K D Ewing, Joan Mahoney and Andrew Moretta, MI5, THE COLD WAR, AND THE RULE OF LAW

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This outstanding and important book sheds new light on the often-unsavoury history of national security law in the United Kingdom. It does so by focusing on the rule of law issues raised by the work of MI5 during the Cold War. Until almost the end of that period – and the enactment of the Security Service Act 1989 – the Service ("MI5") lacked any clear legal basis and, despite occasional revisionist accounts, any legal powers to call its own. As the book shows, however, MI5 seems routinely to have exceeded the various directives which defined its functions and purported to limit its mission and to have interfered with individual liberties by carrying out surveillance of all manner of people who were not, and often could not have been, legitimate targets of its efforts. It is of course impossible to make this case via standard legal analysis. Precisely because of the extent of the illegality there is little or no legal record to examine. Even now very little detail about MI5's actual work, as opposed to the law applicable to that work, shows up on the public record: it is found, if anywhere, in redacted parts of the reports of the Intelligence and Security Committee and in closed judgments given by the Investigatory Powers Tribunal and, following the enactment of the Justice and Security Act 2013, the civil courts generally. For that reason, the book is based on careful archival research, which – though it necessarily sheds light on the topic only in a rather oblique fashion at points – is particularly impressive in context of the very significant gaps in the archival record.

Against the background of a clear exposition of how the rule of law is to be understood for purposes of this exercise – in short, in a largely formal fashion, with a conception of fundamental rights owing far more to the "civil liberties" tradition than modern "human rights" discourse – the book begins chronologically, providing detailed considerations of the instruments by which MI5 was governed before it was given a legal basis – the better-known Maxwell-Fyfe Directive of 1952 and, before that, the Attlee Directive of 1946, and the Stewart Report of 1945 from which that followed. No sooner are the various framings considered, however, than the book turns to the ways in which the activities of MI5 strayed, almost immediately, beyond the (unenforceable) bounds set for it, taking actions which could not have been justified with reference to what was supposed to be its sole legitimate aim: the Defence of the Realm. Subsequent chapters consider certain acts or patterns of action which are, from this point of view, particularly problematic: the surveillance of MPs, of trade unions and of lawyers, as well as the involvement of MI5 in the purging and attempted purging of the civil service and of trade unions.

Given that one consequence of the unwillingness of the state to legislate for MI5 was that, as Lord Denning put it in his report on the Profumo affair, that MI5 officers were "in the eye of the law, ordinary citizens with no powers greater than anyone else" (Lord Denning's Report, Cmnd 2152 (1963), 273), special attention is given to the ways in which MI5's actions belied this account. In particular, the book considers the use by MI5 of what were euphemistically called "special facilities" – eavesdropping either through planted microphones or using telephone receivers. This had no legal basis and was only given one long after the more traditional interception of communications had been regularised by the Interception of Communications Act 1985. If the state's position is that the absence of a legal basis was unproblematic because no such authority was needed – that is, that in the absence of a common law right to privacy this practice was not an analogue of *Entick v Carrington* (1765) 19 St Tr 1030, but rather of *Malone v Metropolitan Police Commissioner* [1979] Ch 344 – then we see clearly how legal positions which would have been politically intolerable if widely understood were maintained through pervasive secrecy as to what acts were being carried out in accordance therewith. As the litigation of the Snowden cases over the last decade or so has shown, this remained the case long after the Cold War had come to an end, and it would be foolish to assume that it has ceased to be true at some point in the last few years.

The book ends with two chapters on the role of particular judges – Lord Radcliffe and Lord Denning – in this milieu, focusing on the manner in which they were called upon to carry out various forms of oversight and review of the national security apparatus outside of the courtroom, being used, in effect, as "instruments of the government" (375). Amongst the themes which emerge from this exercise are the doubtful quality of many of these reviews, which often worked to promote

governmental interests and appear to have benefitted only marginally if at all from the stature, and ostensible independence, of the figures who undertook them. The recurrence of a small number of figures within this national security landscape is an important phenomenon, on which too little work has been carried out. An exercise of this sort might be undertaken in relation to other judges who played a variety of roles in the national security constitution: Lord Diplock is an obvious example, but Lord Griffiths is another promising candidate. One might note, in light of the observations made here about the appropriateness of Lord Radcliffe deciding, in the midst of his national security review work, cases in the highest court which touched on national security (*Chandler v DPP* [1964] AC 763), that Lord Brown of Eaton-under-Heywood has recently hinted in interesting terms at the tension which arises between extra-curial national security review and the traditional judicial role (S Brown, *Playing off the Roof & Other Stories: A Patchwork of Memories* (2020) 148).

Some key themes emerge out of and recur throughout the book. One is the remarkable futility of much of what MI5 did: massive resources were expended on efforts which were not only not covered by MI5's mandate but which in practice can only have distracted from or undermined work that truly was relevant to the Defence of the Realm. A relentless focus on the threat, often merely imagined, of the Communist Party of Great Britain appears at points to have gone hand in hand with an inability to detect and repel genuine threats. A second is the strong link between weaknesses of legal accountability and those of political accountability: to acquire a clear democratic mandate for what was being done would have risked revealing how much of it was probably or certainly unlawful; hiding what was done by MI5 so as to avoid political controversy meant never having to confront the fact that the legal basis of much of its work was so weak. All of this, therefore, was possible only because of pervasive secrecy, not all of which was obviously justified, and even that portion of which was clearly justified at one point in time appears destined to remain in place long after the justification has expired. Despite the modern legal regimes applicable to the security and intelligence agencies – and associated oversight practices – and despite their various public relations efforts, the degree of secrecy which allowed for such abuses is still fundamentally present in the national security domain.

Though the book's focus is on the Cold War, there is much reason to believe that issues of the sort identified in it continue to exist in the contemporary national security landscape. Over the years various findings of unlawfulness have been made regarding the modern practice of investigatory powers, with the information necessary to render them compliant with the ECHR entering the public domain only as a result of legal challenges (see B Keenan, "The Evolution of Elucidation: the Snowden Cases before the IPT" (2022) Modern Law Review (forthcoming)). The recent "Third Direction" case involved a challenge to MI5's policy – dating ultimately from the period covered by this book – of authorising agents (that is, those who are not MI5's employees) to commit crimes (*Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330). Though the courts have so far said the practice was lawful – relying on weak claims about the prerogative of a sort challenged here (at 20) and a narrative of continuity, whereby the Security Service Act 1989 must have empowered MI5 to do what it was already doing – the government nevertheless felt it necessary to give the practice a solid base in the form of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. Alongside that, the long-standing problem of setting the boundaries of MI5 and the other Security and Intelligence Agencies' powers via open-textured phrases persists – not just "national security" but also "economic well-being" and that function of MI5 by which it is required to protect against actions intended to "undermine" parliamentary democracy by "political means". That is, though the era of pervasive, inherent unlawfulness which this book describes may have passed into history around the end of the Cold War, often under the influence of the European Convention on Human Rights, it seems possible that practices of doubtful legality persist under cover of secrecy.

In that regard, one's primary response to this book is to wish that it was the first of many. Though the Cold War framing of this book means that events in Northern Ireland are out of scope, it seems inevitable – as the "Third Direction" case already suggests – that many of the phenomena so carefully analysed in this book (action by MI5 outside of its mandate, anti-democratic endeavours, outright illegality) would also be in evidence there. Given, however, the lengths to which the current government seems willing to go to prevent the true story of involvement in the Troubles not only by MI5 but also by the Royal Ulster Constabulary and the army (especially the notorious Force Research Unit) – up to and including, it seems, a statute of limitations on criminal and civil proceedings (Secretary of State for Northern Ireland, *Addressing the Legacy of Northern Ireland's Past*, CP 498 (July 2021))

– the possibility of that story ever being told in anything like full seems remote. And, again, though the zealousness with which evidence of MI5's (mis)deeds is protected even when (much) more than half a century has passed suggests that it would not be practicable, it would be fascinating to extend the method of this tremendous book to the work of MI6, about whose work over the years much less is in the public domain and the overseas focus of whose work both obscures and complicates the legal issues in play. Even if such hopes are disappointed, Ewing, Mahoney and Moretta have done a great service to the discipline in demonstrating what can be achieved in the domain of national security law notwithstanding the various obstacles which exist on standard doctrinal and socio-legal research in that field.

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