staff are all civil servants, appointed under the royal prerogative as regulated by an Order-in-Council, but subject to various statutory provisions on employment unless a ministerial certificate expressly excludes them “for the purpose of safeguarding national security.”³⁶

After seven incidents of industrial unrest between 1979 and 1981, followed by twenty months of no industrial unrest, the Prime Minister, acting as Minister for the Civil Service, decided that continued membership by GCHQ staff in national trade unions was inimical to national security and that the right of union membership should be abrogated.³⁷ This would bring GCHQ staff into line with the other security and intelligence agencies. Without any prior consultation or discussion with the trade unions or staff, the Foreign Secretary accordingly issued the necessary certificates and informed the House of Commons. GCHQ staff were informed of the change in their terms of service and warned that industrial unrest could lead to disciplinary action. Those not wishing to remain at GCHQ could seek a transfer elsewhere in the Civil Service, but

33. See Lord Bonham-Carter (former Vice-Chairman of the BBC), *The broadcasters' astonishing failure to defend free speech*, *The Independent* (London), Jan. 12, 1989, at 22, col. 3. The chairman of the BBC has, however, condemned the ban. Gibb, *BBC Attacks Ban Over IRA*, *The Times* (London), Oct. 12, 1989, at 2, col. 15.

34. *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] A.C. 374, 394.

35. *Id.*

36. *Employment Protection Act 1975*, ch. 71, § 121(4); *Employment Protection (Consolidation) Act 1978*, ch. 44, § 138(4).

37. *Council of Civil Serv. Unions*, A.C. at 394-96.

if this were not possible, premature retirement or redundancy compensation would be available. Staff who remained would receive £1,000 for their lost right, and could establish and join a staff association instead. All but about thirty-five persons accepted the new terms.

The decision was challenged at the International Labour Organization (ILO), in the English courts and under the European Convention on Human Rights. Although this Article is not primarily about the courts' role in relation to national security, it is necessary to mention briefly the course of events.

An ILO committee found the decision to be in breach of the 1948 ILO Convention on Freedom of Association, but subsequent proceedings were inconclusive.³⁸ The High Court in England granted relief on an application for judicial review because the absence of prior consultation vitiated the staff's legitimate expectation that the government would consult them before it introduced such a change.³⁹ The Court of Appeal reversed this decision⁴⁰ and the House of Lords subsequently upheld the reversal.⁴¹ The House of Lords found that the legitimate expectation arising from the government's duty to act fairly had to yield to the requirements of national security, accepting the government's argument that prior consultation would have risked the very industrial unrest the government was at pains to avoid and put national security in jeopardy.⁴² The House of Lords' decision is notable in affirming that decisions taken under prerogative powers are in principle reviewable and in establishing, in theory at least, a somewhat more rigorous judicial scrutiny of executive claims to national security than had hitherto been the case.⁴³

I am not without sympathy for the government's position, but its action was clumsy and inept and went further than necessary. The argument that prior consultation would itself have precipitated industrial unrest and undermined GCHQ's operational capability is hollow. If industrial unrest were thought to be the likely result of

38. See Ewing, *British labour law and the ILO*, 139 NEW L.J. 1680 (1989).

39. Council of Civil Serv. Unions v. Minister for the Civil Serv. [1984] I.R.L.R. 309.

40. [1984] I.R.L.R. 353.

41. Council of Civil Serv. Unions v. Minister for the Civil Serv. [1985] A.C. 374.

42. *Id.* at 401-02.

43. *Id.* at 397-400.

an intimation by the government that some change was contemplated, why should it not also have been likely—indeed, more likely—on learning of the cancellation of their trade union rights as a *fait accompli*? The staff were no more vulnerable in the latter situation. If the government had been correct in its anticipation, it then would have been entitled to move swiftly to implement the change and take firm disciplinary action against those responsible. Moreover, the extreme step of withdrawing trade union membership was not the only or the most obvious solution open to the government. It instead could have negotiated a no-strike or no-industrial action agreement with the unions (to which they were, incidentally, agreeable), again contingent on its strict observance. At the first breach, trade union membership would go. This minimalist approach would have been more respectful of industrial and collective rights and more proportionate to the potential mischief. The government went too far and destroyed a civil liberty without adequate justification.

So what did the European Commission of Human Rights have to say of the principal complaint that the government's action violated article 11 of the European Convention on Human Rights, under which "[e]veryone has the right . . . to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."⁴⁴ The right to freedom of association is subject to the usual limitations permissible "in the interests of national security"⁴⁵ and, more particularly: "This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."⁴⁶

The Commission accepted that the GCHQ staff fell within the phrase "members . . . of the administration of the State."⁴⁷ Was the restriction "lawful"? The word "lawful" did not imply or subsume the concept of being "necessary in a democratic society" that qualifies the earlier part of the paragraph,⁴⁸ and even if it required

44. European Convention on Human Rights, § 1, art. 11(1).

45. *Id.* art. 11(2).

46. *Id.*

47. Council of Civil Serv. Unions v. United Kingdom, 10 E.H.R.R. 269, 287-91 (1988), Applic. No. 11603/85.

48. *Id.* at 288.

something more than a mere basis in national law, such as an absence of arbitrariness, that condition was met, as states must be accorded a wide discretion when protecting their national security. For that reason and because the restriction was also in accordance with national law, the Commission found the ban "lawful."⁴⁹ The Commission therefore found it unnecessary to determine whether the ban was also justified under the national security qualification in the first part of article 11(2).⁵⁰ It accordingly declared the application inadmissible.⁵¹

Because the Convention clearly contemplates that states may subject public servants to additional or more stringent restrictions than other workers, and in this case the state permitted the GCHQ staff to form a staff association in lieu of union membership, the Commission appears to have interpreted and applied the Convention correctly. The Convention, however, unfortunately couples civil servants with members of the armed forces and the police, with whom civil servants have little in common. Neither the European Social Charter⁵² nor the International Covenant on Civil and Political Rights⁵³ does so in their corresponding provisions.⁵⁴ It would be far better to omit the reference to "members . . . of the administration of the State" from the second sentence of article 11(2) and determine a case such as this in accordance with the first sentence, on whether the restriction was "necessary in a democratic society in the interests of national security."

III. TELEPHONE TAPPING AND MAIL INTERCEPTION

Until 1985, telephone tapping by the police and Security Service operated outside any legal regime because telephone tapping was not unlawful under English law.⁵⁵ There was, however, a practice

49. *Id.* at 290.

50. *Id.* at 290-91.

51. *Id.* at 291.

52. European Social Charter, Oct. 18, 1961, *Treaty Series* No. 38, CMND. 2643, art. 5.

53. International Covenant on Civil and Political Rights, 1966, art. 22(2).

54. See J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 284-85 (2d ed. 1987).

55. *Malone v. Metropolitan Police Comm'r* [1979] ch. 344; *cf. R. v. Secretary of State for the Home Dep't, ex parte Ruddock* [1987] 2 All E.R. 518 (Secretary of State was not guilty of misfeasance in office for not applying criteria pertaining to interception of communications that the Home Office had adopted).

under which the Home and Foreign Secretaries issued so-called warrants. English law, unlike American law, drew no distinction between electronic surveillance for ordinary criminal investigations and law enforcement, on the one hand, and national security purposes on the other, the latter being further subdivided into surveillance of domestic activities and of foreign powers. All were treated alike and subject to the same general regime. Not surprisingly, the absence of any legal controls did not find favour with the European Court of Human Rights,⁵⁶ and the government had no choice but to legislate, the result being the Interception of Communications Act 1985.

The Act makes tapping a telephone or interfering with mail a criminal offence⁵⁷ unless a Secretary of State has issued a warrant,⁵⁸ which may be issued if it is necessary on any of the following grounds: "(a) in the interests of national security; (b) for the purpose of preventing or detecting 'serious crime'; or (c) for the purpose of safeguarding the economic well-being of the United Kingdom."⁵⁹ National security is left undefined. A crime is "serious" if it involves violence, results in substantial financial gain or involves a large number of persons in pursuit of a common goal, or for which a person without previous convictions "could reasonably be expected to be sentenced to imprisonment for a term of three years or more."⁶⁰ The last ground relating to the country's "economic well-being" was apparently so sensitive that scarcely any words of explanation could be offered to Parliament during the bill's passage,⁶¹ although one example was interruption of oil supplies.

The Act also establishes a Tribunal⁶² composed of lawyers,⁶³ to which persons who suspect that their telephones are tapped or their letters intercepted may complain.⁶⁴ If a warrant is in force in

56. *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A), 7 E.H.R.R. 14 (1984).

57. Interception of Communications Act 1985, ch. 56, § 1(1).

58. *Id.* § 1(2)(a).

59. *Id.* § 2(2).

60. *Id.* § 10(3).

61. See 464 PARL. DEB., H.L. 879 (5th ser.) (1985).

62. Interception of Communications Act 1985, ch. 56, § 7, and sched. 1.

63. *Id.* sched. 7, para. 1(1).

64. *Id.* § 7(2).

respect of that person's mail or telephone, the Tribunal can apply judicial review principles⁶⁵ and investigate whether the Secretary of State should have issued that warrant and whether he has observed all the procedures, safeguards and arrangements laid down in the Act.⁶⁶ The Tribunal must inform the applicant of any infringements and report to the Prime Minister.⁶⁷ It may also quash the warrant, direct destruction of the intercepted material and order the Secretary of State to pay compensation to the applicant.⁶⁸ So far the Tribunal has found no contravention.

If no warrant is in force, or if a warrant is in force but the Tribunal discovers no infringements, it will simply tell the applicant that it has found no infringements.⁶⁹ The applicant will not be able to discover whether his telephone has been tapped and, if so, whether lawfully or otherwise. The government's rationale is that individuals should not be able to ascertain routinely whether they were subject to a warrant or not. If telephone calls or letters are being intercepted without a warrant, that is not a matter for the Tribunal or the government. It is a criminal offence and investigation lies with the police, as with any other criminal offence.

The Act, however, overlooks the fact that public disquiet has centered chiefly on unauthorised taps, thought by some to be extensive, rather than on the relatively small number authorised by warrant. Also, to expect the police to investigate taps when they themselves or their colleagues in the Security Service are probably conducting them is absurd.

Under the Act, the Tribunal's decisions are effectively "judge-proof."⁷⁰ The Act also excludes any evidence or cross-examination in any court or tribunal as to whether a warrant was in force or a telephone had been tapped.⁷¹ The Act, therefore, does very little to assuage concern about unauthorised but "official" taps, other than to make such taps a criminal offence. This alone will possibly impel investigators, whether in the police or Security Service, to seek

65. *Id.* § 7(4).

66. *Id.* § 7(3).

67. *Id.* § 7(4).

68. *Id.* § 7(5).

69. *Id.* § 7(7).

70. *Id.* § 7(8).

71. *Id.* § 9.

authorisation in all cases rather than run the risk, albeit remote, of apprehension and prosecution. We may never know, of course, because the present extent of such unauthorised taps is a matter of conjecture, and practice under the new Act will remain a mystery.

In addition to the Tribunal, the Act requires the Prime Minister to appoint a Commissioner from the ranks of the senior judiciary to keep under general review the issuing of warrants and all related matters.⁷² the Commissioner makes an annual report to the Prime Minister,⁷³ which, subject to deletions in the interest of national security and so on,⁷⁴ is laid before Parliament.⁷⁵

The Commissioner examines all counter-subversion warrants, but only a random sample of others. So far, he has not found any warrant to have been improperly issued, although in some cases the wrong telephone has been tapped. He applies the principles appropriate to judicial review,⁷⁶ which is the approach imposed on the Tribunal but not on the Commissioner; the Commissioner's duty is simply "to keep under review" the Secretary of State's functions. Review in this context neither means nor implies that judicial review principles are appropriate, and it is submitted that the Commissioner has misinterpreted his duty and is applying a less rigorous standard than he should. The Commissioner also discloses the number of warrants issued by the Home and Scottish Secretaries (529 in 1987 and 519 in 1988),⁷⁷ but believes it would be prejudicial to national security to give a breakdown of these figures or to reveal the number of warrants issued by the Foreign and Northern Ireland Secretaries,⁷⁸ even though details of the number of warrants issued by the Foreign Secretary have been released in the past.⁷⁹

72. *Id.* § 8(1).

73. *Id.* § 8(6).

74. *Id.* § 8(8).

75. *Id.* § 8(7).

76. INTERCEPTION OF COMMUNICATIONS ACT 1985, CHAPTER 56: REPORT OF THE COMMISSIONER FOR 1988, at 2, para. 8, CM. 652 (1989) [hereinafter REPORT OF THE COMMISSIONER].

77. *Id.* at 5, app.

78. *Id.* at 1, para. 5.

79. HOME OFFICE, THE INTERCEPTION OF COMMUNICATIONS IN THE UNITED KINGDOM, CMND. 9438, para. 11, 13, annex 2 (1985) [hereinafter HOME OFFICE] (The Foreign Secretary issued 136 warrants in 1980 and 115 in 1984.).

Although this Act may not fully satisfy the requirements of the European Convention on Human Rights, it does at least place this important matter on a proper legal basis by providing safeguards and review procedures, and to this extent represents a signal improvement in the law. This is one of several instances in recent years in which a decision of the European Court of Human Rights has provoked British law reform, forcing a government heretofore reluctant to promote legislation to do so.

The evolution of the law on this subject in the United States also has not been a model of coherence and lucidity. As in Britain, warrantless wiretapping by the American executive was common, and in 1928 in *Olmstead v. United States*,⁸⁰ the Supreme Court held that the fourth amendment had no application to such wiretapping. Warrantless wiretapping continued, even after the Federal Communications Act of 1934,⁸¹ because the government took the view that only disclosure of the material so obtained was forbidden. *Olmstead* survived challenge in the Supreme Court in the 1942 case of *Goldman v. United States*,⁸² but the contrary view prevailed in 1967 in *Katz v. United States*,⁸³ which held that the fourth amendment protected people and privacy, not property and places, except in national security cases. Following *Katz*, Congress legislated in 1968 for electronic surveillance warrants in law enforcement cases,⁸⁴ leaving national security to the President.⁸⁵ This exclusion, however, fell for domestic security purposes in 1972,⁸⁶ but electronic surveillance of foreign powers and agents remained untouched.

Following grave concern about misuse of these powers⁸⁷ and a growing feeling that judicial warrants should govern all cases, Con-

80. 277 U.S. 438 (1928).

81. Pub. L. No. 73-416, ch. 652, 48 Stat. 1064, 1103-04 (1934).

82. 316 U.S. 129, 135 (1942).

83. 389 U.S. 347, 353 (1967).

84. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510-2520 (1968)).

85. 18 U.S.C. § 2511(3) (1968).

86. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

87. See, e.g., THE CHURCH COMMITTEE REPORT: FINAL REPORT OF THE SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, Book II, S. REP. NO. 755, 94th Cong., 2d Sess. (1976).

gress passed the Foreign Intelligence Surveillance Act in 1978,⁸⁸ under which applications for warrants, already approved by the Attorney General, must be submitted to a member of the Foreign Intelligence Surveillance Court. The court is composed of seven district court judges designated by the Chief Justice of the United States, from whom appeal lies to a panel of three circuit court judges similarly designated.⁸⁹ The procedure applies to surveillance of foreign powers and agents that is "necessary" for "national defense or foreign affairs, or the ability of the United States to protect against grave hostile acts, terrorism, sabotage, or clandestine intelligence activities of a foreign power."⁹⁰ No warrant is needed if only foreign powers are targeted.⁹¹ In the ten years since the Act's passage, the court has not rejected one of more than 4,000 applications.⁹² Whether this is attributable to the vetting of applications before they are submitted or to the judges being hoodwinked by the security establishment cannot be known. The Act has successfully withstood a number of challenges in the courts.⁹³

If the American experience is any guide—and the American judiciary is certainly not perceived to be supine—the British government would have nothing to fear from entrusting decisions in these cases to judges.

IV. THE SECURITY SERVICE

The Security Service (MI5) was not a very well-kept secret. Although it had a shadowy constitutional existence insofar as its terms of reference had belatedly seen the light of day and it was financed in consequence of a parliamentary vote in the annual Estimates,⁹⁴ it had no proper legal existence or foundation. The Ser-

88. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 18 U.S.C. §§ 2511, 2518, 2519 and 50 U.S.C. §§ 1801-1811 (1982)).

89. *Id.* § 1803.

90. *Id.* §§ 1804(a)(7), 1801(e)(2).

91. *Id.* § 1802(a)(1)(A), (B).

92. See Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 814-15 (1989).

93. See *id.* at 816-20.

94. For early (and rare) references, see the Civil List and Secret Service Money Act 1782, 22 Geo. 3, ch. 82, §§ 24-28, repealed by the Statute Law (Repeals) Act 1977, ch. 18, § 1(1) and sched. 1, pt. II; The Government of Ireland Act 1920, 10 & 11 Geo. 7, ch. 67, sched. 6,

vice was responsible to the Home Secretary, although not a department of the Home Office, and its Director-General had a right of access to the Prime Minister.⁹⁵ Security Service staff were Crown servants appointed, as are all civil servants, in exercise of that part of English law known as the royal prerogative, but they derived no special powers thereby and carried out their duties within the ordinary law in the way that any private citizen could. The only difference was that the Home Secretary might authorise them to tap telephones or intercept mail.⁹⁶ If the exercise of police powers were called for, security staff had to work with the police, whose Special Branch served as the link between the two bodies.

Lord Denning, in his 1963 report on the Profumo affair, summarised the position in characteristic style:

The Security Service in this country is not established by Statute nor is it recognised by Common Law. Even the Official Secrets Acts do not acknowledge its existence. The members of the Service are, in the eye of the law, ordinary citizens with no powers greater than anyone else. They have no special powers of arrest such as the police have. No special powers of search are given to them. They cannot enter premises without the consent of the householder, even though they may suspect a spy is there. . . . They have, in short, no executive powers. They have managed very well without them. We would rather have it so, than have anything in the nature of a "secret police."⁹⁷

Lord Denning's successor as Master of the Rolls, however, tentatively expressed a contrary opinion in the *Spycatcher* case.⁹⁸

In November 1988, without warning, prior public discussion or the customary white paper, the government published the Security Service Bill, modelled on the Interception of Communications Act 1985. By April 1989, it had reached the statute book without a sin-

para. III(b)(iii), repealed by the Northern Ireland Constitution Act 1973, ch. 36, § 41(1) and sched. 6, pt. II.

95. See JUDICIAL INQUIRY INTO THE SECURITY SERVICE IN THE LIGHT OF MR. PROFUMO'S RESIGNATION: LORD DENNING'S REPORT, para. 239, CMND. 2152 (1963) [hereinafter LORD DENNING'S REPORT].

96. See *supra* Section III.

97. LORD DENNING'S REPORT, *supra* note 95, at 91, para. 273.

98. Attorney General v. Guardian Newspapers [1988] 3 All E.R. 545, 605 (per Sir John Donaldson, M.R.).

gle amendment: Not so much as a word or comma had been altered.

The Home Secretary explained the bill's purpose as stemming from concerns about how the Security Service operated and the absence of machinery for dealing with complaints by people claiming to have been subject to action by it.⁹⁹ A more likely explanation is that the absence of such machinery was, in all probability, a breach of the European Convention on Human Rights, following the judgment of the European Court of Human Rights in *Leander v. Sweden*¹⁰⁰ in 1987. The Act does not affect the Secret Intelligence Service (MI6), perhaps because it operates only abroad (if indeed that is so), which thus remains without any formal legal or constitutional authority.

The Security Service's enigmatic past is not ignored, for section 1 of the Security Service Act 1989, in bringing the Service from the shadows into the legitimate light of day, provides that "[t]here shall *continue* to be a Security Service . . . under the authority of the Secretary of State,"¹⁰¹ its functions continuing "to be under the control of a Director-General appointed by the Secretary of State."¹⁰² The Director-General is also responsible for the Service's "efficiency."¹⁰³

The bill aroused little public interest. Most parliamentary discussion focused on the question of some form of parliamentary supervision or accountability and a strengthening of oversight, which the government found wholly unacceptable and firmly resisted.

The functions of the Service are set out in the Act as:

the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.¹⁰⁴

99. Home Office News Release, Nov. 23, 1988 ("Statutory Basis for the Security Service").

100. 116 Eur. Ct. H.R. (ser. A), 9 E.H.R.R. 433 (1987).

101. Security Service Act 1989, ch. 5, § 1(1). See generally Leigh & Lustgarten, *The Security Service Act 1989*, 52 Mod. L. Rev. 801 (1989).

102. Security Service Act 1989, § 2(1).

103. *Id.* § 2(2).

104. *Id.* § 1(2).

. . . .
... to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.¹⁰⁵

This replaced the 1952 Directive, which was in the following terms:

"The Security Service is part of the Defence Forces of the country. Its task is the Defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive of the State."¹⁰⁶

The directive went on to require that the Service's work be strictly limited to what was necessary for this task, stressing that the Service should be kept absolutely free from any political bias or influence or anything other than the defence of the realm as a whole and that no inquiry was to be carried out for any government department unless it had a bearing on the defence of the realm.¹⁰⁷ Lord Denning paraphrased the directive and defined subversion in the following words:

[T]he cardinal principle [is] that their operations are to be used for one purpose, and one purpose only, *the Defence of the Realm*. They are not to be used so as to pry into any man's private conduct, or business affairs: or even into his political opinions, except in so far as they are subversive, that is, they would contemplate the overthrow of the Government by unlawful means.¹⁰⁸

In the new statutory remit, "national security" and "parliamentary democracy" are undefined. The remit also includes undermining parliamentary democracy by political and industrial means as well as violence,¹⁰⁹ and extends to undermining the country's "economic well-being."¹¹⁰

105. *Id.* § 1(3).

106. LORD DENNING'S REPORT, *supra* note 95, at 80, para. 238 (quoting 1952 Directive).

107. *Id.*

108. *Id.* at 77, para. 230.

109. Security Service Act 1989, § 1(2).

110. *Id.* § 1(2)-(3).

According to the Home Secretary, the term "national security" is well-understood and refers to the "survival or well-being of the nation as a whole," as opposed to party or sectional interests;¹¹¹ but are we not entitled to something better in the statute when dealing with a formidable secret agency of the state that is invested with invasive powers affecting the privacy of citizens? The American elaboration of national security—namely, national defence and foreign relations—in a presidential order¹¹² is scarcely more illuminating. The White Paper preceding the Interception of Communications Act, which also rests on the undefined concept of "national security," offered, if not a definition, a working formula, which, in addition to terrorist, espionage and major subversive activity, referred to taking action "in support of the Government's defence and foreign policies,"¹¹³ a form of words that assimilates the government's policies of the day to the public interest and indeed national security. This is dangerously imprecise. While government policy may indeed involve the defence of the realm,¹¹⁴ this is not always the case, and the language should distinguish between the two situations, making clear that the justification for action by the Security Service rests exclusively on protecting the interests of the state, not in supporting government policy. Lloyd, L.J., the Commissioner under the Interception of Communications Act, has confirmed that national security goes beyond terrorism, espionage and subversion. He gives defence against external aggression as one example, but says "[f]urther than that I do not think it would be wise or indeed possible to go. . . . Each case must be judged on its merits."¹¹⁵

These British provisions contrast unfavourably with those found in the corresponding Canadian legislation, which were introduced following the exhaustive analysis and careful recommendations of

111. 143 PARL. DEB., H.C. (6th ser.) 1104, 1105 (1988).

112. Exec. Order No. 12,356, 3 C.F.R. 178 (1983).

113. HOME OFFICE, *supra* note 79, at 9, para. 21. See generally Spjut, *Defining Subversion*, 6 BRIT. J.L. & Soc. 254 (1979).

114. Cf. *Chandler v. Director of Public Prosecutions* [1964] A.C. 763 (evidence regarding government policy as to the necessity of an airfield was properly excluded from inquiry as to prejudice the safety or interests of the state).

115. REPORT OF THE COMMISSIONER, *supra* note 76, at 2, para. 10.

the McDonald Commission.¹¹⁶ Section 2 of the Canadian Security Intelligence Service Act defines "threats to the security of Canada" as:

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada, but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).¹¹⁷

The Director-General of MI5 is responsible in particular for ensuring that the Service only obtains or discloses information necessary for the proper discharge of its functions, or to prevent or detect serious crime.¹¹⁸ Disclosures for the purpose of determining a person's suitability for employment must be in accordance with provisions approved by the Secretary of State.¹¹⁹ The Director-General must also ensure that the Service takes no action "to further the interests of any political party,"¹²⁰ but this laconic limitation may be contrasted with the following passage in the 1952 Directive, which previously governed the Service:

116. 1 COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, SECOND REPORT, FREEDOM AND SECURITY UNDER THE LAW 441-43 (1981) [hereinafter COMMISSION OF INQUIRY].

117. Canadian Security Intelligence Service Act, 32 & 33 Eliz. 2, ch. 21, § 2 (1984); see Gill, *Defining Subversion: The Canadian Experience Since 1977* [1989] PUB. L. 617.

118. Security Service Act 1989, ch. 5, § 2(2)(a).

119. See *id.* § 2(3).

120. See *id.* § 2(2)(b).

"It is essential that the Security Service should be kept absolutely free from any political bias or influence and nothing should be done that might lend colour to any suggestion that it is concerned with the interests of any particular section of the community, or with any other matter than the Defence of the Realm as a whole."¹²¹

The Director-General must make an annual report to the Prime Minister and Secretary of State, and may report to either of them at any other time.¹²² These reports will not be published.

More than two centuries ago, an English court decided a case often celebrated as the most important in English constitutional law. In that case, Lord Camden, C.J., dismissed contemptuously the Secretary of State's claim to issue a warrant empowering the King's Messengers to enter private property and search and seize papers.¹²³ The Secretary of State argued that such a power was essential to government in dealing with sedition, and the common law must recognise a doctrine of state necessity.¹²⁴ But Lord Camden would have none of this argument in the absence of specific legislation and vindicated the principles of the inviolability of private property and personal liberty and the subjection of Ministers and officials to the ordinary law.¹²⁵ The decision was a triumph for the common law and the principle of legality. If the claimed power were supported, Lord Camden observed,

the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel.¹²⁶

He described the power, which he opined would be "subversive of all the comforts of society,"¹²⁷ as:

121. LORD DENNING'S REPORT, *supra* note 95, para. 238 (quoting 1952 Directive).

122. Security Service Act 1989, § 2(4).

123. *Entick v. Carrington*, 19 St. Tr. 1029, 1064-66 (1765).

124. *Id.* at 1040-42.

125. *Id.* at 1064-69.

126. *Id.* at 1063.

127. *Id.* at 1066.

a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if used oppressively, it acts against every man, who is so described in the warrant, though he be innocent.

It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown.

It is executed by messengers . . . in the presence or the absence of the party, as the messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof.

If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity . . .

Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.¹²⁸

Now, after 225 years, comes the legislation that eluded Secretary of State Lord Halifax in 1765 and that furnishes this "exorbitant" power with unmistakable clarity. Section 3(1) of the Security Service Act provides that "[no] entry on or interference with property shall be unlawful if it is authorised by a warrant issued by the Secretary of State . . ."¹²⁹ Entry, obviously surreptitious and therefore if necessary by force, is authorised to premises of any description, as is any "interference"¹³⁰ with property, a term left undefined, but apt to cover, for example, search, seizure, copying, bugging, damaging, destroying and tampering with—and all this is on the authority, not of a judge (as, for example, in Canada),¹³¹ but of a minister of the Crown if he thinks it necessary in order to obtain information "likely to be of substantial value in assisting the Service to discharge any of its functions" that cannot be ob-

128. *Id.* at 1064-66 (footnote omitted).

129. Security Service Act 1989, ch. 5, § 3(1).

130. *Id.*

131. Canadian Security Intelligence Service Act, 32 & 33 Eliz. 2, ch. 21, § 21 (1984).

tained by other means.¹³² A warrant remains valid for six months.¹³³

This, if we are to believe Peter Wright and others,¹³⁴ merely makes legal what has long been common practice,¹³⁵ albeit usually without ministerial knowledge or approval.¹³⁶ The Act gives the authorisation power to a leading politician. The power is not premised on reasonable suspicion, as it is in Canada,¹³⁷ for example, or probable cause or any known legal formula; it is unrelated to any alleged or suspected crime. The Act is modelled on the Interception of Communications Act, but powers of entry, search and seizure are measurably different in kind and degree from intercepting communications, serious though that is. What would Lords Camden and Denning have made of it? The Act is a long way from the provision that proclaims "no warrants shall issue, but upon probable cause, supported by oath and affirmation,"¹³⁸ although the fourth amendment's resonant words are not thought to preclude the executive in the United States from authorising warrantless physical searches on national security grounds.¹³⁹ The Home Secretary believes that one should not underestimate the subsequent scrutiny of his exercise of the warrant power by the Security

132. Security Service Act 1989, § 3(2)(a).

133. See *id.* § 3(4)(a).

134. P. WRIGHT, *supra* note 6.

135. The allegations of "bugging" . . . related to the sort of activities that may seem very distasteful to many right-thinking people but that it would be naive in the extreme to suppose were not carried out by all security services from time to time. Whether in relation to any particular occasion or any particular premises the operations described were justifiable is a matter for the security services and those to whom they are accountable, namely the Director-General, the Home Secretary and the Prime Minister. Operations of this particular sort require, in my opinion, to be protected by a cloak of secrecy. I do not understand how a security service could operate if that were not so.

Attorney General v. Guardian Newspapers Ltd. (No. 2) [1988] 3 All E.R. 545, 587-88 (per Scott, J.) (*Spycatcher* case).

136. Ministers have not normally been informed of the Service's day-to-day activities or given detailed information obtained by the Service. LORD DENNING'S REPORT, *supra* note 95, para. 238.

137. Canadian Security Intelligence Service Act, 32 & 33 Eliz. 2, ch. 21, § 21.

138. U.S. CONST. amend. IV.

139. See Brown and Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U.L. REV. 97, 107-37 (1985); Cinquegrana, *supra* note 92, at 821-23.

Service Commissioner, who is a judge;¹⁴⁰ but one may then ask why the legislature did not entrust the power to issue warrants to the judiciary. It is likely, if telephone-tapping warrants are a guide,¹⁴¹ that only a selection of warrants will be inspected. In any event, only a particularly inept officer would put an application to the Home Secretary in a way that did not almost guarantee success.

On the other side of the coin, the Act creates machinery for the supervision and investigation of complaints. The Prime Minister must appoint a senior judge as Security Service Commissioner;¹⁴² a Tribunal also exists, consisting of between three and five lawyers appointed by the Queen,¹⁴³ which in practice means the Prime Minister.

One duty of the Commissioner is to monitor the granting of warrants,¹⁴⁴ and he is entitled to any information or documents from the Service that he may require.¹⁴⁵ He must submit an annual report to the Prime Minister,¹⁴⁶ which, less any excisions necessary to avoid prejudicing the Service's functioning,¹⁴⁷ must be laid before Parliament.¹⁴⁸ He has no responsibility, however, in relation to the Director-General's functions or the work of the Service in general. Attempts in Parliament to secure the appointment of an inspector-general failed.¹⁴⁹

The Commissioner's other duties, which he shares with the Tribunal, relate to complaints. Any person, organisation or association¹⁵⁰ aggrieved by anything that he believes the Service has done in relation to him or his property, including any place where he

140. 143 PARL. DEB., H.C. (6th ser.) 1104, 1107 (1988).

141. See REPORT OF THE COMMISSIONER, *supra* note 76, at 2, para. 8.

142. Security Service Act 1989, ch. 5, § 4(1). The first Commissioner is Stuart-Smith, L.J.

143. See *id.* § 5(1), sched. 2. The President is a High Court judge (Simon Brown, J.); the other two members are a Scottish sheriff and a solicitor.

144. See *id.* § 4(3).

145. See *id.* § 4(4).

146. See *id.* § 4(5).

147. See *id.* § 4(7).

148. See *id.* § 4(6).

149. There are moves in the United States to establish a presidentially appointed Inspector General of the Central Intelligence Agency. Engelberg, *C.I.A. Mounts Drive to Defeat Plan for Outside Inspector*, N.Y. Times, Sept. 29, 1989, at A1, col. 5; *Senators Want the CIA Supervised*, The Times (London), Oct. 20, 1989, at 8, col. 1.

150. Security Service Act 1989, § 5(1), sched. 1, para. 8(1).

lives or works,¹⁵¹ may lodge a complaint with the Tribunal that, unless judged frivolous or vexatious, the Tribunal must investigate.¹⁵² Neither authority has jurisdiction to deal with more general complaints, such as whether MI5 has tried to "destabilise" the government or smear a political party by rumours.

Once seized of a complaint, the Tribunal must first ascertain whether the complainant has been the subject of inquiries by the Service.¹⁵³ If the complainant has, the Tribunal must determine whether there were "reasonable grounds" for instituting or continuing the inquiries.¹⁵⁴ If those inquiries took place because of the complainant's "membership of a category of persons regarded by the Service as requiring investigation," such as the Communist Party, the Campaign for Nuclear Disarmament, the National Front or a trade union or the Irish Republican Army, the Tribunal will be concerned only with whether the Service had reasonable grounds for believing him to be a member.¹⁵⁵ Any concern the Tribunal has about whether the category merits investigation is referred to the Commissioner,¹⁵⁶ who may report on it to the Secretary of State, who alone has power to deal with it.¹⁵⁷

When the complaint relates to the Service's disclosure of information in connection with the complainant's suitability for particular employment, the Tribunal will investigate whether such disclosure occurred, and, if so, whether the Service had reasonable grounds for believing the disclosed information to be true.¹⁵⁸ Any complaint about property is referred to the Commissioner, who will determine, applying judicial review principles, whether, in issuing any warrant under section 3, the Secretary of State "was acting properly," and report back to the Tribunal accordingly.¹⁵⁹ The scope of the review is thus a narrow one: The Home Secretary

151. *See id.*, para. 8(2).

152. *See id.*, para. 1.

153. *See id.*, para. 2(1).

154. *See id.*, para. 2(2), (3).

155. *See id.*, para. 2(4). Surveillance of National Council for Civil Liberties staff by MI5 in the 1970s has been held to be a violation of the European Convention on Human Rights. *The Times* (London), April 27, 1990, at 2, col. 6.

156. *See id.*, para. 7(1).

157. *See id.*, para. 7(3).

158. *See id.*, para. 2(3).

159. *See id.*, para. 4.

must have acted unreasonably or for an improper purpose, for example, to fall foul of this procedure.

When the Tribunal finds that the Service did not have reasonable grounds for making the inquiries or believing that disclosed information was accurate, it informs the complainant that it has made a determination in his favour¹⁶⁰ and reports its findings to the Secretary of State and the Commissioner.¹⁶¹ The same is done if the Commissioner finds in the complainant's favour in a property case.¹⁶² The Tribunal may order inquiries ended and any records destroyed.¹⁶³ If the Tribunal finds that the Service did not reasonably believe information relating to the complainant's suitability for certain employment was true, the Tribunal may order the Secretary of State to pay the complainant compensation as it determines.¹⁶⁴ Furthermore, if the Commissioner has determined that a warrant was improperly issued and should be quashed, he may quash the warrant and direct the Secretary of State to pay such compensation as the Commissioner has considered appropriate.¹⁶⁵

When the Tribunal does not find in favour of the complainant but believes nevertheless that the allegations make appropriate an investigation into whether the Service has acted unreasonably in relation to the complainant or his property, it can refer the matter to the Commissioner who can report to the Secretary of State.¹⁶⁶ When the Tribunal does not make a finding in the complainant's favour, that is all he may be told.¹⁶⁷ In no case may a complainant be given any information, documents or reasons for any determination.¹⁶⁸ Attempts in Parliament to judicialise proceedings before the Tribunal were unsuccessful.¹⁶⁹

Decisions of the Tribunal and the Commissioner "(including decisions as to their jurisdictions) shall not be subject to appeal or

160. *See id.*, para. 5(1).

161. *See id.*

162. *See id.*, para. 5(2).

163. *See id.*, para. 6(1)(a).

164. *See id.*, para. 6(1)(b).

165. *See id.*, para. 6(2).

166. *See id.*, para. 7(2), (3).

167. *See id.*, para. 5(3).

168. *See id.* § 5(2), sched. 2, para. 4(2).

169. *PARL. DEB., H.L.*, vol. 506, cols. 874-79 (Apr. 20, 1989); *Rights Amendment Rejected*, *The Times* (London), Apr. 21, 1989, at 12, col. 1.

liable to be questioned in any court."¹⁷⁰ This is known by English administrative lawyers as an "ouster" clause, designed to exclude the jurisdiction of the courts. The addition of the words "including decisions as to their jurisdictions" takes the exclusion further than it normally goes and is an attempt to circumvent the judges who in the past have severely limited the scope of ouster clauses.¹⁷¹

Placing the Security Service on a statutory basis was right; subjecting it to some independent oversight was right; establishing a complaints mechanism was right. All these are welcome features of the Act, although one may doubt whether a single judge as Commissioner, and a Tribunal that does not publish reasoned decisions and cannot make any documentation or information available to the complainant for comment, are the happiest solutions.

The Security Service's remit, with its lack of certainty and clarity, the power given to the Home Secretary and Northern Irish Secretary to issue warrants, and the absence of any parliamentary scrutiny, which other major democracies have managed to accommodate,¹⁷² are all, however, seriously disturbing. One hopes that improvements will be effected in the future. I do not for one moment doubt the need for a security service that works in secret; but while such a service may be essential to preserve democracy, it is also uniquely well-placed to undermine or destroy it. Reconciling the need to work in secret with the necessary degree of oversight and supervision to prevent the Service from threatening the democratic processes of the state is admittedly difficult. Politicians may abuse the Service and employ it for improper ends, or may lose political and parliamentary control of it. Both are grave dangers. The McDonald Commission in Canada described the tensions succinctly:

Effectiveness must not be the only standard for judging security arrangements. . . . [I]t is essential that our security system also meet the requirements of democracy. This means that because Canada is a democratic country it must tolerate security risks

170. Service Security Act 1989, § 5(4).

171. See, e.g., H. WADE, *ADMINISTRATIVE LAW* 719 (6th ed. 1988).

172. Even in Poland, the Solidarity Government has taken steps to place the Interior Ministry, which supervises the secret police, under parliamentary control. Boyes, *Polish Parliament Takes Control of Interior Ministry*, *The Times* (London), Sept. 14, 1989, at 12, col. 1.

which a non-democratic state would not. . . . [I]n Canada the overriding objective of our security arrangements is the preservation of our democratic system. It follows that our security system must be assessed in terms both of its effectiveness and its conformity with the requirements of democracy.¹⁷³

This message has yet to gain official acceptance in the United Kingdom.

V. OFFICIAL SECRETS

The prolix section 2 of the Official Secrets Act 1911¹⁷⁴ proved remarkably resilient. In 455 words, it effectively made criminal the disclosure or receipt of any official information of any description for any purpose by almost anyone—Crown servant, government contractor or person entrusted in confidence with the information. An official committee recommended reform of the section eighteen years ago;¹⁷⁵ judges urged that it should be “pensioned-off”;¹⁷⁶ commentators universally described it as “discredited” for years.¹⁷⁷ Yet prosecutions continued and the section defied repeated attempts, even by the present government, to replace it. Despite a consensus that section 2 was overbroad in its reach and should be replaced, there was no common ground on what a new law should say or how its objects might be achieved. On the one hand were fears that a new law would continue to inhibit public knowledge and discussion by controlling the supply of information too strictly; on the other hand were anxieties that a much curtailed law would release information too freely and do genuine damage to the public interest and national security. These opposing forces combined to preserve the 1911 Act in the face of protracted and universal condemnation.

Last year, however, a new Official Secrets Act¹⁷⁸ reached the statute book, but not without fierce parliamentary debate and

173. COMMISSION OF INQUIRY, *supra* note 116, at 407-08, pt. V, ch. 1, para. 5.

174. Official Secrets Act 1911, 1 & 2 Geo. 5, ch. 28.

175. 1 DEPARTMENTAL COMMITTEE ON SECTION 2 OF THE OFFICIAL SECRETS ACT 1911: REPORT OF THE COMMITTEE, CMND. 5104 (1972) (Chairman: Lord Franks) [hereinafter FRANKS REPORT].

176. Griffith, *The Official Secrets Act 1989*, 16 J.L. & Soc. 273, 274 (1989).

177. *Id.* at 275.

178. Official Secrets Act 1989, ch. 6.

much obloquy heaped upon it. It is nevertheless a distinct improvement on the 1911 vintage that it supersedes.

In place of the blanket coverage of all official information, criminal sanctions are now applied only to disclosures of certain identified categories of information,¹⁷⁹ and indeed the list is shorter than that recommended by the Franks Committee in 1972.¹⁸⁰ In most cases, the prosecution must prove that the disclosure was damaging in fact. Unlike previous attempts at reform and the Franks proposals, there is no ministerial role in certifying that the information was classified or confidential; the jury must determine whether the information falls within one of the listed categories and, where necessary, whether its disclosure was harmful. Merely receiving official information is no longer an offence. The Act also covers fewer categories of public servants.¹⁸¹ These all represent notable improvements and deserve to be welcomed.

Much opposition to the bill centred on the absence of a public interest defence under which "whistle-blowing" would attract no penalty, and a prior publication defence, both of which the government found unacceptable.¹⁸² To constitute an offence under the Act, every disclosure must be made "without lawful authority," but this is confined to disclosures made in accordance with official duty.¹⁸³ Critics also raised objections about the absence of a need to prove damage when the disclosure was by a member of the security or intelligence services,¹⁸⁴ the inclusion of international relations in the list of proscribed subjects¹⁸⁵ and the absence of any right of access to other official information.

179. *Id.*

180. See FRANKS REPORT, *supra* note 175, at para. 278.1-13.

181. In addition to Ministers, civil servants, members of the Armed Forces and police officers, Official Secrets Act 1989, § 12(1)(a)-(e), the Secretary of State may prescribe other bodies and offices within the scope of the Act. *Id.* § 12(1)(f), (g). The Official Secrets Act 1989 (Prescription) Order 1990 (S.I. 1990, Feb. 8), made under § 14 of the Act, brings bodies such as the Atomic Energy Authority and British Nuclear Fuels within the Act, but omits such bodies as the National Health Service, Post Office and British Telecom, which were covered by the 1911 Act. See Home Office News Releases, Dec. 18, 1989 ("Prescription Order to Narrow Scope of Official Secrets Legislation") and Feb. 28, 1990 ("Official Secrets Act Comes into Force Tomorrow").

182. Griffith, *supra* note 176, at 279.

183. Official Secrets Act 1989, ch. 6, § 7(1).

184. *Id.* § 1(1).

185. See *id.* § 3.

Prosecutions may be brought only with the consent of the Attorney General¹⁸⁶ or, in the case of disclosures relating to crime, the Director of Public Prosecutions.¹⁸⁷ The maximum penalty is two years' imprisonment or an unlimited fine,¹⁸⁸ unless the offence is tried summarily in the magistrates' court, if the accused agrees, in which case the maximum penalties are six months' imprisonment and a fine of £2,000.¹⁸⁹ The Act is extra-territorial¹⁹⁰ and would cover Mr. Wright's publication of *Spycatcher* in Australia and the United States, although the Act does not overcome the problem that the suspect is beyond the jurisdiction of the British courts.

There are four main categories of information disclosure of which is an offence: security and intelligence; defence; international relations; and crime and special investigation powers.

A. *Security and Intelligence*

Disclosure without lawful authority of any information or document relating to security or intelligence by a member or former member of the security and intelligence services that came into his possession by virtue of his work is an offence.¹⁹¹ A minister may notify anyone who undertakes work connected with the security and intelligence services that the worker is subject to the terms of the section in like manner.¹⁹² "Security and intelligence services" are not defined, and whether it refers only to those working in MI5 and MI6, or whether it includes, for example, staff of GCHQ or military intelligence is not clear. In view of the notification system and the fact that the Act is a penal statute, the preferred interpretation is a narrow reading that covers only those working for the Security Service and the Intelligence Service. Whether the disclosure is true or false does not matter; the Act covers anything purporting to be a disclosure or intended to be taken as a disclosure.¹⁹³ This may look absurd at first blush, but it is necessary; otherwise a

186. See *id.* § 9(1).

187. See *id.* § 9(2).

188. See *id.* § 10(1)(a).

189. See *id.* § 10(1)(b). There are some minor exceptions.

190. See *id.* § 15(1).

191. See *id.* § 1(1).

192. See *id.* § 1(1)(b), (6).

193. See *id.* § 1(2).

prosecution could fail either because the government denied the defendant's allegation as being true or because the defendant persuaded the jury that he fabricated the disclosed information.

In the case of a member or former member of the security services, no proof of harm or damage is required, although the defendant can claim as a defence that he did not know and had no reasonable cause to believe that the information related to security or intelligence.¹⁹⁴ A disclosure of security and intelligence information by other Crown servants or government contractors, however, is an offence only if "damaging,"¹⁹⁵ which means "it causes damage to the work of, or of any part of, the security and intelligence services,"¹⁹⁶ or is likely to cause that damage.¹⁹⁷ Such damage may be caused by the disclosure of the particular document, whose contents are sensitive, or because the document in question falls within a class or description whose disclosure is likely to be damaging.¹⁹⁸ No offence is committed if such a defendant can prove that he did not know or have reasonable cause to believe that the disclosure would be damaging.¹⁹⁹

Revelations of illegal security activities are caught by this provision and no general public interest defence is available. Should not the protection of the criminal law be confined to the proper and lawful activities of the Security Service, easily done now that it is a creature of statute and its functions have been statutorily delineated?²⁰⁰

This absolute lifelong ban on security and intelligence personnel gives explicit recognition in the criminal law to the government's basic argument in the *Spycatcher* case,²⁰¹ even though that case was a civil action for injunctive relief founded on the equitable doctrine of confidentiality. The 1911 Act imposed no less stringent

194. See *id.* § 1(5).

195. See *id.* § 1(3).

196. See *id.* § 1(4)(a).

197. See *id.* § 1(4)(b).

198. See *id.*

199. See *id.* § 1(5).

200. See Leigh & Lustgarten, *The Security Service Act 1989*, 52 MOD. L. REV. 801, 803-09 (1989).

201. See *Attorney General v. Guardian Newspapers Ltd. (No. 2)* [1988] 3 All E.R. 545, 552.

a ban,²⁰² but it did so indiscriminately, lumping the retired or serving MI5 officer together with the retired Ministry of Agriculture tea lady and highly sensitive defence or intelligence information with the number of biscuits consumed in the White Fish Section.²⁰³ But neither this provision, nor the Security Service Act in general, has anything to say about the civil law that featured in *Spycatcher*, which is unchanged and remains in judicial hands, although the statutory framework may have a bearing on a particular case in which an individual is seeking to escape from his basic obligation of confidentiality. The government may, of course, permit a retired officer to publish accounts of his work, but this situation will be rare and permitted only in exceptional circumstances.²⁰⁴

B. Defence

Disclosure of damaging information about defence by a present or former Crown servant or government contractor is an offence.²⁰⁵ A disclosure is "damaging" if:

(a) it damages [replacing the earlier "prejudices"] the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces; or

(b) . . . it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or

(c) . . . [if] its . . . disclosure would be likely to have any of those effects.²⁰⁶

Paragraph (b) is very broad and seems to have little relation to defence.

202. See Official Secrets Act 1911, 1 & 2 Geo. 5, ch. 28, § 2.

203. The Official Secrets Act 1911 forbade "any person" from disclosing protected information. See *id.*

204. 145 PARL. DEB., H.C. (6th ser.) 1047, 1104 (1989); 147 PARL. DEB., H.C. (6th ser.) 1001, 1032-33 (1989).

205. See Official Secrets Act 1989, § 2(1).

206. *Id.* § 2(2).

An accused may raise the defence that he did not know or have reasonable cause to believe that the information would be damaging or was related to defence.²⁰⁷ Information related to defence is limited to details concerning the armed forces, their weapons and equipment, defence policy and strategy, military planning and intelligence, and plans relating to essential supplies and services needed in wartime.²⁰⁸

C. *International Relations*

A damaging disclosure by a present or former Crown servant or government contractor of any information relating to international relations or of any confidential information obtained from another state or international organisation is an offence.²⁰⁹ Such a disclosure is damaging if "it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad," or if its disclosure would be likely to have any of those effects.²¹⁰ The nature or contents of a document or the mere fact that the document is confidential *may* suffice to establish that the disclosure was damaging.²¹¹ Again, the defendant may raise the defence that he did not know and had no reasonable cause to believe that the information related to international relations or was confidential information obtained from another state or international organisation, or that its disclosure would be damaging.²¹²

D. *Crime and Special Investigation Powers*

A present or former Crown servant or government contractor commits an offence if he discloses any information relating to warrants under the Interception of Communications and Security Service Acts (these are the "special investigation powers"),²¹³ or which

207. *See id.* § 2(3).

208. *See id.* § 2(4).

209. *See id.* § 3(1).

210. *See id.* § 3(2).

211. *See id.* § 3(3).

212. *See id.* § 3(4).

213. *See id.* § 4(1), (3).

results in the commission of an offence, facilitates an escape from legal custody or prejudices the safekeeping of prisoners, or impedes the prevention or detection of offences or the apprehension or prosecution of suspects, or is likely to have any of these effects.²¹⁴ The definition of Crown servant for the purposes of the Act includes police officers,²¹⁵ although strictly speaking they are neither servants of the Crown nor civil servants. Once again, the defendant may raise the defence that he did not know or have reasonable cause to believe that any of these effects would result,²¹⁶ or that the information was covered by the section.²¹⁷

E. Other Categories

The Act prohibits two other categories of unlawful disclosure. One category relates to security and intelligence, defence or international relations matters that the British Government has communicated in confidence to another government or international organisation. A person commits an offence if information included in this category is leaked to him and he, knowing or having reasonable cause to believe that the information is covered by the Act, then makes a damaging disclosure of it.²¹⁸

The other category concerns recipients of information covered by the Act, whether the information has been received unlawfully or lawfully on a confidential basis, who then disclose that information, knowing or having reasonable cause to believe—this being for the Crown to prove—that the information is protected under the Act.²¹⁹ Such a disclosure is an offence only if it is damaging.²²⁰ This section governs the media when they receive information leaked by a civil servant or someone else to whom the information was entrusted in confidence. It is not necessary for the Crown to prove any resulting damage when the disclosure relates to crime or special investigation powers.²²¹ With regard to crime, a test of damage

214. *See id.* § 4(1), (2).

215. *See id.* § 12(1)(e).

216. *See id.* § 4(4).

217. *See id.* § 4(5).

218. *See id.* § 6.

219. *See id.* § 5.

220. *See id.* § 5(3)(a).

221. *See id.* § 4.

would be otiose because the information is defined in terms of its inherently injurious effects; but with regard to special investigation powers—warrants to tap telephones and allow the Security Service to enter and interfere with property—disclosure of the information alone will suffice, giving rise to the absurd result that information leaked to an individual that the Security Service had tapped his telephone pursuant to a warrant could not then be repeated by his member of Parliament (other than in the House of Commons where all speech is privileged) to whom he had taken his grievance, or by a newspaper.

In general, I welcome this Act and congratulate the former Home Secretary, Mr. Douglas Hurd, almost as strongly as I have excoriated him elsewhere in this Article for other measures. That is not to say I am insensitive to the Act's defects, but controversial reforming legislation is seldom perfect.

The overriding criticism is the absence of a public interest defence, supported amongst others by a former Prime Minister, Foreign Secretary, two Home Secretaries and a Lord Chancellor, for officials who wish to expose crime, fraud, abuse of authority, neglect in the performance of official duty or other misconduct. Although the government believed that adequate internal mechanisms were available to officials to ventilate matters of this kind and that the disclosure of these improprieties could not justify damaging the public interest in the ways prescribed by the Act, its obduracy on this point should be deplored. Internal mechanisms may not always prove effective, and the object of eliminating abuse, corruption and dishonesty in the country's government is of the first importance. Moreover, in the case of security and intelligence personnel, and in relation to the "special investigation powers"—warrants under the Interception of Communications and Security Service Acts—the Act is premised on an irrebuttable assumption that every unauthorised disclosure is damaging.²²² It is regrettable that the government did not allow a limited defence when all the circumstances rendered communication of the information reasonable, or when all proper and reasonable efforts to have the matter investigated internally had failed. Such a defence would not have emasculated the Act; it would have resulted in an

222. *See id.* § 4.

Act that commanded greater confidence and support. Such a defence did possibly feature in the 1911 Act,²²³ although the trial judge in *R. v. Ponting*²²⁴ refused so to interpret it. The jury in *Ponting* nevertheless acquitted in the face of the evidence and the judge's summing up and direction,²²⁵ and the Attorney General declined to refer this important point of law for consideration by the Court of Appeal. As it is, future prosecutions may founder, as did *Ponting's*.

Less compelling was the argument to allow a prior publication defence, permitting the disclosure of any protected information that had been published previously. Suppose the prior publication occurred abroad or in some obscure technical journal or handbill or pamphlet or in a foreign language; suppose it was expressed in difficult technical language. The government was surely right to maintain that merely because the information had surfaced somewhere previously did not exclude the possibility that further publication might be damaging—that issue in any prosecution being a matter for the jury. If the fresh publication has not added materially to the damage caused by the earlier disclosure, the jury will not convict.

Another change urged on the government was substituting a test of "serious injury" for "damage," as the Franks Committee had recommended.²²⁶ At first sight this alternative test seems attractive, but I doubt if it would have made much difference in practice, in view of the way in which the various kinds of damage are enunciated in the Act. Arguably, any damage of the kind specified in the Act, when caused by a civil servant, is apt for criminal penalties; and, the requirement of the Attorney General's consent and ultimately the jury's power to acquit provide protection against trivial prosecutions.

Moreover, the Franks proposal operated in a different context. Under that proposal, under the categories of information to be cov-

223. See Official Secrets Act 1911, 1 & 2 Geo. 5, ch. 28, § 2(1)(a). "If any person . . . communicates . . . information to any person, other than a person to whom he is authorised to communicate it, or to a person to whom it is in the interest of the State his duty to communicate it, . . . that person shall be guilty of a misdemeanour." *Id.* (emphasis added).

224. [1985] CRIM. L.R. 318.

225. See *id.*

226. See FRANKS REPORT, *supra* note 175, paras. 120, 144-69, 278.6.

ered, ministers would have decided to classify particular documents if their "unauthorised disclosure would cause at least serious injury to the interests of the nation,"²²⁷ but in any prosecution the court or jury would not be concerned whether the classification was appropriate or with the effects of the disclosure. The Act advances considerably from that.

These reforms will do nothing to defuse the demands for freedom of information legislation, however, and dismantling criminal sanctions will certainly not lead to the release of any additional information. That debate will continue unabated.

VI. ANTI-TERRORISM LEGISLATION

The Prevention of Terrorism (Temporary Provisions) Act 1989²²⁸ re-enacts with modifications the Act of 1984 bearing the same title, following a Review of the earlier statute,²²⁹ which was itself a reincarnation of similarly named statutes of 1974 and 1976.²³⁰ The Act principally deals with proscribed organisations, exclusion orders, financial assistance for terrorism, and related powers of arrest and detention.

The Act proscribes two organisations—the Irish Republican Army and the Irish National Liberation Army²³¹—and the Secretary of State may proscribe, with parliamentary approval,²³² other organisations that he believes to be "concerned in, or in promoting or encouraging, terrorism occurring in the United Kingdom and connected with the affairs of Northern Ireland."²³³ The Act defines terrorism as "the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear."²³⁴ The Act makes punishable, in rela-

227. *Id.* at para. 278.6.

228. Prevention of Terrorism (Temporary Provisions) Act 1989, ch. 4. *See generally* Bonner, *Combating Terrorism in the 1990s: The Role of the Prevention of Terrorism (Temporary Provisions) Act 1989* [1989] PUB. L. 440.

229. REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1984 BY THE VISCOUNT COLVILLE OF CULROSS Q.C., CM. 264 (1987) [hereinafter LORD COLVILLE'S REVIEW].

230. *See generally* D. BONNER, EMERGENCY POWERS IN PEACETIME chs. 3-4 (1985).

231. *See* Prevention of Terrorism (Temporary Provisions) Act 1989, § 1(1), sched. 1.

232. *See id.* § 1(3)(a).

233. *Id.* § 1(2)(a).

234. *Id.* § 20(1).

tion to any proscribed organisation, membership, inviting support, arranging meetings,²³⁵ contributing or soliciting funds,²³⁶ and wearing any item of dress indicative of membership or support.²³⁷

Part II of the Act empowers the Secretary of State to make orders prohibiting a person believed to be concerned with terrorism in relation to Northern Ireland from being in or entering Great Britain (the mainland of England, Scotland and Wales).²³⁸ This curious power of internal exile—described by Lord Colville in his Review as “the most draconian in the . . . Act”²³⁹—enables the Secretary of State to “banish” a British citizen to Northern Ireland if the citizen has lived on the mainland for less than three years²⁴⁰ and to exclude a citizen resident in Ulster from entering any other part of the United Kingdom.²⁴¹ The Secretary of State may also make exclusion orders to prevent any person from entering or remaining in Northern Ireland.²⁴² The Secretary of State may also make orders against non-citizens—in practice these are usually Irish citizens who are not subject to normal immigration control—to prevent them from being in or entering the United Kingdom.²⁴³ A person against whom the Secretary of State has made an exclusion order may make representations to a person or panel nominated by the Secretary of State²⁴⁴ and thereby force the Secretary of State to reconsider the matter.²⁴⁵ In practice, the Home Secretary follows the adviser’s or panel’s recommendation. The Secretary of State issued nineteen new exclusion orders between 1984 and 1986. In five of those cases, the excluded persons made representations, and the Secretary of State revoked two of the orders.²⁴⁶ The largest number of exclusion orders made annually by the Home Secretary for Great Britain is fifty-three (in both 1978

235. *See id.* § 2(1).

236. *See id.* § 10(1).

237. *See id.* § 3(1).

238. *See id.* § 5.

239. LORD COLVILLE’S REVIEW, *supra* note 229, at 40, para. 11.7.1.

240. *See* Prevention of Terrorism (Temporary Provisions) Act 1989, § 5(4)(a).

241. *See id.* § 7(2).

242. *See id.* § 6.

243. *See id.* § 7.

244. *See id.*, sched. 2, para. 3.

245. *See id.*, para. 4.

246. *See* LORD COLVILLE’S REVIEW, *supra* note 229, at 39, para. 11.3.1.

and 1979), the smallest is three. The annual average for the period 1976 to 1986 is twenty-three.²⁴⁷

Viscount Colville of Culross, Q.C., a former Conservative Home Office Minister, argued cogently against exclusion orders in his 1987 Review of the Act. He wrote:

Exclusion orders deprive certain people of the right to move freely around the United Kingdom and to live where they please. The evidence against them is not tested in a court of law nor made known to the person excluded and it is possible that some of it may be inaccurate. Similar secrecy may be a feature of certain cases under the Immigration Act 1971, in which people are debarred from entering the country on the grounds that their admission to the United Kingdom would not be conducive to the public good; but that power is exercised rarely, and never against British citizens.

Exclusion orders can divide families, make it difficult to seek a job and difficult too to get away from former terrorist associates. These restrictions are only feasible because there is a stretch of sea between Ireland and Great Britain. It cannot be envisaged that such a power could be exercised against Scottish or Welsh separatists however terroristic their activities. It cannot be used against naturalised or British-born citizens from other countries who become caught up with disputes from overseas and resort to terrorism in Britain. Moreover when a republican terrorist is excluded to Ireland the event is turned into useful propaganda. It should not be forgotten that one of the aims of terrorism is to lead a Government to introduce repressive measures; the unpopularity thus caused can be exploited further to excite criticism and turmoil as part of a vicious circle. The number of orders is now greatly reduced. I obtained the impression that the authorities in Northern Ireland would not encounter problems of any substance if exclusion orders were to disappear; although by contrast orders excluding people to the Province do add to the heavy load already borne by the RUC and the armed forces.²⁴⁸

He conceded some advantages, but was "not convinced that the ends justify these means."²⁴⁹ He recommended accordingly that

247. *Id.* at 38, para. 11.2.1.

248. *Id.* at 39, para. 11.4.1.

249. *Id.* at 40, para. 11.6.1.

the power to make exclusion orders should not be included in the new Act. "I express the view," he concluded, "that it would be . . . correct . . . both in terms of civil rights in the United Kingdom and this country's reputation in that respect among the International Community."²⁵⁰ Unhappily, the government rejected his advice.

Part IV of the Act deals with police powers. A police officer may arrest without warrant a person whom the officer reasonably suspects of being "concerned in the commission, preparation or instigation of acts of terrorism."²⁵¹ Terrorism is not a specific criminal offence. The police may detain a person so arrested for forty-eight hours,²⁵² which the Secretary of State may extend by five additional days.²⁵³ A senior police officer who has not been involved directly in the case reviews detention prior to the Secretary of State's decision.²⁵⁴

The absence of any judicial supervision during the seven-day detention period led in 1988 to the European Court of Human Rights' finding in *Brogan v. U.K.*,²⁵⁵ by 12 to 7 in plenary session, that this power violated article 5(3) of the European Convention on Human Rights, under which "[e]veryone arrested or detained . . . shall be brought promptly [*"aussitôt"* in the French text, meaning "immediately"] before a judge or other officer authorised by law to exercise judicial power."²⁵⁶

The government maintained that the seven-day period was essential and that the sensitivity of the information on which detention was based rendered its presentation to a court in the presence of the detainee impossible.²⁵⁷ Although in the Court's view there

250. *Id.*

251. Prevention of Terrorism (Temporary Provisions) Act 1989, § 14(1)(b).

252. *See id.* § 14(4).

253. *See id.* § 14(5). Tape recording of interviews with suspected terrorists on an experimental basis began in March 1990. 168 PARL. DEB., H.C. (6th ser.) W.A 272 (Mar. 1, 1990).

254. Prevention of Terrorism (Temporary Provisions) Act 1989, sched. 3, paras. 3-4.

255. 145-B Eur. Ct. H.R. (ser. A), 11 E.H.R.R. 117 (1988); *see Bonner, supra* note 230, at 446-52; Finnie, *The Prevention of Terrorism Act and the European Convention on Human Rights*, 52 MOD. L. REV. 703 (1989). The Court did not, however, award compensation. 162-B Eur. Ct. H.R. (ser. A) (1989).

256. *Brogan*, 11 E.H.R.R. at 132, para. 55 (citing European Convention on Human Rights, art. 5(3)).

257. Lord Colville agreed. *See LORD COLVILLE'S REVIEW, supra* note 229, ch. 12, at 43-44.

was some room for flexible interpretation of the provision under special circumstances, such interpretation could not be taken to the point of impairing the very essence of the right, which would effectively negative the state's obligation to ensure a prompt appearance before a judicial authority.²⁵⁸ Even four days without judicial authority fell outside the strict constraints permitted by article 5(3). As the Court concluded: "The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3)."²⁵⁹

The government was not willing to amend the law so as to bring it into conformity with the Convention, even though the Prevention of Terrorism Bill was before Parliament at the time. The old section was re-enacted without modification and the government instead derogated from the Convention under article 15, which permits states to do so "[i]n time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation."²⁶⁰ The government does not believe that a judicial mechanism can be incorporated into the law; accordingly, derogation from the Convention remains the permanent response.²⁶¹

Derogation itself can be challenged before the Commission and Court, and is subject to judicial supervision in Strasbourg.²⁶² The Court has recognised previously the existence of a "public emergency threatening the life of the nation" in Northern Ireland, where the detentions in *Brogan* took place, and upheld the United Kingdom's derogation.²⁶³ Although that characterisation may appear difficult to apply to Britain, states are accorded a wide margin of appreciation in this respect.²⁶⁴ Derogations are permissible, how-

258. *Brogan*, 11 E.H.R.R. at 134, para. 59.

259. *Id.* at 136, para. 62.

260. European Convention on Human Rights, § 1, art. 15(1).

261. 160 PARL. DEB., H.C. (6th ser.) W.A. 209-10 (Nov. 14, 1989).

262. See *Lawless v. Ireland* (No. 3), 1 E.H.R.R. 15, 30-35 (1961); *Ireland v. U.K.*, 2 E.H.R.R. 25, 91-92 (1978); J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 307-13 (2d ed. 1987).

263. See *Ireland v. U.K.*, 2 E.H.R.R. at 91, para. 205.

264. See *id.* at 91, para. 207.

ever, only "to the extent strictly required by the exigencies of the situation,"²⁶⁵ and the Court may require some convincing that the situation could not accommodate a judicial stage in the detention procedure. In due course, therefore, the Court may find a further violation.

Between 1974, when this power of arrest and detention was first introduced, and 1986, 6,246 persons were detained, of whom only 515 were charged with any offence,²⁶⁶ giving, as Lord Colville acknowledged in his Review of the Act, "*prima facie* some cause for concern."²⁶⁷ His modest proposal, adopted in the new Act,²⁶⁸ was for a senior police officer who had not been involved directly in the case to review a detention during the initial forty-eight hours.²⁶⁹

Another unusual provision in the Act criminalises a failure to disclose to the police information that may prevent acts of terrorism connected with the affairs of Northern Ireland, or that may secure someone else's apprehension, prosecution or conviction for a terrorist offence.²⁷⁰ The government rejected Lord Colville's recommendation that this provision be abolished.²⁷¹

Finally, the Act prohibits soliciting, receiving, giving or controlling any money or property in support of acts of terrorism, not only in connection with Northern Ireland, and on conviction any such money or property may be forfeited.²⁷² These provisions also target bankers and financiers who may be knowingly involved in the laundering of terrorists' funds. The Act includes elaborate provisions to make forfeiture an effective weapon in the attack on terrorism.²⁷³

265. *Id.* at 91, para. 203.

266. See LORD COLVILLE'S REVIEW, *supra* note 229, at 15, para. 5.2.3. The latest figures available show that in the 12 months 1988-89, 178 persons were detained, 30 of them for more than 48 hours, and 26 were subsequently charged with an offence. HOME OFFICE STATISTICAL BULLETIN, *Statistics on the Operation of the Prevention of Terrorism Legislation—Third Quarter 1989*, Issue 36/89, Oct. 31, 1989.

267. LORD COLVILLE'S REVIEW, *supra* note 229, at 15, para. 5.2.5.

268. See Prevention of Terrorism (Temporary Provisions) Act 1989, sched. 3, paras. 3-4.

269. See LORD COLVILLE'S REVIEW, *supra* note 229, at 15, para. 5.3.2.

270. See Prevention of Terrorism (Temporary Provisions) Act 1989, § 18(1).

271. See LORD COLVILLE'S REVIEW, *supra* note 229, ch. 15, at 50-51.

272. See Prevention of Terrorism (Temporary Provisions) Act 1989, pt. III, §§ 9-13.

273. See *id.* sched. 4.

I do not seek to minimise the scourge of terrorism in Britain in relation to both Northern Ireland and international affairs, to say nothing of the carnage in Northern Ireland itself. There has been much loss of life and damage to property; precautions against terrorist attacks pervade public life and are enormously costly. The state has an obligation to protect its people. Special legislation is therefore not inadmissible in principle, but critical scrutiny must not be suspended. If legislation erodes civil liberties too far, the cure becomes as bad as the disease, and indeed the terrorists have scored a partial victory, for they have succeeded in destroying part of the nation's culture and values. In any case, terrible though terrorism in Britain is, and great though our vigilance and precautions must be, terrorism has not reached proportions calling for major incursions into human rights. How, then, does the Prevention of Terrorism Act emerge from this critical scrutiny?

The new measures on financial assistance for terrorism are worthwhile and, like corresponding powers for drug trafficking,²⁷⁴ should be welcomed. Let us hope they will have some impact. I find it difficult, however, to be equally enthusiastic about the rest of the legislation.

Until the appalling Birmingham bombing in 1974, which produced the first of the Prevention of Terrorism Acts, successive governments had claimed that proscribing the IRA would only drive it further underground and thereby impede security efforts. The reversal of policy in 1974 was nothing but a futile gesture to demonstrate to the public, outraged by the terrorists, that the government was taking firm, immediate and decisive action. This reversal in policy was irrelevant in the fight against terrorism, although I see no objection in principle to banning an organisation whose self-proclaimed purpose is the ruthless use of violence for political ends in a democratic society.

Exclusion orders, in Lord Colville's considered judgment, contribute little to security and constitute a serious interference with fundamental rights.²⁷⁵ Regrettably, the government saw fit to ig-

274. See Drug Trafficking Offences Act 1986 (provisions for confiscation of proceeds); Criminal Justice Act 1988, § 69 and pt. VI (provisions for forfeiture and confiscation of proceeds).

275. LORD COLVILLE'S REVIEW, *supra* note 229, at 39, para. 11.4.1.

nore his recommendation that they be abolished. Likewise, the offence of withholding information, which represents a departure from the normal principles of criminal liability, has been preserved, contrary to Lord Colville's advice. He should have been heeded. The conclusion of the European Court of Human Rights in the *Brogan* case should also have been heeded.²⁷⁶ The United Kingdom's cause is not helped when it appears not only to have violated an international human rights instrument, but also to continue to flout the *Brogan* judgment by the device of derogation. Actions of this kind play into the hands of the terrorists and their apologists. Situations may well arise in which derogation from human rights obligations is understandable and indeed required, but in this case the government could easily have avoided derogation either by shortening the period of detention or by introducing a judicial element into the procedure.

CONCLUSION

With the tour of Britain's national security topography complete, the inspiration for the imaginary country described in the introduction will no longer be a mystery. It was, of course, a tendentious caricature, though not factually inaccurate save for the substitution of "Minister of the Interior" for Home Secretary, with its connotations of secret police and state repression.²⁷⁷

One can easily heap ridicule on the bizarre world of spies, agents, secret services and so on—and the inglorious record of MI5 and MI6 since the Second World War makes that easier—but I accept unreservedly the need for a security service and for appropriate laws to combat terrorism and subversion. That is not to give the government a blank cheque or to concede that proper regulation and controls are unnecessary, however. On the contrary, secret operations call for special, rigorous arrangements that recognise the dangers they pose to the democratic state. Believing that such dangers are wholly imaginary or illusory is folly.

276. See *supra* notes 255-59 and accompanying text.

277. The comments about the press' being on probation referred to in the Introduction were made by the Minister of State at the Home Office, Mr. Timothy Renton, M.P., during debate on the Right of Reply Bill. See 151 PARL. DEB., H.C. (6th ser.) 561, 593 (1989).

We have heard much of "national security," but part of the explanation for the actions I have talked about lies in national *insecurity*. I do not mean a government fearful either for the survival of the state or of itself—rarely has Britain had a more confident government—but an insecurity emanating from a lack of confidence in the resilience, adaptability, reliability and effectiveness of the ordinary democratic and legal processes. The measures I have discussed do not arise from a deep hostility to freedom or civil liberties as such. They are, for the most part, authentic and sincere responses to genuine problems, but they do evince a lack of regard for civil liberties. In wrestling with these problems and devising solutions, the principles of liberty are too often valued insufficiently. These principles seemingly compete on equal terms, and if further measures of restraint or interference appear desirable, the balance falls in favour of repression.

This is especially so when national security is invoked, which is done all too readily, and fundamental principles of civil liberties are effaced. We need to be much more skeptical when national security is raised, and we should be willing to eclipse cherished liberties only if a compelling case can be made out.

Many of the powers discussed in this Article are both unnecessary and an affront to democracy. You may think, as I do, that a Cabinet Minister who can tap telephones, open mail, search and seize, burgle and bug, ban television and radio programmes and banish citizens has powers that are nothing short of remarkable—perhaps even shocking—in a parliamentary democracy (to borrow a phrase from the Security Service Act); and that a government that refuses to sanction whistle-blowing, that bans civil servants' trade union membership rights without consultation or discussion, that will not tolerate full independent and parliamentary scrutiny of the Security Service, that circumvents a binding judgment of the European Court of Human Rights and that will not countenance a judicial role in reviewing detention following arrest, is exhibiting questionable judgment. The survival of a free society, to which these measures are, paradoxically, devoted, calls for greater sensitivity and refinement. "Security," said Justice Barak of the Israeli Supreme Court, "[is] not a goal in itself, but a means

to a goal. The goal [is] a democratic regime, a regime of the people recognising the freedoms of the individual."²⁷⁸

278. Jerusalem Post, Jan. 20, 1989, at 5 (attributing to Barak, J., from Schnitzer v. Shani (Chief Military Censor) (H.C. 680/88)).