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Judicial Biography in the National Security Constitution: Lord Diplock and a 'Rather Silly Little Secret Racket'

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This article considers the extra-judicial work of Lord Diplock in the domain of national security in the context of his life and judicial work. It first considers briefly the role of judicial biography in understanding the work of judges and then the particular considerations which apply to such biography in the context of national security law and practice. The following sections consider Lord Diplock's role in national security oversight, emphasising the wide range of issues with a national security dimension which Diplock was called upon to consider. It then seeks to shed light on the reasons for which he was repeatedly entrusted by the government to consider matters of the utmost sensitivity by turning back to his early life, his service during the second world war, and his work thereafter.

> … I did not describe there anything of the enormous enjoyment these appointments provided over those years – indeed until 2006 when, by then a Law Lord, I refused further re-appointment as the Commissioner, having begun at that stage to feel a certain tension developing between that role and my judicial role in security-focused appeals to the House of Lords.
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> Simon Brown, Intelligence Services Commissioner (2000-06) and Lord of Appeal in Ordinary (2004-09).[1]

INTRODUCTION

William John Kenneth Diplock (1907-1985) – Baron Diplock of Wansford in the County of Huntingdonshire – was one of the leading public law judges of the 20th century, carrying on in many respects the work of Lord Reid in developing a distinctive approach to public law. But he was also a leading actor in the domain of what we would now call national security, being repeatedly called upon by the government to review the law and practice in sensitive areas. Some of his work in this area is well-remembered – perhaps chief amongst it

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1 Simon Brown, *Playing off the Roof & Other Stories: A Patchwork of Memories* (London: Marble Hill, 2020) 148.

the review by which he gave his name to 'Diplock courts'[2] – though other contributions are largely forgotten. He was in many ways at the forefront of the modern practice whereby senior judges are appointed to oversee the work of the security and intelligence agencies, not by deciding particular legal disputes but by auditing particular uses of the key powers and pronouncing upon that question in the round.[3] Diplock chaired the Security Commission for more than a decade, was tasked with reviewing the law applying to mercenaries in the mid-1970s and, in 1980, carried out a review of the interception of communications, which would not be given statutory basis (and made subject to formal oversight) for several more years. By then he was a member of the Appellate Committee of the House of Lords, where he would contribute to one of the most important public law judgments of the twentieth century in *Council of Civil Service Unions* v *Minister for the Civil Service*[4] (*GCHQ*), which turned on the sorts of national security issues with which Diplock had become so familiar outside of the courtroom. But Diplock's entry into this world did not come only after he took silk: Diplock spent much of the second world war working for a body known as the Home Defence (Security) Executive, which was at the heart of domestic security policy for the course of that war and in which he was exposed to a range of issues which he would later encounter in both his judicial role and his oversight work.

This article first considers briefly the role of judicial biography in understanding the work of judges and then the particular considerations which apply to such biography in the context of national security law and practice, focusing on the dual roles played by certain individuals such as Diplock, on and off the bench. The following sections consider Lord Diplock's role in national security oversight, emphasising the wide range of issues with a national security dimension which Diplock was called upon to consider. I then seek to shed light on the reasons for which he was repeatedly entrusted by the government to consider matters of the utmost sensitivity by turning back to his early life, his service during the Second World War, and his work thereafter. These sections, relating both to Diplock's reviews and to his work during the war, are informed in large part by material held in the National Archives in Kew, as well as relevant secondary material, and in particular by the papers of the Home Defence (Security) Executive, the story of which has not yet been told in detail.[5] The article concludes by reflecting on the linkages between Lord Diplock's biography and his judicial work and then suggests some ways in which the project of judicial biography in the national security constitution might be expanded. Given the expansion of the number and intensity of extra-curial roles in which senior judges are called upon within the national security constitution, the relationship between that work and the ordinary judicial role is ripe for reconsideration.

2 On which see, in retrospect, John Jackson, 'Many Years on in Northern Ireland: The Diplock Legacy' (2009) 60 NILQ 213.

3 See on that phenomenon Paul F. Scott, 'Hybrid institutions in the national security constitution: the case of the Commissioners' (2019) 39 LS 432.

4 *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374.

5 Lord Diplock predeceased his wife and they had no children. I have not been able to find any indication that his personal papers survive, though a small number of files relating to his time on the House of Lords are available in the Parliamentary Archives.

JUDICIAL BIOGRAPHY

Though the prominence of the genre seems to ebb and flow,[6] there is a long history of judicial biography – in the United States, in particular, but also of judges from the United Kingdom and, perhaps to a lesser extent, other common law jurisdictions[7] – the aims of which are multiple. Some biographers expressly disclaim attempts to link biography to the decision-making of the figure under examination. Others are willing to make more or less confident links between biography and, if not specific decisions, then at least the general approach or disposition of a judge and the manner in which it is reflected in his or her work. Elsewhere the value of the exercise has been called into question, at least in a general sense: judges, it has been noted in the US context, are often uninteresting people, who lead uninteresting lives.[8] And so often judicial biography plays some other role. Where the work of the courts, or the correct approach to the judicial role, is highly contested, biography becomes a mode by which particular decisions, the approach which underpins them, or the broader developments which they represent, are defended or endorsed.[9] Though Sugerman, documenting an important trend in modern legal scholarship towards a form of 'life-writing' which goes beyond the traditional subjects of legal biographies to encompass those who are traditionally neglected or obscured, has suggested that 'the once popular biographies of illustrious judges – and the mainstay of legal biography hitherto – appear to be in decline', judicial biography continues to be produced.[10] In many cases, however, the factors which may have contributed to that decline – 'decrease in deference, changes in the working practices of Parliament and the Bar which make it more difficult to practice law and politics, the fewer number of lawyers in the House of Commons, and the institutional and professional separation of law and politics, underpinned by an increasing

6 G. Edward White, 'The Renaissance of Judicial Biography' (1995) 23 *Reviews in American History* 716.

7 See for example, restricting ourselves to judges active in the 20th century and excluding memoirs by judges themselves, Geoffrey Lewis, *Lord Hailsham: A Life* (London: Jonathan Cape, 1997); Neil Duxbury, *Lord Kilmuir: A Vignette* (Oxford: Hart Publishing, 2015); Justice John Sacker, *Lord Devlin* (Oxford: Hart Publishing, 2020). For a consideration of the Australian position, see Tanya Josev, 'Judicial Biography in Australia: Current Obstacles and Opportunities' (2017) 40 *University of New South Wales Law Journal* 842, opening with the observation that 'Judicial biography – or the scarcity of it – is a matter of ongoing complaint in legal and academic circles in Australia'. Twenty years ago it was observed that not only in Australia, but also in New Zealand and Canada 'the writing of judicial biography has been a somewhat halting and sporadic enterprise': Philip Girard, 'Judging Lives: Judicial Biography from Hale to Holmes Alex Castles and Legal History' (2003) 7 *Australian Journal of Legal History* 87. If this was true at the time, it appears no longer to be so of Canada at least, where a number of biographical and similar works relating to judges have appeared in the last decade. For an attempt to extend the endeavour into the study of the British Empire, see Victoria Barnes and Emily Whewell, 'Judicial Biography in the British Empire' (2021) 28 *Indiana Journal of Global Legal Studies* 1.

8 Richard A. Posner, 'Judicial Biography' (1995) 70 *New York University Law Review* 502, 512.

9 Posner, *ibid*, 512. And see R. W. Kostal 'Shilling for Judges' (2006) 51 *McGill Law Journal* 199, 208: 'Dickson's life is not critically evaluated so much as it is used to consolidate a political position.'

10 David Sugerman, 'From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship' (2015) 42 *Journal of Law and Society* 7, 9.

commitment to the separation of powers'[11] – mean that judicial biography in the United Kingdom appears to be retreating back into a more academic pursuit, aimed largely at scholars and practitioners rather than the wider public. And if judges are less interesting to biographers than they once were, many seem to have chosen – either for that reason or, perhaps, for the far greater control it affords them, to say nothing of the demands of ego or the need to fill a longer retirement than was enjoyed by their predecessors – to produce more or less legally-focused memoirs whose value is in some cases more limited than is that of judicial biography from 'outside'.[12]

The distinctive national security context

There are a number of reasons for thinking that the national security context might demonstrate more than most the value of an approach based upon judicial biography. One is that in this context, much more than most others, judges in the United Kingdom do not simply judge. Rather, there is a long tradition of enlisting the judiciary into carrying out a more general oversight of relevant events or legal regimes. Sometimes this is in the context of the public inquiry, of which many of the most important – and most sensitive – have been presided over by judges.[13] Sometimes, now, it is in the context of one of the many oversight roles which have come and gone, or which persist, within the modern national security constitution as – starting with the Interception of Communications Act 1985 – the law was given a clear statutory basis and associated oversight. These include, for example, the Interception of Communications Commissioner, the Security Service Commissioner, the Intelligence Services Commissioner and now, encompassing the domains of all of these predecessors, the Investigatory Powers Commissioner.[14] There is also, starting at the same point in time, the modern move towards specialist tribunals in the security domain, usually operating some form of closed procedure and able to hear evidence that is either inadmissible in, or otherwise not disclosed to, ordinary courts: the Special Immigration Appeals Commission, the Investigatory Powers Tribunal and its various predecessors, and so on.

How particular judges are chosen to fill these security roles is not for the most part known, but it is clear that those who are so chosen will see up close

11 Sugerman, *ibid*, 9 (citations omitted).

12 See, in this category and restricting ourselves to the senior judiciary, John Dyson (Lord Dyson), *A Judge's Journey* (Oxford: Hart Publishing, 2019); Simon Brown (Lord Brown of Eaton-under-Heywood), n 1 above and *Second Helpings* (London: Marble Hill, 2021); Lady Hale, *Spider Woman: A Life* (London: Vintage, 2021).

13 For the appropriateness of that fact, see for example Iain Steele, 'Judging Judicial Inquiries' [2004] PL 738 and Sir Jack Beatson, 'Should judges conduct public inquiries?' (2005) 121 LQR 221. J. A. G. Griffith long ago noted the impossibility of a judge turning an inquiry with a political character into a neutral exercise, suggesting that the effect in practice was to damage the judicial system: J. A. G. Griffith, *The Politics of the Judiciary* (London: Fontana Press, 3rd ed, 1985) 48. One of the examples Griffith gave of this phenomenon was the work of Lord Diplock on the interception of communications (*ibid*, 49).

14 See Scott, n 3 above.

much more of the working of the security and intelligence agencies – their capabilities and the use they make thereof – than would be the case for a judge in the ordinary courts. It would hardly be surprising if, as a result, these judges view the national security enterprise more than a little differently than do those whose exposure to sensitive material is the occasional public interest immunity application lodged by the police, and the particular perspective they take carries over into their judicial role.[15] And this is the second point: it seems that, whatever is the current practice, it was once the case that those judges chosen to perform oversight roles in the domain of national security were those who had experience of relevant activities in the second world war and the period thereafter. Up until the 1980s, it was still the case that a significant proportion of the senior judiciary had served in some capacity during that war, some having experience not merely of service in the armed forces but of involvement with military intelligence in particular. There is therefore a particular potential value in considering how biography influences – maybe even in some cases causes – later decisions: those of the government to request that certain individuals assume oversight roles, and those of the judiciary to rule in certain ways. Alongside Lord Radcliffe, on whom much has already been written,[16] Lord Diplock provides an outstanding test case for this intuition. We will return at the end to the question of which other judges might usefully be considered in this fashion.

REPORTS AND INVESTIGATIONS

This section outlines briefly the various reports produced by Lord Diplock – acting alone or with others – in the broad domain of security.[17] The picture which emerges is of a judge seen by governments of both stripes as exceptionally well-suited to carry out oversight and make recommendations in a range of sensitive situations with a more or less significant legal dimension.

The Security Commission

When Diplock reported on the Northern Ireland question, he was already the Chairman of Security Commission, a post (of sorts) he held between 1971 and

15 See Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon, 1994) 490-491 (references omitted): 'An equally serious danger is to the appearance of impartiality when judges with inside experience of reviewing intelligence matter subsequently sit to hear cases involving questions of national security'.

16 For some discussion of Lord Radcliffe's work in this area see Neil Duxbury, 'Lord Radcliffe Out of Time' (2010) 69 CLJ 41; and Keith Ewing, Joan Mahoney and Andrew Moretta, *MI5, the Cold War, and the Rule of Law* (Oxford: OUP, 2020) ch 13.

17 I therefore do not consider here the range of other bodies of which Diplock was at one or other point a member. These include, for example, the Law Reform Committee (of which Diplock was a founding member: Law Reform Committee, *First Report (Statute of Frauds and Section 4 of the Sale of Goods Act, 1893)* Cmd 8809 (1953)) and the Wolfenden Committee: see its *Report of the Committee on Homosexual Offences and Prostitution* Cmnd 247 (1957).

1982.[18] The Commission was responsible for inquiring into the circumstances in which breaches of security had taken place. Leigh and Lustgarten, who produced the only direct academic consideration of the body, noted that '[w]hy particular judges receive the Prime Ministerial letter of invitation remains a mystery, but it may be not irrelevant to the process that the first chairman, Winn J., had served in naval intelligence and that both he and Lord Bridge (member of the Commission 1977–85 and chairman 1982–85) had before their elevation been Treasury Counsel'.[19] As discussed below, the same sorts of considerations were likely at work with the appointment of Diplock, who was suggested by William Armstrong (in place of Lord Dilhorne, who had first been suggested), and whose appointment was 'agreeable' to the Security Service.[20] Under Diplock's leadership, the Commission produced three substantive reports, two of them into the circumstances in which offences under the Official Secrets Acts had taken place.[21] In between these the Commission published an important report on the circumstances leading to the resignation from government of Earl Jellicoe and Lord Lambton.[22] The two Ministers had been involved with prostitutes and – in the case of Lord Lambton – possibly also with illegal drugs, and resigned. The Commission was to consider whether 'as a result of those incidents any classified information … was in fact communicated directly or indirectly to the intelligence service of any potentially hostile power' (no),[23] and whether there would have been a risk of such communication had they remained in post (in Jellicoe's case, no; in Lambton's, maybe).[24] More interesting are the Commission's observations as to the security arrangements applying to Ministers of the Crown. Ministers are not subject to formal security vetting, notwithstanding that the case for doing so has been advanced on various occasions.[25] The Commission noted that 'it has never been thought appropriate to subject Ministers to the positive vetting process, which is applied to officials so that a positive judgment may be taken that they are suitable to be entrusted with exceptionally secret information'. Though it concurred with this conclusion, the Commission did so not on the grounds of principle but of practicality: 'Against the background of the cases of Lord Jellicoe and Lord Lambton, we have considered this view and have concluded that the practical difficulties involved in trying to apply the process

18 On the Security Commission generally see Ian Leigh and Lawrence Lustgarten. 'The Security Commission: Constitutional Achievement or Curiosity?' [1992] PL 215.

19 Leigh and Lustgarten, *ibid*, 220.

20 For correspondence relating to Diplock's appointment, see TNA/LCO/2/8152 and TNA/BA/19/109. For the original suggestion see Dobson to Armstrong (2 December 1970) in TNA/LCO/2/8152. For Armstrong's suggestion of Diplock see 'Note for file: Security Commission' (23 December 1970) in TNA/LCO/2/8152.

21 Security Commission, *Report of the Security Commission May 1973* Cmnd 5362 (1973) (Security Commission 1973) and Security Commission, *Report of the Security Commission May 1981* Cmnd 8352 (1981).

22 Security Commission 1973, *ibid*. The other members of the Commission which wrote this report were Lord Sinclair of Cleeve, General Sir Dudley Ward, Lord Garner (former Head of the Diplomatic Service) and Sir Philip Allen (who had retired from the Home Office in 1972).

23 Security Commission 1973, *ibid* at [3].

24 *ibid* at [7]-[8].

25 See the discussion in Paul F. Scott, 'The contemporary security vetting landscape' (2020) 35 *Intelligence and National Security* 54.

to Ministers are insuperable, but there are other safeguards which operate in the case of Ministers which are not applicable in the case of officials'.[26]

Crucially, the Commission noted that it had satisfied itself that 'effective arrangements exist for drawing to the attention of the Prime Minister of the day any relevant security information which may have reached the Security Service about those whom he is likely to wish to appoint to Ministerial office'.[27] In the debate which followed, Labour MP Marcus Lipton (who had in 1955 named Kim Philby as the 'Third Man' in a House of Commons question on Burgess and McLean)[28] quoted two extracts from the *New Law Journal* – one said that 'Rarely can a government report on such an important subject as security have been so welcome to those who stand to gain by lax or confused security arrangements in this country' and the other that 'It seems to us that the ranks of the establishment have come together with an almighty clang' – and declared that a 'a perfectly fair description of the Diplock Report'.[29]

Under Lord Diplock's chairmanship, the Security Commission was asked also to 'to review the security procedures and practices currently followed in the public service and to consider what, if any, changes are required'.[30] The procedures had been put in place following a report by a Committee headed by Lord Radcliffe of April 1962.[31] The terms of reference of the Security Commission's revisiting of the matter asked it to 'review the security procedures and practices currently followed in the public service and to consider what, if any, changes are required'.[32] Its report – 'the most significant and wide-ranging' of the Security Commission's reports[33] – was not published. The government, with the agreement of Lord Diplock and the Commission, nevertheless chose to make a statement offering 'an account of the considerations which informed the Commission's thinking and lie behind the specific recommendations that are being published'.[34] Therein, it was observed that the 'external' threat ('from Soviet bloc intelligence services') remained but that the 'internal threat' had 'become more varied and viewed as a whole has grown more serious', in remarks which demonstrate both the desire to present a suitably even-handed

26 Security Commission 1973, n 21 above at [42].
27 Security Commission 1973, *ibid* at [42].
28 HC Deb 25 October 1955 vol 545 col 29.
29 HC Deb 19 July 1973 vol 860 col 855.
30 HM Government, *Statement on the Recommendations of the Security Commission* Cmnd 8540 (1982). The review was prompted by the publication of *Their Trade is Treachery* by the journalist Chapman Pincher, which claimed that Roger Hollis, Director General of MI5, had spied for the USSR.
31 *Security Procedures in the Public Service* Cmnd 1681 (1962). See Ewing, Mahoney and Moretta, n 16 above, ch 10.
32 This would allow it, the Prime Minister said, in a statement in which she denied the central claim of Pincher's book, 'to review, and to make recommendations as appropriate on, the arrangements and procedures used in all parts of the public service for the purposes of safeguarding information and activities involving national security against penetration by hostile intelligence services, and of excluding from appointments that give access to highly classified information both those with allegiances that they put above loyalty to their country and those who may for whatever reason be vulnerable to attempts to undermine their loyalty and to extort information by pressure or blackmail.' HC Deb 26 March 1981 vol 1 cols 1079-1081.
33 Daniel W. B. Lomas, 'Security, scandal and the security commission report, 1981' (2020) 35 *Intelligence and National Security* 734, 736.
34 HM Government, n 30 above, [2]. The specific allegations which had been made by Pincher, all of them predating Radcliffe's report, were not themselves considered by the Commission.

account of the security threat and the unwillingness to commit to the claim that the threats from left and right were genuinely equal that characterise much Cold War official writing on national security: 'The fall in CPGB membership, however, has been accompanied by the proliferation of new subversive groups of the extreme Left and extreme Right (mainly the former) whose aim is to overthrow democratic parliamentary government in this country by violent or other unconstitutional means, not shrinking in the case of the most extreme groups from terrorism to achieve their aims.'[35]

The Commission also identified the growth in computing as a significant change in the landscape and likely cause of new security challenges.[36] The bulk of the statement published, however, related to the security vetting system, on which a number of recommendations were made, including that all members of the Diplomatic Service be subject to positive vetting,[37] and that – in relation to the Home Civil Service, but not the Diplomatic Service or other posts potentially involving posting abroad – male homosexuality should not be a general bar to appointment.[38]

Northern Ireland and the 'Diplock courts'

The work outside the courtroom for which Lord Diplock is best-remembered, however, is the report, published in 1972, which recommended what became known as 'Diplock courts' – trial without jury.[39] The authorities had responded to the increase in violence in the early years of 'the Troubles' with mass arrests and internment, a form of indefinite detention without trial. In recognition of the desirability of finding a way to avoid reliance upon it, a Commission was set up with Diplock as Chairman.[40] The other members were the legal academic Rupert Cross,[41] George Woodcock,[42] and Kenneth Younger.[43] Its terms of reference were to consider 'what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist

35 *ibid*, [4].
36 *ibid*, [5].
37 *ibid*, [11].
38 '[M]ale homosexual inclinations or relationships should not necessarily be treated as an absolute bar to PV clearance, but should be dealt with on a case by case basis', *ibid*, [17].
39 *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (*Report*) Cmnd 5185 (1972).
40 Lord Diplock's wife, Margaret Sarah Atcheson, was 'a nurse, the daughter of George Atcheson who had set up and owned a shirt factory in Londonderry.' Stephen Sedley and Godfray Le Quesne, 'Diplock, (William John) Kenneth, Baron Diplock (1907-1985)' in *Oxford Dictionary of National Biography* (*ODNB*) (28 May 2015). The suggestion of Diplock may have come from Sir Denis Dobson, Permanent Secretary to the Lord Chancellor's Department, himself qualified as both a solicitor and barrister, and who had (as seen at n 20 above) been involved in the appointment of Diplock to the Security Commission: 'Note of a Meeting between Sir Denis Dobson and Messrs Woodfield, Semken, Bloomfield and Bampton on 26 September' (26 September 1972) in TNA/CJ/4/122.
41 Then Vinerian Professor of English Law at the University of Oxford.
42 Formerly General Secretary of the Trades Union Congress, and made a Privy Councillor in 1967: George Goodman, 'Woodcock, George (1904-1979)' *ODNB* (6 January 2011).
43 Formerly shadow Home Secretary and noted law reformer.

organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations'.[44] The Commission accepted that intimidation of witnesses was a real problem.[45] It therefore concluded both that while terrorism continued, 'there will continue to be some dangerous terrorists against whom it will not be possible to obtain convictions by any form of criminal trial which we regard as appropriate to a court of law' and that 'it will not be possible to find witnesses prepared to testify against them in the criminal courts, except those serving in the army or the police, for whom effective protection can be provided'. The hope then that it might find a way to evade the resort to extra-judicial processes proved to be a forlorn one: the efficacy of the criminal process could be restored only 'by using an extra-judicial process to deprive of their ability to operate in Northern Ireland, those terrorists whose activities result in the intimidation of witnesses'.[46]

The Commission did not end there, however. Its members 'thought it [their] duty to consider to what extent changes in criminal procedures which do not conflict with the minimum requirements to which we think criminal courts of law in Northern Ireland ought to continue to adhere, would enable some crimes which can at present be dealt with only by detention to be disposed of by public trial in courts of law'.[47] In answering this new question it noted that the problem of intimidation was not limited to potential witnesses but extended also to jurors, 'though not to the same extent', and cases had been moved to alternative venues in order to avoid intimidation of jurors.[48] This practice was hampered by the demographic issue in Northern Ireland. Protestants were the majority and over-represented amongst those meeting the property qualification. The consequence was that 'juries who have tried Republican terrorists, who until recently have been almost the only detected perpetrators of terrorist crimes, have been juries the great majority, if not all, of whom have been Protestants'.[49] Though the jury system as a method for trying crimes 'may not yet have broken down' the Commission thought the time 'already ripe to forestall its doing so'. It recommended therefore that, 'for the duration of the emergency' certain offences identified by it be tried not by a jury but by a judge alone.[50] This recommendation was enacted into law by the Northern Ireland (Emergency Provisions) Act 1973 and these 'Diplock courts' continued to take place until

44 'The fear of revenge upon "informers" is omnipresent … It is not an idle or irrational fear. It is justified in fact by many well authenticated instances of intimidation, and not least by the example, familiar to all other potential witnesses, of a witness who was shot dead in his home in front of his infant child the day before he was due to give evidence on the prosecution of terrorists.' *Report* n 39 above at [1].

45 *ibid* at [17].

46 *ibid* at [20].

47 *ibid* at [34].

48 'A frightened juror is a bad juror even though his own safety and that of his family may not actually be at risk. This has made it necessary in cases of this kind, either by choice of venue or use of challenge by the prosecution to pick the jurors from some different area where they are less vulnerable to intimidation.' *ibid* at [36].

49 *ibid* at [36].

50 *ibid* at [37]–[38].

the enactment of the Justice and Security (Northern Ireland) Act 2007,[51] which nevertheless provides for a system of trial without a jury – still often referred to as 'Diplock courts' – though no longer on the basis of a list of 'scheduled offences' which are automatically tried without a jury.[52]

The Commission's report was not, however, all that was said on the matter. Upon submitting the report, Diplock wrote to the Secretary of State, noting that – as a result of his role with the Security Commission – he had been supplied with 'intelligence material' not made available to the other members of the Commission, on the basis of which there were 'certain matters' which could not be discussed in the report.[53] Amongst these were observations on those within the legal system in Northern Ireland, including that one High Court judge (Mr Justice O'Donnell) had given a number of 'what can only be described as surprising rulings in favour of the accused … in trials of terrorists'.[54] Though he made no suggestion of disloyalty – the issue was, Diplock suggested, one of temperament – the process recommended in the report would allow trials not to be allocated to that particular judge.[55] And strikingly, in light of what would later happen in Northern Ireland, Diplock also noted that there was a 'small minority of politically committed barristers and solicitors … who could not be relied upon not to pass on to their client or to friends in touch with terrorist organisations any information derived from security sources upon condition that they did not communicate it to anyone else'.[56] This, he said, was an additional reason – over and above those given in the report – why a satisfactory *in camera* procedure could not be devised. Lord Diplock's role on the Security Commission must, therefore, have been part of the reason for which he was originally chosen for this work. It certainly impacted how he performed that role, even as the full benefit of his access to sensitive material had to be denied to his colleagues and the public at large.

After Lord Diplock's death, one of his colleagues on the Appellate Committee of the House of Lords lamented that the issue of the Diplock courts had dominated media coverage of his life: 'In truth, Diplock, like other judges before and since, accepted from the Government of the day the burden of an unpalatable task which he discharged to the best of his great abilities'.[57] Though this was not the only such burden borne by Lord Diplock, it seems clear that none of the others resulted in the sort of 'criticism and indeed abuse which',

51 For appraisals of the operation of the Diplock courts, see John D. Jackson and Sean Doran, 'Conventional trials in unconventional times: The Diplock court experience' (1993) 4 *Criminal Law Forum* 403 and, later, Jackson, n 2 above.

52 See Jessie Blackbourn, *Anti-Terrorism Law and Normalising Northern Ireland* (London: Routledge, 2014) 85-86.

53 Diplock to Whitelaw (4 December 1972) in TNA/LCO/58/4.

54 Mr Justice (Turlough) O'Donnell had been appointed to the Northern Irish High Court in 1971, and would be appointed to the Northern Ireland Court of Appeal in 1979. He did not accept the customary knighthood.

55 *ibid* at [13].

56 *ibid* at [16].

57 Lord Roskill, 'Lord Diplock: Our Recollections' (1986) 7 *Singapore Law Review* 36, 38. Roskill wrote 'on behalf of the Lord Chancellor, Lord Hailsham of St. Marylebone, and all the Lords of Appeal who were former colleagues of the late Lord Diplock'.

Lord Roskill noted, 'his recommendations subsequently brought upon him and which made it necessary for him to be guarded, down to the day of his death'.[58]

The recruitment of mercenaries

In the middle of his period as Chairman of the Security Commission, Diplock was called upon to chair a Committee of Privy Councillors – including Derek Walker-Smith[59] and Geoffrey De Freitas[60] – which was to inquire into and report on 'the recruitment of mercenaries'.[61] Announcing the inquiry, Harold Wilson noted that 'Lord Diplock, as the House will know, is Chairman of the Security Commission, and his expertise in that field will be especially relevant to this inquiry'.[62] The context was the recruitment of around 160 United Kingdom citizens, many former members of the armed forces, as mercenaries by the National Liberation Front of Angola, which had fought for Angolan independence and then become party to a civil war in the new state.[63] The Committee's task was to consider the effectiveness and possible reform of the 'existing legal powers to control the recruitment of United Kingdom citizens as mercenaries'.[64] Before doing so, the Committee considered the possibility of administrative sanctions which might prevent men travelling abroad to become mercenaries. This section of its report is significant, for it is one of the few sustained considerations of the law of passports offered in the 20th century, and its inclusion likely results from earlier research Diplock had carried out on the international law of passports.[65] The consideration here begins from the then-standard proposition that a passport has no legal effect: it 'does not confer upon its holder any greater right to leave or enter the United Kingdom than that to which he is entitled at common law.' And so withdrawing or refusing a passport is not as a matter of law an obstacle to a person travelling abroad.

58 *ibid*, 38.

59 Barrister and Conservative Member of Parliament for Hertford from 1945 to 1955 and for East Hertfordshire from 1955 to 1983.

60 Labour Member of Parliament for Nottingham Central (1945-50), Lincoln (1950-61) and Kettering (1964-79). De Freitas had been British High Commissioner to Ghana between 1961 and 1964 and would later be President of the Council of Europe.

61 *Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries* Cmnd 6569 (1976).

62 HC Deb 10 February 1976 vol 905 col 237. Its policy context was outlined by Wilson in a meeting with Diplock shortly after it was announced, with the Prime Minster also noting that he had intended the matter to be considered by a Joint Select Committee of the two Houses, but that the Leader of the Opposition, Mrs Thatcher, had been 'allergic' to that idea: 'Note for the Record' (20 February 1976) in TNA/PREM/16/1665.

63 The mercenaries were recruited mostly via adverts in British newspapers which invited former members of the British armed forces to apply for 'interesting work abroad'. The Committee noted, however, that '[a]ctive recruiting came to an end when it became known that a number of British mercenaries had been massacred by their own side in Africa.' *Report of the Committee of Privy Counsellors* n 61 above at [3]. See Geraint Hughes, 'Soldiers of Misfortune: the Angolan Civil War, The British Mercenary Intervention, and UK Policy towards Southern Africa, 1975-6' (2014) 36 *The International History Review* 493.

64 *Report of the Committee of Privy Counsellors ibid* at [4].

65 Kenneth Diplock, 'Passports and Protection in International Law' (1946) 32 *Transactions of the Grotius Society* 42.

Rather, it works as a purely practical obstacle: 'No administrative action can stop a United Kingdom citizen from volunteering for service as a mercenary once he is abroad, but his journey from this country to a foreign destination, though it cannot be prevented, can be hindered and made more difficult for him by his not possessing a valid passport.'[66]

For a variety of reasons, however, the use of passports as a solution to the problem of mercenaries was not practicable.[67] The key statute was the Foreign Enlistment Act 1870, which creates a series of offences relating to foreign enlistment,[68] applying however only to enlistment in the forces of any foreign state at war with any foreign state at peace with Her Majesty, with 'foreign state' defined so as to include 'any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people'.[69] The Committee concluded that the Act's provisions had 'become thoroughly unsatisfactory in modern conditions' and that it 'should be repealed and a fresh start made.[70] That fresh start should not however include an offence of enlisting as a mercenary abroad or of leaving the United Kingdom in order to so enlist.[71] The Diplock report, whose submission to the Government had been delayed, on the suggestion of Diplock himself, until the conclusion of the trial of mercenaries in Angola,[72] was subject to significant criticism at the time of its publication,[73] but has remained prominent within the legal literature on mercenaries. In the event, however, its practical significance was little: though the government originally intended to legislate in response to the report, the 1870 Act remains in place to this day.[74]

The interception of communications

The final report carried out by Diplock was that on the interception of communications, which he had been tasked by the Prime Minister to review in

66 *Report of the Committee of Privy Counsellors* n 61 above at [16].
67 *ibid* at [20]-[22].
68 Foreign Enlistment Act 1870, ss 4-6. On the history of the Act, as well as its invocation and proposals for its reform since Diplock's report, see Nir Arielli, Gabriela A. Frei and Inge Van Hulle, 'The Foreign Enlistment Act, International Law, and British Politics, 1819-2014' (2016) 38 *The International History Review* 636.
69 Foreign Enlistment Act 1870, s 30.
70 *Report of the Committee of Privy Counsellors* n 61 above at [41].
71 *ibid* at [44].
72 See Diplock to Callaghan (12 April 1976) and Callaghan to Diplock (20 April 1976) in TNA/PREM/16/1665.
73 See the discussion in Wilfred Burchett and Derek Roebuck, *The Whores of War: Mercenaries Today* (Harmondsworth: Penguin, 1977) 196-203. The internal response was also mixed. See for example 'Record of a Meeting held at the Foreign and Commonwealth Office on Tuesday 10 August 1976 to discuss the Diplock Report on Mercenaries' in TNA/FCO/53/494 for criticisms from within the Foreign Office.
74 For a discussion of some of the reasons why no legislation resulted, see Hugh Pattenden, 'Britain and the Rhodesian Mercenary Issue, c.1970-1980' (2021) 49 *Journal of Imperial and Commonwealth History* 777, 790-792.

1980.[75] The terms of reference of Diplock's work were to 'review on a continuing basis the purposes, procedures, conditions and safeguards governing the interception of communications on behalf of the police, HM Customs and Excise, and the Security Service as set out in Cmnd 7873'.[76] The command paper in question had been published earlier that year,[77] and was the first public consideration of the law and practice since the Birkett report had been published in 1957.[78] Diplock, who had worked on Northern Ireland, no doubt appreciated the significance of the ostentatious exclusion of that jurisdiction from his terms of reference.[79] The terms of reference suggest that Diplock was the precursor of what became, in time, the Interception of Communications Commissioner (a post first held by Lord Justice Lloyd).[80] As prefigured by the original announcement of his work,[81] however, the report produced in March 1981 was the only such report published until the Commissioner was appointed subsequent to the enactment of the Interception of Communications Act 1985. Describing his random sampling of interception warrants, Diplock noted the connection between this work and his other work in the security domain:

> My ability to do this effectively in those cases in which information of high security classification is involved has been facilitated by the fact that as holder of the position of Chairman of the Security Commission I am qualified to be the recipient of information which falls within even the 'top secret' class. This, indeed, formed the principal reason why I felt it to be my duty to accept the task of monitoring these procedures.[82]

He concluded that 'from the monitoring of the procedures for the interception of communications that I have been able to undertake up to the present date, that those procedures are working satisfactorily and with the minimum interference with the individual's rights of privacy in the interests of the public weal'.[83]

The choice of Diplock to carry out this review was met in certain quarters with a response which suggested that Diplock's capital was diminishing. While the report was awaited Labour MP Bob Cryer asked in Parliament if the Home Secretary accepted that 'secret reports by a Tory judge will give the impression that there is a cover-up? Is it not the best form of accountability for the right hon. Gentleman to report directly to this democratically elected House?'[84]

75 It is not possible to speak with confidence about the context in which this request was made, as all of the relevant records appear to remain closed.
76 Rt Hon Lord Diplock, *The Interception of Communications in Great Britain* Cmnd 8191 (1981), 2.
77 Home Secretary, *The Interception of Communications in Great Britain* Cmnd 7873 (1980).
78 *Report of the Committee of Privy Councillors appointed to inquire into the interception of communications* Cmnd 283 (1957).
79 See, noting the exclusion of Northern Ireland and the work of the Foreign Office ('more sensitive, and hence exemplary, areas') from the Diplock review and the White Paper preceding it, P. Goodrich, 'Freedom of the Phone' (1981) 3 *Liverpool Law Review* 91, 95.
80 See Scott, n 3 above.
81 HC Deb 1 April 1980 vol 982 col 208.
82 Diplock, n 76 above.
83 Diplock, *ibid*, 6-7.
84 The Home Secretary replied: 'It is perfectly clear, and was made clear when Lord Diplock was appointed to do this job, that his first review will be published. The hon. Member talks of a

Though much stock was placed in this report by the Government – who had, they noted, solicited it from 'one of our most respected judges'[85] – not all in the Commons were convinced, fearing that Diplock's focus on whether procedures were complied with missed the more important question of whether the interception of communication was happening outside the system of warrantry then in place:

> When I read Lord Diplock's report I was worried about the lack of concentration on the question 'Is all tapping covered by warrant?'. That is what bothers the members of the Post Office Engineering Union. They want to know whether all tapping is covered by warrant. The suspicion is that it is not. The figures that the Home Secretary has supplied do not correspond with what others feel is the truth. There is a gap. Therefore, the major problem is not that of the Home Secretary's control. There are other problems.[86]

Diplock proposed to 'continue to follow the system described in this Report of random checks of applications for issue of warrants' but the fruit of those efforts was – as had always been planned – never published,[87] though a reference to his second report is found in Hansard during debate on what became the 1985 Act.[88] This must have been his last: it was noted in 1982 that 'Lord Bridge of Harwich has now taken over from Lord Diplock as judicial monitor of the arrangements for the interception of communications'.[89]

With this Lord Diplock's long service in the field of national security came to an end – though he remained until his death in 1985 a member of the Appellate Committee of the House of Lords, which he had joined in 1968. When preparations were being made for the Falkland Islands Review, there was a discussion about whether a judge should be involved and, if so, whether the judge should be a serving or retired figure. The Attorney General suggested

"secret" report from a Tory judge, but the report will not be secret. I do not think that Lord Diplock would in the least like to be described as a Tory judge, but that is a matter for Lord Diplock and the hon. Member to sort out and not one for me.' HC Deb 18 December 1980 vol 996 cols 538-539. See also n 104 below and accompanying text.

85 HL Deb 19 May 1981 vol 420 col 855.

86 HC Deb 1 April 1981 vol 2 col 341 (John Golding). And see HC Deb 1 April 1981 vol 2 col 352 (John McWilliam): 'I have every respect for Lord Diplock. His report was excellent as far as it was allowed to go, but unfortunately it was allowed to cover only matters that are already adequately covered. Lord Diplock's terms of reference were to consider what was legal and properly covered by warrant, which is not our concern tonight.' And HC Deb 1 April 1981 vol 2 col 333 (John Gorst): 'It has been suggested that Lord Diplock's recently published report should have allayed any fears. Quite the contrary. Lord Diplock addressed himself to the procedures which take place when the Home Secretary has granted a warrant. He did not – and was not, I understand, required to – examine what might be happening without a Home Secretary's warrant. To that extent I regard his report as being irrelevant.'

87 'Will he also accept that there is accountability to this House for this serious incursion into the rights of the private citizen, and that regular publication of the Diplock reports would be at least a start in that direction, although no substitute for the Home Secretary's own accountability, because one might see in the publication of the reports a development of perception and scrutiny, even by Lord Diplock?' HC Deb 5 March 1981 vol 1000 cols 404-405.

88 HL Deb 6 June 1985 vol 464 vol 924 (Viscount Whitelaw).

89 HC Deb 22 July 1982 vol 28 col 519 (William Whitelaw). Lord Bridge was, like Diplock, a chair of the Security Commission: see Leigh and Lustgarten, n 18 above, 220.

to the Prime Minster that a Committee of Privy Councillors headed by a judge would be the preferred format. He noted that a Lord Justice of Appeal would be better than a Law Lord, because the Law Lords 'have recently, collectively, been associated with some unpopular decisions' and there were 'presentational advantages' in appointing a figure who enjoyed the respect of a senior judge while being 'virtually unknown to the general public'.[90] Lord Diplock was excluded from consideration for the post, being (it was said) 'unsuitable because of his special responsibilities and his wish to give up this sort of work'.[91]

LORD DIPLOCK'S EDUCATION AND THE WAR YEARS

How, then, did Lord Diplock come to be such a trusted figure for the government, called upon to perform a variety of extra-judicial tasks in the domain of national security over the course of a decade or so? Not only is a likely explanation for that fact to be found in Diplock's work during the war, but there exist striking linkages between that wartime work and some of the issues Diplock was later called upon to consider as a roving specialist in national security law and policy.

Early life

Kenneth Diplock was born on 8 December 1907 in South London. His father, William John Hubert Diplock, was a Croydon solicitor who specialised in patent law,[92] while his mother, Christine Joan Diplock (née Brooke), hailed from Yorkshire. Diplock was educated at Whitgift School and University College, Oxford where he was awarded a second-class degree in chemistry in 1929,[93] but 'it was always his purpose to go to the Bar'.[94] At Oxford, Diplock was the contemporary of Quintin Hogg, later Lord Hailsham, being Secretary of the Oxford Union when Hogg was its President,[95] and was remembered as

90 Michael Havers, Minute to Prime Minister (30 April 1982) in TNA/PREM/19/654, [2].
91 *ibid* at [2].
92 Sydney Aylett, *Under the Wigs: The Memories of a Legal King-Maker* (London: Methuen, 1978) 101.
93 Sedley and Quesne, n 40 above.
94 '[I]t was thought that his father's practice would provide Patent work for him there but his father died while he was still at Oxford so that put an end to that plan …': Aylett, n 92 above, 101. 'Lord Diplock was the next dominant Law Lord in IP. He gave the leading (often the only) speech time and time again. His interest in IP probably stemmed not only from the fact that he had a degree in chemistry but also from the fact that his father had been a patent agent', Robin Jacob, 'Intellectual Property' in Louis Blom-Cooper QC, Brice Dickson, and Gavin Drewry, *The Judicial House of Lords 1876-2009* (Oxford: OUP, 2009) 714 (citations omitted).
95 Aylett, n 92 above, 101. See Edward Pearce, *The Golden Talking-Shop: The Oxford Union Debates Empire, World War, Revolution, and Women* (Oxford: OUP, 2016) xiii: 'some of the very best, wisest speeches found in these pages come from future judges – Gerald Gardiner, Herbert du Parcq, Kenneth Diplock, and James Comyn.' When Diplock made his maiden speech in the House of Lords Lord Hailsham noted that 'politics lost a formidable debater when he embarked upon a sedulously austere legal career.' HL Deb 25 February 1971 vol 812 cols 1210-1211.

a 'forceful speaker'.[96] Diplock's background in the sciences puts in a somewhat unflattering light the short book he published in 1929, entitled *Isis, or the Future of Oxford*.[97] The book was a response to a book published in the same series by one Julian Hall, *Alma Mater, or the Future of Oxford and Cambridge*.[98] In *Isis*, which might be read as evidencing simultaneously an astonishing arrogance and a tremendous insecurity as to his own choice of studies, Diplock argued for the superiority of a focus on the study of classics, but also law (subjects which were studied by those who followed 'the Ideal for a University', and which he associated with Oxford) over the increasing focus on the sciences which he took (on the basis of his 'half-dozen visits to it') to be beginning to dominate at Cambridge.[99]

Diplock did not, however, remain at Oxford long enough to see his predictions falsified.[100] He was called to the Bar in 1932, and was (again, alongside Hogg)[101] a pupil of Theobald Mathew,[102] before leaving for the chambers of Sir Valentine Holmes and then those of Sir Leslie Scott.[103] Around this time, he was described as a 'leading member' of the Young Conservatives' Union.[104]

Diplock's some-time clerk, Sydney Aylett, notes of Diplock that it was 'apparent during his pupillage that he was bound for stardom',[105] and records that Diplock went to Holmes' chambers on his, Aylett's, recommendation and that of Mathews. In 1938 Diplock became Legal Secretary to the Master of the Rolls, Wilfrid Greene.[106] Come the War, Aylett notes, Diplock 'made worrying noises about joining up, but to my relief the army turned him down on medical grounds' and so Diplock instead assisted him in his duties as a warden.[107] Only thereafter did Diplock, 'determined that, come what may, he was going to get into uniform', make another attempt to enlist, applying to the RAF and then – following another rejection on health grounds – procuring from a private

96 John Parker MP, 'Oxford Politics in the Late Twenties' (1974) 45 *The Political Quarterly* 216, 218. Parker noted that Diplock was an exception to the practice whereby reports of debates were normally written by people who did not speak in debates: Diplock 'for a time wrote reports for both The Isis and its rival The Cherwell.'

97 W. J. K. Diplock, *Isis; or, the Future of Oxford* (London: Kegan Paul, 1929). A review called it a 'sparkling and thoughtful essay on Oxford as it appeared to him during the past five years', (1930) 125 *Nature* 382.

98 J. H. Hall, *Alma Mater, or the future of Oxford and Cambridge* (London: Kegan Paul, 1928). Hall was the heir to the Hall Baronetcy, of Dunglass in the County of Haddington, to which he succeeded in 1958.

99 Diplock, n 97 above, 87-95, noting (at 94) that 'Half-a-century ahead, when the choice comes to me to send my grandchildren to the technical-school-cum-research-station that will be Cambridge, or to the University that will still be Oxford; there will be no hesitation in my decision.'

100 Though falsified it was, see the discussion in Jack Morrell, *Science at Oxford, 1914-1939: Transforming an Arts University* (Oxford: OUP, 1997) conclusion.

101 Roskill, n 2 above, 36.

102 1866-1939. See (1939) 55 LQR 498.

103 Aylett, n 92 above, 101 and Sedley and Le Quesne, n 40 above.

104 *The Times* 6 December 1934.

105 Aylett, n 92 above, 102. Aylett says that his friends at the bar have demonstrated their value to him 'by their willingness not only to refresh but to correct' his memory. One of these friends is Diplock, Aylett, *ibid*, preface.

106 That same year he married Margaret Sarah Atcheson, a nurse, who would outlive him. They had no children. Roskill, n 2 above, 36.

107 Aylett, n 92 above, 103.

doctor 'some sort of medical certificate, which eventually enabled him to get into the Air Force, but for home service duties only'.[108]

Lord Diplock and the Security Executive

The Oxford Dictionary of National Biography entry on Diplock tells us that in 1939 he 'left his practice for war service, joining the Royal Air Force two years later and reaching the rank of squadron leader. He returned to the bar in 1945'.[109] What this leaves out is Diplock's work with the 'Home Defence (Security) Executive', which placed Diplock at the heart of the national security activities of the wartime regime, and may have been central to the later decision to recruit him in order to consider issues of considerable sensitivity.[110] The story of the Security Executive remains largely untold: its papers were long withheld,[111] and there has therefore been no account of Diplock's involvement in its work. Aylett though gives some sense of how Diplock might have ended up with the body in the first place. We are told he was made personal assistant to Air Vice Marshall William Dickson, at the time the Director of Plans in the Air Ministry. When Dickson was replaced, by John Slessor,[112] Diplock stayed on, 'working on Air Intelligence'. Finally, says Aylett, he joined Lord Swinton, who was in charge of the Security Executive: 'There, as he puts it, "I helped to run a rather silly little secret racket until the end of the war."'[113]

This would seem greatly to understate the significance both of Diplock's wartime work and of the 'rather silly little secret racket' more generally, the origins of which have been explained in the following terms, describing the period shortly after Churchill became Prime Minister:

> On 27 May the War Cabinet considered a grim paper from the Chiefs of Staff discussing whether Britain could continue the war alone if France fell. The conclusion was that so long as British morale held this was possible; a consequential

108 Aylett, *ibid*, 111-112.

109 Sedley and Le Quesne, n 40 above. Holmes served as an officer with the Royal Artillery during World War I and was later the Treasury Devil, during his time as which he was led by the Attorney General for the Crown in *Liversidge* v *Anderson* [1942] AC 206: John Laws, 'Holmes, Sir Valentine (1888-1956)' *ODNB* (23 September 2004). Leslie Scott (1869-1950) was a Conservative MP between 1910 and 1929 and was briefly Solicitor General. Following his political career, he returned to the bar and was appointed, in 1935, directly to the Court of Appeal, P. A. Landon (rev Marc Brodie), 'Scott, Sir Leslie Frederic (1869-1950)' *ODNB* (3 January 2008).

110 This is not to say that Diplock's involvement has been unknown, and indeed already shortly after his death Lord Roskill noted that 'during the War, lightly disguised as a squadron leader in the Royal Air Force, [Diplock] acted as Secretary of the then Security Executive under the chairmanship of Lord Swinton and thus gained the experience of intelligence work which stood him in such good stead when he became Chairman of the Security Commission, an office he held with great distinction between 1971 and 1982.' See Roskill, n 2 above, 36-37.

111 See A. W. Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992) 185-186: 'Its papers are, ridiculously, closed, but some have leaked into other files without any apparent harm to the national interest.'

112 Slessor was Director of Plans at the Air Ministry at the beginning of the War and was later Chief of the Air Staff: Max Hastings (rev), 'Slessor, Sir John Cotesworth (1897-1979)' *ODNB* (6 January 2011).

113 Aylett, n 92 above, 112.

> recommendation was ruthless action against the Fifth Column, and the proscribing of subversive organizations. The Cabinet accepted this paper, and one outcome was the establishment of a new expediting committee, the Home Defence (Security) Executive …[114]

The memo presented to the War Cabinet by the Lord President of the Council referred to it as a 'small central co-ordinating body' to be composed of members nominated by the Home Office, the Commander in Chief of the Home Forces, MI5, and MI6, it being open to the Chairman 'to co-opt additional outside members should this be found desirable'. The Executive would consider questions relating to defence against the Fifth Column; it would not take action directly, but rather through the relevant departments.[115] The very early focus of the Executive, its minutes show, was on topics such as the action to be taken against the British Union of Fascists,[116] and the internment of aliens.[117] In the following months other topics that attracted attention included the security situation in Ulster, enemy activities amongst alien seamen, and the operation of censorship. As had been apparent to Swinton from the start,[118] however, Churchill's belief in the existence of a Fifth Column proved to be ill-founded – it turned out to be, 'in reality, a mostly imaginary menace'[119] – and the Security Executive's work evolved significantly beyond its original remit over the course of its existence.

A memo from October 1942 clarifies a number of points about the Executive and its work. One was that by 'security' was understood 'the defence of national interests against hostile elements other than the armed forces of the enemy'; another that the security in question was not confined to the United Kingdom but extended to 'the Colonies, the Dominions and India, and covers such British interests abroad as the security of British shops and cargoes in foreign ports'.[120] The Executive had the function 'of co-ordinating all security activities, preventing overlapping and omissions, affording opportunity for the sharing of experience and maintaining a proper balance between security and other national interests'.[121] The Chairman consulted with the Lord President where necessary and referred to him any 'inter-departmental difficulties'.[122] The Chairman was 'assisted by two independent members without departmental associations or responsibilities',[123] and the Executive 'served by a small full-time staff of civil servants'.[124] A number of standing committees,

114 Simpson, n 111 above, 185.
115 'Home Defence (Security) Executive', memo of Lord President to the Council Neville Chamberlain (27 May 1940) in TNA/CAB/66/8/2.
116 HD(S)E, First Meeting – Minutes (28 May 1940) at [2], in TNA/CAB/93/2.
117 HD(S)E, Second Meeting – Minutes (28 May 1940) at [2], in TNA/CAB/93/2.
118 'The Executive had before them a paper summarising the policy of the Home Secretary on "Fifth Column" activities, regarding which the Chairman said that the difficulty he felt was that the organisation the Executive were fighting had only a suspected existence', *ibid*.
119 Christopher Andrew, 'Churchill and intelligence' (1988) 3 *Intelligence and National Security* 181, 185.
120 'The Functions of the Security Executive' (25 October 1942) in TNA/FO/371/32583 at [1].
121 *ibid* at [3].
122 *ibid* at [4].
123 *ibid* at [5].
124 *ibid* at [9].

chaired by persons 'provided by the Executive' dealt with specific issues: at the time the memo was produced these included the Liaison Officers' Conference (comprising specially appointed officers of a number of bodies, including the War Office, Home Office and security services),[125] the Seamen and Overseas Shipping Committee, the Control at Ports Committee, the Shipping Information and Home Shipping Committee, and the Committee on Communism.[126]

The Executive also managed a number of overseas bodies, including the Security Division of British Security Co-ordination (BSC) in New York and Washington and, through it, Consular Security Organisations in the United States and South America and an Industrial Security Organisation in South America.[127] BSC overall was headed by the Canadian William Stephenson;[128] its Security Division's head was Sir Connop Guthrie.[129] Back in the United Kingdom, there was taken, at the seventh meeting of the Executive, the decision to establish the Security Intelligence Centre (SIC).[130] The SIC had the particular task of co-ordinating intelligence on the German 'Fifth Column' but the differentiation between its work and that of the Executive proper 'soon proved to be artificial' and, by the middle of 1941, it had become clear that there was no significant such 'Fifth Column' in the United Kingdom and the SIC's distinct existence was 'ended by its absorption into the Executive'.[131] From this overview, it is obvious that all of those who were members of the Executive, or who worked for it in any capacity, will have been exposed to a huge range of material relevant to the security apparatus of the wartime state and, within that, those aspects of it which persisted into the post-war era.

What was later renamed the Security Executive[132] was chaired by Lord Swinton, also a barrister, who had won the Military Cross for his actions during the Great War and been elevated to the House of Lords in 1935, having sat in the Commons from 1918.[133] Other members included the Liberal politician

125 *ibid* at [10].
126 *ibid* at [8].
127 Sir Herbert Creedy, 'The Future of the Security Executive' (March 1945) at [25] in TNA/CAB/21/3499. More detail of this is found in a 'Report on British Security Co-ordination in the United States of America: Part II – Security' in TNA/HS/7/74.
128 On the BSC generally, see Nigel West, *British Security Coordination: The Secret History of British Intelligence in the Americas, 1940-1945* (London: St Ermin's, 1998). There is much mythology around Stephenson's work during the War: for an attempt to unravel some of it, see Timothy J. Naftali, 'Intrepid's last deception: Documenting the career of Sir William Stephenson' (1993) 8 *Intelligence and National Security* 72.
129 Guthrie, a Baronet who had worked for Ministry of Shipping in the USA during the first World War and enjoyed a successful business career between the Wars, had been 'tireless in building up and maintaining' the Security Division and had 'never failed to find time for any other special mission' on which the Security Executive wished to send him: Creedy to Wilson (Treasury) (30 July 1942) in TNA/CAB/301/82.
130 HD(S)E, Seventh Meeting – Minutes (10 June 1940), (2) in TNA/CAB/93/2. The SIC's papers are found in TNA/CAB/93/5.
131 See 'The Security Executive: An outline of its course and functions' (February 1946) in CAB/21/3498 at [10].
132 The name was changed on account of the confusion arising with the 'Ministry of Home Security' and the 'Home Defence Executive', see William Armstrong, 'Security Executive – Change of Title – Note by the Secretary' (1 October 1941) in TNA/CAB/21/3498.
133 See J. A. Cross, *Lord Swinton* (Oxford: OUP, 1982). The biography contains little relating to Swinton's work during with the Security Executive: see the review at (1983) 88 *American Historical*

Isaac Foot,[134] and the trade unionist Alfred M. Wall.[135] Lord Swinton, it is recorded, seems to have taken the view ('tacitly accepted') that he, Wall and Foot were the only permanent members of the Executive.[136] Early in the war the roles played by two other figures, Joseph Ball[137] and W. C. Crocker,[138] were the cause of much controversy, but it appears that they were only members of the Executive's staff and not (as some assumed) of the Executive itself.[139] In any case, both appear to have left their roles with the Executive relatively early

Review 1271. Swinton himself wrote briefly of the Executive and its work: Viscount Swinton, *I Remember* (London: Hutchinson & Co, 1948) 180-187. Cross notes amongst the other members William Armstrong, 'a young civil servant … who acted as secretary to the Executive', Ronald Wells, Joseph Ball, and Reginald Duthy. On Armstrong and the Executive, see Kevin Theakston and Philip Connelly, *William Armstrong and British Policy Making* (Basingstoke: Palgrave Macmillan, 2017) 54-59. When Diplock was appointed to the Security Commission in 1971 it was at the behest of Armstrong ('Note for file: Security Commission' (23 December 1970) in TNA/LCO/2/8152), who was also the person who approached Diplock to offer the post: Duke to Day (3 February 1971) in TNA/BA/19/109.

134 Liberal Politician, Member of Parliament for Bodmin (1922-1924 and 1929-1935), and Secretary for Mines in the National Government: Stanley Goodman (rev Mark Pottle), 'Foot, Isaac (1880-1960)' *ODNB* (9 January 2014). Foot was added to the Executive in October 1940. See also Michael Foot and Alison Highet (eds), *Isaac Foot: A Westcountry Boy - Apostle of England* (London: Politico, 2006) 229.

135 Simpson notes that Wall, General Secretary of the London Society of Compositors and a former communist, was, 'somewhat oddly' a member of the Executive, Simpson, n 111 above, 187. In February 1944 Wall wrote a foreword for the publication of Spartakus, *German Communists* (London: Hutchinson, 1944) arguing that the lesson to be learned from the errors of the past was that 'we must rely upon democracy, expressing itself through the institutions of free citizenship and in resistance to dictatorships and regimentation either from above or below', *ibid*, 6.

136 Untitled memo (November 1944) in TNA/CAB/21/3498.

137 Ball had spent more than a decade with MI5 starting from the outbreak of the First World War before leaving to work for the Conservative Party: Robert Blake, 'Ball, Sir (George) Joseph (1885-1961)' *ODNB* (23 September 2004). He was suggested for the post by Swinton himself, Morton to Churchill (11 June 1940) in TNA/PREM/3/418/1. The position of Ball in particular caused difficulty, with the press assuming he had been appointed for his Conservative background and not – as he claimed – for his relevant experience: see the correspondence in TNA/CAB/21/3498 and the various draft statements prepared for the PM before his statement to the Commons on 15 August 1940, which in the event did not name Ball or any other member of the Executive other than Swinton: HC Deb 15 August 1940 vol 364 cols 957-960. Simpson suggests that Ball was nominated by Chamberlain and joined by Major Desmond Morton, Churchill's nominee, Simpson, n 111 above, 186-187. Morton had a military background, having spent time as aide-de-camp to Field Marshal Douglas Haig during the First World War. He later took on various intelligence roles, before becoming personal assistant to Churchill – to whom he had long-standing links – early in the Second World War, see Ronald Lewin, 'Morton, Sir Desmond John Falkiner (1891-1971)' *ODNB* (3 January 2008) and Gill Bennett, *Churchill's Man of Mystery: Desmond Morton and the World of Intelligence* (London: Routledge, 2006).

138 Later President of the Law Society, Mark Lunney, 'Crocker, Sir William Charles (1886-1973)' *ODNB* (23 September 2004). See Morton to Churchill (29 August 1940) and the attachment (26 August 1940) in TNA/PREM/3/418/1, where Morton notes that he has been passed a letter by Ivor Churchill, sent from someone within MI5 (the sender's details have been redacted) criticising Crocker's behaviour since joining MI5 and asking, in effect, that the Prime Minister be prevailed upon to remove him. In his memoir, Crocker notes that, like the ghost in Hamlet, he is 'forbid to tell the secrets of [his] prison-house': 'This is a pity. I could have told a side-splitting yarn, but at the risk of being disbelieved.' William Charles Crocker, *Far from Humdrum: A Lawyer's Life* (London: Hutchinson, 1967) 220.

139 Untitled memo (November 1944) in TNA/CAB/21/3498, which emphasises that Crocker and Ball had 'joined the staff of the Executive'.

in the War.[140] It appears that the Chairman of the Committee made periodic reports in person to the Prime Minister regarding the Executive's work.[141]

A further memo, put before the War Cabinet two months after the Executive's formation, records that Lord Swinton had been entrusted with 'executive control' of MI5 and 'operational control' of MI6's activities in the United Kingdom and Ireland,[142] though correspondence suggests that the former's control of MI5 and MI6 was in a personal capacity and so distinct from the responsibilities Swinton had *ex officio* as Chairman of the Security Executive.[143] A few days later the Prime Minister was asked about the body in the House of Commons, responding that it 'would not be in the public interest to give any information on the subject covered by the hon. Member's Question'. The point was pressed further: 'As this committee was set up without any public announcement', the questioner – George Strauss – asked, 'and its purpose seems to be rather peculiar, would it not be possible to allay public suspicion by some announcement in regard to its activities?' The Prime Minister responded that 'A great many committees and a good many enterprises, some of them of a peculiar character, are set up without any public announcement' and that he could not see any advantage 'in dealing with the matter across the Floor of the House'.[144] Parliament was, therefore, told little about the of work of the Executive.[145]

140 See for example Daily Telegraph Reporter, 'Home Security' *Daily Telegraph & Morning Post* (15 October 1940), clipping in TNA/CAB/21/3498, noting Crocker's departure.

141 See for instance the letter to Churchill from October 1943 communicating Duff Cooper's wish to see him to present his quarterly report in TNA/PREM/3/418/5.

142 'Home Defence (Security) Executive/Special Operation Executive', memo of Lord President to the Council Neville Chamberlain (19 July 1940) in TNA/CAB/66/10/1. In February 1941, Sir David Petrie, who would shortly thereafter take up the position of Director General of the Security Service, produced for Swinton a report on the organisation of the Service and the need to reform it in light, in particular, of the growth it had undergone in the early war years, see Sir David Petrie, *Report on the Security Service* (13 February 1941) in TNA/KV/4/88.

143 See for example Petrie to Creedy (20 June 1942), Petrie to Creedy (6 July 1942), and Creedy to Petrie (7 July 1942) in TNA/CAB/21/3498. That arrangement was altered when Creedy took over as Chairman of the Security Executive: see 'Ministerial Responsibility for the Security Service' (22 December 1943) in TNA/CAB/21/3499.

144 HC Deb 23 July 1940 vol 363 col 604. Later that same day, in debate on the Emergency Powers (Defence) (No 2) Bill, another member noted that 'I feel very strongly on this point, more especially in view of what we heard at Question Time, in regard to this rather odd, secret Gestapo, which has been formed under Lord Swinton with a couple of toughs named Crocker and Ball': HC Deb 23 July 1940 vol 363 col 736.

145 The following was the fullest account ever offered to the House of Commons of its role and functions: 'The Home Defence (Security) Executive, over which Lord Swinton presides, is responsible for the co-ordination of a number of activities in connection with Home Defence, and the Services and other Government Departments are represented on it, and the executive has been furnished with the necessary staff. Lord Swinton was invited to undertake this work by the present War Cabinet and is responsible to the Prime Minister. The remuneration of the staff and the expenses of administration are borne on the Treasury Vote … The Prime Minister takes full responsibility for its functions and work.' HC Deb 8 August 1940 vol 364 cols 414–415 (The Lord Keeper of the Privy Seal, Clement Attlee). The questions in response to which this answer came focused upon the position of a trade unionist on the Executive. The individual in question was Alfred Mervyn Wall, 'General Secretary of the London Society of Compositors and a former communist', Simpson, n 111 above, 187.

Swinton's various roles were taken over, in June 1942, by Duff Cooper, then Chancellor of the Duchy of Lancaster,[146] who was in turn succeeded by Sir Herbert Creedy in January 1944.[147] The organisation was dissolved in July 1945,[148] with its work taken over by an Interdepartmental Committee on Security.[149] The list of its staff at the time of its dissolution includes one 'Mr W.J.K. Diplock' identified as 'Temporary Principal', one of the minority of members of staff who does not have a parent department.[150] Diplock appears to have joined the Executive in 1942. Lord Swinton's biographer – who interviewed Diplock in 1979[151] – notes that Swinton had met Diplock 'as a legal adviser to [Dannie] Heineman's Sofina',[152] of which Swinton was for several periods of his life a director.[153] The first meeting of the Executive proper which Diplock appears to have attended was the 69th, which took place in mid-1942.[154] Thereafter he attended regularly, though the minutes of its meetings show him making only (very) infrequent contributions at these full meetings, and only marginally more at the meetings of the various committees run by the Executive which he also attended.[155] He was often present at meetings of the Committee on the Control of Ports, usually chaired by Foot or Creedy.[156] He attended meetings of the Liaison Officers' Conference, infrequently in the period after joining the Executive but very frequently in the final year or so of the War,[157] and was present at the Executive's final meeting, at the end of July 1945.[158]

The papers of the Security Executive show it dealing with a number of issues relevant to work Diplock would later carry out in the domain of national security. So, for example, in 1940 blank British passports were acquired by Germans as a result of the invasion of Norway.[159] MI5 was concerned about the use to which these might be put by enemy agents and at its request to the

146 'The Security Executive', note by the Secretary of the War Cabinet (16 June 1942) in TNA/CAB/66/25/38. See also the correspondence relating to Duff Cooper's appointment and its announcement in TNA/PREM/3/418/3. The choice of Duff Cooper was not universally popular: HC Deb 10 February 1944 vol 396 col 1996 (Bevan). Duff Cooper briefly discussed some of the Executive's work in his autobiography: Duff Cooper, *Old Men Forget* (London: Rupert Hart-Davis, 1954).

147 'The Security Executive' *ibid*.

148 *ibid*. See also the exaugural correspondence between Churchill, Herbert Creedy, Isaac Foot and Alfred Wall in TNA/PREM/3/418/4.

149 See for example 'The Future of The Security Executive' (24 May 1945), a note of the meeting at which the relevant decision was taken, in TNA/CAB/21/3499, as well as other correspondence in the same file.

150 'The Security Executive' n 146 above, Appendix A.

151 Cross, n 133 above, 319 note 14.

152 *ibid*, 226.

153 *ibid*, 92, 257-258. Heineman was a Belgian/American engineer; Sofina (Société Financière de Transports et d'Entreprises Industrielles) the major Belgian holding company he managed from 1905 until 1955. 'Obituary: Dannie N. Heineman' (1962) *Physics Today* 84.

154 HD(S)E, 69th Meeting – Minutes (nd) in TNA/CAB/93/2.

155 He first attended, for example, the Security Intelligence Committee on 9 June 1942: Security Intelligence Committee, Note of 73rd Meeting (9 June 1942) in TNA/CAB/93/5.

156 The minutes of meetings of the Committee on the Control of Ports are in TNA/CAB/93/5.

157 The minutes of meetings of the Liaison Officers' Conference are in TNA/CAB/93/4.

158 Amongst the other attendees was one H. L. A. Hart of the Security Service: SE, 109th Meeting – Minutes (26 July 1945) in TNA/CAB/93/2.

159 TNA/CAB/114/38. The topic was first discussed in August 1940: see HD(S)E, Thirteen Meeting – Minutes (19 August 1940) in TNA/CAB/93/2 at [1].

Executive a scheme was put in place to counter that possibility. British subjects travelling to the UK from foreign countries 'would be advised in their own interest to take their passports to the nearest British Consul for endorsement', the Consul indicating – by means of a secret code – that he had confirmed the identity of the passport holder and his 'bona fide possession of it' or that, while he was satisfied of those things, 'he was not satisfied as to the holder's loyalty, or his motives in proceeding to the United Kingdom', or (and this would be communicated openly rather than in secret) that he had not had time to make enquiries. Though this would not stop British subjects entering the UK, those without an endorsement or with one indicating suspicion would be subject to greater scrutiny as a result.[160] It was, in that way, a secret visa scheme, which continued for the duration of the war.[161] Though Diplock was not involved in the original formulation of the scheme, he was party to correspondence about it as it was being discontinued.[162]

The Security Executive was also a central hub for the discussion of issues around censorship and interception.[163] At one meeting in July 1941, for example, it considered a paper produced by the Home Office and commented on by the Director of Postal and Telegraph Censorship.[164] The Home Office was proposing an amendment to the 'general warrant' so as to render the Ministry of Information a single point of responsibility for telephone interception, but had also raised the question of the interception of calls on the line of an individual subscriber.[165] On the latter, the Home Office was anxious to 'keep secret the use for this purpose of the very wide warrant, and to establish the principle that individual subscriber's lines should be tapped only when there was sufficient suspicion to justify the step'.[166] It accepted however that where suspicion of an individual arose from general listening, then it should be followed up without waiting for a warrant, and that 'the standard of suspicion should be lower than in peacetime'.[167] The Executive agreed the proposed amendment to the general warrant and suggested new arrangements for listening to individual lines.[168] Later, when Diplock was a regular attender of the SE meetings, discussion of censorship continued. At one meeting at which he was present, a topic of discussion was the use of telephone censorship

160 HD(S)E, Twentieth Meeting – Minutes (5 December 1940) at [5] in TNA/CAB/93/2. A copy of one iteration of the instructions to immigration officers can be found in TNA/CAB/114/38: Home Office Immigration Branch, 'Arrival from Enemy or Foreign Territory Order' (2 December 1940),

161 See the circular communicating the decision to (largely) bring the scheme to an end: 'Consular Passport Endorsements' (26 June 1945) in TNA/CAB/114/38.

162 Letter from MI5 to Diplock (26 June 1945) in TNA/CAB/114/38.

163 For discussion of the relationship between these two issues, albeit during the first World War, see Paul F. Scott, 'The first interception provision: Section 4 of the Official Secrets Act 1920' (2022) 43 *Journal of Legal History* 352, 365-366.

164 HD(S)E, 43rd Meeting – Minutes (30 July 1941) in TNA/CAB/93/2. The paper was HD(S)E/95 – Home Office, 'The Interception of Telephone Calls' (22 July 1941) in TNA/CAB/93/3.

165 See Home Office, 'The Interception of Telephone Calls' HD(S)E paper 95 (22 July 1941) in TNA/CAB/93/3.

166 HD(S)E, 43rd Meeting – Minutes (30 July 1941) in TNA/CAB/93/2, Appendix 1 at [1].

167 *ibid* at [1].

168 *ibid* at [5].

material. More publicity having been given to the carrying out of such censorship, the Security Service had proposed the use of such material in prosecutions. The Executive approved the statement of policy put before it.[169]

Diplock seems to have had a particular role in liaising with the Security Division of British Security Co-ordination. That body was 'primarily interested in the security against sabotage or accident of British shipping, material, factories, sources of supply, strategic interests, and government offices in the Americas, as well as of strategic ports, railroads and docks not properly protected by the local authorities',[170] with responsibility transferred from MI6 to the Security Executive in April 1942.[171] Diplock was in frequent contact with Sir Connop Guthrie,[172] including – for example – on matters of industrial security, especially in South America.[173] The immediately responsible body, controlled by the Executive via the Security Division, was the British Security Organisation in South America (BSOSA), charged with preventing the sabotage of 'British and Allied ships and cargoes and British controlled undertakings engaged in the production and transportation of strategic materials and the supply of essential public utilities'.[174] BSOSA, which worked closely with MI6, included a Consular Security Organisation and an Industrial Security Organisation.[175] And so, when plans for the Executive's overseas activities in the post-War period were being formulated, Diplock had become invested in the substance of this matter in particular, noting that he was personally 'both disappointed and disturbed at the apparent absence of any real plan for collecting commercial intelligence from or developing our markets' in South America.[176] Diplock was central to discussions about the post-war roles of Consular and Industrial Security Offices (CSO and ISO), including the use of information provided by the latter to encourage export trade, the possibility that the Foreign Office might make use of them, and the relevance to these questions of the fact that Nazis were planning to set up in South America after the war.[177] Ultimately, though the CSO and ISO were shut down at the end of the war, it was understood that those who had worked with the two bodies during it would continue to report 'matters of interest to British missions in accordance with their duties as British subjects'.[178]

The Security Executive itself was shut down at end of July 1945 in accordance with a plan in whose formulation Diplock was prominent,[179] with its

169 Home Defence (Security) Executive, Seventy-sixth Meeting (9 September 1942) at [3] in TNA/CAB/93/2.
170 'British Security Co-ordination – Security Division: New York' in TNA/CAB/114/45.
171 *ibid*.
172 For background to Guthrie's appointment see Swinton, n 133 above, 182-183.
173 See, generally, the papers in TNA/CAB/114/50.
174 'Note on the British Security Organisation in South America' (31 May 1944) in TNA/CAB/114/35 at [1].
175 *ibid* at [2]-[3].
176 Diplock to Guthrie (9 September 1944) in TNA/CAB/114/45.
177 See the correspondence in TNA/CAB/114/35.
178 Wells to Freese-Pennefather (11 June 1945) in TNA/CAB/114/35.
179 See for example Diplock to Guthrie (26 September 1944) in TNA/CAB/114/45, communicating a detailed plan as to the overseas activities of the Security Executive before, at, and after an anticipated cease-fire in Europe.

residual duties – relating to the security of merchant shipping in the western hemisphere – transferred to the Ministry of War Transport.[180] As part of this process Diplock was asked about the destruction of documents belonging to the BSC and those for which it was responsible. Diplock replied, in terms which make clear the exceptional nature of the body for which he was working, that the 'old established Government Departments are subject to Statutory Regulation as to the destruction of their official documents' but that '[w]e do not regard these provisions as applying to a secret and temporary department such as the Security Executive'.[181] From the relevant correspondence there emerges also some information as to Diplock's fate: a letter of 31 July 1945 notes that he was leaving government service the following day, and inviting his correspondent to contact him in due course at the Chambers, 4 Paper Buildings, to which he was returning.[182]

It is not possible to be certain what exactly were Diplock's responsibilities during his period working for the Security Executive. In practice, however, he appears to have been involved mostly in liaising between that body and British Security Co-Operation in New York, in relation to both its own work and that of other organisations for which it was in turn responsible. Diplock was a member of staff, rather than a member of the Executive itself, though the record shows that he was no mere administrator. Certainly, from about halfway through its life he attended meetings of the Executive proper, along with representatives from a range of government departments and the various secret security bodies, including those which continued in being after the war. Those meetings included extensive discussion of topics (or topics adjacent to those) upon which he would later be called by the government to report – most obviously interception of communications, but also issues around what would now be called freedom of movement and the security vetting of personnel. Diplock was, the record shows, in direct communication with many of those central to the national security enterprise, including – for example – Sir David Petrie, head of MI5 until 1946. More generally, he was embedded within an organisation whose range of responsibilities in the domain of security was probably greater than any other body that has existed in British history. Given the range and importance of the Security Executive's work, we understand clearly both the deep irony in Diplock's reported description of it as a 'rather silly little secret racket' but also, perhaps, why – when he became, as had long been clear he would, a distinguished lawyer – he was an obvious, and repeated, choice to carry out supervision and review of some of the most sensitive security matters of the day.

180 Correspondence between Creedy and Horcumb in TNA/CAB/114/45.

181 Diplock to Wolton (29 March 1945) in TNA/CAB/114/45.

182 Diplock to Wolton (31 July 1945) in TNA/CAB/114/45. Diplock appears though to have continued to practise to at least some extent during his time with the Executive, so that in 1944 – for example – he can be found giving legal advice to Churchill on the question of film rights for 'A History of the English Speaking People': Opinion by Kenneth Diplock (10 Febraury 1944) in Churchill Papers, CHAR/8/713. He also appeared in a small number of reported cases in this period: see for example *Land Settlement Association, Limited* v *Carr* [1944] KB 657, where Diplock – led by Valentine Holmes – appeared for the Land Settlement Association.

LORD DIPLOCK AFTER THE WAR

Lord Diplock at the bar

Shortly after Diplock returned to the bar, he published a paper on the international law of passports,[183] a topic – chosen, he said, because it was of 'some immediate topicality'[184] – on which he would, we have noted above, much later write in an official capacity, and to the importance of which he had been exposed during the war. The modern sense of passports, Diplock noted, was 'almost without exception ignored even in the most recent editions of the standard textbooks on International Law' with the relevant knowledge appearing 'mainly to be locked up in the archives of the various foreign offices'.[185] Diplock showed that the idea of a passport had evolved over time, being now 'in essence, a document of identity with which a State may – but not necessarily does require alien travellers within its territories to be furnished'.[186] Turning to the domestic legal import of passports, Diplock was dismissive of attempts to identify their legal effect, asserting not only that they are of no legal relevance to one's right to enter or leave the country but also that it was not possession of a passport but rather nationality which determined the existence of a relationship of allegiance and protection between citizen and state.[187] Diplock did not, no doubt for the obvious reasons, make any reference to his work (only recently concluded) with the Security Executive. Nor, when he revisited the topic in the context of his work on mercenaries, did he cite the earlier publication. Nevertheless, it seems plausible that a causal thread runs through these events: Diplock wrote about passports shortly after the war because he had had the opportunity to consider the legal issues around movement during the war and later, when called upon to address the mercenaries question, his thoughts turned back to the issue of passports, even if only to address the limitations of their use.

Back at the bar, Diplock took on a prodigious range of work. He was appointed Queen's Counsel in April 1948 and in 1951 was made Recorder of the City of Oxford. Shortly thereafter he was 'asked to serve on the Lord Chancellor's Law Reform Committee, a role he carried out until 1971'.[188] Though his clerk of the time has suggested that his work 'was not of general interest',[189] a number of cases are of biographical interest. Diplock was involved in the

183 Diplock, n 65 above.
184 *ibid*, 42.
185 *ibid*, 43.
186 *ibid*, 52.
187 *ibid*, 58.
188 Brice Dickson, 'The Contribution of Lord Diplock to the General Law of Contract' (1989) 9 OJLS 441, 443.
189 'He was concerned with what is called lawyer's [sic] law, with Constitutional Law, Commercial Law, Boundary Commissions, Coal Mining. As he said there are two kinds of lawyers – those who are interested in ideas, and those who are interested in people. He was interested in ideas' Aylett, n 92 above, 113.

'Kabaka crisis' in Uganda in the 1950s.[190] The British Government had floated the possibility of uniting the Protectorate of Uganda with Kenya (a Crown Colony) and the Trust Territory of Tanganyika. This was opposed by the leadership of Buganda, a subnational kingdom in Uganda whose position within the Protectorate had been recognised by the Buganda Agreement of 1900 and which was presided over by a 'Kabaka'. The Kabaka of Buganda, Mutesa II, pushed for secession, supported by the Bugandan 'Lukiko' – its parliament. The Governor of Uganda withdrew the British government's recognition of Mutesa II – acting under the authority of Article 6 of the 1900 Agreement – then declared a state of emergency and sent him into exile in London.[191] After a period of negotiation in London and at the 'Namirembe Conference' – to which the public lawyer Stanley de Smith acted as Secretary[192] – the Bugandan Agreement of 1955 was signed, paving the way for Mutesa's return to the Protectorate.

In the paper by which the UK government identified the conditions under which it would allow the Lukiko 'the opportunity to choose whether a new Kabaka should be elected or whether Kabaka Mutesa II should return as Native Ruler of Buganda', it identified however not only the talks at Namirembe, but also a judgment of the Ugandan High Court in which it had been argued that the 1900 Agreement did not permit the government to withdraw the recognition of Mutesa II.[193] Though the court did not make the declarations sought by the Lukiko in that case, on the basis that the agreement did not create enforceable rights, it indicated that the course the government had taken was not the one which was justified by the terms of the agreement.[194] Though the agreement could have been terminated entirely, it said, the conditions for the withdrawal of recognition under Article 6 were not met. This case was filed by Apolo Kironde and two London lawyers, Dingle Foot and Kenneth Diplock, 'managed the case for the plaintiffs'.[195] Here again there is a striking continuity: Foot was the son of Isaac Foot, who had been a member of the Security Executive when Diplock worked for it. And when the Kintu Committee, set up to advise the Lukiko as to whether to accept the Namirembe recommendations, seemed like it might reject those recommendations, a compromise was found

190 For an account see David E. Apter, *The Political Kingdom in Uganda: A Study in Bureaucratic Nationalism* (London: Frank Cass, 3rd ed, 1997); and R. C. Pratt, 'The Anatomy of a Crisis: Uganda 1953-55' (1955) 10 *International Journal* 267. Diplock's role is also described in Aylett, *ibid*, 113-116.

191 See Secretary of State for the Colonies, *Uganda Protectorate: Withdrawal of Recognition from Kabaka Mutesa II of Buganda* Cmd 9028 (1953).

192 'De Smith was already one of the three or four most knowledgeable men on the law and constitutions of the British colonial territories. He had, moreover, a superb command of the English language, and his minutes of the fifty meetings in Buganda which ensued are a model of their kind.' D. A. Low, 'The Buganda Mission, 1954' (1968) 13 *Australian Historical Studies* 353, 367.

193 Colonial Office, *Uganda Protectorate Buganda* Cmd 9320 (1954) at [1].

194 *ibid* at [10]-[15].

195 Apter, n 190 above, 292fn. Diplock later noted, in a lecture in memory of de Smith that 'I first met him when he was a brilliant young law don at the London School of Economics and I was a fairly senior silk instructed on behalf of the Kabaka in the constitutional dispute about Buganda.' Lord Diplock, 'Administrative Law: Judicial Review Reviewed' (1974) 33 CLJ 233.

'[u]nder the guidance of' Diplock, its legal adviser.[196] Later, Diplock assisted a delegation sent to London by the Lukiko.[197] When the text of what became the 1955 Agreement was finalised, he was named in the statement announcing it.[198]

This period also saw Diplock involved with a constitutional dispute in Pakistan,[199] after the Governor General dissolved the Constituent Assembly 'to forestall the adoption a new constitution that would have curbed his powers'.[200] The key figure was Ivor Jennings who, in his role as adviser to the Governor General, Harshan Kumarasingham has argued, 'colluded to ex post facto justify a constitutional coup d'état that crushed democratic saplings, ridiculed the rule of law, and exposed the dangers of adopting the Westminster model and the conventions and prerogatives that came with it'.[201] When the dissolution was challenged in court – leading to 'the most dramatic court case in Pakistani history following one of the most controversial constitutional crises in the common law world' – it was not, however, Jennings who defended it but rather Diplock, albeit using – it appears – arguments that were marshalled by Jennings.[202] Diplock triumphed, with the Federal Court of Pakistan ruling that the dissolution was lawful.[203] Diplock later recalled that he had sought de Smith's assistance in light of the expertise he had demonstrated on constitutional issues during the Uganda affair, and that 'unless my memory plays me false, it was de Smith who drew my attention to opinions given by the Law Officers in the seventeenth century about the government of the Plantations, that supplied the basis for the argument that was ultimately accepted by that court'.[204] Here too there may be a causal relationship with Diplock's Security Executive work. Mara Malagodi has noted that during the period when the litigation took place the Secretary of State for Commonwealth Relations was Lord Swinton – first head of the Executive – and that the Commonwealth Relations Office had been 'closely monitoring Pakistan's constitution-making developments, in particular its prospective transformation from Dominion to Republic as that would radically alter the basis of

196 Apter, *ibid*, 296fn. Aylett records that the first Diplock knew of his appointment as this advisor was when he read it in *The Times*, but that 'he agreed to it on the condition that he received no payment or fee': Aylett, n 92 above, 115-116.

197 Apter, *ibid*, 297fn.

198 HC Deb 22 July 1955 vol 544 cols 720-721.

199 'There were two cases in which he led in Pakistan just before he was appointed to the Bench in 1956. They were Constitutional cases, which were intensely fascinating to him and to other specialist lawyers; the entire procedures were published in a book by the academic barrister Sir Ivor Jennings, who was his junior at the time.' Aylett, n 92 above, 113. The reference is to Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: CUP, 1957).

200 Harshan Kumarasingham, 'A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan' (2017) 2 *UC Irvine Journal of International, Transnational, and Comparative Law* 33.

201 *ibid*, 34.

202 'Jennings, through Diplock, successfully questioned the validity of the Constituent Assembly on the grounds that it had failed in its functions of representing the people and presenting a constitution'. *ibid*, 51.

203 *Federation of Pakistan* v *Moulvi T Khan* (1955) 240 PLD (SC).

204 Diplock, n 195 above, 233.

Pakistan's membership to the Commonwealth'.[205] It had also been in receipt of information passed by Jennings via the High Commissioner in Colombo. As a result, she suggests, 'it seems reasonable to infer that the British Government was somehow involved in the instruction of Diplock by the Government of Pakistan'.[206]

Lord Diplock as judge

Lord Wilberforce once said of Diplock that he 'possessed the quality of persuading his colleagues to the extreme … it almost got to the stage of a mesmeric quality … He was a man who got his way in almost everything … He would work on persuading people to his point of view during the conduct of a case, in the lunch intervals, in the corridors, in their rooms. I do not know anybody else who had this ability, and the desire to exercise it, so strongly as he did'.[207] Diplock was appointed to the High Court on 11 January 1956 and to the Court of Appeal on 12 October 1961. No doubt reflecting his experience in Commonwealth constitutionalism, he was – while on the High Court – invited to participate in a seminar in Lagos on 'Constitutional Problems of Federalism' in Nigeria.[208] On 30 September 1968, at the age of 60, Lord Diplock was appointed Lord of Appeal in Ordinary. He would remain on the Appellate Committee until his death in October 1985, at which point he was the longest serving Lord of Appeal, being one of the two judges – along with Lord Wilberforce – who came to steer its work most influentially in the years following the retirement of Lord Reid in 1975.[209] In particular, he was 'a firm believer that there should be more single judgments' and 'being a very persuasive man he got his way, with single judgments in the House peaking at 68 per cent in 1985'.[210] By then Diplock had ceased to preside over hearings of the Appellate Committee on the grounds of ill-health, giving way to Lord Fraser of Tullybelton, though he continued to sit as an ordinary Lord of Appeal.[211]

205 Mara Malagodi, 'Dominion status and the origins of authoritarian constitutionalism in Pakistan' (2019) 17 ICON 1235, 1250. Malagodi's argument is that the involvement of Diplock and others in this litigation 'was not just in their professional capacity as lawyers, but also of an opaque political nature in the intricate context of the Cold War.'

206 *ibid*, 1250. Note also that Diplock had earlier acted (along with Lord Hailsham) for the Pakistan Federation in *Kahan* v *Pakistan Federation* [1951] 2 KB 1003, a dispute which raised the question of whether Pakistan was a sovereign state.

207 Garry Sturgess and Philip Chubb, *Judging the World* (Sydney, London: Butterworths, 1988) 275, cited in Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* (Cambridge: CUP, 2011) 178.

208 Taylor Cole, 'The Independence Constitution of Federal Nigeria' in Robert O. Tilman and Taylor Cole (eds), *The Nigerian Political Scene* (Cambridge: CUP, 1962) 68fn. See also Lionel Brett (ed), *Constitutional Problems of Federalism in Nigeria* (Lagos: Times Press, 1961).

209 See Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (Chapel Hill, NC: University of North Carolina Press, 1978) 562-569.

210 Paterson, n 207 above, 181. Dickson, n 188 above, 441 notes that 'From 1974 to 1983 [Diplock] delivered the sole judgment in almost one-quarter of all the cases in which he sat.'

211 'My noble and learned friend Lord Diplock recently told me that he had decided that the time had come for him to cease presiding as the senior Lord of Appeal. But I am happy to say that,

In those years Diplock would give a number of important judgments which laid the ground for much of modern public law,[212] amongst them *Gouriet* v *Union of Post Office Workers*,[213] *R* v *Inland Revenue Commissioners, ex parte Rossminster*,[214] and *O'Reilly* v *Mackman*[215] (*O'Reilly*). In the first of these, Lord Diplock noted that 'at the heart of the issues in these appeals lies the difference between private law and public law' and suggested that it was 'the failure to recognise this distinction that has in my view led to some confusion and an unaccustomed degree of rhetoric in this case'.[216] This distinction was crucial also in *O'Reilly*, where Diplock asserted the exclusivity of the new procedure for judicial review under Order 53 of the Rules of the Supreme Court, stating that it would in general be 'contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action'.[217] As well as asserting the existence of a distinct body of public law – a novelty which we should not allow the passage of time to diminish – Lord Diplock's general approach to that public law placed at its heart the language of the 'rule of law'.[218] Though he may not have been the first modern Law Lord to do so (the concept is visible in Lord Reid's work before him) it was Diplock whose rule of law approach had become the dominant conception of administrative law by around the turn of the century, and indeed the logic has become so influential in the period since as to pose a threat to the notion of parliamentary sovereignty itself. When, after all, the 'rule of law' that was identified in *Jackson* v *Attorney General*[219] as the key possible limit upon the ability of parliament to legislate, it was the rule of law in the Diplockian sense, understood largely, perhaps exclusively, in terms of the ability of the individual to challenge the potentially unlawful action of the state.[220] In keeping with the points made above about Diplock's interest in and expertise as to the question of rights of movement, he gave the leading judgment in the House of Lords in *DPP* v *Bhagwan*, relating to an individual

assuming that his health permits him to do so, he still wishes to continue sitting as an ordinary Lord of Appeal.' HL Deb 27 June 1984 vol 453 col 916 (The Lord Chancellor, Lord Hailsham of Saint Marylebone). In a tribute to Diplock on behalf of his colleagues, Lord Roskill claimed that 'until the end his mind triumphed over the frailties of his body as well as over his failing eyesight': Roskill, n 2 above, 36.

212 See also Sedley and Le Quesne, n 40 above: 'He had both a panoptic knowledge and comprehension of the law and a scientist's desire to rationalize it. His most conspicuous contribution was to constitutional and public law.'

213 *Gouriet* v *Union of Post Office Workers* [1978] AC 435 (*Gouriet*).

214 *R* v *Inland Revenue Commissioners, ex parte Rossminster* [1980] AC 952.

215 *O'Reilly* v *Mackman* [1983] 2 AC 237 (*O'Reilly*).

216 *Gouriet* n 213 above, 496.

217 *O'Reilly* n 215 above, 285.

218 See in particular *R (National Federation of Self-Employment and Small Businesses Ltd)* v *Inland Revenue Commissioners* [1982] AC 617, 644 and his claim that it would be 'a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.'

219 *Jackson* v *Attorney General* [2005] UKHL 56.

220 Assessments encompassing Diplock's work outside of public law are often mixed. See, for example, Louis Blom-Cooper, 'Style of Judgments' in Blom-Cooper, Dickson and Drewry, n 94 above, 151-152. Though compare Dickson, n 188 above.

who – liable to be refused entry to the United Kingdom under the Commonwealth Immigrants Act 1962, which cut down the rights of 'Citizens of the United Kingdom and Colonies' who lacked sufficient connection to the United Kingdom – had entered the United Kingdom via a small boat at a 'deserted beach'. Holding that this did not, at that time, constitute an offence, Diplock noted that prior to the 1962 Act a British subject 'had the right at common law to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he liked'.[221]

We are interested, however, most particularly in Diplock's work in the domain of national security. In *McEldowney* v *Forde*,[222] the House of Lords considered a regulation which added to an earlier regulation made under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 and which made it an offence to belong to an 'unlawful association'; not the names of specific organisations (as were already contained in the regulation) but rather the words 'organisations at the date of this regulation or at any time thereafter describing themselves as ''republican clubs'' or any like organisation howsoever described'.[223] The appellant argued that this regulation was *ultra vires* the parent act. Though a majority in the House of Lords dismissed the appeal, Lord Diplock dissented from their conclusions, holding that that the words in question were either too vague and uncertain in their meaning to be enforceable or, if they were not, were too wide to fall within the power under which they purported to be made.[224] In *Attorney General* v *Leveller Magazine*,[225] two journalists had been charged under the Official Secrets Act and, during committal proceedings, a witness had been called whose name had been disclosed to the defendants and the court but who was known to the public only as 'Colonel B'. Colonel B's real name – ascertainable by following up on information given by him in evidence – was published by a number of publications in advance of the trial proper, and contempt proceedings were brought against those responsible. On appeal against findings of contempt by the Divisional Court, the House of Lords allowed the appeal. Though Diplock accepted both the principle that a witness might give evidence without his name being made known to the public and that whereby a person who knew of the court's ruling and published the name anyway might be in contempt of court for having interfered with the due administration of justice, he held that in the particular circumstances of the case there had been no such interference: Colonel B had given evidence which permitted his identification without difficulty and no suggestion was made that the relevant parts of the evidence should not be published.[226] In neither case, then, does Diplock's exposure to the workings of the security apparatus of the state seem to result in a particular deference to claims made about what security requires. If anything, the opposite would seem to be true.

221 *DPP* v *Bhagwan* [1972] AC 60, 74.
222 *McEldowney* v *Forde* [1971] 1 AC 632 (*McEldowney*).
223 Civil Authorities (Special Powers) Acts (Amending) (No 1) Regulations (Northern Ireland) 1967, reg 1.
224 *McEldowney* n 222 above, 665.
225 *Attorney General* v *Leveller Magazine* [1979] AC 440.
226 *ibid*, 452-453.

By far the best-remembered of the cases implicating national security in which Diplock was involved is the *GCHQ* case.[227] The facts are well-known. The government, through (secondary) exercise of the royal prerogative, introduced a ban on trade union activity at the Government Communications Headquarters. The reason for this ban was the interests of national security, of which Diplock gave an account that is to modern ears perhaps overly deferential: 'National security', he said, 'is the responsibility of the executive government; what action is needed to protect its interests is … a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question'.[228]

Previously, where changes had been made to the employment conditions of these employees, the relevant trade unions had been consulted. Here, however, no consultation had taken place, on the basis that there was 'the risk that advance notice to the national unions of the executive government's intention would attract the very disruptive action prejudicial to the national security the recurrence of which the decision barring membership of national trade unions to civil servants employed at GCHQ was designed to prevent'.[229] And so while Lord Diplock accepted that the unions enjoyed a legitimate expectation as to the procedure that would be adopted, that legitimate expectation gave way in the face of the risk to national security.[230] This though must be considered in its context: Diplock was no quicker to accept the government's view as to what national security required than were any of the other judges, and it would have been at that point in time unthinkable for Diplock to hold otherwise than that the exigencies of national security triumphed over a legitimate expectation. Indeed, such a thing would be highly improbable even now that the judiciary has shed some of its historic deference to the executive in this area. Though Diplock's experience in the domain of national security therefore is an important point of context to the decision in *GCHQ*, the idea that the former might have been causally influential on the latter seems difficult to sustain.

Another case with a national security dimension in which Diplock was the central voice was *Secretary of State for Defence* v *Guardian Newspapers*,[231] the judgment being handed down just a few weeks before that in *GCHQ*. The case arose out of the leak to the *Guardian* newspaper of internal government documents relating to the arrival of US cruise missiles – armed with nuclear warheads – at the RAF base at Greenham Common, and the way in which the issue would be presented to the House of Commons. When the *Guardian* published stories based on some of the information in the leaked documents the government sought an order requiring the newspaper disclose its source. The question then

227 *GCHQ* n 4 above.
228 *ibid*, 412.
229 *ibid*, 412.
230 '[T]he crucial point of law in this case is whether procedural propriety must give way to national security when there is conflict between (1) on the one hand, the prima facie rule of "procedural propriety" in public law … and (2) on the other hand, action that is needed to be taken in the interests of national security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is. To that there can, in my opinion, be only one sensible answer. That answer is "Yes."' *ibid*, 413.
231 *Secretary of State for Defence* v *Guardian Newspapers* [1985] AC 339.

became whether the paper was protected by section 10 of the Contempt of Court Act 1981, which provides that a court may not require a person to disclose 'the source of information contained in a publication for which he is responsible' unless satisfied that 'disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.' The government relied upon the interests of national security in particular, with the key question when the matter reached the House of Lords being whether at the time of the interlocutory order those interests did or did not require disclosure. An affidavit from a Ministry of Defence employee indicated that the threat to national security was not merely from the disclosure of this particular information, but rather the wider impact of its disclosure.[232]

Against this background, Lord Diplock turned to the system of classification, holding that the significance of a document being marked 'secret' was 'a matter of public record of which your Lordships are, in my view, entitled to take judicial notice'. He quoted from the statement on the recommendations of the Security Commission presented to Parliament a few years earlier, which outlined the four classifications which were at that point in use in the United Kingdom, observing that 'None of these definitions uses the actual words "national security" but documents which deal with weapons intended for the defence of the United Kingdom against potential hostile powers if the disclosure of their contents would cause serious injury to the interests of the nation clearly relate to "national security" in the narrowest sense in which that term could be used'.[233] What Diplock does not say here is that he himself was the Chairman of the Security Commission when it produced the report whose conclusions are summarised in that statement. And to what was explicitly said in the affidavit he added a number of inferences which judges would have been entitled to draw. First, that 'civil servants who have access to a document that is classified as "Secret" are likely to have access to others'.[234] Second, that internal inquiries 'should have been undertaken without success, before recourse was had to tangling with the press upon what was currently so sensitive a matter as the identification of informants, with all the publicity that this was likely to entail',[235] the implication being that the time of the government was wasted by the affair. The threat to national security lay, therefore – a third inference which a judge would be justified by common sense in drawing – 'not in the publication of the particular document of which the delivery up was sought, but in the possibility … that whoever leaked that document might leak in future other classified documents disclosure of which would have much more serious consequences on national security'.[236] Through this series of inferences,

232 'The fact that a document marked "Secret" addressed by the Secretary of State for Defence to the Prime Minister on 20 October 1983 … had, by 31 October 1983, found its way into the possession of a national newspaper, is of the gravest importance to the continued maintenance of national security … the identity of the person or persons who disclosed or assisted in the disclosure of the above mentioned document to the defendant must be established in order that national security should be preserved.' Quoted *ibid*, 354.

233 *ibid*, 354.

234 *ibid*, 355.

235 *ibid*, 355.

236 *ibid*, 355.

Diplock was able to conclude, with the majority in the House of Lords, that 'the evidential material that was before that court at the interlocutory stage on 16 December 1983, was sufficient to establish that immediate delivery up of the document was necessary in the interests of national security'.[237] Here, then, we see an example of where Diplock's extra-curial work was perhaps not merely influential on his decision but crucial to it. The Security Commission report on which he relied was not referenced by the Court of Appeal and does not appear to have been cited in argument before the House of Lords. Similarly, the inferences he was willing to draw were perhaps rather further reaching and certainly more confident than would have been drawn by a judge not socialised into the security domain. Given that the House of Lords was split 3-2, Diplock's acceptance of the national security justification on a basis which he himself had helped to construct was in practice decisive of the outcome of the case.

CONCLUSION

Lord Diplock died in hospital on 14 October 1985, having sat to hear a Privy Council case just a month before. At his memorial service, Lord Scarman said he 'could only properly be described as a *Christian gentleman* and a *genius*'.[238] Though his public law jurisprudence is influential, having set the tone for much of the modern law of judicial review,[239] he was not always remembered fondly in terms of his character. Dickson notes that '[b]y most accounts Kenneth Diplock was not a modest man' but rather one who 'did not suffer fools gladly'.[240] Sedley and Le Quesne concur, suggesting that 'his consciousness of his own ability made him dismissive of ideas at which his own fast brain had not arrived first' and '[t]he disdain he found increasingly difficult to conceal for judicial views contrary to his own sometimes stifled discussion and dissent'.[241] At least in the world of national security, however, Diplock was justified in thinking he was not just one voice amongst many. He was for a period the government's preferred overseer, being given far greater insight into the operations of many strands of national security policy and practice than would have been the case for the majority of his counterparts on his bench. Though the reception to and legacy of his inquiries and reports varied, his political clients seem to have appreciated them.

What this article has shown, however, is that this was not mere coincidence: Diplock was in many ways pre-ordained for the role he found himself

237 *ibid*, 356.

238 Quoted in Canon Joseph Robinson, 'Lord Diplock (1907-1985): A Tribute' (1985-1986) 5 *Simon Greenleaf Law Review* 213, 215.

239 See, for example, Lord Wilberforce, 'Lord Diplock and Administrative Law' [1986] PL 6, 7: 'Administrative law owes much indeed to Lord Diplock: his cool, rational thinking and lucid expression will be greatly missed.'

240 Dickson, n 188 above, 443.

241 Sedley and Le Quesne, n 40 above. One could multiply examples: in its obituary, *The Times* noted that Diplock 'was a powerful, if not always a sympathetic, judge at every level of his career', *The Times* 16 October 1985. For what it is worth, the wartime correspondence of Diplock's I have reviewed does not support what had by his death become the consensus as to his character.

playing in the national security constitution. His war service was not that of an ordinary man, but rather placed him at the heart of the national security apparatus. His links to the state continued over time, and made him the obvious choice for the conduct of reports on sensitive topics. It was suggested, by Leigh and Lustgarten, that it might be possible to link the role played by Lord Diplock and his successors in extra-curial national security oversight to their judicial decision-making. In Diplock's case the charge seems difficult to sustain, at least in its strongest form: Lord Diplock had a distinctive approach to public law, to be sure, but on national security points he was largely in the mainstream. In siding with the Government in *GCHQ* he was doing nothing that would not have been done – was not done – by other judges of his generation, nor would be out of place in the decisions of succeeding generations. This does not mean, however, that biography is irrelevant: it seems more than plausible – highly likely – that it was biographical factors which saw Lord Diplock emerge as the favoured candidate for such extra-curial work in the first place. This demonstrates the particular value of judicial biography in the context of the United Kingdom's national security constitution, and wherever else members of the judiciary are called upon to perform inquiries into sensitive matters.

And though Lord Diplock is an obvious target for such an approach, he is not the only one. A number of other judges have a similar profile: Lords Griffith and Scarman,[242] for example, as well as a steady stream of Lords Chief Justices of Northern Ireland, many of whom had experience sitting in the Diplock courts. One of these, Lord Hutton, was chosen to carry out the inquiry into the death of David Kelly, the reception of which demonstrates the difficulty that even the most highly qualified judge will have in assuaging a sceptical public. And the task is not merely that of explaining how and why certain judges are chosen to carry out national security oversight, but also the implications of their being chosen for their judicial decision-making. This article opened with a quote from Lord Brown of Eaton-under-Heywood, who was for many years the President of the Security Service and then the Intelligence Services Tribunals.[243] When he was appointed as a Lord of Appeal in Ordinary, he was serving as the Intelligence Services Commissioner, and acknowledged in his autobiographical writings 'a certain tension' in the overlap of his judicial and extra-judicial roles which led him to decline to continue in that role once on the apex court.[244] A number of factors – the Human Rights Act 1998, the modern approach to the review

242 An anonymous reviewer draws attention to the substantial military experience of Lord Scarman, who was of the same generation as Diplock and was also frequently called upon by the government to carry out inquiries and reviews, though none of them with a national security dimension. In *GCHQ*, Scarman's judgment is perhaps less favourable to the government than is Diplock's, emphasising the need for the government to evidence its national security claims and the right of the courts to test their rationality: *GCHQ* n 4 above, 404-407.

243 As Treasury Devil, Simon Brown had appeared for the Government in *Malone* v *United Kingdom* (1985) 7 EHRR 14: Brown, n 1 above, 222-223.

244 One possible candidate for the site of that tension is *A* v *Secretary of State for the Home Department* [2005] UKHL 71 in which, in the words of Lord Bingham, the central question was whether the Special Immigration Appeals Commission could in the circumstances 'receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities?', *ibid* at [1]. Amongst the notable

of the prerogative powers, the relative transparency which now pertains in the domain of national security – mean that (senior) judicial consideration of these matters is more likely than in the past. From the other direction, the growing number of specialist tribunals, the enactment of the Justice and Security Act 2013, and the large number of Judicial Commissioners appointed under the Investigatory Powers Act 2016 mean that ever-more judges are likely to have direct knowledge of the working of the national security state. The conjunction of these trends may, then, call for a re-examination of the appropriateness of the sort of double-hatting of which Lord Diplock was the most striking, but by no means the only, example.

national security cases which he would decide having ceased to be Commissioner are *R (A)* v *B* [2009] UKSC 12, in which Lord Brown gave judgment for the court, involving mention of certain of the oversight roles he himself had once played.