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EXECUTIVE DETENTION IN TIME OF WAR

*Richard A. Posner**

IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN. By *A.W. Brian Simpson*. Oxford: Clarendon Press. 1992. Pp. x, 453. \$62.

During World War II, Great Britain, like the United States — and, I imagine, every other belligerent nation and doubtless many neutral ones as well — imprisoned a number of its own citizens (not to mention aliens) without lodging criminal charges against them. Brian Simpson, the versatile, distinguished, and prolific English legal historian and jurist now teaching at the University of Michigan Law School, tells the story of Britain's use of executive detention during World War II with his accustomed combination of wit, panache, an eye for the vivid and telling detail, narrative vigor and clarity, and tenacious burrowing in archives and survivors' (or their descendants') memories.¹

The legal vehicle for the program of detention was a regulation, denoted Regulation 18B, promulgated by the Cabinet pursuant to an emergency defense bill passed by Parliament a week before Germany invaded Poland in 1939. The regulation had been drafted much earlier, however; it was in fact an updated version of a regulation that had authorized executive detention in World War I and in troubled periods in Ireland. As amended shortly after the outbreak of World War II, Regulation 18B authorized the Home Office, which corresponds roughly to our Department of Justice, to detain any person upon "reasonable cause to believe" that he was "of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts."² The person detained was entitled to make "objections" to an advisory committee appointed by the Home Office, and the chairman of the committee was required "to inform the objector of the grounds on which the order [of detention, or other restriction] ha[d] been made and to furnish him with such particulars as [were] in the opinion of the chairman sufficient to enable him to present his case"

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1. Simpson understands that historians have a duty to report fascinating discoveries even when not strictly relevant to their study, so I was pleased to learn that the British Home Office "has a history of curious gifts, the oddest perhaps being a dead baby, posted to the Home Secretary by an eccentric parson back in 1884, and marked 'perishable.'" P. 391.

2. P. 424. The entire regulation is reprinted at pp. 424-25.

(p. 425). After hearing the objector's case, the advisory committee would advise the Home Secretary whether to continue or lift the detention order. The regulation contains no reference to judicial review.

A total of 1847 detention orders were executed under Regulation 18B, of which 1145 were against "straightforwardly British citizens" (p. 223) as distinct from aliens, persons who had been born in nations with which Britain was at war, or persons of uncertain nationality. The vast majority of the orders were issued in May, June, and July of 1940, the nadir of Britain's fortunes in the war; the peak month was June, when 826 orders were issued, although not all were executed. The names of persons to be detained were supplied to the Home Office by the Security Service, commonly known as MI5.³ The Home Secretary reviewed the Security Service's recommendation, though often perfunctorily, and if the recommendation was approved, the person to be detained was immediately arrested, without any warning, and imprisoned. If the detained person filed an objection, he was given a hearing before an advisory committee, though often not for several months. He could be advised by a lawyer, but the lawyer was not permitted to attend the hearing. The advisory committees were composed of distinguished private citizens; the chairmen were lawyers. Often, as a result of the hearing, the committee would recommend to the Home Office that the detained person be released, and these recommendations, though often opposed by the Security Service, were generally followed. Most detainees were released after some months; very few were held to the end of the war. Some challenged their detention in court, mainly by habeas corpus proceedings. These challenges were uniformly unsuccessful.

The largest group of citizen detainees were members or ex-members of the British Union of Fascists (BU), headed by Sir Oswald Mosley (he and his wife were among the detainees), or of other pro-Nazi or fascist associations. Among the persons detained were a Member of Parliament, a retired admiral, and a peer. The Security Service believed that the people it wanted detained represented a potential Fifth Column that would erode the British will to fight and, in the event of a German invasion, assist the German army. In retrospect it is apparent that the Security Service greatly exaggerated the danger of Fifth Column activity in Britain. The potential Fifth Columnists were few, and the vast majority of them were harmless cranks given to anti-Semitism and "nostalgic veteranism" (p. 116); one of the BU's front organizations was the London and Provincial Anti-Vivisection Society, and after his release one of the detainees composed an autobiography that he entitled *Out of Step: Events in the Two Lives of an Anti-Jewish Camel Doctor*. Even the leaders and hard-core members of the BU were, with

3. MI5 stands for "Military Intelligence 5"; the Security Service began life as a branch of military intelligence.

only a few exceptions, loyal to their country, though prone to admire Germany and to criticize Britain for having entered the war on the side of France and Poland. "That there was never any real need to lock most detainees up is simply common sense" (p. 411). The Security Service's mistake was soon evident, even to itself, and the continued if diminishing use of Regulation 18B after the summer of 1940 was largely a sop to the British Labour Party, which was fiercely hostile to the BU. Churchill was an early skeptic about the existence of a Fifth Column in Britain, and it was he who later in the war described executive detention as "in the highest degree odious" and "the foundation of all totalitarian government whether Nazi or Communist" (p. 391).

The number of detentions, in a nation of forty-seven million people engaged in a desperate struggle for survival, was small, the detentions mostly brief, and the exaggeration of the Fifth Column danger understandable, for it was an article of faith at the time that the collapse of most of Germany's enemies like Napoleon had been due to the "enemy within." Indeed the Germans themselves attributed their sudden collapse in the fall of 1918 to such machinations, and the term *Fifth Column* had originated in the Spanish Civil War, when Franco credited it as a factor in his victory. Better to be safe than sorry, the British authorities — security, executive, and judicial — must have believed. In incomparably more dangerous circumstances than those facing the United States after Pearl Harbor, the British responded to the danger of the "enemy within" with greater restraint than our government did when it decided to incarcerate tens of thousands of U.S. citizens of Japanese origin living on the West Coast.

Simpson was a child during World War II, but an old enough one to retain in adulthood vivid memories of the war. So it is a tribute to his detachment that he is so critical of Britain's program of wartime detention. And critical he is. He concentrates on three institutions involved in the program: the Security Service, the Home Office, and the courts. The key to his assessment of the Security Service lies in his statement that "intelligence organizations attract peculiar and unreliable people,"⁴ at least in time of peace. The Security Service had been a backwater between the world wars and thus was not adequately staffed at the outset of the second war to perform the duties heaped on it, including the enforcement of Regulation 18B. "Its archive must have largely comprised ill-digested and unreliable tittle-tattle," and "it concentrated on deviant groups, such as the Nordic League or Right Club, which possessed about as much significance in the life of the nation as the Flat Earth Society" (p. 417). Because "[s]ecurity, not

4. P. 92. An example was Harold Kurtz, later "employed to record the dying words of the Nazi war criminals incompetently hanged by the American executioner, an assignment which did not improve his drink habit." P. 368.

justice, is the business of security services" (p. 93), the Security Service showed scant regard for civil liberties. It was "engaged in the pursuit of phantoms" (p. 92); but then "those who believe in the enemy in our midst," as the Security Service was naturally disposed to do, "have minds insulated against evidence; its absence proves the extreme skill of the enemy" (p. 108). "You can never really trust security services, for they are in the business of constructing threats to security, and the weaker the evidence the more sinister the threat is thought to be. And the mechanisms which insulate them from public accountability contribute to their unreliability" (pp. 410-11).

The Home Office comes off better in Simpson's account. (The Security Service was not part of the Home Office; apparently it reported directly to the Cabinet.) "In general Home Office officials seem to have genuinely respected legality, though there was a willingness to stretch things and break the rules when it seemed in the public interest to do so" (p. 415). Simpson's major criticism is that the civil servants of the Home Office were implacably hostile to open government and judicial review. But he is also critical of the sudden arrests, which were made by officers of the Special Branch of Scotland Yard, a part of the Home Office, and of the conditions in the prisons (also run by the Home Office) in which the detainees were held. "An arrest was . . . rather like a heart attack, or indeed a visit from the Gestapo, in its immediate social consequences" (p. 87). No provision was made for informing relatives that a person had been detained or where he was being taken; and although detained persons, not being charged with or convicted of any crime, were supposed to be treated with consideration, in fact they were treated much like ordinary prison inmates, at least in the period of mass detentions. Mothers were sometimes separated from young children, and the medical needs of detainees were not always properly attended to. Some of the detainees were off their rockers. James Larratt Battersby, "known in fascist circles as 'the mad hatter'" (p. 250) — he was in the hat business — was detained for three years and after his release established a religious center for the worship of Hitler as the risen Christ. He committed suicide in 1955. "Cause and effect are hard in these areas to prove, but detention does not seem to have been good for Battersby" (p. 251). Simpson attributes "the apparent inhumanity" of the detentions to the callousness of Home Office officials: "A great deal of what the Home Office did, or still does, is intrinsically very unpleasant A certain detachment is needed to preside over such things. . . . Civil Servants deal with files, not people" (p. 415). Simpson acknowledges, however, that "many in the armed services in Britain in 1940 must have endured conditions quite as bad as those of the detainees" (p. 246).

As for the legal profession, it shows very badly in Simpson's account:

[T]he courts did virtually nothing for the detainees, either to secure their

liberty, to preserve what rights they did possess under the regulation, to scrutinize the legality of Home Office action, or to provide compensation when matters went wrong. The legal profession too, as a profession, did nothing; I am told that it was not easy to persuade lawyers to act for detainees at all. [pp. 418-19]

The basic position of the courts was that, so long as the Home Office acted on the basis of reasonable suspicion that the detainee fell under one of the criteria of the regulation, his detention was legal. Because the courts did not require the Home Office to submit to them the evidence on which its suspicion was based — the evidence consisted mainly of files of the Security Service, and the government might have asserted “Crown privilege” had the courts demanded them — judges were helpless to give meaningful review to the detention orders. They intoned “the traditional judicial humbug on the liberty of the subject” (p. 364) but were content to accept “the Home Office affidavit [that reasonable grounds for the order existed] as conclusive so long as no formal irregularities appeared” (p. 328). “Civil Servants were nervous of strong-minded judges” (p. 311) but had little to fear. One judge did dissent from the dismissal of a petition for habeas corpus, saying that “judges should [not] be ‘mice squeaking under a chair in the Home Office’ ” (p. 328), but he deleted this phrase from his published opinion, and “his concern was not so much with civil liberty as with judicial status” (p. 329). “The only circumstance capable of galvanizing the judges into action was blatant lack of respect for their status The judges were prepared to behave like mice, so long as they were treated like lions” (p. 331). “As for the traditional judicial practice of trumpeting professional solicitude for the liberty of the subject, the less said the better” (p. 419).

I have no basis for quarreling with Simpson’s criticisms in detail, but I think his overall verdict on the wartime detention program is too severe. That severity is evident from the passages I have quoted but even more so from the summary assessments sprinkled throughout the book. Simpson says that the function of law in the scheme that became Regulation 18B was to be “the instrument with which the rule of law was to be abolished, to be replaced by executive discretion, exercised by gentlemen, in secret, in pursuance of the public interest” (p. 44). “[T]he legal regime under which Britain fought the war was that of a totalitarian state” (p. 46). “Britain had, within a very few weeks, become, in the name of liberty, a totalitarian state” (p. 190). “[D]uring the war Britain was not, in any real sense, a democratic state” (p. 282). The ultimate question these passages raise is whether it is essential to the survival of liberal democracies “that they should temporarily cease to be liberal democracies until the threat is over” (p. 409).

The severity of Simpson’s assessment has many causes. One is his uncritical use of the terms *democracy* and *totalitarian*. He implicitly

divides the possible forms of government into just two, democratic and totalitarian; anything that is not one is the other, and in particular, anything that does not conform to a specific conception of democratic government is totalitarian. This classification is objectionable on three counts.

First, it conceals important distinctions. The fact that for a short period during the war Britain in effect suspended habeas corpus, as Lincoln had done early in our Civil War, is not equivalent to the wholesale extinction of liberty, legality, and democracy by Nazi Germany and the Soviet Union in war and peace alike. We should not forget that the British electorate threw out Churchill and the Conservative Party before the war ended, a dénouement unthinkable in a totalitarian state. The United States did not cease to be a democracy in 1942, even though it interned tens of thousands of its citizens on flimsy grounds.

Second, Simpson imposes on the term *democracy* an arbitrary and even somewhat paradoxical meaning — democracy ceases to be such if executive detention is permitted — though in fact there is tension between legality and democracy. Simpson acknowledges that there was no popular pressure to abrogate Regulation 18B even when the felt necessity for it had passed. Fascists and fascist sympathizers were, unsurprisingly, intensely unpopular; the British people were happy to see them detained. The popular will was fulfilled rather than thwarted by this “undemocratic” regulation. No doubt even popular measures for the repression of the politically unpopular can undermine democracy. Plebiscitary democracy, even Athenian democracy, which was notably lacking in legal protection of rights, is not the best, perhaps not even the most democratic, form of democracy. But it is rather a stretch to call a regime *totalitarian* merely because it does not place legal checks on democratic preference.

Third, it is untrue that democratic or liberal institutions must be invariant to circumstances. That idea was refuted by Justice Robert Jackson when he remarked that the Constitution is not a suicide pact.⁵ Liberal democracy is a means, not an end, and one of the ends to which it is a means is national survival in the face of a totalitarian nation bent on conquest. It is no more “totalitarian” for a liberal democracy to suspend some civil liberties in wartime than it is for a liberal democracy to have an army in which officers are appointed rather than elected.

Another source of Simpson’s negative assessment of Britain’s wartime detentions is his unwillingness, as it seems to me, to accept people and institutions for what they are. It is a fact, and a readily understandable one, that an intelligence service attracts peculiar and unreli-

5. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

able people in peacetime and may thus be inadequately prepared for the strains of war. It is readily understandable that civil servants resent political and judicial interference with their work, that police and prison work attracts people less delicate than professors, and that the work itself makes them more callous. As Hamlet put it, "the hand of little employment hath the daintier sense."⁶ It is also a fact that judges care about their status and are reluctant to check the executive in matters of national security. Our vaunted independent judiciary upheld the Japanese relocation, upheld the constitutionality of the Smith Act until the wind had gone out of the Act's sails, and has devised ingenious doctrines for minimizing judicial intervention in military and foreign policy. People being what they are, with their human failings and professional deformations, it is not to be expected that the administration of a program of executive detention in wartime will be a model of efficiency and rectitude. The question is whether the program, given the inevitable abuses, is on balance worthwhile. If it is, the abuses are worth pointing out, but they do not condemn the program.

The absence of a comparative dimension is a closely related source of Simpson's disparagement of his country's response to national emergency. Peacetime civil liberties are a luxury that nations engaged in wars of survival do not believe they can afford. The question for the realistic civil libertarian is not whether Britain curtailed civil liberties more than either seemed at the time or was in retrospect necessary, but whether it reacted more or less temperately than other nations in comparable circumstances would do or have done. So far as I can judge, the answer to this question is more temperately⁷ — than the United States, for example, which was far less endangered.⁸ Of course there are perils in using a purely relative standard. The administration of Regulation 18B caused hardships and, in hindsight at least, seems not to have contributed materially to Britain's survival or to have shortened the war. If there are lessons here that might enable Britain or the United States to deal more effectively with the problem of internal security in wartime the next time the problem arises, they ought to be drawn. But the only lesson Simpson draws is that Britain should not have destroyed "about 99 per cent of public records dealing with detention, which is in line with general practice" (p. 422) and should not be refusing access, half a century later, to most of the rest. I am sure this observation is right, but it makes for rather a tepid ending to the book; the ending reads as if the British government's greatest sin

6. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 5, sc. 1.

7. Simpson does remark this (p. 413), but he quickly drops the point.

8. J. Gregory Sidak discusses the Japanese relocation and other wartime suspensions of civil liberties in this country in J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992).

with respect to the wartime detention program was to make it difficult for academics to write the program's history.

I am not sure how many of these points Simpson would reject if they were pointed out to him, because his book displays considerable ambivalence about the ultimate merit of Regulation 18B. He notes official fears before World War II "that the horrors of the trenches had produced a state of affairs, symbolized by the celebrated King and Country motion in the Oxford Union in 1933, in which it might be extremely difficult for the government to conduct war at all" (p. 46). He acknowledges "the widespread [although, again, erroneous] belief that Norway's collapse was brought about by 'Quislings'" (pp. 98-99) and appears to agree that the British Union of Fascists "was pro-German and undermined morale, and might get up to mischief" (p. 167). In fact, "a British Fifth Column, that is a number of individuals who were, with some element of organization, clandestinely assisting the enemy, actually existed" (p. 171). While regarding "[t]he acceptance by the [House of] Commons of the detention of one of its own members in conditions of complete secrecy" as "quite bizarre in a liberal democracy," he acknowledges that "the times were desperate" (p. 282). He notes that "common sense would also suggest that detentions under 18B may have in some instances prevented individuals with pro-German sympathies from attempted acts of espionage or sabotage and been useful in contributing to the control of the IRA or in preventing leakage of information about the Normandy landings" (p. 412). The judges "may have been right in conceiving of the conflict [between them and the Home Office] in terms of status: not so much their personal status, but that of the institution to which they belonged" (p. 422). Regulation 18B may even "have saved some individuals from violence, from long prison terms, or even from death sentences" (p. 412), as it provided a relatively mild way of dealing with people who were hated and believed dangerous. Most important, the Cabinet had been advised in May 1940 that Britain could fight even if France fell, "so long as British morale held . . . ; a consequential recommendation was ruthless action against the Fifth Column" (p. 185). This "special sort of political necessity — to exhibit a ruthless determination to continue the war against Germany at whatever cost" (p. 412) — furnishes the strongest justification of Regulation 18B. As for those who

view executive detention as simply wrong in principle, [i]t is perhaps worth remembering that any absolute objection to detention without trial runs into problems unless it also excludes the pre-trial detention of persons accused of crimes, and the detention of the mentally ill, or at least explains why these practices may nevertheless be justifiable. [p. 413]

Simpson's ambivalence has the virtue of enabling the reader to form his own judgment. Mine is that the British government was

right to promulgate and enforce Regulation 18B and that the mistakes and injustices and suffering that resulted were no more than were inevitable given the nature of the program and the human and institutional resources available for its administration.

I have focused naturally on the areas in which I disagree with Simpson, but I would not like that focus to convey a misleading impression of my opinion of the book. My points of disagreement concern matters of judgment and interpretation rather than of fact; what I have called the book's ambivalence other readers will undoubtedly regard as the proof of an admirably judicious balance. As a work of modern legal and political history, *In the Highest Degree Odious* is a superb achievement. To its wealth of illuminating detail, which somehow does not slow the narrative, its breadth and scope, and the vividness and penetration of its account of British political and official life, I cannot do justice in a review. But I hope I have succeeded in imparting something of the book's Hogarthian, even Swiftian, flavor. It is that rare combination: a work of exhaustive scholarship, and a splendid read.