Intimations of legality amid the clash of arms

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This power to act according to discretion for the public good, without the prescription of the Law and sometimes even against it, is that which is called Prerogative.¹ For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.²

1. Introduction

“Sovereign is he who decides on the state of exception,” said Carl Schmitt, in the opening line of Political Theology, thus asserting that in abnormal times—in a state of emergency or exception—the sovereign is legally uncontrolled.³ Schmitt’s thought, of course, goes further. Not only is the sovereign legally uncontrolled in the state of emergency: the quality of being sovereign, he who is the sovereign, is revealed in the answer to the question, who decides that there is a state of emergency?

Closely bound up with Schmitt’s claim about states of emergency is another claim about “the political.”⁴ According to Schmitt, the political is prior to law and its central distinction is between friend and enemy, so that the primary task of the sovereign is to make that distinction. It is in the moment of the emergency that the existential nature of the political is revealed. Since to make

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¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., Cambridge Univ. Press 1988).
² 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244 (Univ. of Chicago Press 1977).
that distinction is to make a kind of existential decision, he who makes it has
to be capable of acting in a decisive way, which for Schmitt ruled out both the
judiciary and parliament, leaving the executive as the only serious candidate.\(^5\)

There is, in Schmitt’s view, a continuum of exceptional situations, ranging
from a global threat or a war situation where the state—the political and legal
order as a whole—is in danger, to situations that occur within the political and
legal order and are local manifestations of the global external threat. The sov-
eign must respond to all exceptions. He is the only figure in the political and
legal order capable of acting as the guardian of the constitution, since he
alone has the power to make the ultimate decision as to who is an enemy. Once
one recognizes the possibility of a threat from without, threatening the life of
the state, and that it is the sovereign’s role both to determine that there is such
an emergency and to deal with it, one should also recognize that in more local
emergency situations, the sovereign should play the same role.

Schmitt’s claims, forged in the hothouse of Weimar politics and the disinteg-
ration of the attempt to establish democracy in Germany,\(^6\) might seem
overblown to the practitioners of common law in jurisdictions such as the
United Kingdom and Canada. They will point with pride to their long tradi-
tions of parliamentary democracy and the control by judges of the executive
in light of the judges’ understanding of the rule of law and, in particular, their
attention to dicta such as Lord Atkin’s, during World War II, in \emph{Liversidge v.
Anderson}: “In this country, amid the clash of arms, the laws are not silent. They
may be changed, but they speak the same language in war as in peace.”\(^7\)

Schmitt’s claims might seem even more overblown when one takes into
account the tide of constitutionalism in many common law jurisdictions. For
example, in Canada, judges have had, for almost twenty years, the resource of
the Charter of Rights and Freedoms,\(^8\) which can check both the legislature
and the executive when fundamental values are at stake, while judges in the
United Kingdom, since 1998, have had the Human Rights Act,\(^9\) which largely
incorporates the European Convention on Human Rights\(^\text{10}\) into domestic law.
In short, in such jurisdictions it might well seem that the sovereign is subject
to the control of law, to the rule of law, in abnormal as well as normal times.

Lord Atkin’s judgment is so famous that it is regarded as a classic. Often
it seems difficult to recall that his judgment was a lone dissent. This might

\(^5\) CARL SCHMITT, DER HÜTER DER VERFASSUNG (Duncker & Humblot 1985).

\(^6\) For further discussion, see DAVID DIEZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN
AND HERMANN HELLER IN WEIMAR (Clarendon Press 1997).

\(^7\) \emph{Liversidge v. Anderson}, [1942] A.C. 206, 244 (Eng.).

\(^8\) Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, enacted as
Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [hereinafter Charter].

\(^9\) Human Rights Act, 1998, c. 42 (Eng.) [hereinafter HRA].

\(^10\) European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4,
1950, 213 U.N.T.S. 221 [hereinafter ECHR].
seem to indicate the extent to which the idea of judicial guardianship of rule of law is entrenched in the common law consciousness, so that we have even less reason to take Schmitt’s claims seriously. Yet there is more than enough in the adjudication of cases since World War II, and, in particular, since September 11, 2001, to give us pause.

The fact is that when issues of national security arise, judges almost invariably defer to the executive’s determination of what is in the national interest, just as the majority in *Liversidge* argued they should. In these instances, it is Lord Atkin’s dissent that is forgotten, unless the judges are forthright enough to admit that they are siding with the majority. And even when judges rely on Lord Atkin’s dissent in their judgments, it seems that they do so only when such reliance makes no difference to the outcome of the decision. Putting matters at their most cynical, one might say that the majority in *Liversidge* rules, but judges will, when they can, pay lip service to Lord Atkin’s dissent. To make matters worse, in a very detailed and sensitive analysis of *Liversidge* in its context, Brian Simpson, a leading scholar of the common law, argues that Lord Atkin’s dissent is itself an example of judicial lip service to the rule of law—an attempt by a judge to shore up his sense of his judicial role in the face of necessarily untrammeled executive discretion. If Simpson is right, it would be no accident that the history of adjudication of national security since *Liversidge* has played itself out in the manner just sketched, and this history would be grist for the Schmittian mill, much as John Locke’s quotation about the prerogative in the first epigraph to this essay is. Blackstone’s attempt in the second epigraph to recharacterize Locke’s definition, so as to provide a constitutional basis for controlling the prerogative, looks vain because only the executive can determine what is to the public detriment.

Any discussion of the adjudication of national security issues in common law jurisdictions must confront the prerogative, the residuary power of the sovereign, which—or so Dicey claimed—is the “residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.” The idea of the prerogative is difficult to translate into the modern era precisely because it derives from the sixteenth century, a time when sovereign power was concentrated in the person of the king. By the seventeenth

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In the 18th century, the king as sovereign was considered subject to two constraints. First, he could make law only through parliament. Second, he could not himself act as judge in his own cause but had to defer to his judges’ pronouncements as to the law. Today, while the greater part of government power depends on statute, it is still considered to be within the prerogative power wielded by government to prorogue and dissolve parliament, to conduct foreign affairs, to command the armed forces, to deal with situations of extreme emergency.

Because the sovereign is the “sovereign in parliament,” there is generally no difficulty in conceiving how the exercise of prerogative powers should be subject to the normal parliamentary safeguards of question and debate. Much more vexed is the issue of whether or not the exercise of prerogative powers can be challenged in the courts. If, as would appear to be the case, the only clear limitation on the exercise of prerogative powers is parliamentary, then the use of the prerogative, including its exercise on matters to do with national security, should not be justiciable or vulnerable to challenge in a court of law.

The claim regarding nonjusticiability is, of course, very close to a doctrine of “political questions” that are, by their nature, beyond the scope of judicial review. And Locke’s point is not so much about the actual history of the royal prerogative in these cases: it is about the necessity of nature asserting itself even in the face of history, in that such power will necessarily accrue to the executive branch. The inappropriateness, indeed, the inability of judges to impose the rule of law in these more local exceptional situations thus seems to prove Schmitt’s global point about sovereignty and the state of exception. Blackstone’s attempt in the second epigraph to manipulate Locke’s definition of the prerogative so as to make it susceptible to constitutional controls seems vain.

Notice, in this regard, that Lord Atkin’s dictum is, on close inspection, rather puzzling. He acknowledges that in times of war or emergency “the laws” are likely to be changed, and, in *Liversidge*, the House of Lords had to grapple with a legislative regime put in place to make it possible for the executive to detain individuals who threatened national security during a state of wartime emergency. Yet Lord Atkin wishes to claim that while the laws are changed, they “speak the same language... as in peace.”¹³ His dictum, then, is highly ambiguous. Does “laws” refer to the legislative regime or to some higher law—the common law of habeas corpus, which requires that “...no member of the executive can interfere with the liberty... of a British subject except on the condition that he can support the legality of his action before a court of justice”?¹⁴ Since this quotation is taken from a judgment that

¹³ *Liversidge*, [1942] A.C. at 244.

cited as authority Lord Atkin’s “classic dissenting judgment,” we could infer that the ambiguity is easily clarified. But even if we adopt this clarification, we have to ask what it means for this higher law to “speak the same language” while it is, at the same time, “changed.” Are the tones softer, so that judges should not let the law shout its message at the executive? And if the issue is volume, does this mean that the judges should intimate something to the executive, rather than enforce the rule of law?

But if that is right, then, on the cynical view, when judges claim that they are upholding the rule of law they are paying mere lip service to its values. They recognize that it is not business as usual but are unwilling to admit how unusual the business is. One might consequently want to drop any idea that a government under the rule of law is legitimate because the rule of law intrinsically protects important moral values or the fundamental interests of the individual. It might seem that a more hardheaded account of the rule of law is appropriate, one that merely explicates what makes law an effective instrument of political authority, all the while recognizing that the instrument can be put to bad as well as to good use.15

I will argue that Lord Atkin’s understanding of the way that law speaks amid the clash of arms is not best captured by metaphors of volume. Rather, it is revealed by articulating the model of the rule of law that best explains his reasoning. That model provides a genuine and attractive alternative to Schmitt, because, on its best understanding, it does not fall prey to a dilemma that Schmitt sets up as a trap for liberal democratic accounts of the rule of law, which I will call the dilemma of guardianship.

Briefly, the horns of this dilemma are, on the one side, the claim that judges are the guardians of the constitution and, on the other, that the guardian is the sovereign, who turns out to be the executive. The dilemma of guardianship was argued in these terms in late Weimar, but it is hardly unfamiliar in debates in late twentieth-century legal theory, though often the choice is portrayed these days as one between the judges and parliament. However, as soon as one concedes both the either/or nature of the choice and that, ultimately, the decisions that must be made about an emergency, global or local, are political, it seems to follow that the horn other than the one on which the judges perch must win.

My claim is that Lord Atkin’s model of the rule of law avoids this dilemma, once one understands that it is an aspirational model. Such a model presupposes the cooperation of the legislature, the judiciary, and the executive in maintaining the rule of law and that what is maintained is not merely formal. The rule of law tends to protect fundamental legal or constitutional values, just the sort of values that Lon L. Fuller had in mind when he argued that there is an internal morality of legal order.16

15 See Joseph Raz, The Rule of Law and its Virtue, in THE AUTHORITY OF LAW 210 (Clarendon Press 1979). Raz argues that government under the rule of law is subject to constraints inherent in legal order, but these constraints serve only to make law a better instrument of political authority.

The lawyerly reaction to my claim is likely the hardheaded one mentioned earlier—that aspiration and reality seldom meet, and a model of the rule of law that depends on legislative cooperation is useless. The test for such a model comes precisely when the legislature is not cooperating; when the government that controls the legislature gives to itself, through legislation, executive powers to deal with an emergency, powers that are deliberately unhindered by what the model considers to be the values of the rule of law. Since, in this situation, government is acting in accordance with the law, perhaps specially amended for the emergency, we should accept that the rule of law is not best understood along the lines of the aspirational model. If judges are unable, as they themselves often seem to recognize, to impose alleged fundamental legal values when the legislature stops cooperating, and yet the government is still acting lawfully, one should conclude that the fundamental values might well figure on some noble wish list, but are not intrinsic to the rule of law.

I will try to show, in what follows, that the aspirational model is not so easily refuted. The proper test for it is not whether judges are able, in all circumstances, to impose the values of the rule of law. The idea that this is the test comes out of the very same mind-set that leads to the dilemma of guardianship; if in the state of exception the judges cannot prevail, the guardian of the constitution must be some other institution.

I will argue for a different perspective. When there are compelling reasons for government to act in accordance with the rule of law, but government has handed itself through parliament the power to act unconstrained by that rule, we should see that the fact of a lack of constraint does not tell in favor of Schmitt. Rather, it tells us that a political choice has been made that requires justification since it cannot appeal to some idea of the brute nature of politics. A corollary is that until the choice against the rule of law is explicitly taken by the legal order, judges legitimately impose the values of the rule of law in their judgments. And the question of when the point of explicit choice is reached is one rightly open to interpretation by judges who adopt the aspirational model. And while I regard the choice against the rule of law as misguided, my argument is mainly not for or against the choice: only that the choice is a genuine one. However, I will sketch a partial defense of the choice for the rule of law at the end.

I will start by exploring more deeply the puzzle in *Liversidge*. There is much still to be learned from that fascinating case, and, despite the ill will between the majority and the dissent, the lesson is based on a combination of elements from the leading judgment of the majority, from the dissent, and even on a surprising kind of agreement between them.

17 Thus, as I mention in the conclusion, I will not contest, for example, the argument recently put by Oren Gross for what he calls the “extra-legal measures model,” which is a variation of Locke. See Gross, supra note 2, at 1096–1134. Contrast here Aharon Barak, *The Supreme Court 2001 Term: Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 148–60 (2002).

2. The puzzle in *Liversidge*

In *Liversidge*, the House of Lords had to interpret the wartime Regulation 18B, made by Order in Council under the authority of the Emergency Powers (Defence) Act, 1939. The statute authorized the cabinet to make such regulations as “appear . . . to be necessary or expedient for securing the public safety . . .,” and it specifically authorized regulations to be made “for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm.” Regulation 18B provided:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origins or associations or to have been recently concerned in acts prejudicial to public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

The only protection detainees had was that they could make representations to a three-person advisory committee, within the administration, whose chairman had to inform them of the grounds of their detentions so they could make a case to the committee for their release. The secretary of state could decline to follow the advice of the committee but had to report monthly to parliament about the orders he had made and about whether he had declined to follow advice.

The issue before the Court was whether it could require particulars about the grounds of a detention in order to test its validity. The majority held it could not, despite the fact that the phrase “reasonable cause” in Regulation 18B had been substituted by an executive committee for the more subjective sounding “if satisfied that” of the original regulation in order to head off a revolt in parliament. In the majority’s view, if the minister produced an authenticated
detention order, the detainee had the onus of establishing that the order was invalid or defective, basically showing that the minister had not acted in good faith.

In the leading judgment for the majority, Viscount Maugham recognized fully the change in wording in Regulation 18B and that other parts of the regulations generally adopted an “if satisfied that . . .” formula. He also acknowledged that the regulation impacted on liberty. But he rejected Liversidge’s argument that legislation dealing with the liberty of the subject “must be construed, if possible, in favour of the subject and against the Crown.” Rather, following the majority in R v. Halliday, a House of Lords decision on detention during World War I, he said that this interpretative rule has “no relevance in dealing with an executive measure by way of preventing a public danger.” The Court should adopt the “universal presumption” that if there were reasonable doubt about the meaning of the words, it must follow the “construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.”

He reasoned that while the prima facie meaning of “reasonable cause to believe” is, in the “absence of a context,” “if there is in fact reasonable cause,” the words need not have only that meaning. He found several reasons to support his conclusion that—in this context—“reasonable cause to believe” means the more subjective “if the official thinks” he has such cause. First, there was the fact that, in his view, no judicial control could be exercised over the second limb of Regulation 18B—that the secretary of state believes that it is “necessary to exercise control” over the person. And if that matter was left to the “sole discretion” of the official, it followed that the same was “true as to all the facts which he must have reasonable cause to believe.” Second, the secretary of state was not acting “judicially” when he made the detention order—he could act on hearsay and was not required to obtain legal evidence or to hear the person’s objections. Third, the Crown could refuse on the ground of privilege to disclose any evidence it wanted to keep confidential. Finally, the discretion was entrusted to a high member of government, responsible to parliament.

the meaning they had hitherto carried.” He confidently expected a decision in his favor. D. N. Pritt, The Autobiography of D. N. Pritt: Part One: From Right to Left 304–7 (Lawrence & Wishart 1965). See also Simpson, supra note 11, ch. 17.

22 Id. at 218.
23 Halliday, [1917] A.C. at 270 (Lord Finlay, LC).
24 Id. at 218–19.
25 Id.
27 Id. at 219–20.
28 Id. at 220–21.
29 Id. at 220–22.
In response, Lord Atkin excoriated his fellow judges for returning the Court to the days of the Star Chamber, where subjects could be detained simply on the say-so of the executive. They had, he seemed to suggest, abdicated their constitutional role of standing “between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”

But he also laid great stress on the fact that “reasonable cause to believe” was the formula used, citing chapter and verse from the common law and statute to show that these words meant that a court was entitled to test the basis for the belief.

In his magisterial work on detention under Regulation 18B, Brian Simpson is decidedly unimpressed by Atkin’s dissent. It is, he says, “quite unconvincing, for it fails to explain with any clarity at all how the supervisory role of the courts was to operate, granted the right, which [Atkin] conceded, to withhold information of a confidential character.” In Simpson’s view, Atkin’s real concern was not liberty but role—his sense that the executive was riding roughshod over judges. “All that he seems to have wanted was for the Home Office to exhibit deference to the judges by being a little more forthcoming about the basis for detention orders.”

Simpson also argues that the majority decision better reflects reality, given that the courts were not intended then, nor since, to have “any significant role in the business of state security.” He recognizes that “outside the particular field of security, a massive body” of law has been developed in which the courts have “an important role to play” in “controlling . . . the exercise of power.”

“Subject,” he says, “to the fact that Parliament can overrule them, the courts decide what their role is, and the principles they then formulate to express this role are called the law.” But this law, or the rule of law, he seems to think is not transplantable to the security field because of the veil of secrecy the executive draws there; there the law, or the rule of law, has “nothing to contribute.” In the “conflict between secrecy and the rule of law secrecy wins.”

Simpson’s realism is very reluctant. He is far from trusting the security services, since, as he says, “they are in the business of constructing threats to security, and the weaker the evidence the more sinister the threat is thought to be.” He also notes that secret administration is incompatible not only with

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31 Id. at 244.
32 SIMPSON, supra note 11, at 363.
33 Id.
34 Id. at 419.
35 Id. at 420.
36 Id.
37 Id. at 421.
38 Id. at 410.
the rule of law but also with parliamentary control and sovereignty. And in the closing pages of his book, he even seems to relent a bit in his harsh evaluation of the judges who tried ostensibly to impose the rule of law on the administration of Regulation 18B. They could, he said, have “prised more information out of the executive . . . and thereby empowered themselves to exercise a greater degree of supervision.”

A closer inspection of the reasoning in Lord Atkin’s judgment reveals that he was rather more sensitive to the issue of privilege and confidentiality than Simpson allows. Lord Atkin noted that the chairman of the administrative committee before whom the detainee appeared if he wished to object had to inform the detainee of the grounds on which the order against him had been made, grounds which the secretary of state would have to convey. And he expressed puzzlement at the thought that there could be a duty to inform the objector of the grounds presented to the committee, but that it was “impossible in the public interest to furnish the objector with them in court.” Indeed, it is important to know that the circumstances of Liversidge’s detention order were such as to make it—so Simpson describes it—“at the least, very close to being an example of an order made in bad faith.” And this was reflected in the fact that the grounds given to Liversidge before the committee were either so irrelevant or so bare as to be, in Simpson’s word, offensive.

In contrast, the more fully described grounds furnished to Ben Greene, in a case decided simultaneously with Liversidge satisfied Lord Atkin, and from this he inferred that it was possible in many cases to provide satisfactory grounds without raising issues of confidentiality. He further pointed out that, often, the issue would be one of protecting the confidentiality of informants rather than

39 Id. at 421.
40 Id. at 421–22.
41 Liversidge, [1942] A.C. at 240. As Simpson points out, the security services did not generally supply either the secretary of state or the chair of the committee with the reasons why they wanted people detained. So the whole process—from detention decision to committee review—was largely a charade. See SIMPSON, supra note 11, ch. 12, 13. But that it was a charade supports my argument below that judges are entitled to take a charade and try to render it real, thus confronting the government with the choice whether to accept the reality or to bear the political cost of doing without the charade.
42 SIMPSON, supra note 11, at 421. Liversidge was detained because he had lied about his background in order to join the RAF—his date and place of birth. He wanted to surmount the obstacle that a police file had been opened on him as a result of his business connection, in 1928, with two brothers who were tried on a charge of conspiracy to defraud. See id. at 333–37. Simpson demonstrates that Liversidge’s patriotic motives were impeccable as was his service before detention. But as Simpson also shows, Liversidge’s business activities just prior to the war involved contacts with foreigners, “and no doubt some were dubious people.” In addition, he seemed to have some connection with British intelligence, passing it information that he had gleaned in the course of his dealings. Id. at 335. Thus, it would have been open, I think, to the home secretary to give very bare particulars of the grounds for suspicion in regard to Liversidge’s “hostile associations.”
43 Id. at 339.
that of the information. However, in that case, the courts had, in section 6 of the Emergency Powers (Defence) Act, 1939, the power to order a trial to be held in camera, and he could not see why challenges to detention orders presented more difficulties than the trial of a spy.44

Finally, Lord Atkin and Viscount Maugham differed on another important issue. Lord Atkin reasoned that if a stricter standard were appropriate for whether or not the detainee met the test for detention, then the decision about its necessity must be subject to judicial scrutiny as well. If there were reasonable grounds for the belief that would usually dispose of the matter. While if there were reasonable grounds for the belief that would usually dispose of the matter, he contemplated circumstances where it could not be thought necessary to detain someone who was clearly of “hostile origin” because that person had lived in the country for so long and had a record of utter loyalty to it.45

Even more important than the fact that Lord Atkin’s understanding of appropriate judicial scrutiny seemed rather more realistic than Simpson allows is that there is some agreement between Atkin and Viscount Maugham. Unlike his fellow majority judges, Lords MacMillan and Wright, Viscount Maugham did not waffle in a self-exculpatory fashion about how he loved liberty as much as the next man, or about how the advisory committee was, in any case, an adequate rule-of-law safeguard for the detainees. Rather, he reasoned from the assumption that because information and sources often would have to be confidential it would be futile to try to impose a general requirement that the secretary of state justify detention orders to a court. He also said that if an appeal against the secretary of state’s decision “had been thought proper, it would have been to a special tribunal with power to inquire privately into all the reasons for the Secretary’s action, but without any obligation to communicate them to the person detained.”46

Where Viscount Maugham and Lord Atkin agree is that both think it possible to have such detentions reviewed and both agree that context is all important in determining if and how it is to be reviewed. The difference between them lies in the interpretative approach. For Lord Atkin, the interpretative context is structured by the common law principles he believes are at stake; namely, the general principle that executive decisions are subject to the control of the rule of law and the particular principle that judges should strain to find that liberty is protected rather than undermined by any legislative scheme. Thus, he is prepared to go as far as he possibly can to implement review, even if the review possible is not very effective. For him, the very fact that an internal panel has been set up is a legislative signal or intimation that detention decisions are susceptible to review, even if the committee does not have the teeth to perform the review.

45 Id. at 243.
46 Id. at 220–22.
In contrast, for Viscount Maugham all that matters, with one qualification, are the explicit terms of the statute as well as the regulations made under its authority. The qualification is that the minister’s decision has to be in good faith, although—as both he and Lord Atkin point out—the decision will be presumed to be in good faith unless the applicant can bring evidence placing the presumption in doubt. And in the absence of a duty to give reasons or particulars justifying the detention order, the duty to act in good faith has no content. In Maugham’s view, effective review requires that the legislature establish a quasi-judicial panel with authority to inquire into confidential material. Judges should not attempt to turn themselves into such a panel, and the difficulties in the way of any such attempt serve for him as secondary indications that no intention to have judges review these decisions should be imputed to the legislature or the cabinet.

My argument is that once one takes seriously Viscount Maugham’s idea of the appropriate kind of review panel, one that must be set up by the legislature, then we should be able to see that this idea actually proves the power of Lord Atkin’s dissent. The very reasons that operate as secondary considerations for Viscount Maugham’s construction of legislative intention and for Simpson’s critique of Lord Atkin’s dissent—the factors that made judicial review rather ineffective—can be seen as the point of that dissent. If rule-of-law controls are appropriate but very difficult to impose, given the structure put in place by legislation, judges should try, insofar as they can, to impose such controls. And they should do this not only to deal with the bad faith, or close to bad faith cases, as in *Liversidge*, but also to send a message to the legislature and cabinet that it is high time for them to put their house in order. That judges are only able to enforce the rule of law partially is hardly a reason not to enforce it at all. Rather, they should go as far as they can toward enforcing it, both because that is their duty to the individuals who would otherwise be subject to executive whim and arbitrariness and because they should send a message to the legislature about the need for it to cooperate better in maintaining the rule of law. This message requires a rather different tone from Lord Atkin’s judgment, which tends to blame the executive and his fellow judges for Liversidge’s plight rather than the legislature and the cabinet. In this sense, Simpson is right, inasmuch as Lord Atkin suggests, much too strongly, that all is well with the rule of law so long as judges will not be satisfied by mere executive say-so.

On the view that I am developing, Lord Atkin would have been justified in reaching his conclusion even if Regulation 18B had retained its original “if satisfied that . . .” wording. In his dissent, he makes too much of “reasonable cause to believe.” His citation of chapter and verse from legislation and the common law makes it look as if he is grasping at straws rather than making an argument from a position of strength, of which “reasonable cause to believe” is not the basis but rather the *evidence*. This argument would accept Viscount Maugham’s claim that words receive their meaning in context. But it would also insist that the context is established by the rule of law unless the legislation explicitly excludes the rule of law from operating.
“If satisfied that” does no more to exclude the rule of law from operating than does a privative clause, a provision in a statute that says the courts shall not review the decisions of a tribunal. In the common law world, courts have come to accept the position that a privative clause is largely empty, since a legislature cannot seriously intend that a tribunal be delegated legally unlimited authority, and so judges are constitutionally entitled to review decisions that encroach on those limits. How to make sense of the legislative message contained in a privative clause is not a topic for this article. The point I need to make is that there is a difference between the following kinds of legislative message.

On the one hand, there is the general hands-off message to the courts through a privative clause or (if judges choose to interpret it this way) a subjective grant of discretionary authority (“if satisfied that”). On the other hand, there is what I call a substantive privative clause, one that does not say “no review” but seeks explicitly to remove grounds for review, for example, by saying that the courts may not review even if a decision is unreasonable, biased, or made in bad faith. Only the latter kind of message serves to exclude the constitutional rule-of-law approach that I think is the proper basis of Lord Atkin’s judgment. Moreover, once that approach establishes the context, “reasonable cause to believe” is simply a confirmation from the legislative scheme of the constitutional basis for the scheme that the judge must assume to be in place until he is disabused by the legislature. It is, to draw on my title, a legislative intimation of legality that a judge should take into account, though not as a factor that is constitutive of the basis of his judgment.

It was, of course, the cabinet and not the legislature that made this intimation. Lord Atkin dealt with this fact by simply deeming the executive’s intention to be the legislature’s,47 while Viscount Maugham chose to claim that the change in wording made by the executive meant that less significance should be attributed to it than to a change in the drafting of legislation, which, he suggested would receive more attention.48 However, it was well known that the change in wording had occurred because of parliamentary unease with an uncontrolled power to detain. While the executive might have thought it had achieved a compromise that successfully fudged the issue without, in fact, putting in place an explicit review mechanism, such fudges are not legally insignificant, if one adopts the constitutional approach to the rule of law.49

The weaknesses in Lord Atkin’s judgment do not so much inhere in its basis as in the fact that his excessive reliance on the wording of Regulation18B derives from embarrassment. He himself noted, though commentators have

47 Id. at 232.
48 Id. at 223.
49 As I will suggest below, it is this same approach that leads some judges in the common law world, in more recent times, to attribute legal significance to executive ratification of human rights treaties, despite the fact that there has been no domestic legislative incorporation of the treaties. Just as the legislature should be ascribed an intention to uphold the rule of law, so judges should take seriously executive indications of its allegiance to fundamental rule-of-law values.
not generally picked this up, that the World War I decision of the majority of the House of Lords in *Halliday* affirmed the decision of a lower court of which he was a member. The question in *Halliday* was whether the executive was empowered to make a detention regulation when the enabling statute—the Defence of the Realm (Consolidation) Act, 1914—gave only a general power to the executive to make regulations for the defense of the realm. It thus could be distinguished from the question in *Liversidge* since the question, there, was about whether the executive could act in a certain way under a detention regulation whose validity was not in doubt, given that the Emergency Powers (Defence) Act, 1939—presumably with Lord Shaw’s dissent in *Halliday* in mind—specifically authorized such a regulation. But in following this distinction, Lord Atkin was unable to rely on Lord Shaw’s dissent in *Halliday*, since he was committed to regarding it as irrelevant to his present concerns. Thus, he studiously avoided relying on Lord Shaw’s sophisticated account of the common law approach to adjudication in matters of national security.

In particular, Lord Shaw warned against allowing the prerogative to make security-based detention decisions to get “into association with executive acts done apart from clear parliamentary authority.” Not only would that, in his view, be “an evil day”; it would amount to a “revolution.” “Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger.” This “basic danger,” he said, is found in an especial degree whenever the law is not the same for all, but the selection of the victim is left to the plenary discretion whether of a tyrant, a committee, a bureaucracy or any other depositary of despotic power. Whoever administers it, this power of selection of a class, and power of selection within a class is the negation of public safety or defense. It is poison to the commonwealth.

Lord Shaw’s reasoning supplies the premise that is not entirely articulated in Lord Atkin’s dissent. Legislation is legitimate only on condition that it does not grossly offend fundamental common law principles, and so judges should interpret legislation in light of such principles. Drawing on Blackstone, Lord Shaw reasons that the right to habeas corpus is of such fundamental importance to the constitution that judges will not allow it to be abridged except by express, unambiguous intention. As he put it, the judicial stance should be that “if

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50 Defence of the Realm (Consolidation) Act, 1914, 5 Geo. 5, c. 8.
52 Id. at 286.
53 Id. at 287.
54 Id. at 292.
Parliament had intended to make this colossal delegation of power it would have
done so plainly and courageously and not under cover of words about regulations
for safety and defence.”55 For judges to allow the right to be abridged is to
revolutionize the constitution, or, perhaps, more accurately to undertake a
counterrevolution.

3. In the black hole of legality

However, as Simpson points out, reality seems to triumph again and again.
He cites as a reflection of this reality Lord Denning’s dictum, in 1977, in
*R v. Secretary of State ex parte Hosenball:* “There is a conflict between the inter-
ests of national security on the one hand and the freedom of the individual on
the other. The balance between these two is not for a court of law. It is for the
Home Secretary. He is the person entrusted by Parliament with the task.”56

This case concerned the deportation of an American journalist on alleged
national security grounds. Those subject to deportation on national security
grounds were statutorily deprived of the right of appeal that individuals sub-
ject to deportation on other grounds enjoyed, and their only recourse was to
an advisory procedure modeled on that set up to administer Regulation 18B.
Hosenball argued that the common law required that he have a hearing from
the minister prior to deportation.

Lord Denning recognized that if the case were an “ordinary one” it might be
thought appropriate that judicial review was in order on the basis of the com-
mon law principle that one is entitled to a hearing before the decision maker
whose decision will affect one’s fundamental interests. But because the context
was national security, matters were different: “[O]ur history shows that, when
the state itself is endangered, our cherished freedoms may have to take sec-
ond place. Even natural justice itself may suffer a set-back. Time after time
Parliament has so enacted and the courts have loyally followed.”57 And in
support of these claims, he not only quoted, with evident approval, from the
majority judgments in *Liversidge* and *Halliday* but said that while these were
wartime cases “times of peace hold their dangers too. Spies, subverters and sabo-
teurs may be mingling amongst us, putting on a most innocent exterior.”58
He did recognize this meant that the liberties of the individuals affected were at
the mercy of the home secretary. But he then indulged, as Simpson puts it, in
some “rhetorical rubbish,”59 by saying that England was not like other parts of

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55 *Id.* at 291–92.
56 SIMPSON, *supra* note 11, at 419 *citing R. v. Secretary of State ex parte Hosenball,* [1977] 1
W.L.R. 766.
58 *Id.*
59 SIMPSON, *supra* note 11, at 419.
the world, where national security has been used as “an excuse for all sorts of infringements of individual liberty,” since in England “successive ministers have discharged their duties to the complete satisfaction of the people at large.”

An inspection of other decisions in the area of national security reveals a consistent pattern of judgments favorably disposed toward the executive. In addition, when developments in ordinary administrative law—that is, not involving national security—made it inevitable that judges asserted the authority to control public power in general, including the prerogative, sooner or later they also asserted that the prerogative to deal with national security is subject to the rule of law, as well, and thus to judicial review. Yet, in the same breath, they also said that executive say-so as to what was required in the interests of national security must prevail. In other words, they reinvented the prerogative under the guise of a doctrine of judicial deference.

As a result of the foregoing developments, a bifurcated approach emerged. In normal or ordinary administrative law, Lord Atkin’s dissent was often cited, and if the prerogative was discussed, then Blackstone’s definition was preferred to Locke’s. If national security was in issue, then, either explicitly or implicitly, Locke was preferred to Blackstone and the majority in Liversidge to the dissent.

Nor have things changed in what one could think of as the United Kingdom’s human rights era, the period in which the United Kingdom, by enacting the Human Rights Act (1998), joined those countries that have constitutionalized such rights. Prior to the enactment of this law, in Chahal v. United Kingdom, the European Court of Human Rights had rejected the United Kingdom’s argument that national security grounds are inherently incapable of being tested in a court of law. It held that the advisory panel for those subject to deportation on national security grounds did not give an “effective remedy” in terms of article 13 of the European Convention

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60 Hosenball, [1977] 1 W.L.R. at 783.


62 Lord Denning more than any other judge exemplified this bifurcation. In the same year in which his decision in Hosenball is reported, in a case of review of executive discretion affecting commercial interests, he quoted Blackstone with approval and said the following:

It is a serious matter for the courts to declare that a minister of the Crown has exceeded his powers. So serious that we think hard before doing it. But there comes a point when it has to be done. The courts have the authority—and I would add, the duty—in a proper case, when called upon to inquire into the exercise of a discretionary power by a minister or his department. If it found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject, then these courts must so declare. They stand, as ever, between the executive and the subject, alert, as Lord Atkin said in a famous passage—“alert to see that any coercive action is justified in law.” . . . To which, I would add, alert to see that a discretionary power is not exceeded or misused.


D. Dyzenhaus

The government responded through parliament with a statute in 1997 establishing the Special Immigration Appeals Commission (SIAC), a three-person panel of which one member had to have held high judicial office; the second had to have been the chief adjudicator or a legally qualified member of the Immigration Appeals Tribunal; and the third would ordinarily be someone with experience in national security matters. The 1997 statute gave an individual who would have had the right to appeal against a deportation order but for the fact that national security was involved a right to appeal to SIAC. And it gave to SIAC itself the authority to review the secretary of state’s decision regarding the law and the facts as well as the question of whether the discretion should have been exercised differently. There was, in addition, a further appeal possible to the Court of Appeal on “any question of law material to” SIAC’s determination. The statute also provided for the appointment of a special advocate who could represent the appellant if parts of the proceedings before SIAC took place in closed session because it was considered necessary for confidentiality. SIAC’s final decision is based on both the closed and the open sessions though the reasoning underlying the decision may not disclose information from the closed sessions.

SIAC thus seems to be an answer to Lord Atkin’s, Viscount Maugham’s, and Simpson’s concerns. It is seized of jurisdiction through a statutory right of appeal, and it has the explicit authority and the necessary expertise to review security decisions. Moreover, when the panel conducts its reviews, it has the same information on which the executive and the security services acted, which is fully tested even if it is highly confidential. At least, it is the answer, unless, of course, Simpson is right that judges are less motivated by a concern for the rule of law than about their place in the hierarchy of the legal order, in which case the creation of such a body might be seen as an occasion for judicial jealousy.

Such jealousy seems at least part of the explanation, albeit a rather perverse one, for the House of Lords’s decision in Secretary of State for the Home Department v. Rehman. Here, SIAC rejected the argument that the question of what could constitute a threat to national security was a matter for an exclusive decision by the secretary of state. It said that the definition of national security was a question of law, which it had jurisdiction to decide. It then found that the secretary of state had interpreted the phrase “national security” too broadly, since, properly understood, Rehman’s alleged activities did not affect the United Kingdom’s national security. National security, according

64 ECHR, supra note 10, art. 13, 213 U.N.T.S at 232.
65 Special Immigration Appeals Commission Act, 1997, c. 68.
66 Secretary of State for the Home Department v. Rehman, [2002] 1 All ER 122.
to the commission, included only activity that “targeted the United Kingdom” or United Kingdom citizens “wherever they may be,” or activities against a foreign government that “might take reprisals” against the United Kingdom. In addition, SIAC found that the specific allegations against Rehman did not meet the test it deemed appropriate in such cases, which it called a test for a “high civil balance of probabilities.” It further suggested that this failure occurred whether one adopted the secretary of state’s broad or its own narrow definition of national security.

The House of Lords held, on separation of powers grounds, that it was for the executive to decide what is in the interests of national security and, on the issue of the particular allegations against an individual, that these must stand unless they can be shown to be absurd. Most remarkably, Lord Hoffmann closed his speech with this passage:

Postscript—I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

The perversity, here, comes about because the Court, in order to preserve its sense of role, refuses to concede to SIAC the capacity to be a more effective enforcer of the rule of law than a generalist court that has at its disposal only the resources of the common law. To bolster its sense of place, the Court first interprets the legislation as giving the courts some review authority, though it clearly undersells the resources of the common law: courts can review only if decisions are manifestly absurd. But in the same cause, the Court then cuts down SIAC’s authority to fit the Court’s parsimonious understanding of its own role. Given the generous delegation of authority to SIAC, the result is little

67 Id. at 126, ¶ 2.
68 Id. ¶ 3.
69 Id. at 142, ¶ 62.
70 See id. at 139, ¶ 49 (Lord Hoffmann).
71 See Barak’s carefully phrased rebuke on this point to Lord Hoffmann in Barak, supra note 17, at 158, n.546.
different from that of the majority’s claim in *Liversidge*—that detention orders were not arbitrary since the courts could still check that they were made in good faith.

The question why this Court did not give full effect to the legislative message becomes even more pressing when one notes that two of the judges on this bench—Lords Steyn and Hoffmann—are responsible for articulating a principle of legality in ordinary administrative law that requires all executive acts be demonstrably justifiable in law, where law is assumed to include fundamental values. The puzzle is, then, why these two judges find that in some cases they are driven to constitutional bedrock, which they find to be full of values and principles, while in others they find that the constitution amounts only to a very formal understanding of the separation of powers.

One response to this puzzle would be to point out that in the cases where this principle of legality was articulated, the people affected by the decisions were citizens of the United Kingdom whose fundamental rights—liberty, freedom of expression, and access to the courts—were impinged on by the executive decisions. This response is reinforced by Lord Woolf’s judgment in *A. and others v. Secretary of State for the Home Department*. Here, the Court of Appeal overturned SIAC’s decision that section 23 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with articles 5 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because this section permitted discrimination on the grounds of nationality. This provision allowed for the detention of suspected foreign terrorists but not of British nationals. Article 5 of the ECHR enshrines the right of the individual not to be arbitrarily detained, while article 14 requires that all rights and freedoms secured by the convention are to be enjoyed without discrimination, including discrimination on the ground of “national . . . origin.”

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72 Thus, in *R. v Secretary of State for the Home Department, ex parte Pierson*, Lord Steyn said that “Parliament does not legislate in a vacuum” but “for a European liberal democracy founded on the principles and traditions of the common law.” [1997] 3 W.L.R. 492, 518 (Eng.). And in *R. v Secretary of State, ex parte Simms*, Lord Hoffmann said that while Parliament can override fundamental rights, the principle of legality means that “Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.” [1999] 3 All ER 400, 412 (Eng.).

73 *A. and others v. Secretary of State for the Home Department*, [2003] 1 All ER 816 (Eng.).


76 *Id.* art. 14, 213 U.N.T.S. at 232.
Intimations of legality amid the clash of arms

When the matter came before SIAC, the government’s lawyers argued that the measures in the Anti-Terrorism Act formed part of immigration control, and that it is legitimate in that field to distinguish between United Kingdom nationals and others. They argued, further, that there were objective reasons for focusing powers on foreign nationals as they represented the predominant threat. SIAC rejected the latter contention and found the government’s argument in respect of the first point simplistic:

A person who is irremovable cannot be detained or kept in detention simply because he lacks British nationality. In order to detain him there must be some other justification, such as that he is suspected of having committed a criminal offence. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of international terrorists—and we can see powerful arguments in favour of such a derogation—the derogation ought rationally to extend to all suspected irremovable international terrorists. It would properly be confined to the alien section of the population only if, as the Attorney-General contends, the threat stems exclusively or almost exclusively from that alien section.

In the Court of Appeal, Lord Woolf, relying on Rehman and other executive-minded authority, said that it was “impossible” for the Court to differ with the secretary of state on the issue whether or not action was necessary only in relation to nonnational suspected terrorists, though the Court still retained, he said, its “supervisory role.” He then reasoned that the detained aliens had no right to remain, only a right not to be removed, and this distinction, he said, “objectively distinguished” aliens from nationals. It followed from this that it was an “over-simplification” to argue that it was discriminatory to detain only aliens because there were “objectively justifiable grounds which do not involve impermissible discrimination. The grounds are the fact that the aliens who cannot be deported have, unlike nationals, no more right to remain, only a right not to be removed, which means legally that they come into a different class from those who have a right of abode.”

Lord Woolf also claimed that his conclusion promoted human rights, whereas the argument for the respondents would require the secretary of state to do more than he thought was necessary, which would undermine human rights by supplying an “additional intrusion into the rights of the nationals.”

77 The Court of Appeal and SIAC agreed that, notwithstanding the derogation by the government, there could still be discrimination in relation to article 5 read with article 14.

78 A., [2003] 1 All ER at 828, ¶ 37.

79 Id. at 832, ¶ 40.

80 Id. at 834, ¶ 46–47.

81 Id. ¶ 49.
This result, he said, would be “surprising.” Further, it was to be “hoped that although there is no time limit which at present can be imposed on their detention, the regular review of their positions, which the legislation requires, will result in their detention being of limited duration.”\(^\text{82}\) It was wrong to regard \textit{Chahal} as establishing that those who cannot be removed have a legally enforceable right to remain. They have a right not to be removed so as to protect their right not to be subject to treatment in breach of article 3, but that is not the same as having “a legally enforceable [Convention] right to remain.”\(^\text{83}\)

But this claim is unconvincing, to say the least. SIAC’s decision required the government to accept the political costs of a public disregard for human rights, whereas Lord Woolf’s ruling lets the government off the hook. His reasoning sustains Simpson’s charge of judicial lip service to the rule of law, since—on the way to overturning SIAC’s decision—he warned against the dangers of repeating past mistakes when it came to the internment of aliens,\(^\text{84}\) adding that his judgment conserved the rule of law.

The one ray of light is \textit{Abbasi}, where the Court of Appeal had to deal with the detention of Abbasi in what it described as a “legal black hole.”\(^\text{85}\) Abbasi was one of a number of British citizens captured by American forces in Afghanistan and transferred to Guantanamo Bay, an area controlled by the United States and thus beyond the jurisdiction of English courts. Challenges in the courts in the United States had led nowhere, because, as described by the Court of Appeal, these courts had held that the “legality” of the detention of foreign nationals rested “solely on the dictate of the United States government, and, unlike that of United States’ citizens, is said to be immune from review in any court or independent forum.”\(^\text{86}\)

Lord Phillips, for the Court of Appeal, accepted the argument that Abbasi’s detention contravened “fundamental principles recognized by both jurisdictions and by international law.”\(^\text{87}\) He referred here to Lord Atkin’s dissent in \textit{Liversidge}; to a dictum of Justice Brennan’s for the U.S. Supreme Court in 1963, where Brennan adopted the claim of an English judge that habeas corpus was “a writ antecedent to statute, and throwing its root deep into the genius of our common law”;\(^\text{88}\) and to the International Covenant on Civil and Political Rights, which, in article 9, provides the right of a detainee to have access to a court to decide on the lawfulness of his detention and, in article 2, requires that the parties, including the United States and the United Kingdom,

\(^82\) Id. at 835, ¶ 51.  
\(^83\) Id. ¶ 53.  
\(^84\) Id. at 821, ¶ 9.  
\(^85\) \textit{Abbasi}, [2002] EWCA at ¶ 22.  
\(^86\) Id. ¶ 66.  
\(^87\) Id.  
ensure that the rights protected by the covenant are accorded to all individuals “without distinction of any kind, such as . . . national origin. . . .”

Abbasi’s lawyers sought a finding from the Court that the foreign secretary had a duty to respond positively to Abbasi’s and his mother’s requests for diplomatic assistance. The Court rejected the claim put by the government that decisions by the executive are nonjusticiable when these pertain to its dealings with foreign states regarding the protection of British nationals abroad. On the basis of various policy statements made by the government, the Court found that a British citizen had a legitimate expectation that if he is “subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate.” The secretary of state was still free to give “full weight to foreign policy considerations, which are not justiciable,” and, here, the Court was keenly aware of the stated position of the Foreign and Commonwealth Office. This office relies on its ability to gather information in guarding against terror attacks against the United Kingdom, which entails not endangering the relationship between the United Kingdom and the United States in such a way as to impede the flow of information. “However,” said Lord Phillips, “that does not mean the whole process is immune from judicial scrutiny. The citizen’s legitimate expectation is that his request will be ‘considered,’ and that in that consideration all relevant factors will be thrown into the balance.”

Lord Phillips suggested that even where there were a “gross miscarriage of justice,” there could be “overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted.”

The “extreme case,” the one where judges should make a mandatory order that the foreign office give due consideration to the applicant’s case, would be in a situation where the office were, “contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated.”

But, Lord Phillips noted, such a case was “unlikely,” as seemed proved by Abbasi’s situation, which was, in fact, a topic of discussion between the two

90 Abbasi, [2002] EWCA at ¶ 98.
91 Id. ¶ 99 and see earlier ¶¶ 7 and 8.
92 Id. ¶ 99.
93 Id. ¶ 100.
94 Id. ¶ 104.
95 Id.
governments, and the Court did not “consider that Mr. Abbasi could reason-ably expect more than this.”96 If the Foreign and Commonwealth Office were to express any view about the “legality of the detention of the British prisoners, or any statement as to the nature of discussions held with the United States officials, this might well undermine those discussions.” In addition, on “no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly difficult time.”97

Finally, the Court expressed its confidence that the appellate courts in the United States would prove to have the “same respect for human rights as our own,” and it noted that the Inter-American Commission on Human Rights had “taken up the case of the detainees,” though it was as “yet unclear what the result of the Commission’s intervention would be.”98

But whether this is a genuine ray of light is questionable. On the one hand, the Court seems to be extending judicial control of the prerogative even further. The Court is engaged in a process of intimation different from a legis-lative or executive signal to the judiciary—it is letting the executive know that it would be concerned if it departed from its practice, and it is also sending a disapproving message to the government and to the courts of the United States.

On the other hand, if one looks at the decision in the context of Rehman and A.,99 it might seem that the Court of Appeal is willing to rely on the dissent in Liversidge and on the jurisprudence of normal or ordinary administrative law in security matters only when this makes no difference, when it can affirm the value of a practice in which the executive is already engaged. In addition, it is clear that the Court of Appeal in Abbasi regards the reach of the rule of law as purely procedural; it would not require the executive to do more than go through the motions of intervening. Finally, the Court left unclear what its stance would be if the executive announced that it would no longer make it a practice to intervene in such cases.

Just this tactic of going through the motions was unsuccessfully adopted by the Australian government in the wake of a decision by the Court of Appeal, relying on Minister for Immigration and Ethnic Affairs v. Teoh.100 In Teoh, the High Court of Australia held that executive ratification of a human rights treaty created a legitimate expectation that the rights would be taken into

96 Id. ¶ 107.
97 Id.
98 Id.
99 See Lord Woolf’s judgment in Rehman, [2000] 3 All ER 778.
account by administrative decision makers, despite the fact that the treaty had not been incorporated into domestic legislation. Two of the judges suggested that it would be hypocritical for the government to do otherwise, or, in my terms, to intimate its respect for human rights in the international legal order but to refuse to live up to equivalent commitments when it came to decisions within the domestic legal order. The failure of the Australian government to renege on its self-incurred obligations is significant. It seems to show that once the executive steps onto the rule-of-law path, judges can, if they have the nerve, keep it on that path until the point where the legislature orders the executive to step off.

Thus, one can concede that the judicial control in Abbasi was purely procedural and hence very easily satisfied. But if that control is seen as purely procedural only because it is at the outer reaches of legal order since Abbasi was under the control of a foreign government, and if judges demonstrate their willingness to exercise more substantive controls as one moves within the sphere of national sovereignty, then even pure proceduralism does not look like window dressing or lip service. Moreover, Lord Phillip’s judgment suggests that even beyond that outer reach there is no black hole, as international institutions might play a role, and the courts of the foreign jurisdiction might come to their rule-of-law senses. It is the creation of the black hole within the sphere of national sovereignty that is the true problem, and, in my view, the issue boils down, as I just suggested, to failure of judicial nerve.101

The invocation of the separation of powers and a doctrine of judicial deference, which we saw in Rehman and which has been echoed by the Canadian Supreme Court in its own retreat from the rule of law in national security cases,102 is merely cover for this loss of nerve. It results in an inappropriately pure proceduralism—pure proceduralism, where something more substantive is required—and it contradicts the development in both jurisdictions of a robust understanding of principles of the rule of law that are the basis of governmental accountability. Moreover, the legitimacy of judges holding government to account has been indicated not only by the acquiescence by legislatures and executives but also by the positive steps, on the part of these branches of government at the domestic and the international levels to increase the reach and intensity of control by the rule of law.

It is, I believe, impossible to draw any principled distinction between small-p politics or large-P politics that could demarcate the area of prerogative, or the

101 I owe this way of describing things to a remark made by a distinguished Canadian judge about the majority in Liversidge.

exceptional situation, where the controls of the rule of law are inappropriate. Indeed, here I agree with Schmitt, though I want to reject the implications he wished to draw. Those implications follow only if it is also impossible to have political accountability according to the rule of law in some situations; for example, if it were impossible to conceive of an institution such as SIAC. It might take, that is, institutional imagination—a readiness on the part of legislature, executive, and judiciary to experiment, unhindered by formal understandings of the separation of powers—to give full expression to the rule of law. But whether or not one should do this is not determined by the brute nature of the political, but by a political choice. Moreover, as I will now suggest, while this choice in a democracy is one for the people to make through their representative body, it is not a choice open to judges, at least it is not open to judges who regard it as their duty to uphold the rule of law.

4. Constitutionalism and emergency powers

My argument has been not only that the rule of law can be imposed in national security matters but also that judges are under an obligation to do so until they are explicitly told by the legislature that it wants government to govern outside of the rule of law. The full realization of the rule of law will require the cooperation of all three branches of government, but judges must adopt, as a regulative assumption underlying their own practice, that the other two are cooperating. Hence, judges should treat positive intimations of a desire to be governed by the rule of law—whether these come from the legislature or the executive—as evidence of the basis in constitutional principles to which all three branches are committed. However, intimations to the contrary should be ignored. It is not enough, for example, for a government to send a message to the judges by avoiding a declaration of a state of emergency while enacting, instead, a terrorism statute that introduces a series of partial exceptions into the ordinary law of the land. Just as judges should treat a state of emergency as governed by the rule of law, except insofar as there is explicit legislative command to do otherwise, so they should treat attempts to normalize or make a state of emergency permanent through a terrorism statute as subject to the rule of law.

Those who wield executive power might successfully act against the law, but for judges to validate such executive actions would be for them to confuse power with authority. If the law gives to officials in completely explicit terms the power to disregard rule-of-law values, judges might find that, in the absence of a written constitution, they are powerless to do anything about this. They are still, however, under a duty to uphold the rule of law. Hence, they should certainly not give in to the temptation to assert that all is well in

103 For a similar view, see Barak, supra note 17, at 101–2.
Intimations of legality amid the clash of arms

order to maintain that they still have their role. Judicial intimations of legality are to be shunned, since they usually are attempts to disguise the fact that the judges have lost their nerve. Rather, it their duty to point out publicly that a matter that is susceptible to the control of the rule of law, and which is very important for the rule of law to control, has been deliberately removed from such control.104

In sum, the nature of politics, or of the political, as Schmitt would put it, does not undermine the claim that there is a constitutional basis for the control of states of emergency or of exception by the rule of law. A choice has to be made, which is itself political, and which Schmitt conceals by dint of a series of stipulative definitions. At its starkest, the choice is between government under the rule of law and government by arbitrary power. One might argue that national security is different because judges will always lose their nerve when it comes to national security, or that the executive will always do what it sees fit in an emergency, thus bringing the law into disrepute if one seeks to impose the rule of law too strenuously. Or one might argue that there are some situations that are so exceptional it would be better to avoid an attempt to regulate them by the rule of law since that attempt will muddy the issue of the rule of law’s reach in less exceptional situations.105 But none of these arguments can support the claim that there is something exceptional about national security that makes executive decisions in the security area unsusceptible to the constitutional control of the rule of law.

There are, however, two better, closely related arguments. First, there is the argument that judges cannot have any significant independent role in scrutinizing executive decisions about national security without access to independent sources of information. Since the judicial branch cannot establish its own intelligence service, effective review is not possible. But this objection to judicial review is not to review of national security alone. Rather, it is an objection to

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105 This argument is advanced by Gross, *ibid* note 12, at 1096. His model seeks to reduce arbitrariness through ex post facto mechanisms of democratic accountability as well as ex ante requirements of public justification.
review in all those situations where the information on which the executive acts is not, by and large, in the public domain, so that the applicant for judicial review has to rely on the ability of lawyers to test the executive’s claim that the information it presents as the basis for its decision does provide a reasonable justification of the decision. All that makes the area of national security special—if not unique—is the issue of the sensitivity and confidentiality of the information. And, as we have seen, if a government is minded or required to think imaginatively about how to design institutions that implement the rule of law, it can create through legislation something like the Special Immigration Appeals Commission—a review panel that provides effective review while protecting confidentiality.

The second argument has to do with judicial ability to evaluate the information in the national security area. The concern, here, is not only with lack of expertise. It is also with the thought that as soon as judges become involved in the process of evaluating reasons for decision, whatever they claim about respecting a distinction between review and appeal, between an assessment of the legality of the decision and substituting their sense of the merits for the executive’s, they do, in fact, turn review into appeal.

In my view, the answer to these concerns, again, lies in imagination in institutional design. Recall that my point in linking Liversidge through Chahal to Rehman was that Lord Atkin’s dissent could not, by itself, provide a basis for the effective review of detention decisions. Rather, the dissent should be regarded as a prompt to government and the legislature either to accept the political costs of doing away with a charade of the rule of law, established by the phrase “reasonable cause to believe” and by the ineffective advisory committee, or to turn the charade into something real and effective. And “real and effective,” here, requires that those engaged in the review do not accept the say-so of the executive, whether it comes in the form of “We can’t tell you the reasons but there are reasons,” as in Liversidge, or, as in Rehman, “We will give you the reasons because we have no choice, but as long as we have reasons that are not absurd, our decisions must withstand review.” Indeed, developments in Canada, since September 11, 2001, suggest that judges will attempt to proceduralize hitherto quite substantive scrutiny of the executive when it comes to national security matters. They do this by turning a proper evaluation of whether the government can provide a reasonable justification of its decisions into a tick-the-box exercise, which simply checks to see that the government has provided reasons that are not absurd. ¹⁰⁶

Moreover, as before, the concerns are not confined to the national security area. There are concerns about judicial review more generally, once judges move away from a more positivistic or formal conception of the rule of law to a more substantive, common law model.¹⁰⁷ Telling here is that the Supreme


¹⁰⁷ Here, I think I am in agreement with Mark Tushnet, Defending Korematsu?: Reflections on Civil Liberties in Wartime, 2003 WISC. L. REV. 273, and Samuel Issacharoff & Richard H. Pildes, Between
Court of Canada did not describe its retreat from earlier jurisprudence, a retreat in which Lord Hoffmann’s judgment in *Rehman* was very influential, as confined to the situation of national security. Rather, on formal separation of powers grounds, the Court made a general claim that the earlier jurisprudence was wrongly interpreted if one thought it supported the proposition that when judges review they are entitled to “reweigh” the factors or reasons that the decision maker had to take into account. All they are entitled to do is to check that reasons are present.\(^{108}\)

I cannot defend, here, the claim that a model of the rule of law can both require that judges generally defer to executive decisions and hold the executive accountable to substantive as well as procedural rule of law values. However, it is on that defense that the claim rests, and not on any special feature of national security.\(^{109}\)


\(^{109}\) See David Dyzenhaus et al., *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD UNIV. COMMONWEALTH LJ. 5 (2001) and many of the chapters in *The Unity of Public Law* (David Dyzenhaus ed., Hart Publishing 2004). There is extensive discussion in several of the chapters in this collection of the implications of *Suresh*. 

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*Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime* 5 THEORETICAL INQ. L. (forthcoming 2004). However, I remain skeptical of their efforts to vindicate the U.S. Supreme Court’s decision in *Korematsu v. United States*, 323 U.S. 214 (1944), as these seem to rely on a very formal understanding of proceduralism, one which permits the executive to abuse legislation in order to escape accepting the political costs of operating outside of the rule of law.