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Judicial Power and Moral Ideology in Wartime: Shaping the Legal Process in World War I Britain

Offering a cautionary lesson of contemporary significance, the Article suggests that judicial power is not in and of itself the solution to executive infringements on due process rights in wartime. It examines the response of the British judiciary to serious threats to its institutional power during the First World War. To facilitate prosecution of the war, the government narrowed the jurisdiction of the traditional courts by eliminating jury trial, subjecting civilians to court-martial, and establishing new administrative tribunals to displace the traditional courts. Rather than remaining passive and deferential to the executive, as scholars have generally assumed, the judges moved forcefully to assert control over rival executive and military bodies. Even more critically, they used their enlarged power to shape the legal process in accordance with a distinctive moral ideology. Judicial wartime decisions reflected not a neutral rule of procedural propriety but a moral calculus that enhanced procedural rights for litigants who advanced the war effort and curtailed them for those who obstructed it. Thus, the Article generally argues that during the war the judiciary aggressively pursued its institutional self-interest and employed its resulting power to allocate procedural entitlements in a manner that undermined the rule of law. Understanding the role of the judiciary in this earlier conflict may

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encourage the heightened vigilance necessary to secure a full and fair judicial process to all litigants in times of war.

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INTRODUCTION

In western democracies a state of war generally enlarges executive power and erodes individual rights, and the judiciary often emerges as the supposed guarantor of personal freedoms and a fair legal process. Executive or legislative efforts to curtail judicial power, such as the recent Military Commissions Act[1] in the United States eliminating habeas corpus jurisdiction over Guantanamo detainees, raise concerns about potentially unrestrained executive conduct. Britain during World War I provides an interesting case study of the struggle between different branches of government for control over the legal process in wartime, and it offers two particularly significant lessons. First, it illustrates that regardless of the formal legal regime imposed by the government, judges have many tools at their disposal to shape legal procedures and institutions to promote their collective self-interest. Second, and more significantly, it suggests that in wartime the judiciary will not necessarily produce a procedural regime that fully protects due process rights. On the contrary, the English experience during this first global conflict demonstrates that an aggressive judiciary may use its power not to secure a fair legal process but rather to distort the rule of law.

Responding to the pressures of World War I, the British government undertook a series of initiatives aimed at narrowing the authority of the traditional courts. First, it constricted the jurisdiction of the common law courts in both civil and criminal cases. Its declaration of war in August 1914 transformed many residents into

[1] Pub. L. No. 109-366, 120 Stat. 2623 (2006) (codified at 10 U.S.C. § 950j(b) (2008)).

enemy aliens with no right of access to the civil courts; shortly thereafter it introduced emergency legislation eliminating jury trial and vesting criminal jurisdiction over wartime offenses in magistrates' courts and military tribunals. Second, to expedite the adjudication of disputes in areas essential to the war effort, including conscription and munitions production, the executive created new administrative agencies with specialized "judicial" functions. Third, the government established new military courts in Ireland with competing jurisdiction over civilians. This Article argues that the judges in the traditional courts did not, as scholars have generally assumed, passively acquiesce in these executive encroachments.[2] In the sphere of legal procedures and institutions, no less than that of substantive law,[3] they responded to events quickly and forcefully. They enlarged their jurisdiction over both civil and criminal cases, insisted on a power of review over the new administrative bodies, and asserted supremacy over rival military courts. During World War I, in short, the British judiciary buttressed and even amplified its institutional power.

This development, however, is only one part of a complex story, as power must be used to a purpose. The other critical element is that the judges directed their power to the service of a particular objective: infusing the legal process with a moral ideology adapted to the exigencies of military struggle. Beyond preserving their institutional self-interest, the judges embedded in the law a moral framework that they believed would facilitate prosecution of the war. On issues of

[2] *See, e.g.*, K.D. EWING & C.A. GEARTY, THE STRUGGLE FOR CIVIL LIBERTIES: POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN, 1914–1945, at 36 (2000) (observing that during Word War I the judiciary was "compliant" to a "largely unaccountable" executive); A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 6–7, 25 (1992) (referring to the "strength of the British judicial tradition of faithfully supporting the executive in cases involving security"); CHARLES TOWNSHEND, MAKING THE PEACE: PUBLIC ORDER AND PUBLIC SECURITY IN MODERN BRITAIN 78 (1993) (commenting on the "wartime complaisance of the judiciary"); DAVID WILLIAMS, NOT IN THE PUBLIC INTEREST: THE PROBLEM OF SECURITY IN DEMOCRACY 187 (1965) (noting that in wartime the judges extended "considerable indulgence" to the executive); George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 28 (1984) (observing that in wartime the British courts "will not question the acts of the government").

[3] *See* Rachel Vorspan, *Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I*, 38 VAND. J. TRANSNAT'L L. 261 (2005) (arguing that through wartime rulings in cases involving individual substantive rights, the judges vigorously pursued a particular institutional, political, and moral agenda).

procedural as well as substantive rights,[4] judicial decisions reflected an implicit moral consensus that litigants should enjoy rights based on their perceived contributions to the national struggle. Wartime decisions embodied not a neutral rule of procedural propriety but a moral calculus that enhanced procedural entitlements for litigants who advanced the war effort and curtailed them for those who obstructed it. Accordingly, "undeserving" litigants such as criminal defendants, draft evaders, and Irish rebels received fewer procedural protections than "deserving" parties such as munitions workers and "innocent" alien detainees.

Thus, this Article contends that the judges both aggressively pursued their institutional self-interest during the war and employed their resulting power to shape procedural rights according to a distinctive set of wartime moral values. Corresponding to these broader points, this Article is divided into two parts. Part I describes the wartime challenges to the traditional courts and demonstrates that the judiciary asserted its authority by treating all potentially encroaching "judicial" entities—magistrates' courts, administrative tribunals, and military courts—as "inferior courts" equally subject to its authority and oversight. Part II argues that the judges used their institutional power to disseminate a bellicose wartime moral vision, and it explores in particular the fate of three particular groups of litigants: criminal defendants, enemy aliens, and applicants before administrative tribunals.

The Conclusion suggests that to understand fully the judicial role in wartime Britain, scholars must move beyond assessing the judiciary's impact on "substantive" rights such as personal freedom and begin to examine the way judges applied procedural rights contextually to achieve a new wartime balance of institutional powers. Further, it offers the contemporary lesson that elevating judicial over executive power is not in and of itself necessarily the best mechanism for bolstering due process rights in wartime. On the contrary, the experience of World War I indicates that judges wielding power and driven by a moralistic view of wartime imperatives can produce a procedural regime woefully inadequate to provide a robust and fair judicial process to all litigants.

[4] *See id.* at 329–40 (arguing that in deciding cases involving substantive rights, the World War I judges were driven by a moral ideology that differentiated among litigants based on their perceived contribution to the war effort).

I
WARTIME CHALLENGES AND THE ASSERTION OF JUDICIAL INSTITUTIONAL AUTHORITY

During the First World War, the British government challenged the authority of the traditional "superior"[5] courts in three distinct ways: it narrowed their jurisdiction in civil and criminal matters, created new administrative entities with "judicial" features to handle specialized wartime problems, and established military courts in Ireland with rival jurisdiction over civilians. Far from acquiescing in these developments, the judges fought successfully to bolster and accentuate their own institutional power.

A. The Traditional Justice System: The Challenge of Diminished Jurisdiction

The judiciary faced significant wartime challenges to its authority in the spheres of both civil and criminal law. In the civil arena the war deprived a significant segment of the population of access to civil justice, while in the criminal domain it led to the transfer of jurisdiction over wartime offenses from common law to military and magistrates' courts.

1. Civil Procedure: Admitting Enemy Aliens to the Civil Courts

On August 4, 1914, by the simple act of proclaiming war, the British government transformed a large segment of the foreign population[6] into enemy aliens[7] who under common law precedent lost their right to bring civil lawsuits. The judges met this challenge of diminished civil jurisdiction by altering the common law to restore the excluded residents: in successive stages they admitted enemy

[5] This Article uses the term "superior" courts to refer to the High Court (containing the Divisional Courts of Chancery and King's Bench), the Court of Appeal, and the House of Lords. These bodies are contrasted with "inferior" courts such as magistrates' courts, courts-martial, and administrative tribunals, which were not presided over by judges and were bound by superior court decisions issued either on direct appeal or via the writs of certiorari, mandamus, prohibition, and habeas corpus.

[6] There were approximately 75,000 foreigners in Britain upon the outbreak of war. *See* 76 PARL. DEB., H.C. (5th ser.) (Nov. 24, 1915) 313; 83 PARL. DEB., H.C. (5th ser.) (June 29, 1916) 1068–71; *see also* J.C. BIRD, CONTROL OF ENEMY ALIEN CIVILIANS IN GREAT BRITAIN, 1914–1918, at 6–9 (1986); 1 JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR 73 (1920).

[7] The term actually used during World War I was "alien enemy," but this Article employs modern usage except where the term is directly quoted.

aliens to the courts as defendants, allowed enemy aliens in Britain to sue as plaintiffs, and permitted even enemy aliens in hostile territory to bring actions in British courts.

a. Enemy Aliens As Defendants: Creating a Right to Appear in the British Courts

Prior to the First World War, no case in English law directly held that an enemy alien could be sued in the English courts.[8] In 1915, however, the groundbreaking decision of *Robinson & Co. v. Continental Insurance Co.*[9] expressly opened the door to suits against enemy defendants. The case involved an action by British subjects to recover a loss under a policy of marine insurance from a German insurance company operating in Germany. The defendant firm claimed that as an enemy alien, it could not be sued in the English courts for the duration of the war. Mr. Justice Bailhache, however, fortified by an eighteenth-century treatise and a series of American decisions, concluded that to suspend a subject's right of suit against an enemy alien would pointlessly injure British subjects. The reason for precluding suits by enemy plaintiffs was that it was "contrary to public policy for the Courts of this country to render any assistance to an alien enemy,"[10] a rationale that obviously did not apply in the case of alien defendants.

Equally significant, the High Court further ruled that upon being sued, an enemy alien had full rights to appear and defend himself. Any other course "would be opposed to the fundamental principles of justice," as not even a state of war could "demand or justify the condemnation by a Civil Court of a man unheard."[11] The full Court of Appeal approved *Robinson* in *Porter v. Freudenberg*,[12] agreeing that while suits against enemy aliens would enable the King's subjects to enforce their rights against the enemy, preventing an enemy alien from being heard in his own defense "would be quite contrary to the basic principles guiding the King's Courts in the administration of

[8] Lord Scrutton, a judge on the Court of Appeal, noted in a lecture delivered in 1918 that the point had not been decided until the war. T.E. Scrutton, *The War and the Law*, 34 L.Q.R. 116, 123 (1918); *see* Robinson & Co. v. Cont'l Ins. Co., [1915] 1 K.B. 155, 159–61; Porter v. Freudenberg, [1915] 1 K.B. 857, 882 (C.A.).

[9] [1915] 1 K.B. 155.

[10] *Id.* at 159–60.

[11] *Id.* at 161. However, the court ruled that if the defense was successful, the alien's right to receive costs would be suspended until the war was over. *Id.* at 162.

[12] [1915] 1 K.B. 857 (C.A.).

justice."[13] This new rule, ostensibly showcasing English principles of justice,[14] also had the indisputable effect of extending the jurisdiction of the traditional courts to a new category of defendants.

b. Enemy Aliens As Plaintiffs: Creating a Right to Sue

The courts soon adopted an even more unprecedented and aggressive stance, allowing enemy aliens not only to defend themselves but also to sue as plaintiffs. If at the beginning of the war enemy aliens had no access to the courts as defendants, a fortiori they could not be plaintiffs. Indeed, there was substantial judicial authority to this effect.[15] As the Court of Appeal pronounced in 1915, under the "ancient common law"[16] an enemy alien "cannot sue or proceed in the civil Courts of the realm."[17]

Although the courts theoretically maintained this principle throughout the war, in a series of deft legal maneuvers they redefined the term "enemy alien" to exclude from its scope anyone lawfully in

[13] *Id.* at 880, 883. Moreover, a defendant who lost a case had a right to appeal. As the Court of Appeal stated in *Porter*, if the judgment went against the alien, "the appellate Courts are as much open to him as to any other defendant." *Id.* at 883. An enemy alien defendant was not, however, allowed to institute third-party proceedings, for in so doing he came under the procedural disability of the enemy alien plaintiff. *See* Halsey v. Lowenfeld, [1916] 2 K.B. 707 (C.A.) (holding that an enemy alien could mount a defense but not initiate a third-party proceeding for indemnification).

[14] Justice also required that a defendant have actual notice of the action, but a practical problem was serving process on enemy alien defendants. The German government not surprisingly declined to allow service on its subjects in Germany. *See* Scrutton, *supra* note 8, at 124. The Legal Proceedings Against Enemies Act, 1915, 5 & 6 Geo. 5, c. 36, § 1, instituted rules of substitute service to facilitate English suits against enemy aliens. *See* Arnold D. McNair, *Alien Enemy Litigants II*, 34 L.Q.R. 134, 141 (1918). Substituted service could be made on agents in England or Holland where there was reason to believe that knowledge of the proceedings would be transmitted to the principals in Germany. *See Porter*, [1915] 1 K.B. at 888; Scrutton, *supra* note 8, at 124. Lord Reading boasted in *Porter* that English procedure was "laudably superior" to Continental law in not permitting constructive service. [1915] 1 K.B. at 889.

[15] The Privy Council ruled in *Re* Wilson, (1916) 113 L.T. 1116 (P.C.), that anyone carrying on business in a hostile country must be treated as an alien enemy and that "[n]o action will lie by or in favour of an alien enemy in the King's Court." *Id.* at 1116; *accord* Princess Thurn and Taxis v. Moffitt, [1915] 1 Ch. 58, 60; *Porter*, [1915] 1 K.B. at 873, 880 (C.A.); Arnold D. McNair, *Alien Enemy Litigants I*, 31 L.Q.R. 154, 159 (1915). The preclusion of enemy aliens from suit, however, was only to last for the duration of the war: "The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored." Janson v. Driefontein Consol. Mines, Ltd., [1902] A.C. 484, 493 (H.L.).

[16] *Porter*, [1915] 1 K.B. at 869.

[17] *Id.* at 873.

Britain, including subjects of enemy states. Adopting this stratagem early in the war, the courts declared that the criterion for "enemy alien" status was henceforth to be locality rather than nationality. The new test reconceived "enemy alien" to mean a person of any nationality, even British, who resided or worked in enemy territory. Conversely, the term did not apply to persons of any nationality residing or working in British, allied, or neutral territory. By reinterpreting the meaning of "enemy alien," the judges extended civil jurisdiction to everyone residentially or commercially domiciled in Britain.

Establishing this new concept of "enemy alien," the common law courts in a remarkable series of decisions progressively conferred on enemy subjects in the United Kingdom the right to sue in tort, contract, property, and divorce. The first case, *Princess Thurn and Taxis v. Moffitt*,[18] was a defamation action brought by a woman claiming to be the wife of a Hungarian prince against another woman also presenting herself as the prince's wife. The plaintiff had registered as an alien as required by the Aliens Restriction Act 1914,[19] and the defendant attempted to stay the proceedings on the ground that an enemy alien had no right to sue. Mr. Justice Sargant acknowledged that an enemy alien was generally not entitled to any relief at law as a plaintiff in the English courts.[20] But this particular plaintiff, he noted, resided in the United Kingdom and had registered as an alien, thereby obtaining a license to remain in the country. Indeed, he proclaimed, the registration amounted to a "command to the alien enemy not to depart."[21] Persons thus allowed to remain were "under protection" and not subject to the disabilities of enemies.

Later the same year, in *Porter v. Freudenberg*,[22] the Court of Appeal placed its imprimatur on this broad conception of civil jurisdiction, confirming that registered enemy aliens in Britain were not enemies for purposes of judicial access. The decision in *Princess Thurn*, the court observed, was "clearly right,"[23] as the test in wartime

[18] [1915] 1 Ch. 58.

[19] 4 & 5 Geo. 5, c. 12, § 1(1)(f). Registration was required of all aliens, and it allowed the alien to remain during "good behaviour." *See* McNair, *supra* note 15, at 160.

[20] *Princess Thurn*, [1915] 1 Ch. at 60.

[21] *Id.* at 61. In addition to being registered under section 1(1) of the Aliens Restriction Act, 1914, 4 & 5 Geo. 5, c. 12, § 1(1)(f), "under protection" meant interned under either the ARA or the royal prerogative. *See* 1 GARNER, *supra* note 6, at 119.

[22] [1915] 1 K.B. 857.

[23] *Id.* at 874.

was not nationality but the place where a person resided or carried on business. An enemy subject lawfully in Britain, the court definitively established, was entitled to the same rights as an English resident.[24] Acknowledging that the natural meaning of "alien enemy" was a subject of enemy nationality, the court announced that such usage "is not the sense in which the term is used in reference to civil rights."[25] The object of war was to cripple an enemy's commerce as much as to capture its territory, the court reasoned, and British subjects doing business in hostile territory were assisting the enemy to the same extent as subjects of enemy nationality.[26] In contrast, enemy subjects in Britain were under the King's protection, and the right to sue flowed from this protection.[27] The court thus conferred a right of judicial access on tens of thousands of enemy aliens and ensured that English law would control the disposition of their claims.

Applying the definition of enemy alien elaborated in *Porter*, the landmark case of *Schaffenius v. Goldberg*[28] further enlarged the rights of enemy subjects in Britain in two directions. First, it extended the concept into commercial affairs by allowing enemy aliens to bring cases in contract, which comprised the bulk of litigation during World War I. Second, and far more surprisingly, it brought even interned aliens within the scope of the new rule.[29]

Schaffenius involved a German national who had resided and carried on business in England for twenty-two years and who at the outbreak of war registered as an enemy alien. In March 1915 Schaffenius entered into an agreement to finance a business in picture moldings. Four months later he was interned, and the picture molder rescinded the agreement on the ground that Schaffenius was an enemy alien. Schaffenius sued, and the defendant argued that internment operated as a revocation of the plaintiff's protected status. The High

[24] *Id.* at 868.

[25] *Id.* at 867.

[26] *Id.* at 867–68. The court adopted a dictum of the House of Lords in *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484, 505–06 (H.L.), in which Lord Lindley stated that "the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy."

[27] *Porter*, [1915] 1 K.B. at 870–71.

[28] [1916] 1 K.B. 284, *aff'd*, [1916] 1 K.B. 296 (C.A.).

[29] In May 1915 the government undertook a campaign to intern subjects of enemy states in Britain, *see* 71 PARL. DEB., H.C. (5th ser.) (May 13, 1915) 1841–42, and it eventually detained more than 30,000 able-bodied men of military age, *see* 76 PARL. DEB., H.C. (5th ser.) (Nov. 24, 1915) 313; BIRD, *supra* note 6, at 8–9. The internees comprised practically the entire enemy population. *See* 1 GARNER, *supra* note 6, at 73, 127.

Court concluded, however, that the detainee plaintiff could still maintain his action. Despite the internment, he was not an enemy: he was not in enemy territory, and "[e]nemy character in a trading sense ha[d] never attached to him."[30] Presenting a justification based on English self-interest, the judge noted that precluding an alien internee from suit would "leave him liable to fulfill all his permitted transactions but powerless to enforce any of them, and such a result would not only be ruinous to the plaintiff, but speedily disastrous to all persons contracting with him."[31] Prima facie all English residents were entitled to have access to the courts, and internment was not only a form of residency but a guarantee that the "command to the alien enemy not to depart" would be obeyed.[32]

On appeal, the Court of Appeal agreed that an enemy alien interned as a civilian prisoner of war did not lose his contractual rights. As the Master of the Rolls insisted, it was in accordance with general principles of law that "the restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract."[33] Another case decided the same year, *Nordman v. Rayner*,[34] confirmed the new principle that internment did not operate to destroy an alien's "civil rights."[35] Given that practically the entire alien population was interned during World War I, the effect of the ruling was to open the English courts to virtually all enemy subjects in England.[36]

Taking a further step at the end of the war, the Court of King's Bench expanded the causes of action available to alien plaintiffs to include divorce. The plaintiff in *Krauss v. Krauss*[37] was an Austrian domiciled in England and married to an Englishwoman. When war broke out he applied for naturalization, was rejected, and immediately registered as an enemy alien. Soon thereafter he was interned, and while he was under detention his wife committed adultery and gave birth to a child. The court held that a registered alien could sue in the

30 *Schaffenius*, [1916] 1 K.B. at 290. Mr. Justice Younger observed that though an alien enemy plaintiff must prove that he was in the country with "license," registration was sufficient evidence of such a license and internment did not revoke it. *Id.* at 294–95.

31 *Id.* at 291.

32 *Id.* at 294–95.

33 *Id.* at 302.

34 (1916) 33 T.L.R. 87 (K.B.).

35 *Id.* at 88.

36 *See* 1 GARNER, *supra* note 6, at 127.

37 (1919) 35 T.L.R. 637 (Prob., Divorce & Adm.).

English courts and that the civil actions open to him included divorce.[38]

The courts did not restrict judicial access to aliens residing or working in Britain but rather extended it to enemy subjects domiciled or doing business in allied or neutral countries. As noted earlier, only persons residing or working in enemy territory were technically "enemy aliens," and by force of logic enemy subjects in countries not at war with Britain did not fall within the definition either. The Court of Chancery explicitly endorsed this expansion of jurisdiction in *Mary, Duchess of Sutherland v. Bubna*,[39] a case involving three partners who started a business in Paris before the war and subsequently sued the Duchess of Sutherland's estate. At the time of the suit in 1915, two of the partners were French subjects living in Paris, and the third, Siegfried David, was an Austrian subject apparently domiciled in Spain. On the threshold question of whether David was an enemy alien and therefore barred from suit, Mr. Justice Warrington observed that since the test was not nationality but rather the place of business, and since David was neither residing nor working in an enemy state, the case could proceed.[40] On appeal, the Court of Appeal reserved the question of David's status until the trial because there was uncertainty as to his actual residence, but it confirmed the rule that an enemy subject in a neutral country could sue in the English courts.[41] Later in the war the House of Lords expressly approved *Duchess of Sutherland*, endorsing the principle that nationality was "no longer a test of alienage in the enforcement of civil rights."[42] Thus, the judiciary skillfully dealt with the removal of a sizeable segment of the population from its jurisdiction by

[38] *Id.*

[39] (1915) 31 T.L.R. 248 (Ch.).

[40] *Id.*

[41] Mary, Duchess of Sutherland v. Bubna, (1915) 31 T.L.R. 394, 395 (C.A.).

[42] Rodriguez v. Speyer, [1919] A.C. 59, 135 (H.L.). Such an inclusive approach to jurisdiction was also evident in *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (H.L.(I.)), where the House of Lords allowed an Irish rebel to sue the Crown to recover money seized from him during an arrest. The Lords found that the plaintiff, an American citizen living in Ireland, was in the same position as a British subject even though he was apparently guilty of treason. Relying on both *Shaffenius* and *Porter*, Lord Atkinson observed that the fact that Pedlar had "shown himself unworthy of the Sovereign's protection, has abused his privileges and violated his allegiance" did not ipso facto terminate his right to sue. *Id.* at 285. The Crown had not withdrawn its protection by trying him for high treason or expelling him from the country, and mere internment did not operate as a revocation of his license to remain. *Id.* The court concluded that the case could therefore proceed. *Id.* at 284–85.

transforming the common law to return the excluded element to its fold.

c. Enemy Subjects in Enemy Territory: Joining "True" Enemy Aliens

The common law courts did not rest, however, with enlarging their jurisdiction to reach enemy subjects in British, allied, or neutral territory. Broadening judicial access still further, they held that even enemy aliens under the revised definition—persons residing or doing business in hostile countries—could bring an action if doing so would benefit English commercial interests. In *Rodriguez v. Speyer Bros.*,[43] the House of Lords for the first time allowed a German national to join a suit as a coplaintiff on the ground that he was an indispensable party to liquidating a partnership dissolved by the war. The Lord Chancellor reasoned that if the British partners were unable to join the enemy partner to recover a debt owed to the firm, the company would not be able to secure its assets until the war was over.[44] To bar the enemy alien from serving as a plaintiff in the action would thus harm British subjects more than it would damage the enemy:

> [T]here is no danger of the alien enemy's being enriched by the proceedings, as none of the assets of the firm can be handed over to him during the war. To apply the rule against suing to such a case would be to inflict hardship not on the enemy but on British and neutral partners. . . . [T]he question is whether the rule does exist in a class of cases manifestly not within the mischief at which the rule is aimed.[45]

Concluding that it would be wrong to deny a British company the right to bring an action for its own protection, the Lord Chancellor relieved the enemy alien of his procedural "disability" where his presence in the lawsuit was necessary to benefit his British partners.[46]

Lord Haldane, embarking on a lengthy excursion through the precedents, supported the Lord Chancellor's position by pointing out that while the preponderance of authority treated the preclusion of enemy aliens as a rigid common law rule rather than as a matter of policy, the courts had not been unanimous on this point.[47] It was

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[43] [1919] A.C. 59 (H.L.).

[44] *Id.* at 68. The English firm consisted of six partners, four of whom were British, one an American, and one a German. *Id.* at 64–65.

[45] *Id.* at 71.

[46] *Id.* at 75.

[47] *Id.* at 84–85.

therefore open to the highest court to examine the reason for the rule, and in his view "the balance of public convenience is in favour of allowing the respondent firm to get in this debt."[48] Lord Parmoor reached a similar conclusion, discerning no inflexible rule of law that prevented an enemy alien from suing as a coplaintiff. Applying such a rule in the present case, he decided, would not disadvantage the enemy but would rather deprive British subjects of property rights that "they unquestionably possess."[49] The House of Lords thus treated rules ensuring access to justice as flexible rules of policy rather than rigid rules of law in order to admit even "true" enemy aliens to the civil courts.

In the course of the war, therefore, the judges transformed the common law rules so that everyone lawfully in Britain could sue or be sued, and even aliens in enemy territory could bring an action if necessary to protect English commercial interests. In *Johnstone v. Pedlar*,[50] decided in 1921, the House of Lords underscored the fact that these wartime jurisdictional changes resulted solely from judicial rather than executive action. As Lord Sumner declared, the "foundation of these rights of action is that the Courts have defined their jurisdiction so as to admit them, not that the Crown has granted a right of suit."[51]

Taken collectively, the wartime decisions elevated judicial access to the status of an "elemental" right. In 1920 the King's Bench acknowledged this development in *Chester v. Bateson*,[52] which invalidated an emergency regulation prohibiting a landlord from suing to recover property without the consent of the Minister of Munitions.[53] Mr. Justice Darling observed that the regulation at issue

[48] *Id.* at 86–87.

[49] *Id.* at 136. The judges were split three to two, with Lords Atkinson and Sumner dissenting. Lord Atkinson insisted that allowing a judicial tribunal to disregard an established rule in a particular case would usurp the powers of the Legislature. *Id.* at 90. In his view, the proposition that an enemy alien was disqualified from suing only in actions where he would be enriched had "not a shred of authority" in support. *Id.* at 92. Lord Sumner dissented on the ground that the rule was unqualified—it had always been "as curt as the Commandments"—and that if the enemy was a party to the action, a successful judgment would "enure presently, if indirectly, to his material benefit." *Id.* at 117, 108.

[50] [1921] 2 A.C. 262 (H.L.(I.)).

[51] *Id.* at 291.

[52] [1920] 1 K.B. 829.

[53] CONSOLIDATED REGULATIONS, DEFENCE OF THE REALM MANUAL, Reg. 2(A)2 (5th ed. 1918) [hereinafter DORA CONSOL. REGS.].

"deprives the subject of his ordinary right to seek justice in the Courts of law,"[54] and he further insisted that forbidding a litigant access to all legal tribunals could be accomplished only by direct enactment of the legislature.[55] Conceding that "in stress of war we may rightly be obliged, as we should be ready, to forgo much of our liberty," he nonetheless concluded that "this elemental right of the subjects of the British Crown cannot be thus easily taken from them."[56] Mr. Justice Avory echoed this view, proclaiming that under constitutional law, a regulation establishing a precondition for bringing a civil suit violated Magna Carta and the Bill of Rights.[57]

As has been shown, the courts presented a number of rationales for broadening civil jurisdiction, including promoting trade, protecting property rights, assisting British subjects, and simply "doing justice." Granting judicial access to hostile subjects would facilitate commercial relations when peace was restored, and enforcing a principle of evenhanded justice would exhibit the moral superiority of the English legal system. In an early plea to admit aliens to the British courts, the *Solicitors' Journal* theorized that it was in the nation's self-interest for judges to "perform their ordinary duties towards persons of all nations."[58] As it explained in November 1914:

> [It] cannot fail to produce a great moral effect if, while Europe is submerged under a sea of cruelty and violence, justice is still dispensed with even hand to all alike. . . . [T]he guns of both sides now deal out indiscriminate destruction and slaughter in all the area of war. But this will pass; peace will return; and not a little will have been gained if, till that day, the courts of Great Britain, like the courts of Germany, can stand as emblems of peace amid the desolation of war.[59]

These considerations coalesced in a judicial policy that, in addition to advancing a variety of stated objectives, not incidentally also extended the authority of English judges and raised the stature of their courts.

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[54] *Chester*, [1920] 1 K.B. at 834.

[55] *Id.* at 833.

[56] *Id.* at 834.

[57] *Id.* at 836.

[58] *Civil Courts and War*, 59 SOL. J. 67, 68 (Nov. 21, 1914).

[59] *Id.* The article continued: "Business relations are not terminated, they are only suspended. . . . [W]e entertain no doubt that the proper motto for the courts is 'Justice as usual.'" *Id.* It was recognized that war was "inhuman and barbarous" and should not be allowed to affect the procedures of civilian courts of justice. *Id.*

2. Criminal Procedure: Restoring Jury Trial and Controlling Courts of Summary Jurisdiction

Whereas in the civil sphere diminished superior court jurisdiction flowed from common law rules that could be altered by the judiciary at will, in the criminal sphere it resulted from parliamentary action vesting jurisdiction over wartime offenses in lesser judicial bodies. Here too the courts fought to reverse the loss of authority, in this case by asserting a power of review over the newly empowered entities. Though the decisions were more circumscribed and less dramatic, the judges' impulse toward institutional self-preservation was as evident in the criminal as civil domain.

Successive incarnations of the Defence of the Realm Act ("DORA"),[60] enacted in the first few months of the war, authorized the government to create by regulation a broad range of national security offenses. In institutional terms DORA was significant because it conferred jurisdiction over the new crimes on summary magistrates' courts and courts-martial[61] rather than traditional superior courts offering jury trial. The goal was to speed up the hearing of criminal cases, reduce procedural rights of defendants, and enhance available penalties.[62] The elimination of jury trial and loss of criminal jurisdiction obviously threatened to undermine the status of the superior court judiciary. Moving aggressively to restore their authority, the judges used their legislative capacity to secure the

[60] Defence of the Realm Act, Aug. 8, 1914, 4 & 5 Geo. 5, c. 29; Defence of the Realm Act (No. 2), Aug. 28, 1914, 4 & 5 Geo. 5, c. 63; Defence of the Realm (Consolidation) Act, Nov. 27, 1914, 5 Geo. 5, c. 8; Defence of the Realm (Amendment) Act, Mar. 16, 1915, 5 Geo. 5, c. 34; Defence of the Realm (Amendment) (No. 3) Act, 1915, 5 & 6 Geo. 5, c. 42 (collectively known as "DORA").

[61] The first Defence of the Realm Act, passed on August 8, 1914, empowered the government to authorize by regulation the trial by court-martial of persons who breached regulations designed to "prevent persons communicating with the enemy" or "secure the safety of any means of communication, or of railways, docks or harbours." 4 & 5 Geo. 5, c. 29, § 1(a)–(b). A second act three weeks later extended trial by court-martial to breaches of regulations issued to "prevent the spread of reports likely to cause disaffection or alarm" or secure the safety of an area used by the troops. DORA (No. 2), 4 & 5 Geo. 5, c. 63, § 1(a)–(b). The DORA Consolidation Act, Nov. 27, 1914, 5 Geo. 5, c. 8, § 1(1), provided that the government could by regulation "authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction" of any offenses against the regulations.

[62] Where trial was by court-martial, for example, the accused was subject to the death penalty if the offense was committed "with the intention of assisting the enemy." DORA Consol. Act, Nov. 27, 1914, 5 Geo. 5, c. 8, § 1(4).

reinstatement of jury trial and their judicial capacity to control the proceedings of magistrates' and military courts.

As members of the House of Lords, the judges pressed forcefully for the restoration of trial by jury. During a debate over DORA in the House of Lords in November 1914, Earl Loreburn deplored the fact that the legislation placed "the life of the British subject at the mercy of a military Court-Martial, even though the Court of Assize may be sitting within fifty yards."[63] Similarly, Lord Parmoor insisted that there was no "precedent for taking away the rights of a British subject as regards ordinary trial by a jury directed by a skilled Judge."[64] According to Lord Bryce, the "constitutional protection of being tried by a civil Court"[65] was "one of the oldest and most treasured parts of our Constitution,"[66] while Lord Halsbury thought that there was "no necessity for getting rid of the fabric of personal liberty that has been built up for many generations."[67] Cowed by the vigor of the judges' resistance, the government reversed its position. In March 1915, claiming that such a drastic departure from constitutional principle was no longer necessary,[68] the Home Secretary introduced legislation allowing defendants to elect jury trial in the regular courts instead of court-martial.[69] Critically, in forcing the government to reinstate a fundamental right of defendants, the judges at the same time protected their traditional jurisdiction.

The restoration of jury trial, however, was limited and primarily of symbolic importance. It was available only to British subjects[70] and could be abrogated by royal proclamation in the event of "invasion or other special military emergency arising out of the present war"[71]— a

63 18 PARL. DEB., H.L. (5th ser.) (Nov. 27, 1914) 207.

64 *Id.* at 210.

65 *Id.* at 209.

66 *Id.* at 695 (Mar. 11, 1915).

67 *Id.* at 208 (Nov. 27, 1914).

68 70 PARL. DEB., H.C. (5th ser.) (Feb. 24, 1915) 288–89.

69 Defence of the Realm (Amendment) Act, Mar. 16, 1915, 5 Geo. 5, c. 34, § 1(1) ("Any offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, which is triable by court martial may, instead of being tried by a court martial, be tried by a civil court with a jury . . . .").

70 Neutrals or enemy aliens who committed offenses against the regulations remained punishable under military law. Such cases could be transferred to a civil court at the discretion of the prosecuting officer. *Id.*; *see also* Lindsay Rogers, *The War and the English Constitution*, [1915] THE FORUM 27, 30.

71 DORA (Amendment) Act, Mar. 16, 1915, 5 Geo. 5, c. 45, § 1(7). There were also procedural burdens on the election of jury trial. The accused had to make his choice within six days, *id.* § 1(2), and the use of a jury required the approval of the Attorney

provision implemented in Ireland in 1916 and again in 1920.[72] Moreover, the restoration had no effect on cases triable by summary proceeding, a category that comprised the vast majority of DORA cases.[73] In practice, between courts-martial on the one hand and summary proceedings on the other, few jury trials occurred during the war. Indeed, in 1917 the National Council of Civil Liberties reported that trial by jury had been "almost obliterated,"[74] contending that between the "upper and nether millstones of court-martial and summary jurisdiction," trial by jury was being "ground into a smallness, if not with that slowness, which is usually attributed to the mills of God."[75] Thus, the reinstatement of jury trial did not eliminate the serious challenges posed to the judiciary by magistrates' courts and courts-martial, and the judges dealt with these threats by treating both bodies as "inferior courts" subject to their review.

With respect to the magistrates' courts,[76] two cases in particular illustrated the vigorous exercise of superior court control. The first case, *Kaye v. Cole*,[77] limited the magistrates' power over national security offenses to the duration of the war, and the second, *Norman*

General. DORA CONSOL. REGS., *supra* note 53, Reg. 56(11). If the offender made no claim to jury trial, the case could be tried by court-martial unless the Admiralty or Army Council instructed that it should not be. *Id.* Reg. 56(6)(b). If a person entitled to jury trial failed to elect it, it was reversible error to provide it to him. *See* R. v. Kakelo, [1923] 2 K.B. 793 (C.C.A.) (quashing a conviction because a magistrate sent a case to quarter sessions without a request by the prisoner). Finally, even in a jury trial the offender was liable to the punishment that could be inflicted by a court-martial, with the possibility of a death sentence if an offense was committed with the intention of assisting the enemy. DORA CONSOL. REGS, *supra* note 53, Reg. 56A.

[72] *See infra* text accompanying notes 176–91.

[73] *See* DORA (Amendment) Act, 1915, 5 Geo. 5, c. 45, § 1(2). A preference for summary jurisdiction pervaded the regulatory scheme. Some offenses were specifically vested only in courts of summary jurisdiction. *See* DORA CONSOL. REGS., *supra* note 53, Reg. 56(2). Where a person was charged with other than a summary offense, the competent naval or military authority was required to investigate and determine whether the offense could indeed be dealt with by a court of summary jurisdiction. *Id.* Reg. 56(3). If so, the offender was to be tried only summarily. *Id.* Reg. 56(5). In a case scheduled for jury trial, the prosecution was required to investigate it again to determine whether summary proceedings might be adequate. *Id.* Reg. 56(7). The Director of Public Prosecutions determined the forum for press and munitions offenses, *id.* Reg. 56(13)–(14); *see* Fox v. Spicer, (1917) 33 T.L.R. 172 (K.B.), and the Director almost always chose summary trial. *See, e.g.*, "NORTH BRITON," BRITISH FREEDOM 1914–1917, at 50 (1917).

[74] "NORTH BRITON," *supra* note 73, at 49.

[75] *Id.* at 51–52.

[76] The exercise of superior court control over courts-martial is discussed *infra* Part I.C.

[77] (1917) 115 L.T. 783 (K.B.).

v. Matthews,[78] dictated procedures in the magistrates' courts. *Kaye* involved an Oxford undergraduate convicted in a magistrate's court of possessing antiwar posters in violation of a DORA regulation.[79] The defendant appealed on the ground that his prosecution was untimely under the Summary Jurisdiction Act 1848,[80] which required that a summary prosecution be initiated within six months of the offense. The King's Bench held that the magistrates derived their powers over wartime crimes exclusively from DORA—an act effective only for "the continuance of the present war"[81]—and declared the Summary Jurisdiction Act to be inoperative.[82] As the Lord Chief Justice observed, the magistrates were able to entertain the case only because the military authority, acting under DORA, had selected a summary court as the appropriate forum. "The jurisdiction is conferred by the regulations," the court proclaimed, and was "not derived from the Summary Jurisdiction Acts at all."[83] The import of the case was that the King's Bench put finite limits on the newly expanded jurisdiction of the summary courts.

The second case, *Norman v. Matthews*,[84] demonstrated the manner in which the superior courts shaped procedural rules governing magistrates' courts, and it further indicated that in determining the contours of summary jurisdiction, the wartime judges were quite willing to flout executive policy. In 1916 the police utilized a DORA regulation dealing with press offenses to seize newspapers in the possession of C.H. Norman, a left-wing journalist.[85] Norman sued the Department of Public Prosecutions to quash an order to destroy the documents, and a magistrate dismissed his action in a private hearing. Norman protested the fact that the hearing had been conducted in secret, raising an issue of some significance since closed

[78] [1916–17] All E.R. Rep. 696 (K.B.).

[79] *Id.* at 788. The regulation criminalized statements "likely to prejudice the recruiting, training, discipline, or administration of any his Majesty's forces." DORA CONSOL. REGS., *supra* note 53, Reg. 27(c).

[80] 11 & 12 Vict., c. 43, § 11.

[81] DORA, Aug. 8, 1914, 4 & 5 Geo. 5, c. 29, § 1.

[82] *Kaye*, 115 L.T. at 785.

[83] *Id.* In contrast to the Summary Jurisdiction Act, a DORA regulation provided that a defendant could be tried by a court of summary jurisdiction even if the offense had been committed more than six months before institution of the proceedings. DORA CONSOL. REGS., *supra* note 53, Reg. 56(6).

[84] [1916–17] All E.R. Rep. 696 (K.B.).

[85] *Id.* at 697.

proceedings were a common and controversial magisterial practice.[86] The government was also troubled about the magistrates' excessive use of this procedure. In 1915, for example, the Home Secretary issued a circular urging magistrates to exercise this power with "great care,"[87] and he subsequently declared in Parliament that it was important "to maintain the good practice of public trial as far as possible."[88]

Ignoring the government's position on public trials, the King's Bench upheld the closure of the proceedings below on the basis that a court has inherent authority to hear a case in camera if "necessary for the proper administration of justice."[89] Significantly, the court could have reached the same result on the basis of statutory and regulatory authority: both DORA and Regulation 51A authorized in camera proceedings.[90] Instead, however, the court chose to rely on inherent judicial powers. In other words, judges displayed their independence by grounding their decisions in common law authority rather than on any powers vested in them by the executive or legislature.[91]

In instances where the courts necessarily construed emergency statutes and regulations rather than relying on common law analysis,

[86] *See id.* at 699 (Mr. Justice Sankey noting that in numerous recent cases heard by the magistrates, hearings had been conducted in camera). The National Council for Civil Liberties reported that magistrates generally acceded to a prosecutor's demand that an entire case—not merely some part of the evidence—be heard in camera. *See* "NORTH BRITON," *supra* note 73, at 54.

[87] *See* 79 J.P. 596, 597 (1915). Two years later Lord Sheffield complained in the House of Lords of the magistrates' "unreasonable use of the power of hearing cases *in camera*" and their "indifferen[ce] to these pious hopes on the part of the Secretary of State." 24 PARL. DEB., H.L. (5th ser.) (Mar. 7, 1917) 408–09.

[88] 75 PARL. DEB., H.C. (5th ser.) (Nov. 4, 1915) 810. He also stated that "trial *in camera* should only be resorted to in so far as national interests really demand." *Id.*; *see* 81 PARL. DEB., H.C. (5th ser.) (Mar. 23, 1916) 422–23.

[89] *Norman*, [1916–17] All E.R. Rep. at 698. The court cautioned, however, that it should not hear a case in camera lightly. To close the proceedings "is to take a very exceptional course, and it is a jurisdiction which ought to be exercised with the greatest care, and only upon the strongest grounds." *Id.* at 699.

[90] DORA (Amendment) Act, Mar. 16, 1915, 5 Geo. 5, c. 34, § 1(3); DORA CONSOL. REGS., *supra* note 53, Reg. 51A.

[91] In an earlier case, *Ex parte Norman*, (1916) 114 L.T. 232 (K.B.), Norman had challenged Regulation 51A itself, which provided that proceedings challenging confiscation of material by the police could be held in camera if the public interest so required. The court concluded that the regulation was intra vires DORA, emphasizing that since the magistrate had the power apart from regulation to hear proceedings in camera, it followed that the regulation was not ultra vires. *Id.* at 234. In other words, the court validated a DORA regulation on the basis of a magistrate's preexisting common law power to hear cases in camera.

the judges demonstrated their lack of subservience to other bodies by rejecting positions espoused by the government, the legislature, and the magistrates below. For example, in cases involving the conscription of dual nationals, the High Court ignored both parliamentary intent and magistrates' decisions effectuating that intent by ruling that enemy aliens were subject to military service.[92] The judges also discarded the interpretations of magistrates and ministers in analyzing other provisions of the Military Service Act.[93] In addition, they construed statutes to facilitate appeals from magistrates' courts to higher courts, thereby ensuring the availability of superior court review over summary court proceedings.[94]

The superior courts thus responded to the elimination of jury trial and the concomitant rise of magistrates' courts by securing a key statutory change with respect to jury trial, closely supervising the proceedings of inferior courts, and rendering decisions that underscored judicial independence. In the criminal no less than the civil sphere, the courts responded to the challenge of diminished jurisdiction by working assiduously and successfully to restore their traditional authority.

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[92] The Military Service Act 1916, 5 & 6 Geo. 5, c. 104, § 1(1), conscripted "[e]very male British subject" of a certain age, and the British Nationality & Status of Aliens Act 1914, 4 & 5 Geo. 5, c. 17, § 14, enabled any dual national upon reaching adulthood to cease being a British subject. Magistrates often sensibly interpreted the legislation to allow dual nationals to declare their alienage and avoid conscription. *See, e.g.*, Sawyer v. Kropp, (1916) 85 L.J.K.B. 1446, 1447; Dawson v. Meuli, (1918) 118 L.T. 357, 359 (K.B.). However, the High Court disregarded clear parliamentary intent in both statutes and insisted upon drafting enemy aliens into the British Army. *See* Vorspan, *supra* note 3, at 288–93.

[93] *See, e.g.*, Towler v. Sutton, (1917) 86 L.J.K.B. 46 (rejecting the position of the magistrate and the Crown that a recruiting officer's refusal to accept an affirmation in place of a statement under oath from an atheist attempting to enlist was not a "rejection" from military service); R. v. Burnham, (1918) 119 L.T. 308 (K.B.) (rejecting the position of the magistrate and the Crown that the defendant had not been interned by the enemy and was therefore liable to military service under the Military Service Act).

[94] *See, e.g.*, R. v. Campbell ex parte Moussa, [1921] All E.R. Rep. 499 (K.B.) (finding a right of the defendant under the Summary Jurisdiction and Criminal Justice Acts to appeal from a magistrate's court to a court of general or quarter sessions). The courts also interpreted criminal statutes to confer expansive jurisdiction on the English courts. *See, e.g.*, R. v. Casement, [1916–17] All E.R. Rep. 214 (C.C.A.) (interpreting the Treason Act 1351 broadly to reach Irish rebels giving "aid and comfort to the King's enemies" in Germany rather than England).

B. Wartime Executive Tribunals: The Challenge of Administrative Encroachment

A second wartime challenge to the authority of the traditional courts emanated from the new executive agencies established by the government to deal expeditiously with critical matters affecting the war. The two primary wartime administrative entities were the munitions tribunals to enforce the comprehensive labor code established by the Munitions of War Act[95] and the military service tribunals to decide applications for exemption under the Military Service Act.[96] These bodies posed a particular threat to the judiciary because the government invested the tribunals with "judicial" features to enhance their legitimacy. Utilizing judicial personnel and procedures, and charged with the ordinary judicial tasks of interpreting statutes and adjudicating disputes, the new agencies potentially supplanted the regular courts. The judges responded by treating these bodies as equivalent to magistrates' courts, dealing with them as "inferior courts" that were part of the normal judicial hierarchy and subject to superior court review. Although scholars have assumed that such administrative entities relegated the judiciary to a subsidiary role during and after the war,[97] the courts in fact

95 1915, 5 & 6 Geo. 5, c. 54; Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99; Munitions of War (Amendment) Act, 1917, 7 & 8 Geo. 5, c. 45.

96 1916, 5 & 6 Geo. 5, c. 104. There was also a third wartime administrative agency, an Advisory Committee that gave advice to the Home Secretary on internment and deportation orders. DORA CONSOL. REGS., *supra* note 53, Reg. 12. The Chairman of the Committee was required to be a person who "holds or has held high judicial office," which meant a judge of the High Court or above. *Id.* Reg. 13. Two High Court judges each chaired a subcommittee. Sir John Sankey's committee dealt with challenges to internment orders, while Sir Robert Younger's dealt with deportation questions. Persons ordered interned or detained had seven days to appeal, and after March 1916 they received a statement indicating the grounds on which the order had been made. *See* 81 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1916) 1248. The function of the Committee was largely to give judicial legitimacy to the government's internment and deportation decisions; in introducing the body to the House of Commons, the Home Secretary referred to it as an advisory body of a "judicial" character." *See* SIMPSON, *supra* note 2, at 16.

97 *See, e.g.*, COLM CAMPBELL, EMERGENCY LAW IN IRELAND, 1918–1925, at 148 (1994) (discussing the diminution of the judicial role in British legal culture owing to the grant of judicial and quasi-judicial powers to the executive); BARTON L. INGRAHAM, POLITICAL CRIME IN EUROPE 292 (1979) (noting that Britain during and between the wars was ruled by administrative regulations "practically free from interference by the courts"); ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976, at 196 (1978) (contending that in the period from 1912 to 1940 "governments had few qualms in passing new functions of government to bodies totally unrelated to the regular courts," thereby making the courts "increasingly irrelevant"); TOWNSHEND, *supra* note 2, at 66 (discussing the diminution of judicial authority after World War I);

energetically asserted control over these potentially encroaching bodies and dictated their jurisdiction, procedures, and substantive law.

1. Munitions Tribunals Under the Munitions of War Act

The Munitions of War Act[98] ("Munitions Act") introduced a detailed scheme for regulating munitions production during the war. It banned strikes and lockouts, restricted labor mobility, promoted labor discipline, and authorized replacement of skilled workers with semi-skilled and female labor.[99] Specific provisions of the statute directed the government to prohibit companies essential to armaments production from limiting productivity, exceeding specified profit margins, or altering wages without government consent.[100] A particularly controversial clause regulated the flow of labor by requiring munitions workers to secure a "leaving certificate" from their current employer before obtaining alternate employment.[101] The Munitions Act also empowered the Minister of Munitions to develop rules for individual establishments dealing with such matters as sobriety, diligence, and punctuality.[102]

To enforce this scheme, the Munitions Act established special industrial courts known as "munitions tribunals." Initially the

WILLIAMS, *supra* note 2, at 188 (observing the decline of judicial in favor of administrative powers and stating that "[t]housands of administrative tribunals . . . now exist for decisions which the courts have neither the time nor the technique to undertake").

98 1915, 5 & 6 Geo. 5, c. 54.

99 *See* GERRY R. RUBIN, WAR, LAW AND LABOUR: THE MUNITIONS ACTS, STATE REGULATION, AND THE UNIONS, 1915–1921, at 1 (1987); CHRIS WRIGLEY, DAVID LLOYD GEORGE AND THE BRITISH LABOUR MOVEMENT 6–7 (1976).

100 *See* RUBIN, *supra* note 99, at 16; WRIGLEY, *supra* note 99, at 110–21. A contemporary summarized the basic scheme for the legislation as placing both employers and workmen under the control of the government, supplanting strikes and lockouts with a system of statutory arbitration, abrogating freedom of contract, and allocating excess profits to the state rather than the employer. *See* THOMAS ALEXANDER FYFE, EMPLOYERS & WORKMEN UNDER THE MUNITIONS OF WAR ACTS 1915–1917, at 2–3 (3d ed. 1918).

101 If an employer refused the certificate, the worker was not permitted to work for another employer for six weeks. Munitions of War Act, 1915, 5 & 6 Geo. 5, c. 54, § 7(1); *see* GERD HARDACH, THE FIRST WORLD WAR, 1914–1918, at 188 (1977) (noting that few workers could afford to forego wages for six weeks); *Munitions Tribunals*, 31 JURID. REV. 152, 154 (1919) (commenting that no provision of the Act was more disliked by workers). Workers particularly resented employers who suspended workers without giving them leaving certificates in order to create a reserve of labor in anticipation of new government contracts. *See* THE LABOUR YEAR BOOK 1919, at 99 (1919) [hereinafter LABOUR YEAR BOOK]. The scheme was so unpopular that it was abolished in October 1917. *Id.* at 104; *see* HARDACH, *supra*, at 189.

102 *See* WRIGLEY, *supra* note 99, at 6–7.

government proposed to use ordinary criminal courts for this purpose, but the Labour Party, harboring longstanding suspicions of magistrates and judges,[103] resisted this plan. Conceding that it was not expedient to treat labor questions as criminal law matters, the Home Secretary placated workers by agreeing to establish more appropriate "domestic" bodies.[104] The government created two types of munitions tribunals: ten "general" tribunals to deal with major offenses under the act, such as striking or poaching employees from competing firms; and fifty-five "local" tribunals to handle routine matters, such as employers denying leaving certificates or workers infringing work rules.[105] Both general and local tribunals consisted of a chairman and an even number of lay "assessors," half of whom represented employers and half employees.[106] By December 1915 the tribunals controlled more than a million workers in Britain.[107] In

[103] *See* 4 HISTORY OF THE MINISTRY OF MUNITIONS, PART II: THE REGULATION OF LABOUR 11 (1918) [hereinafter HISTORY]; WRIGLEY, *supra* note 99, at 112; G.R. Rubin, *The Origins of Industrial Tribunals: Munitions Tribunals During the First World War*, 6 INDUS. L.J. 149, 153 (1977). According to Arthur Henderson, President of the Board of Education, munitions tribunals were created because the government desired "not to have the men taken before the magistrates and to feel possibly that they were not getting their cases considered always by men of a more sympathetic nature." 72 PARL. DEB., H.C. (5th ser.) (July 1, 1915) 2079. On labor hostility to the judiciary in the late nineteenth and early twentieth centuries, see Rachel Vorspan, *The Political Power of Nuisance Law: Labor Picketing and the Courts in Modern England, 1871–Present*, 46 BUFF. L. REV. 593, 609–43 (1998).

[104] Sir John Simon, the Home Secretary, declared that the object was to secure "something in the nature of a domestic tribunal. You do not want to carry the workmen, or the employer either, in a matter of this sort before a Police Court in order to deal with it as if this was a criminal matter." 72 PARL. DEB., H.C. (5th ser.) (June 28, 1915) 1548. Similarly, Arthur Henderson stated that the government wanted to "take all the cases right away from the Police Court" and have them dealt with by a "domestic court." *Id.* at 2077–78 (July 1, 1915); *see id.* at 1550, 1588; *see also De Minimis*, 34 LAW NOTES 321, 322 (1915).

[105] *See* HISTORY, *supra* note 103, at 12; RUBIN, *supra* note 99, at 2; *Munitions Tribunals*, *supra* note 101, at 153–54. Whereas the general tribunals could deal with all offenses, impose fines, and in some circumstances imprison offenders, the local tribunals dealt only with offenses for which the maximum fine did not exceed five pounds. Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99, § 18(1).

[106] Munitions of War Act, 1915, 5 & 6 Geo. 5, c. 54, § 15(1). The Munitions of War Amendment Act 1916 provided for the appointment of a woman assessor in cases involving a female worker. 5 & 6 Geo. 5, c. 99, § 18(2)(b). The Act also required the chairman to consult the assessors before giving his decision; if they were unanimous, he was bound by their opinion except on questions of law. *Id.* § 18(2)(a).

[107] *See* Chris Wrigley, *Introduction*, *in* CHALLENGES OF LABOUR: CENTRAL AND WESTERN EUROPE 1917–1920 1, 7 (Chris Wrigley ed., 1993). In 1918, 3.4 million workers were involved in munitions work and more than two million were employed in controlled establishments. *See* Rubin, *supra* note 103, at 162.

their first year of operation, they heard more than 21,000 cases, 354 in the general tribunals and the remainder in the local tribunals.[108]

The tribunals presented a special threat to the judiciary because they possessed features that conveyed "judicial" legitimacy even as these entities remained distinct from the ordinary courts. Their judicial character was evident in their personnel, structure, and procedures. Eminent members of the bar, generally King's Counsel, presided over the general tribunals, while solicitors, coroners, barristers, and justices of the peace chaired the local bodies.[109] Magistrates' clerks, familiar with procedures in courts of summary jurisdiction, acted as tribunal clerks.[110] The tribunals also emulated the courts in utilizing an adversarial system: employers and employees could lodge complaints against one another, and the Minister of Munitions could bring a prosecution against either side.[111] Cases were to be tried in open court,[112] and a tribunal could not fine a person unless he or she had either appeared before the tribunal or had a reasonable opportunity of so appearing.[113] Counsel were permitted in the general tribunals though not in the local tribunals out of fear that legal representation would put workers at a disadvantage.[114] The Minister of Munitions promulgated rules requiring a complaint to be in writing[115] and allowing, but not requiring, evidence to be taken

[108] *See* LABOUR YEAR BOOK, *supra* note 101, at 106; Rubin, *supra* note 103, at 162. The general tribunals heard a comparatively small number of cases since they could not hear cases within the competence of a local tribunal unless the matter was referred to them by the Ministry of Munitions. *See* LABOUR YEAR BOOK, *supra* note 101, at 105.

[109] *See Munitions Tribunals*, *supra* note 101, at 152; Rubin, *supra* note 103, at 154.

[110] *See* HISTORY, *supra* note 103, at 11; *Munitions Tribunals*, *supra* note 101, at 153. This feature was helpful because prosecutions by the Minister of Munitions were governed by the Summary Jurisdiction Act regarding compelled attendance of defendants and witnesses, the payment and recovery of fines, and the execution of service between one part of the British Isles and another. MUNITIONS (TRIBUNALS) RULES, 1917, R. 11, *reprinted in* FYFE, *supra* note 100, at 147–56 [hereinafter TRIBUNAL RULES].

[111] *See* RUBIN, *supra* note 99, at 138–44; Rubin, *supra* note 103, at 153–59.

[112] TRIBUNAL RULES, *supra* note 110, R. 13.

[113] *Id.* R. 11(iii); *see id.* R. 12(ii).

[114] *Id.* R. 16; *see also* Rubin, *supra* note 103, at 158; *De Minimis*, *supra* note 104, at 321–22. Trade union representatives often appeared on behalf of their members. *See* TRIBUNAL RULES, *supra* note 110, R. 16; HISTORY, *supra* note 103, at 12; Rubin, *supra* note 103, at 158.

[115] TRIBUNAL RULES, *supra* note 110, R. 8. In order to maintain the domestic character of the tribunal, a summons to attend could be made by registered letter rather than by a police officer. *See* HISTORY, *supra* note 103, at 12.

under oath.[116] This quasi-judicial structure posed a challenge to the regular courts because it suggested that they were unnecessary for either the interpretation or enforcement of wartime legislation.

Judicial review had not been part of the original administrative scheme, but labor quickly became dissatisfied with the munitions tribunals. Despite the government's intention to create "domestic" bodies, the tribunals acquired the aura of a criminal court. Hearings often took place in a law or even police court where, as an official investigator reported, there was "an objectionable criminal atmosphere."[117] It only exacerbated the unpleasantness that police were frequently summoned to maintain order.[118] In addition to resenting the oppressive setting, workers and unions complained that tribunal rulings were arbitrary, inconsistent, and biased against them.[119] Statistics indeed bore out the claim that employees were prosecuted far more often than employers and convicted at a much higher rate.[120] In the face of mounting complaints, the government

116 TRIBUNAL RULES, *supra* note 110, R. 10A; *see* Kinder v. Delta Metal Co., (1916) 1 Mun. App. Rep. 46, 50 (noting that the usual procedure was not to hear evidence under oath). Under the Munitions of War Act 1915, 5 & 6 Geo. 5, c. 54, § 15(3), the Home Secretary issued rules to be followed in penal offenses and the Minister of Munitions promulgated rules involving any other matter.

117 U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, INDUSTRIAL UNREST IN GREAT BRITAIN 93 (1917) [hereinafter INDUSTRIAL UNREST]; *see also id.* at 91, 112; Rubin, *supra* note 103, at 156. As the National Council for Civil Liberties proclaimed, the tribunals, if not courts in name, were "courts in the essential fact." "NORTH BRITON," *supra* note 73, at 66.

118 Rubin, *supra* note 103, at 156.

119 *See, e.g.*, INDUSTRIAL UNREST, *supra* note 117, at 91–92; LABOUR YEAR BOOK, *supra* note 101, at 97 (citing widespread dissatisfaction by unions with arbitrary tribunal decisions); G.R. Rubin, *The Munitions Appeal Reports 1916–1920: A Neglected Episode in Modern Legal History*, 1977 JURID. REV. 221, 222. Another investigator reported that the tribunals were considered "peculiarly obnoxious" by workers, who found it difficult to distinguish them from a police court and resented the stigma. Similarly, an investigator reported that "[i]n normal times the employer disciplines his own men, now discipline is enforced publicly in a criminal court." INDUSTRIAL UNREST, *supra* note 117, at 91.

120 In the period between July and November 1915, 589 workers were prosecuted for striking and 407 of them were convicted; charges were also brought against 3074 workers for breaches of work rules, 2012 of whom were convicted. In the case of employers, fifty-five were convicted of illegally employing workers without a leaving certificate, and there was one failed prosecution of an employer for locking out his employees. In the same period, the tribunals granted 782 leaving certificates and rejected 1343. MINISTRY OF MUNITIONS, RETURN OF CASES HEARD BEFORE MUNITIONS TRIBUNALS, 1915, Cd. 8143, at 2. From November 1915 to July 1916, there were 1023 prosecutions of striking workers, 599 of whom were convicted, and there were 12,004 complaints of breaches of rules of controlled establishments resulting in the conviction of 8633 workers. The same period saw no prosecutions of employers for lock-out violations and only 115 charges,

decided to insert into the administrative scheme a formal layer of judicial review. Accordingly, in January 1916 Parliament amended the Munitions Act to provide a process for appealing tribunal decisions to special divisions of the High Court for England and Wales, Ireland, and Scotland.[121]

The High Court judges made the most of their opportunity. They vigorously asserted their power of review over the administrative tribunals, treating them as inferior courts and determining both their law and procedures. In rendering substantive decisions, the High Court judges construed the Munitions Act to resolve many important issues of national policy: the scope of the statute,[122] the rate of wages payable to workers,[123] the standards for issuing or withholding leaving certificates,[124] the rights of unions and striking workers under

yielding 71 convictions, of employing workers without a certificate. The tribunals granted 3225 leaving certificates and refused 5185. MINISTRY OF MUNITIONS, RETURN OF CASES HEARD BEFORE MUNITIONS TRIBUNALS, 1916, Cd. 8360, at 2; *see also* LABOUR YEAR BOOK, *supra* note 101, at 106–07.

121 Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99, § 18(3). Superior court review of tribunal procedures was especially important because at the trial level the tribunals had exclusive jurisdiction over most claims arising under the Munitions of War Acts. *See* Hulme v. Ferranti, Ltd., [1915] 2 K.B. 426. High Court proceedings were more formal than tribunal proceedings but differed from ordinary proceedings by following a simple and expeditious procedure and assessing low fees. Appeals were conducted by counsel, though on occasion the judge allowed trade union officials to appear. *See* Rubin, *supra* note 103, at 159 (quoting H. WOLFE, LABOUR SUPPLY AND REGULATION 113 (1923)).

122 The court determined, for example, what firms qualified as "controlled establishments" and what types of employees were entitled to protection against dismissal without notice. *See, e.g.*, Mayne v. Micanite & Insulators Co., (1916) 1 Mun. App. Rep. 1; Shaw v. Lincoln Waggon & Engine Co., (1916) 1 Mun. App. Rep. 11; Briggs v. London & S. W. Ry. Co., (1916) 1 Mun. App. Rep. 43; Rawnsley v. Bradford Dyers Assoc., Ltd., (1916) 1 Mun. App. Rep. 103; Foden v. Jacquet-Maurel & Condac, Ltd., (1916) 1 Mun. App. Rep. 237; Perris v. Wolseley Motors, Ltd., (1917) 2 Mun. App. Rep. 48.

123 Collins v. Brazil, Straker & Co., (1916) 1 Mun. App. Rep. 27; Curnock v. J. Butler & Co., (1916) 1 Mun. App. Rep. 52; *Perris*, (1917) 2 Mun. App. Rep. 48; Morris v. Rudge-Whitworth, Ltd., (1917) 2 Mun. App. Rep. 107; Scott v. MacLellan, (1919) Scot. Mun. App. Rep. 182.

124 *See, e.g.*, Bennett v. King's Norton Metal Co., (1916) 1 Mun. App. Rep. 114; Acme Steel & Foundry Co. v. Stafford, (1917) Scot. Mun. App. Rep. 53, 54; Stierlin v. Gen. Stores & Munitions Co., (1916) 1 Mun. App. Rep. 124; Gane v. Rees Roturbo Mfg. Co., (1916) 1 Mun. App. Rep. 129; Padgett v. Richard Hornsby & Sons, Ltd., (1916) 1 Mun. App. Rep. 137; Knowles v. Ollersett Collieries Co., (1916) 1 Mun. App. Rep. 63; Taylor v. Samuel Osborn & Co., (1916) 1 Mun. App. Rep. 163; Dodds v. J.L. Thompson & Sons, Ltd., (1917) 2 Mun. App. Rep. 63; Bayliss v. Worsey, Ltd., (1917) 2 Mun. App. Rep. 68.

the regulatory scheme,[125] and the conditions under which an employee could be discharged for misconduct.[126] The High Court established uniform binding rules on all these matters,[127] frequently reversing the decisions of the munitions tribunals for incorrectly interpreting the statutory requirements.[128]

Even more significant than reversing tribunal judgments, the High Court judges not infrequently decided against the government, demonstrating their intention to shape national munitions policy on their own distinctive terms.[129] In *Whittingham v. New Liverpool Rubber Co.*,[130] for example, the High Court expanded statutory protection for workers over the objections of both the Minister of Munitions and the employer. Whittingham, a packing employee, complained that he had been summarily dismissed without receiving compensation that the Act mandated. The employer countered that Whittingham was not covered by the legislation because he had spent

125 *See, e.g.*, Guillet v. E.H. Bentall & Co., (1916) 1 Mun. App. Rep. 86; George v. Larne Shipbuilding Co., (1917) 2 Mun. App. Rep. 82; *Morris*, (1917) 2 Mun. App. Rep. 107; Orr v. Beardmore & Co., (1917) Scot. Mun. App. Rep. 99.

126 *See, e.g.*, Payne v. Brazil, Straker & Co., (1916) 1 Mun. App. Rep. 223; Nat'l Projectile Factory v. Fagan, (1917) 2 Mun. App. Rep. 75; Kilby v. Chief Superintendent of Ordnance Factories, (1917) 2 Mun. App. Rep. 121; Lane v. Chief Superintendent of Ordnance Factories, (1917) 2 Mun. App. Rep. 117; Rodgers v. Menzies & Co., (1917) Scot. Mun. App. Rep. 83.

127 Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99, § 18(3).

128 *See, e.g.*, Mayne v. Micanite & Insulators Co., (1916) 1 Mun. App. Rep. 1; Shaw v. Lincoln Waggon & Engine Co., (1916) 1 Mun. App. Rep. 11; *Curnock*, (1916) 1 Mun. App. Rep. 52; Sandberg v. A.D. Dawnay & Sons, (1916) 1 Mun. App. Rep. 70; *Guillet*, (1916) 1 Mun. App. Rep. 86; Abbott & Rea v. Cammell, Laird & Co., (1916) 1 Mun. App. Rep. 199; *Taylor*, (1916) 1 Mun. App. Rep. 163; Norris v. Lancashire Dynamo & Motor Co., (1916) 1 Mun. App. Rep. 98.

129 Judicial independence was also evident in the decisions of the Internment and Deportation Advisory Committee, *see supra* note 96, which more often than not reversed the Home Secretary's determinations. The Sankey internment subcommittee held its first meeting on May 27, 1915, and sat on forty occasions during the next two months, considering 14,117 challenges to internment orders. Though the burden was on the alien to show why exemption was warranted, the committee granted 6092 applications and held another 1233 for further consideration. In the following seven months, the subcommittee dealt with an additional 2076 applications, recommending favorably on 1211. *See* BIRD, *supra* note 6, at 96. Viscount Cave pointed out in February 1917 that nearly all the 20,000 aliens still at liberty had been recommended for exemption by the Advisory Committee. *Id.* at 118. Though critics complained that the Committee had no real power – it was appointed by the government, could be instantly dismissed by the government, and could not insist on a person's release, *see* "NORTH BRITON," *supra* note 73, at 61 – the government insisted that the Committee's advice was always followed, *see* 80 PARL. DEB., H.C. (5th ser.) (Mar. 2, 1916) 1247; *see also* BIRD, *supra* note 6, at 97.

130 (1917) 2 Mun. App. Rep. 98.

only twenty percent of his time packing military goods. The Minister had previously circulated a memorandum interpreting the Munitions Act to apply only to workers engaged in "substantial" munitions work, and twenty percent was arguably inadequate to satisfy this standard. Mr. Justice Atkin, however, noting that his view differed significantly from that of the Minister, concluded that the statute applied in Whittingham's case.[131] He pointed out that it merely required that an employee work "on or in connection with munitions work," interposing no such qualification as "substantially employed."[132]

Similarly, the judiciary reached decisions independent of the government on the appropriate wage rate for workers, repeatedly announcing that such a critical matter was its own responsibility and not that of the Minister of Munitions. In *Collins v. Brazil, Straker & Co.*,[133] for example, four employees in Bristol charged their employer with reneging on a promise to pay them a particular wage. The employer's defense, backed by the Minister of Munitions, was that the employees were receiving exactly the salary that the Ministry had authorized, which was less than the sum agreed upon between workers and employer. Mr. Justice Atkin declared that the amount of remuneration was not for the Minister to decide: the worker need only satisfy the court, not the Minister, of the wages to which he was entitled.[134] Similarly, other rulings on the merits departed from the stated policy of the Minister of Munitions.[135]

Revealingly, while the judges readily rejected the position of the government, they were deeply reluctant to eschew their own precedents. Where common law rules arguably factored into the

131 *Id.* at 106.

132 *Id.* at 104.

133 (1916) 1 Mun. App. Rep. 27.

134 *Id.* at 40.

135 *See, e.g.*, Briggs v. London & S. W. Ry. Co., (1916) 1 Mun. App. Rep. 43 (rejecting the Minister's position that repairing navy locomotives was not "munitions work" within the meaning of the Act); Curnock v. J. Butler & Co., (1916) 1 Mun. App. Rep. 52 (rejecting the Minister's view of the applicability of an agreement between employers and unions in determining the rate of wages); Rawnsley v. Bradford Dyers Ass'n, Ltd., (1916) 1 Mun. App. Rep. 103 (rejecting the Minister's view that a worker was not engaged in munitions work and therefore not entitled to compensation in lieu of notice upon dismissal); Cook v. Haslam Foundry & Eng'g Co., (1917) 2 Mun. App. Rep. 8 (rejecting the Minister's policy that it was not generally in the national interest for a man to change his employment to obtain overtime work); Lane v. Chief Superintendent of Ordnance Factories, (1917) 2 Mun. App. Rep. 117 (rejecting the Minister's contention that an employee was guilty of misconduct for being under the influence of alcohol).

analysis, the courts invariably treated them as dispositive. For example, in *Payne v. Brazil, Straker & Co.*,[136] the court rejected an employee's claim of unjust dismissal in light of a restrictive common law rule allowing an employer to dismiss a worker for misconduct even if the misconduct was unknown to the employer at the time of discharge. The worker argued that the common law rule did not apply to claims under the Munitions Act,[137] but the court concluded otherwise. Similarly, in *Hinchley v. A.V. Roe & Co.*[138] the court relied on a common law rule to deny a claim of wrongful discharge brought by workers who had mistakenly remained on the job while filing their complaint.[139] These decisions adverse to labor were at odds with the High Court's generally sympathetic stance toward workers, suggesting that institutional loyalty was a paramount factor in determining substantive judicial results.

In addition to deciding the legal rules that the tribunals would apply, the courts also controlled the procedures that would govern. For example, operating within the parameters set by regulation, the High Court issued specific rulings with respect to the form of the complaint.[140] It further determined evidentiary requirements, establishing that testimony under oath was unnecessary since munitions tribunals were "emergency Courts" that administered justice "in very difficult circumstances, and with all possible speed."[141] Frequently, the High Court demonstrated its lack of

136 (1916) 1 Mun. App. Rep. 223.

137 *Id.* at 225. The position of the worker was that the employer could only rely on the actual ground for dismissal. *Id.*

138 (1919) 3 Mun. App. Rep. 50.

139 Nonetheless, the judge suggested in dicta that the employers had probably breached the contract of employment and that the workers might have a remedy in damages. *Id.* at 57–58; *see* Gorman v. Luke & Spencer, Ltd., (1919) 3 Mun. App. Rep. 59 (ruling in favor of the employer on common law principles but again suggesting that the employer might have breached the contract of employment); Morgan v. Fraser & Chalmers, Ltd., (1916) 1 Mun. App. Rep. 109 (holding that the amount owed a worker in compensation for dismissal without notice must be determined on common law damages principles); *see also* Hoyle v. Harland & Wolff, Ltd., (1918) 3 Mun. App. Rep. 18; Acme Steel & Foundry Co. v. Fulton, (1919) Scot. Mun. App. Rep. 186.

140 *See* G. Inglis & Co. v. Walker, (1916) Scot. Mun. App. Rep. 10; Swales v. Great E. Ry. Co., (1916) 1 Mun. App. Rep. 189; Shelton Iron, Steel & Coal Co. v. Hassall, (1916) 1 Mun. App. Rep. 208.

141 Scottish Tube Co. v. M'Gillivray, (1916) Scot. Mun. App. Rep. 16, 17. The judge noted, however, that more formality was required if the case involved a penalty. *Id.* at 18.

deference to the government by disagreeing with the Minister of Munitions as to the requisite procedures.[142]

The superior courts exercised control over the munitions tribunals not only through their statutory power of review but through a more traditional channel as well. Refusing to view the statutory appeal procedure as ousting their ordinary jurisdiction, the courts also exercised oversight over the tribunals via the prerogative writs. In *R. v. Newcastle Munitions Tribunal ex parte Lloyd George*,[143] the King's Bench affirmed that it had the same power to review a tribunal that it enjoyed over an inferior court. The case involved a munitions tribunal that refused to entertain a complaint from the Minister of Munitions about ship workers who rejected an instruction to work overtime. The Divisional Court granted a writ of certiorari directing the tribunal to show cause why it declined to hear the case. Calling attention to this decision, the *Law Journal* found it noteworthy that the High Court characterized the munitions tribunals as inferior courts whose exercise of jurisdiction it could regulate.[144] The case was decided in November 1915, only three months after passage of the statute authorizing the tribunals. Obviously, the courts had acted quickly to assert over these bodies their traditional as well as special powers of supervision.

2. Military Service Tribunals Under the Military Service Act

The "judicial" character of wartime administrative bodies and the consequent threat they presented to the traditional courts was equally pronounced in tribunals established to adjudicate claims for military exemption. Introducing conscription for the first time in British history, the Military Service Act of 1916[145] excused persons in certain categories. An individual could obtain a waiver from military service if he worked in an essential occupation, was a conscientious objector, or suffered from ill-health or other hardship.[146] The Act

142 For example, in *Shelton*, (1916) 1 Mun. App. Rep. at 214, the court rejected the position of the Minister that the ground of the complaint need not be stated, and in *Binns v. Nasmyth, Wilson and Co.*, (1916) 1 Mun. App. Rep. 169, it held that the employer was not required to give notice of a change in working conditions in the form prescribed by the Minister of Munitions.

143 (1915) 50 L.J. 530 (K.B.).

144 *Id.* at 530.

145 5 & 6 Geo. 5, c. 104.

146 *Id.* § 2(1)(a)–(d).

established local bodies of between five and twenty-five persons to hear and determine requests for exemption certificates.[147]

Like the munitions tribunals, the military service tribunals boasted "judicial" features. First, they were composed of men who possessed legal and often judicial training. Describing the functions of the local tribunals as being "of a judicial nature,"[148] the department responsible for setting up the tribunals sought people who would "give full and fair consideration" to the cases.[149] As a result, magistrates and inferior court judges constituted a large proportion of the tribunal membership.[150]

Second, the tribunal process, in the words of a contemporary, was "modelled on that of a law court."[151] It basically consisted of an adversary system pitting the applicant for exemption against an Army emissary known as the military representative. The representative, who had a right to appear as a party and functioned as the prosecutor, had informal counsel in the form of an advisory committee.[152] His role was controversial since many tribunals allowed him to sit among

147 *Id.* § 2(1), sched. 2 § 1.

148 *See* JOHN RAE, CONSCIENCE AND POLITICS: THE BRITISH GOVERNMENT AND THE CONSCIENTIOUS OBJECTOR TO MILITARY SERVICE, 1916–1919, at 54 (1970).

149 *Id.* at 53.

150 *See* JOHN W. GRAHAM, CONSCRIPTION AND CONSCIENCE: A HISTORY 1916–1919, at 65 (1922); RAE, *supra* note 148, at 57.

151 Adrian Stephen, *The Tribunals*, *in* WE DID NOT FIGHT: 1914–18 EXPERIENCES OF WAR RESISTERS 377, 378 (Julian Bell ed., 1935). Unlike the munitions bodies, whose procedures were dictated in part by regulation, the military service tribunals wholly determined the applicable process themselves. Under the Military Service Act 1916 the government was empowered to regulate the tribunals, and insofar as it did not do so, the procedure of the tribunal "shall be such as may be determined by the tribunal." 5 & 6 Geo. 5, c. 104, sched. 2, § 5. The government did not promulgate any regulations establishing procedures, leaving the tribunals free to determine their own. The procedures adopted were generally consistent from tribunal to tribunal. *See* RAE, *supra* note 148, at 99.

152 The War Office appointed an advisory committee in each district to scrutinize the applications and instruct the military representative as a solicitor instructs counsel. The committee often interviewed applicants prior to the tribunal hearing. Lytton Strachey provided one account of such an interview. He appeared as a claimant for exemption before his local advisory committee in March 1916 but was not allowed to argue his case, as the committee maintained that it existed only to give advice to the military representative. The committee members listened to him politely but at the end informed him that they would recommend that the tribunal grant "no relief." 2 MICHAEL HOLROYD, LYTTON STRACHEY: A CRITICAL BIOGRAPHY 176–77 (1968). The National Council of Civil Liberties bitterly opposed the role of the advisory committees in interviewing claimants, contending that this practice was an "entirely illegal attempt to insert a military board between the legal tribunal and the claimant." "NORTH BRITON," *supra* note 73, at 69.

the members and even preside over the hearing.[153] Nonetheless, the government defended the position as necessary to a full-fledged adversary proceeding. As the Under-Secretary of State for War declared in the House of Commons, since the business of the tribunal was "to exercise judicial functions," it was essential that the military case be "fully and properly presented."[154]

During the hearing the applicant was entitled to be represented by counsel or a friend, though in practice legal representation was rare.[155] Tribunal sessions were generally public, and both the applicant and military representative were allowed to make opening statements and to examine and cross-examine witnesses.[156] Like the munitions tribunals, the military service tribunals employed more informal procedures than a regular court. They could admit hearsay and opinion evidence and were not required to hear testimony on oath.[157] Another judicial feature of the tribunal system was its elaborate appellate structure: parties could appeal as of right to an Appeals Tribunal and from there, if the Appeals Tribunal consented, to a Central Tribunal.[158] Both appellate tribunals included legally qualified members.[159] In sum, the administrative military tribunals looked like courts and seemingly enjoyed the legitimacy of courts.

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153 *See* RAE, *supra* note 148, at 17–18, 102; PHILIP SNOWDEN, BRITISH PRUSSIANISM: THE SCANDAL OF THE TRIBUNALS 7–8 (1916); Lois Bibbings, *State Reaction to Conscientious Objection*, *in* FRONTIERS OF CRIMINALITY 57, 64 (Ian Loveland ed., 1995); Stephen, *supra* note 151, at 379. It was difficult for tribunal members to resist a view expressed by both the military representative and his advisory committee. *See* RAE, *supra* note 148, at 17–18.

154 *Quoted in* THE PARLIAMENTARY HISTORY OF CONSCRIPTION IN GREAT BRITAIN 185 (Richard C. Lambert ed., 1917). The Under-Secretary added that it was "the duty of the local military and recruiting authorities to place the facts completely before the tribunals just as much as applicants for exemption are entitled to state their case fully." *Id.*

155 *See* RAE, *supra* note 148, at 99–100. The President of the Local Government Board instructed the tribunals to discourage counsel, and pacifist organizations advised their members not to be represented by a friend and certainly not by a solicitor. *Id.* Not surprisingly, the solicitors' organization took a different position, claiming that the presence of lawyers at a tribunal not only protected their clients but substantially assisted the work of the tribunal. *See* Comment, *Lawyers and Military Tribunals*, 62 SOL. J. 513, 513–14 (1918).

156 *See* Bibbings, *supra* note 153, at 61.

157 *See* RAE, *supra* note 148, at 100. In *R. v. Wiltshire Appeal Tribunal ex parte Thatcher*, (1916) 86 L.J.K.B. 121, 136–37, the court observed that in almost all cases the tribunals exercised a wise discretion in abstaining from hearing evidence on oath.

158 Military Service Act, 1916, 5 & 6 Geo. 5, c. 104, § 2(7).

159 *See* Keith Robbins, *The British Experience of Conscientious Objection*, *in* FACING ARMAGEDDON: THE FIRST WORLD WAR EXPERIENCED 691, 694 (Hugh Cecil & Peter H. Liddle eds., 1996).

Confronting the challenge posed by this potentially encroaching institution, the judges treated the military service tribunals like they had the munitions tribunals, as inferior courts subject to their control. In *Co-Partnership Farms v. Harvey Smith*,[160] which considered a case of slander against a member of the East Elloe Local Tribunal, the court announced that the military service tribunals were ordinary "judicial" rather than administrative entities. The defendant had argued that the local tribunal was a judicial body and hence that his statements at the hearing were "absolutely privileged."[161] The plaintiffs, however, insisted that by virtue of its constitution and functions, the tribunal was a mere administrative body. Holding unequivocally that the statements were absolutely privileged, the Court of King's Bench asserted that the local tribunal was "a body of men exercising judicial functions."[162] In other words, the work of the tribunals was normal judicial work. Reaffirming this principle in another case,[163] the court declared flatly that the tribunals were inferior courts with a "judicial duty."[164] A necessary consequence of this characterization was that the administrative bodies were subject to superior court oversight.

Although there was no special statutory procedure for appealing from a military service tribunal to the High Court, as existed in the case of a munitions tribunal, applicants dissatisfied with the tribunal process could obtain superior court review via the prerogative writs of certiorari and mandamus. In exercising their power of review, the superior courts determined the substantive law that governed tribunal decisions. The most controversial High Court decision of the war, *R. v. Central Tribunal ex parte Parton*,[165] demonstrated judicial independence by interpreting the Military Service Act in a manner contrary to government policy. Handed down in 1916, *Parton* dealt with the appropriate construction of the conscientious objector exemption. The Chertsey local tribunal had exempted Parton only from combatant service, and both the Appeal and Central Tribunals

160 (1918) 53 L.J. 191 (K.B.).

161 *Id.* at 191.

162 *Id.*

163 R. v. County of London Appeal Tribunal *ex parte* Febbutt Bros., (1917) 52 L.J. 62 (K.B.).

164 *Id.* at 62; *see Ex parte* Mann, (1916) 32 T.L.R. 479, 479 (K.B.) (ruling that the military tribunals were a "statutory body which would come under the jurisdiction of the Court").

165 (1916) 32 T.L.R. 476 (K.B.).

confirmed the order below that Parton enter the ambulance corps. Parton petitioned the High Court for writs of mandamus and certiorari, charging that the Central Tribunal had erred as a matter of law in finding that conscientious objectors were ineligible for absolute exemption. Declining to disclose his reasoning, Mr. Justice Darling brusquely declared that absolute exemption was available only in cases of essential employment, financial hardship, or ill-health. It was simply "common sense," he proclaimed, that the Military Service Act did not allow a conscientious objector to avoid military service entirely.[166]

This ruling conflicted with both executive and legislative policy. Although the wording of the statute was somewhat ambiguous, the government had expressly instructed the tribunals that absolute exemption was an option for conscientious objectors.[167] Indeed, a month later Parliament clarified that the court had misconstrued the conscience provision by amending the statute to provide explicitly that conscientious objectors were eligible for total exemption.[168] Rather than deferring to the other branches of government, therefore, the High Court in *Parton* imposed on the tribunals its own bellicose misunderstanding of statutory meaning.[169] And despite the statutory amendment in May 1916, the High Court's influence continued for the duration of the war, with many tribunals relying on *Parton* to require conscientious objectors to serve in non-combatant capacities.[170]

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166 *Id.* at 477. A contemporary observed that Mr. Justice Darling conducted the case "with little dignity or self-restraint." GRAHAM, *supra* note 150, at 73.

167 *See* 80 PARL. DEB., H.C. (5th ser.) (Feb. 21, 1916) 412; 81 PARL. DEB., H.C. (5th ser.) (Mar. 23, 1916) 353. Just the previous month, on March 23, 1916, the President of the Local Government Board had written to all tribunals clarifying that absolute exemption was available, and four days later he reaffirmed his position at a conference of tribunal chairmen. *See* GRAHAM, *supra* note 150, at 83; RAE, *supra* note 148, at 118–30.

168 Military Service Act (Sess. 2), May 25, 1916, 6 & 7 Geo. 5, c. 15, § 4(3).

169 The courts also dealt substantively with other matters of conscription policy. *See, e.g.*, Towler v. Sutton, (1916) 86 L.J.K.B. 46 (holding that the refusal of a recruiting officer to allow an atheist to affirm rather than swear constituted a rejection of his enlistment); R. v. Wiltshire Appeal Tribunal *ex parte* Thatcher, (1916) 86 L.J.K.B. 121 (establishing the requirements for an occupational exemption); R. v. Essex Tribunal *ex parte* Pikesley, (1918) 82 J.P. 1, 2 (C.A.) (holding that a national security regulation was not ultra vires unless it was "utterly unreasonable").

170 *See, e.g.*, ARTHUR MARWICK, BRITAIN IN THE CENTURY OF TOTAL WAR: WAR, PEACE AND SOCIAL CHANGE, 1900–1967, at 70 (1968); RAE, *supra* note 148, at 120; Bibbings, *supra* note 153, at 65.

In addition to issuing decisions constraining the tribunals in matters of substantive law, the superior courts also determined tribunal procedures. As the government had declined to promulgate procedural regulations, under statute the tribunals were free to design their own rules.[171] The superior courts insisted on reviewing them nonetheless. For example, the conscientious objector in *Parton* also raised the procedural claim that he was entitled to be heard orally before the Central Tribunal.[172] Mr. Justice Darling, however, confirmed the tribunal's right to render a decision based on written materials alone.[173] The High Court issued numerous other instructions to tribunals regarding the hearing and appellate processes, and in so doing bent legislative and executive instruments to its will, often treating statutory and regulatory requirements as mere dispensable formalities.[174]

Thus, due to the judges' zealous pursuit of their institutional self-interest, the munitions and military service tribunals never evolved into administrative agencies capable of supplanting the courts. The very fact that they were "judicial" entities, employing judicial personnel and procedures, allowed the superior courts to regard them as subordinate bodies within their sphere of authority. That is, the precise reason the tribunals constituted a threat to the traditional judges ultimately inured to the latter's advantage, legitimating their efforts to bring these bodies under judicial rather than executive control.

C. Military Courts in Ireland: The Challenge of Competing Jurisdiction over Civilians

An even more serious threat to traditional court authority was the creation of military courts in Ireland to adjudicate offenses committed by civilians. The civil courts not only resisted military encroachment but also turned the tables on the military authorities: they treated the

171 *See* Stephen, *supra* note 151, at 148.

172 R. v. Central Tribunal *ex parte* Parton, (1916) 32 T.L.R. 476 (K.B.). The Central Tribunal did not generally hear the parties in person. *See* RAE, *supra* note 148, at 104.

173 *Parton*, (1916) 32 T.L.R. at 477. The court held that the tribunals were free to adopt a procedure that was "not that of the King's Bench Division." *Id.* It relied on a recent decision by the House of Lords, *Local Government Board v. Arlidge* [1915] A.C. 120 (H.L.), which rejected the notion that judicial methods or procedures necessarily applied to actions by a local governmental authority. *See* Bibbings, *supra* note 153, at 62.

174 *See infra* text accompanying notes 360–96.

military entities as they did magistrates' courts and administrative tribunals—as "inferior courts" subject to their oversight and review.

As noted, the judiciary in England repulsed a military challenge to its authority by restoring jury trial after a seven-month period in which civilians were subject to court-martial for breaching DORA regulations.[175] In Ireland, military jurisdiction over civilians had a longer and far deeper tenure. In 1916 and again in 1920, the British government declared martial law in certain Irish counties and suspended operation of the DORA provision restoring jury trial. Even in areas not under martial law, special legislation for Ireland authorized court-martial of citizens for ordinary crimes. Throughout the period of Irish conflict, this expansive military jurisdiction threatened to undermine the authority of the regular courts. Yet the civil courts never ceased to function; indeed, they entertained a prolonged series of civilian challenges to military trials pursuant to the writs of habeas corpus, certiorari, and prohibition. Events in Ireland during and immediately after World War I provide a useful case study of the intersection of civil and military justice, and they demonstrate yet again the forceful reaction of the common law judges to perceived threats to their jurisdiction.

1. The Legal Framework: Statutory Courts-Martial and Military Tribunals

The British government first declared martial law in Ireland during the Easter Rebellion of April 1916,[176] triggering a DORA provision that authorized court-martial of civilians during a "military emergency."[177] The DORA court-martial regime included imposing the death penalty where the accused had acted with the intention of assisting the enemy.[178] Immediately following the rebellion, 3419 Irish civilians were arrested and 2006 were tried by DORA courts-

175 *See supra* text accompanying notes 60–69.

176 *See* 81 PARL. DEB., H.C. (5th ser.) (Apr. 26, 1916) 2483 (H.H. Asquith); EWING & GEARTY, *supra* note 2, at 339.

177 The provision stated: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by Proclamation forthwith suspend the operation of this section [establishing jury trial], either generally or as respects any area specified in the Proclamation . . . ." DORA (Amendment) Act Mar. 16, 1915, 5 Geo. 5, c. 34, § 7.

178 DORA Consol. Act, Nov. 27, 1914, 5 Geo. 5, c. 8, § 1(4).

martial; of these, ninety received the death penalty and fifteen were executed.[179]

Martial law was lifted in November 1916,[180] but courts-martial for civilians reappeared in response to a second outbreak of guerilla activity against the British government in 1920.[181] Parliament reacted by passing the Restoration and Maintenance of Order in Ireland Act ("ROIA"),[182] which enlarged the court-martial provisions of DORA to allow military trial of civilians not only for national security violations but also for ordinary crimes.[183] The new statutory courts-martial created under ROIA could impose a death sentence where such a penalty was available under ordinary law, provided that a member of the military court was a person of "legal knowledge and experience."[184]

Despite the draconian nature of the ROIA court-martial scheme, the Army was not satisfied; it considered its statutory provisions too cumbersome for use against a population in rebellion.[185] It therefore determined to impose martial law. On December 10, 1920, the Lord Lieutenant in Ireland promulgated martial law in the four southwestern counties of Cork, Tipperary, Kerry, and Limerick; two days later General Nevil Macready, Commander of the Crown forces, proclaimed any person possessing arms in the martial law area to be

179 *See* EWING & GEARTY, *supra* note 2, at 342; CHARLES TOWNSHEND, POLITICAL VIOLENCE IN IRELAND: GOVERNMENT AND RESISTANCE SINCE 1848, at 308 (1983).

180 *See* TOWNSHEND, *supra* note 179, at 313.

181 *Id.* at 340.

182 Aug. 9, 1920, 10 & 11 Geo. 5, c. 31.

183 *Id.* § 1(2). ROIA applied "to the trial of persons alleged to have committed, and the punishment on conviction, of persons who have committed crimes in Ireland." *Id.* "Crime" was defined broadly to include "any treason, treason felony, misdemeanor, or other offence punishable, whether on indictment or on summary conviction, by imprisonment or by any greater punishment." *Id.* § 1(6). ROIA also eliminated the requirement in the DORA Consolidation Act, Nov. 27, 1914, 5 Geo. 5, c. 8, § 1(4), that to be subject to the death penalty a civilian must have assisted a foreign enemy. Although the war against Germany technically continued until 1921, it was effectively over, and the point of eliminating the clause was to reach rebels against English rule rather than wartime collaborators with enemy powers.

184 RESTORATION OF ORDER IN IRELAND REGULATIONS, Reg. 69(5); *see* CAMPBELL, *supra* note 97, at 69. Persons of legal experience were nominated by the Lord-Lieutenant and certified by the Lord Chancellor of Ireland or the Lord Chief Justice of England as being so qualified. ROIA Reg. 69(5); *see* Whelan v. R., [1921] 2 Ir. R. 310 (K.B.) (involving a prisoner's challenge to his conviction on the ground that no certification had been provided that a member of the court had legal knowledge and experience).

185 *See* CHARLES TOWNSHEND, THE BRITISH CAMPAIGN IN IRELAND, 1919–1921, at 103 (1975).

subject to the death penalty.[186] Martial law allowed the Army to set up new entities of military justice known as "military tribunals," which utilized a more simplified and expeditious procedure than statutory courts-martial.[187] Among other things, military tribunals were not limited to penalties available under the general criminal law and could impose the death sentence for any offense.[188] The military tribunals also differed from DORA and ROIA courts-martial in their formal legal character. Rooted in the exigencies of military necessity, these non-statutory bodies were theoretically "nonlegal," and under prevailing legal theory their actions were nonjusticiable by the ordinary courts.[189] The civil judges could not therefore treat these entities as inferior courts under their supervision.[190]

Adding to the legal complexity, DORA and ROIA courts-martial continued to function alongside the new "nonlegal" military tribunals, as did the ordinary civil courts.[191] Repeatedly, the civil courts entertained challenges by Irish rebels to both courts-martial and "nonlegal" military tribunals, eagerly taking on the task of determining the authority of the various military courts and resolving issues of competing military jurisdictions.

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186 *See* CAMPBELL, *supra* note 97, at 30; EWING & GEARTY, *supra* note 2, at 360. On January 4 the Cabinet extended the martial law area to the counties of Clare, Kilkenny, Waterford, and Wexford. *See* CAMPBELL, *supra* note 97, at 30; EWING & GEARTY, *supra* note 2, at 361.

187 *See* CAMPBELL, *supra* note 97, at 86–87.

188 The offenses tried by military tribunals were generally treason and improper possession of arms. There were twenty-four executions for political offenses in 1920–21, ten pursuant to convictions by ROIA courts-martial and fourteen pursuant to convictions by military tribunals. *See id.* at 97.

189 In Dicey's classic formulation, military tribunals derived from "the common law right of the Crown and its servants to repel force with force" rather than from law. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183 (8th ed. 1915). As Lord Halsbury stated in *Tilonko v. Attorney-General of the Colony of Natal*, [1907] A.C 93, 94 (P.C.), martial law was "no law at all." Although it was "found convenient and decorous, from time to time, to authorize what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war," to analogize these summary proceedings under the supervision of a military commander to regular court proceedings was "quite illusory." *Id.* at 94–95.

190 *See infra* text accompanying notes 222–24.

191 *See* CAMPBELL, *supra* note 97, at 32–33; EWING & GEARTY, *supra* note 2, at 361. In areas not under martial law – which comprised most of the country – ROIA remained the primary vehicle for prosecuting rebels. *See* CAMPBELL, *supra* note 97, at 36. Dublin was outside the martial law area, which facilitated the hearing of challenges to the military tribunals in the civil courts. *See* 2 NEVIL MACREADY, ANNALS OF AN ACTIVE LIFE 516 (1925).

2. Asserting the Principle of Civil Primacy

The civil courts confronted the jurisdictional challenge arising from courts-martial and military tribunals directly, insisting on their principled right to supervise courts-martial and to determine the legitimacy of military tribunals. Though the civil courts generally upheld the decisions of these military bodies on the merits, their assertions of civil control were profoundly significant. Regardless of the outcome of the cases, repeated civil intrusions into military justice seriously hampered the military in its quest to impose order in Ireland. As General Macready observed, the rebels never hesitated to take full advantage of the civil courts whenever a military death sentence was at issue:

> Seeing that as a general rule the civil courts upheld the decisions of the military courts it may be asked how the civil courts hampered the military authorities. It was the delay and uncertainty involved which nullified the effect of martial law, encouraging the rebels to take advantage of every quibble which the fertile brains of sharp Irish lawyers could discover, and proportionately depressing the forces of the Crown, who could not be expected to understand the constitutional questions involved in these applications to the King's Bench . . . .[192]

If writs by the High Court had not run, he added bitterly, "we should have been saved all this trouble."[193] Indeed, he complained, the appeals process caused so many postponements of sentences that at times it became inhumane to carry them out. This consequence was "fully realized by those who acted for the prisoners, and who lost no opportunity of dragging on the proceedings to the utmost limit."[194] The judges fully understood that their insistence on civil review frustrated the government and undermined military authority. As the Master of the Rolls admitted in *Egan v. Macready*,[195] his willingness to review the rebel conviction at issue "unduly hamper[ed] the military authority in their effort to establish peace and order in this distracted country."[196] Although conceding that the principle of civil

192 2 MACREADY, *supra* note 191, at 516–17.

193 *Quoted in* TOWNSHEND, *supra* note 179, at 16; *see* CAMPBELL, *supra* note 97, at 138 (commenting that though the applications were not successful, they clogged up the courts and annoyed the military authorities); Charles Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940*, 25 HIST. J. 167, 186–87 (1982).

194 2 MACREADY, *supra* note 191, at 517.

195 [1921] 1 Ir. R. 265 (Ch.).

196 *Id.* at 279.

review produced critical practical consequences, however, the civil courts never retreated from the position that military conduct was subject to their oversight and control.

To claim civil supremacy required different strategies with regard to the statutory courts-martial and the "nonlegal" military tribunals. The traditional courts could easily treat statutory courts-martial under DORA and ROIA as analogous to magistrates' courts and administrative tribunals – that is, as inferior "legal" courts subject to their supervision. With respect to the "nonlegal" military tribunals, however, whose procedures and decisions were not justiciable by the civil authorities, the superior courts needed an alternate way to assert civil control. As will be shown, they found the solution in claiming a right to determine the very legality of these military entities.

a. Civil Control over Statutory Courts-Martial Under DORA and ROIA

DORA and ROIA courts-martial were statutory bodies over which the common law courts claimed their ordinary power of review. Indeed, it was well established that the superior courts had oversight over courts-martial. As the King's Bench asserted in *R. v. Murphy*,[197] a statutory court-martial was "an inferior Court, subject to our limited right of control,"[198] and there was "no doubt that this Court has always exercised over Courts-martial, and over other Courts of limited jurisdiction, a power to prevent them acting without or in excess of jurisdiction."[199] Comparing statutory courts-martial to magistrates' courts, the High Court stated categorically that such bodies were "always the subject of jealous supervision by the Superior Courts."[200] The mechanisms of review over courts-martial were the prerogative writs of certiorari, prohibition, and habeas corpus, writs that ran to statutory bodies in their ordinary course.[201] In reviewing conduct by courts-martial pursuant to these writs, the

197 [1921] 2 Ir. R. 190 (K.B.).

198 *Id.* at 217.

199 *Id.* at 223; *see* R. v. Editor of the Daily Mail *ex parte* Farnsworth, (1921) 37 T.L.R. 310, 313 (K.B.) (noting that whenever and wherever the court had jurisdiction "to correct an inferior Court, it also has jurisdiction to . . . correct a Court-martial").

200 *Murphy*, [1921] 2 Ir. R. at 224.

201 In *Murphy* the court stated: "If a Court-martial acts without or in excess of jurisdiction, this Court can exercise its controlling authority against the tribunal by writs of prohibition or certiorari, and against the governor of the prison, or whoever improperly detains a person, by means of a writ of habeas corpus." *Id.*

civil court judges asserted the primacy of civil law and institutions in three ways: first, where common law and military regulations conflicted, the courts required courts-martial to comply with the former rather than the latter; second, they evaluated the sufficiency of military procedures using abstract common law principles; and third, they protected civil institutions from military interference.

A case from the Easter Rising, *R. v. Governor of Lewes Prison ex parte Doyle*,[202] illustrated that the courts viewed general common law principles as more authoritative than applicable military law. Doyle was a Dublin plasterer who received a death sentence from a DORA court-martial for participating in the rebellion. His trial, like all field courts-martial of rebels in 1916, was conducted in secret.[203] Doyle petitioned for a habeas writ on the ground that secret trials were unlawful under military law, relying on a specific rule of procedure promulgated under the Army Act that required courts-martial to be "held in open court, in the presence of the accused."[204] While acknowledging this military rule, the King's Bench found it inapposite in light of a contrary common law principle allowing closed proceedings. It was plain, the Chief Justice declared, that "inherent jurisdiction exists in any Court which enables it to exclude the public."[205] Like *Norman v. Matthews*,[206] *Doyle* upheld the right of all inferior courts to close their doors to the public under their inherent common law powers, but whereas in *Norman* the common law rule was at least compatible with a DORA regulation permitting closed proceedings, here the common law rule directly conflicted with the relevant military regulation. Nonetheless, the court in *Doyle* found the common law rule to govern, thereby affirming the supremacy of civil over military law.

Second, even where the courts treated a specialized military rule as controlling, they evaluated a court-martial's compliance with it using abstract common law principles. The defendant in *Whelan v. R.*[207] objected that his court-martial had not comported with a ROIA

202 [1917] 2 K.B. 254.

203 *See* EWING & GEARTY, *supra* note 2, at 343.

204 ARMY RULES OF PROCEDURE 1907, at Rule 119(c). The rules were promulgated under the Army Act, 1881, 44 & 45 Vict., c. 58.

205 *Doyle*, [1917] 2 K.B. at 271. The court relied on *Scott v. Scott*, [1913] A.C. 417 (H.L.), a House of Lords divorce case mandating open trials but carving out exceptions for urgent circumstances.

206 [1916–17] All E.R. Rep. 696 (K.B.); *see supra* text accompanying notes 84–91.

207 [1921] 2 Ir. R. 310 (K.B.).

requirement that a member of the court be certified as possessing legal experience. Relying on a plethora of treatises and common law decisions handed down over the previous century, the King's Bench responded by applying a general common law presumption that "a person acting in a public or judicial capacity is duly authorized to do so."[208] Similarly, in *R. v. Murphy*,[209] where an Irish rebel challenged his conviction on the ground that he was not given an adequate opportunity to cross-examine prosecution witnesses, the High Court reviewed centuries of common law precedent to conclude that the court-martial's error was not fatal to its jurisdiction.[210] Again, the civil court equated military with civil bodies and applied an ordinary common law principle to determine the sufficiency of a specialized military procedure. Common law rules governing civil courts thus trumped military law even in the context of a court-martial.

Third, the civil courts used the common law to insulate civil institutions from military interference. *R. v. Fitzgerald*[211] involved procedures applicable not to the court-martial itself but rather to a prisoner's detention between court-martial and sentencing. In 1921 a ROIA court-martial convicted the proprietors and editor of a Dublin newspaper for violating ROIA press regulations. At the end of the trial, a military detachment acting without a written order from the military court arrested the defendants and conveyed them to a civil prison.[212] The prisoners petitioned for a writ of habeas corpus on the ground that a transfer from military to civil custody based merely on oral statements of anonymous soldiers was unlawful. The Crown argued that since the defendants were subject to military law, they could be moved from military to civil confinement without a written order. Finding this contention to be "quite untenable,"[213] the King's Bench put on record its desire "in the clearest way possible to repudiate"[214] the doctrine that a civil prison could detain a king's subject without proper written authority: "To sanction such a course would be to strike a deadly blow at the doctrine of personal liberty, which is part of the first rudiments of the constitution."[215] Moreover,

208 *Id.* at 313.

209 [1921] 2 Ir. R. 190 (K.B.).

210 *Id.* at 226–27.

211 (1921) 55 Ir. L.T.R. 60 (K.B.).

212 *Id.* at 60.

213 *Id.* at 64.

214 *Id.* at 63 (per Molony, J.).

215 *Id.* (per Malory, J.).

the court-martial's failure to issue an order left the civil jailer "without the protection of any written mandate"[216] and therefore exposed to the risk of a lawsuit. Declaring that there was "no vinculum or bond of union between the military and the civil custody,"[217] the King's Bench issued the writ of habeas corpus. Ostensibly protecting the liberty of civilians against overreaching by the Army, the court equally protected a civil institution from subordination to military command.

b. Civil Control over "Nonlegal" Military Tribunals Under Martial Law

Asserting civil control over military tribunals created under martial law was more problematic than doing so over courts-martial. Even exercising jurisdiction faced a special obstacle: the writs of certiorari, mandamus, and prohibition, which were directed at the judicial entity itself, did not run to a "nonlegal" body. Nonetheless, the writ of habeas corpus, which produced an order to the authority holding a prisoner in custody, was always available. As Viscount Cave declared in a House of Lords decision, although a civil court could not order a military tribunal to quash proceedings or prohibit judicial action, it could always instruct a military commander to release a prisoner.[218]

The wartime judges invariably spoke of the writ of habeas corpus with reverence, emphasizing its importance in securing individual liberty. As the Master of the Rolls proclaimed, it was always the right of the subject "to apply to any Judge of the High Court for the writ of habeas corpus, and, if the writ is refused, to proceed from Judge to Judge."[219] Moreover, it was the duty of each judge to "form his independent opinion and to act upon it."[220] Nonetheless, it is significant that the writ also served the judges' institutional self-interest by conferring on civil courts the power to command the military authorities. Through the writ of habeas corpus, an Irish

[216] *Id.* at 64.

[217] *Id.*

[218] R. v. Clifford & O'Sullivan, [1921] 2 A.C. 570, 586 (H.L.(I.)).

[219] Egan v. Macready, [1921] 1 Ir. R. 265, 279 (Ch.).

[220] *Id.* In *R. v. Adjutant-General ex parte Childers*, [1923] 1 Ir. R. 5, 13 (Ch.), the Master of the Rolls also applauded the "right of every subject of the King to apply at any time for the writ of habeas corpus."

civilian arrested or tried by a military body could, and inevitably did, challenge the proceedings in civil court.[221]

Even with the availability of habeas jurisdiction, however, another impediment to civil control presented itself: it was well settled that the procedures and decisions of nonlegal entities were not justiciable.[222] As the court declared in *R. v. Allen*,[223] a civil court could not in wartime "control the military authorities, or question any sentence imposed in the exercise of martial law."[224] The common law judges were thus compelled to find another way to supervise the military courts. Their solution was to claim authority not to review results as to particular convictions but to decide the prior dispositive question of whether military tribunals were legitimate bodies at all. In every case involving the death sentence, therefore, the courts carefully evaluated the fundamental lawfulness of military tribunals under martial law. In so doing, they considered two basic theories of invalidity: first, that no "state of war" existed to justify martial law; and second, that ROIA's comprehensive courts-martial scheme pre-empted the creation of military tribunals trying civilians for the same crimes. In evaluating these objections, and even ruling occasionally in the prisoners' favor, the common law courts again asserted the primacy of civil over military law.

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221 In addition to considering petitions for habeas writs, the common law courts also claimed the power to review on direct appeal a lower court's denial of a writ seeking to challenge the conduct of a military tribunal. In *Clifford*, [1921] 2 A.C. 570, the House of Lords dealt with the situation of two civilians sentenced to death in April 1921 by a military tribunal for unauthorized possession of weapons. The defendants applied in Chancery for a writ of prohibition restraining the military tribunal from carrying out the death sentence. The judge refused the writ, and the defendants appealed. The House of Lords considered whether a denial of the writ was a non-appealable order within section 50 of the Judicature Act (Ireland) 1877, which precluded appeals of criminal matters from the High Court. It concluded that the Court of Appeal and the House of Lords had jurisdiction to hear the appeal since the military tribunal was only a nonlegal military committee advising the commanding officer; thus, what was appealed was not a legal "crime." *Id.* at 581. The fact that the court could hear the appeal meant, however, that it could not grant the relief requested, as a court order could not be issued to a nonlegal entity. *See id.* at 590; Johnstone v. O'Sullivan, [1923] 2 Ir. R. 13, 22 (C.A.) (expanding *Clifford* to hold that an appeal also lay from an order refusing a writ of habeas corpus).

222 *See, e.g.*, *Ex parte* Marais, [1902] A.C. 109, 115 (P.C.); R. v. Strickland *ex parte* Garde, [1921] 2 Ir. R. 317, 328 (K.B.); R. v. Allen, [1921] 2 Ir. R. 241, 269–72 (K.B.).

223 [1921] 2 Ir. R. 241.

224 *Id.* at 272; *see* R. v. Strickland *ex parte* Ronayne, [1921] 2 Ir. R. 333, 334 (K.B.) (ruling that once a state of war was proved to the court's satisfaction, the court's hands were tied); R. v. Strickland *ex parte* Garde, [1921] 2 Ir. R. at 332 (stating that once a state of war was established, a civil court could not "interfere to determine what is or what is not necessary").

(i) The "State of War" Inquiry

The civil courts repeatedly insisted that it was their unique role to determine whether a "state of war" existed to justify martial law, even though this question seemingly fell within military expertise. The leading precedent was *Ex parte Marais*,[225] a decision by the Privy Council during the Boer War holding that martial law could only be triggered by a "state of war." According to *Marais*, the courts were solely responsible for deciding when war existed, and the continuing operation of the civil courts was not dispositive evidence of its absence.[226] Moreover, as a subsequent case established, whether the military authorities had proclaimed martial law was irrelevant to the civil determination.[227]

During the Irish rebellion the civil courts continually deliberated whether guerilla conflict satisfied *Marais*'s requirement of "state of war." The first major case dealing with this issue, *R. v. Allen*,[228] involved a civilian sentenced to death by a military tribunal in Cork for possessing a revolver, some ammunition, and a book entitled *Night Fighting* that purported to be an official publication of the Irish Republican Army ("IRA").[229] Such a punishment would not have been available in a ROIA court-martial. General Macready submitted a lengthy affidavit stating that the rebellion amounted to "actual warfare of a guerilla character."[230] He recounted that between July 1920 and February 1921, the IRA had raided the mail, held up trains, destroyed police barracks, attacked government offices, and ambushed and killed many soldiers.[231] Since his affidavit was uncontroverted, the court easily concluded that a state of war existed.[232]

Irish petitioners did not again make the mistake of failing to counter Macready's evidence. In a similar case the following month, the prisoner introduced affidavits from various notables in Cork– the

225 [1902] A.C. 109.

226 *Id.* at 114.

227 *See* Tilonko v. Attorney-Gen. of the Colony of Natal, [1907] A.C. 93, 94 (P.C.) ("The notion that 'martial law' exists by reason of the proclamation . . . is an entire delusion.").

228 [1921] 2 Ir. R. 241 (K.B.).

229 *Id.* at 242.

230 *Id.* at 244.

231 *Id.*

232 *Id.* at 265.

High Sheriff, Justices of the Peace, and the President of University College—certifying that life in the city continued normally. The officials testified that the Assizes were sitting, churches and schools operating, and daily business activities proceeding in their ordinary way.[233] When Crown counsel suggested during oral argument that the court was incompetent to decide the matter, the Chief Justice bridled. *Allen*, he declared, had made clear the judges' right to decide whether a state of war existed, and "we will continue to assert that right."[234] He found the government's contention that Macready's evidence was irrebuttable to be "destitute of authority" and "absolutely opposed" to the prior judgment: "[W]e desire to state, in the clearest possible language, that this Court has the power and the duty to decide whether a state of war exists which justifies the application of martial law."[235] As it turned out, the judge's independent evaluation of the military situation coincided with that of the Army.[236] Nonetheless, the civil court held firm to the principle that the predicate for the military's autonomy—the existence of a state of war—lay in the determination of the civil judges alone.

Subsequent cases, while largely supporting the Army's position that a state of war existed,[237] were similarly meticulous in scrutinizing military conditions.[238] The judges seemed to rely

233 R. v. Strickland *ex parte* Garde, [1921] 2 Ir. R. 317, 328 (K.B.). The affidavits further pointed to the anomaly that ROIA courts-martials tried treason cases daily, indicating that there was no need for separate military tribunals. *Id.* at 321.

234 *Id.* at 326.

235 *Id.* at 329. He found the government's argument to be "somewhat startling." *Id.* The judge also took pains to point out that he did not sit as a judge with the consent of the military authorities: "It is quite clear that the right of a Judge to sit is derived from the King and not from the military authorities under martial law." *Id.* at 331. "So far, therefore, from being in any way subject to the military authorities, a Judge of Assize in the execution of the King's commission is authorized to command the assistance of every liege subject of His Majesty." *Id.*

236 The court noted that Macready's affidavit, written two months after the affidavit filed in *Allen*, pointed to an enormous increase in casualties among the military forces and police. *Id.* at 329–30.

237 *See, e.g.*, R. v. Strickland *ex parte* Ronayne & Mulcahy, [1921] 2 Ir. R. 333, 334 (K.B.) (noting that "for the reasons just given in *Garde's Case* . . . a state of war still exist[ed]"); R. v. Clifford & O'Sullivan, [1921] 2 A.C. 570, 579 (H.L.(I.)) (Viscount Cave calling attention to the ruling of the lower court that a state of war existed and that therefore the civil courts had no jurisdiction to interfere with the proceedings of the military authority); Egan v. Macready, [1921] 1 Ir. R. 265, 269 (Ch.) (stating that the affidavits left no room for doubt that there existed a "widespread rebellion amounting to a state of war").

238 The judges rarely set forth a formal standard for determining the existence of a state of war except to assert that the continuing operation of the civil courts was not conclusive

primarily on their own personal experience, treating it as more relevant than any evidence submitted by the Army. In *R. v. Adjutant-General ex parte Childers*,[239] for example, the Master of the Rolls based his conclusion not on the government's affidavit but rather on his personal knowledge of the destruction of his courtroom:

> I am sitting here in this temporary makeshift for a Court of Justice. Why? Because one of the noblest buildings in this country, which was erected for the accommodation of the King's Courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins . . . .[240]

Taking judicial notice of the bombing of railways, the blocking of roads, and the torching of mansions, the judge concluded that "[i]f this is not a state of war, I would like to know what is."[241] In a subsequent case, *Johnstone v. O'Sullivan*,[242] the Master of the Rolls again based his judgment "upon my own knowledge of what is going on in the greater part of this island."[243] He determined that there was undoubtedly war: "[a] guerilla war, a sort of war perhaps, but war."[244]

Though the cases generally favored the Army in their substantive results, *R. v. Military Governor ex parte O'Brien*[245] demonstrated that the "state of war" investigation was more than a mere formality. After soldiers of the Irish Free State interned IRA member Nora O'Brien in Dublin in January 1923, she applied to the Court of Chancery for a writ of habeas corpus.[246] She argued that a state of war no longer raged in the area, relying primarily on a newspaper report that Eamonn de Valera, President of the IRA, had issued a proclamation directing its members to cease all acts of warfare.[247]

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evidence of its absence. *See, e.g.*, *Ex parte* Marais, [1902] A.C. 109, 114 (P.C.); R. v. Allen, [1921] 2 Ir. R. 241, 270 (K.B.). An exception was *Johnstone v. O'Sullivan*, [1923] 2 Ir. R. 13 (C.A.), where the Master of the Rolls applied a test of whether "the forcible resistance to authority [was] so widespread, so continuous, so formidable, of such duration that the help of an army must be invoked . . . habitually or constantly, lest the State shall perish." *Id.* at 25. Tested in that way, he had no doubt that "in point of law, a state of war exists." *Id.*

239 [1923] 1 Ir. R. 5 (Ch.).

240 *Id.* at 13.

241 *Id.*

242 [1923] 2 Ir. R. 13 (C.A.).

243 *Id.* at 23–24.

244 *Id.* at 24.

245 [1924] 1 Ir. R. 32 (C.A.).

246 *Id.* at 32.

247 *Id.* at 33.

The trial judge rejected O'Brien's claim, viewing the cease-fire as merely a breathing space while the irregulars reorganized.[248] Drawing on his own daily observations, he recounted:

> It is common knowledge—and what is common knowledge I can take judicial notice of—that the Free State army has not been allowed to rest. What do I see on my way down to Court every morning? Armoured cars, military lorries full of armed troops, military patrols in our chief thoroughfares; even the approaches to the Courts guarded by soldiers with fixed bayonets. When I see all this, surely I cannot say that we have arrived at a state of peace, for which all orderly citizens are longing.[249]

In a surprising decision, however, the Court of Appeal reversed. Molony, who had authored all the previous decisions finding that a state of war existed, displayed his open-mindedness by questioning whether in this case there was in fact "deliberate, organised resistance by force and arms to the laws and operations of the lawful Government."[250] He concluded that despite a certain amount of disorder, it had "not been proved that a state of war or armed rebellion at present exist[ed] in the City of Dublin."[251] In defiance of both the Army and the Irish government, therefore, the Court of Appeal asserted its civil authority to release Nora O'Brien from military custody. The case thus demonstrated the significance of the repeated prior statements that there were legal limits to military power: the principle of civil control was available when a court actually desired to give it effect.

(ii) The Issue of ROIA Preemption

The courts determined not only whether a state of war existed but also whether Parliament's creation of statutory courts-martial in August 1920 pre-empted the subsequent implementation of a military tribunal system. Here too the principle of judicial review turned out to be more than mere verbiage, though on this issue two divisions of the High Court reached disparate results. Whereas the Court of King's Bench upheld military tribunals as a valid supplement to

248 *Id.* at 36.

249 *Id.* at 36–37.

250 *Id.* at 38. He commented that the onus of establishing the existence of a state of war rested on the prosecution. Further, he stated that "if there is war, we cannot, durante bello, inquire into or pass judgment upon the conduct of the Commander of the Forces in repressing the war," but that if there was not war, "it is our manifest duty to see that no person shall be deprived of his or her liberty except in accordance with the law." *Id.*

251 *Id.* at 42.

statutory courts-martial, the Court of Chancery ruled that the court-martial scheme under ROIA precluded military tribunals under martial law entirely.

In a series of unanimous opinions authored by Molony, the King's Bench consistently rejected the prisoners' claim that ROIA prescribed Parliament's exclusive method for dealing with the crisis. *R. v. Allen*,[252] for example, pointed out that the public danger had escalated since ROIA's enactment,[253] and it suggested that if there was a problem with co-existing courts inflicting radically different punishments for the same offense, it was up to Parliament to resolve.[254]

The wholly unexpected decision of the Court of Chancery in *Egan v. Macready*,[255] in contrast, rejected the position of the King's Bench. Molony had proved in *O'Brien* that judicial review was not a mere formality by actually issuing the writ in a "state of war" case.[256] In this instance O'Connor, who invariably agreed with the Army on the "state of war" question, charted an independent course on the ROIA preemption issue. Ruling that ROIA was not enabling but prohibitory, he nullified the military tribunals on the alternate ground that the power to declare martial law had been surrendered with the passage of ROIA the previous year:

> To hold that, notwithstanding the Restoration of Order Act, the military authority can waive aside Courts-martial, and sweep away the limitations as to punishment . . . would be a new development of British Constitutional Law, for which I can find no authority. The claim of the military authority to override legislation, specially made for a state of war, would seem to me to call for a new Bill of Rights.[257]

If the emergency was greater than Parliament had contemplated, it was for the legislature to enlarge ROIA's scope; Parliament was in full session and presumably not in "a lethargic condition, incapable of

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252 [1921] 2 Ir. R. 241 (K.B.).

253 *Id.* at 271.

254 *Id.* at 272. *Allen* was followed in *R. v. Strickland ex parte Ronayne*, [1921] 2 Ir. R. 333 (K.B.), where Molony again rejected the accused's argument that the prerogative right of the king to proclaim martial law had been surrendered by ROIA. *Id.* at 334.

255 [1921] 1 Ir. R. 265 (Ch.).

256 *See supra* text accompanying notes 245–51.

257 *Egan*, [1921] 1 Ir. R. at 275. O'Connor also noted that Egan's crime and arrest had taken place on May 26 but the trial was not held until June 11, suggesting that summary action was not necessary. *Id.* at 277.

energetic action."[258] Despite his view that the rebels had perpetrated "appalling murders, conflagrations, and other outrages,"[259] O'Connor granted Egan the writ of habeas corpus. He did so based on the "first principle of British law: that every subject of the King is at least entitled to be legally tried and legally convicted."[260]

Horrified at the decision, both General Macready and Major General Strickland disobeyed the order to release Egan. O'Connor, equally furious, issued writs of attachment against Macready, Strickland and the governor of the prison. He declared that their obstruction amounted to "a deliberate contempt of Court—a thing unprecedented in this Court and the whole history of British law."[261] The issue was explosive, and since negotiations for a truce between British forces and the IRA had just been concluded, all sides wished to defuse the looming constitutional crisis.[262] Without consulting Macready, the government released Egan. In a statement in the House of Commons, the government insisted that its actions were unrelated to the case and continued to deny that civil courts had any power to overrule military tribunals in the martial law area.[263] But the true situation was readily apparent. As Macready complained in his memoirs, requiring a soldier to account to any judge "makes the administration of martial law impossible, and if I may be permitted to

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[258] *Id.* at 274.

[259] *Id.* at 278.

[260] *Id.* at 279. Interestingly, the Master of the Rolls observed that a court-martial, in contrast to a military tribunal, was "absolutely fair and impartial," with precise requirements to ensure against miscarriages of justice:

> In particular, the charge against the accused must be precisely formulated. Contrast this with the procedure before this so-called military Court. The charge here is that the accused "was improperly in possession of ammunition." What does this mean? It might mean anything from some desperate criminal purpose down to some technical irregularity. Justice requires that an accused person should know exactly with what he is charged.

Id. at 278. He thus based his decision not only on parliamentary intent but also on his independent view of the merits of the procedures supplied by the Act.

[261] *Id.* at 280. There were two theories underlying martial law, one that it derived from the common law and the other that it was rooted in the prerogative. The first theory encouraged a non-interventionist judicial posture and underlay *R. v. Allen*; the second justified an interventionist approach and underpinned *R. v. Egan*. The precise legal status of martial law is still unresolved. For a discussion of these theories, see CAMPBELL, *supra* note 97, at 123–48.

[262] *See* EWING & GEARTY, *supra* note 2, at 365. The truce was announced on July 11, three days after O'Connor reserved judgment in *Egan*. *See id.*

[263] *See* 146 PARL. DEB. H.C. (5th ser.) (Aug. 10, 1921) 437 (J.A. Chamberlain); 2 MACREADY, *supra* note 191, at 591; TOWNSHEND, *supra* note 179, at 187.

use the expression, ridiculous."[264] O'Connor, as noted, readily understood that his assertion of civil authority was obstructing the military authorities,[265] but from his perspective civil review served a higher principle: "There are considerations more important even than shortening the temporary duration of an insurrection."[266] Violating certain immutable principles of justice, he insisted, would produce "lasting detriment to the true interest and well-being of a civilized community."[267] Such principles, obviously, included maintaining a firm civil presence in affairs of military justice.

Thus, the civil courts in Ireland dealt with the problem of military jurisdiction over civilians by claiming a right to review court-martial procedures, issuing dispositive rulings on the viability of military tribunals, and resolving questions of the interaction between competing systems of military justice. The civil courts also exerted their authority by insisting upon their power to review all military actions upon termination of the conflict, even those concededly not justiciable during a state of martial law. Adhering to a principle elaborated by A.V. Dicey,[268] the judges consistently affirmed that after the war they were entitled to evaluate whether the degree of military force exercised during the conflict had been reasonable. As Molony declared in *R. v. Allen*,[269] upon termination of the conflict "persons may be made liable, civilly and criminally, for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case."[270] This proposition was actually applied in 1921 in *Higgins v. Willis*,[271] in which Molony refused to dismiss a suit by a suspected rebel against a brigade commander for damaging his house during an official reprisal. Satisfied that the action was not frivolous, the court held that "the

264 2 MACREADY, *supra* note 191, at 590.

265 *See supra* text accompanying notes 195–96.

266 *Egan*, [1921] 1 Ir. R. at 279 (quoting Cockburn, C.J.).

267 *Id.*

268 DICEY, *supra* note 189, at 185.

269 [1921] 2 Ir. R. 241 (K.B.).

270 *Id.* at 269. He also proclaimed in *R. v. Strickland ex parte Ronayne*:

> When the state of war is over, the acts of the military during the war, unless protected by an Act of Indemnity, can be challenged before a jury; and in that event even the King's command would not be an answer if the jury were satisfied that the acts complained of were not justified by the circumstances then existing and the necessities of the case.

[1921] 2. Ir. R. 333, 334; *see* Johnstone v. O'Sullivan, [1923] 2 Ir. R. 13, 30 (C.A.).

271 [1921] 2 Ir. R. 386 (K.B.).

plaintiff has a right to have his case tried so soon as a state of war no longer prevails."[272] As with the other challenges pressing the judiciary during the war—the loss of criminal cases to magistrates' courts, the exclusion of enemy aliens from civil justice, and the encroachment of administrative bodies—the common law judges vigorously countered the military threat by asserting the principle, and occasionally the meaningful practice, of judicial review.

II

THE MORAL IDEOLOGY OF THE WARTIME JUDICIARY

The judges thus successfully preserved their institutional power during the war. A critical question, however, was the uses to which they directed it. During World War I the judges exercised their authority to an identifiable moral objective: to delineate procedural no less than substantive rights pursuant to a pervasive moral ideology adapted to the exigencies of war.[273] An implicit but widely shared judicial framework was the distinction between the "deserving" and the "undeserving," a Victorian conceptual legacy that the World War I judges translated into legal terms and modified to wartime use.[274] Ardently embracing the cause of war, they sought to embed in the law a distinctive set of moral values that would aid in its prosecution. They calculated a litigant's moral worth based primarily on his or her contribution to the national struggle and allocated procedural entitlements accordingly. Persons who breached national security—criminal defendants charged with violating DORA, draftees seeking exemption from military service, enemy aliens petitioning for release from internment, and Irish patriots rebelling against English rule—were manifestly undeserving of a robust judicial process. In contrast, parties who advanced English interests in prosecuting the war, including munitions workers and aliens participating in the nation's

[272] *Id.* at 387. *Heddon v. Evans*, (1919) 35 T.L.R. 642 (K.B.), upheld a right to bring a civil suit for damages against a court-martial for assault, false imprisonment, or other common law wrong, even if committed in the course of military discipline. The case established the right of a soldier to seek the protection of the civil courts against officers acting outside their jurisdiction either individually or as members of a court-martial. The holding applied also to civilians court-martialled under DORA or ROIA. *See* RICHARD O'SULLIVAN, MILITARY LAW AND THE SUPREMACY OF THE CIVIL COURTS 14 (1921).

[273] For a discussion of the judges' moral ideology as applied to the substantive right of individual freedom, see Vorspan, *supra* note 3, at 329–40.

[274] On the conversion of this moral framework into legal terms in the context of popular recreation, see Rachel Vorspan, *"Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England*, 45 MCGILL L.J. 891 (2000).

economic life, were perceived as worthy of procedural rights. Thus, during the war judges determined due process rights according to a characteristic moralism rather than neutral principles of procedural propriety.

The judges' wartime moral ideology explains when they reversed decisions below and when they allowed them to stand. Most inferior courts were not sympathetic to the parties before them: magistrates were generally inhospitable to DORA defendants, military courts were antagonistic to Irish rebels, military service tribunals were antipathetic to draft avoiders, and munitions tribunals were hostile to workers. The judges affirmed or reversed lower court decisions depending on whether the judgment under review conformed to their own moral predispositions. To the extent that they acquiesced in the rulings of magistrates, administrative tribunals, and courts-martial, they were not "deferring" to the executive but rather signifying their moral approval of the course that the subordinate body had adopted. In the rare situation where their moral posture diverged from that of the inferior court, as in the case of workers before the munitions tribunals, the superior court judges did not hesitate to adopt a more corrective and interventionist stance.

The distinctive moral culture of the judiciary was particularly evident in decisions determining the procedural rights of three categories of litigants: criminal defendants in national security cases, enemy aliens in internment camps, and applicants before the administrative tribunals. These varying contexts highlight the judges' propensity to place moral weights on the scales of their ostensibly neutral judgments of law and assign procedural rights based on the perceived moral status of the litigants before them.

A. Criminal Defendants and the Constriction of Procedural Rights

Not surprisingly, the prototypically "undeserving" litigant was a criminal defendant charged with a national security offense. In reviewing magistrates' decisions in DORA cases, the judges sanctioned a continuing erosion of defendants' procedural rights during this period.[275] For example, the High Court ruling in *Kaye v.*

[275] Magistrates were generally not hospitable to the rights of criminals. *See, e.g.*, 72 PARL. DEB., H.C. (5th ser.) (July 1, 1915) 2079; 83 PARL. DEB., H.C. (5th ser.) at 1101, 1171 (June 29, 1916). An example of a militaristic magistrate's decision was *R. v. Cheshire*, (1917) 81 J.P. 324, where the court invalidated a special set of military service exceptions granted by government officials to men in their own departments. Even though the Army did not object to the exemptions, the magistrate thought it was unconstitutional

Cole[276] severely undermined a defendant's right to a speedy trial. As noted, the case held that magistrates derived their power to deal with wartime offenses exclusively from DORA, which placed no time limit on prosecutions.[277] Judicial rulings in the *Norman* cases[278] further limited defendants' due process rights by approving the magistrates' common practice of holding closed proceedings.

Driven by the precarious circumstances in Ireland and a general overlay of ethnic hostility toward the Irish, the courts curtailed the rights of Irish defendants even more aggressively, whittling down procedural protections in courts-martial to the bare minimum. In *R. v. Governor of Lewes Prison ex parte Doyle*,[279] a case rejecting a prisoner's request for a public trial, the judges' disapproval of the defendant and his sympathizers was palpable. Lord Reading declared that Doyle's supporters might have come into court and "terrorized, possibly even have shot, witnesses,"[280] while Mr. Justice Darling proclaimed with equal stridency that allowing people to testify publicly would have been "grotesque."[281] Other decisions similarly exemplified the courts' cursory treatment of Irish defendants' procedural claims. In *Whelan v. R.*,[282] for example, the court undercut a requirement intended to protect defendants by simply presuming without further inquiry that the prosecutor had complied with his regulatory obligation.

R. v. Murphy[283] was perhaps the most egregious example of the superior courts' disinclination to take seriously the due process claims of Irish rebels. A ROIA court-martial tried Murphy in December 1920 for being a member of an ambush party that caused the death of an English soldier. Prior to the court-martial, the Army had conducted a military inquest in which two soldiers gave evidence at a deposition that varied significantly from their subsequent court-

for government departments to relieve men from military service. *Id.* at 324; *see Protection Certificates*, 61 SOL. J. 732 (1917).

276 (1917) 115 L.T. 783 (K.B.).

277 *Id.* at 785. The court also found that regulations criminalizing antiwar statements were in conformity with DORA even though they "were of a drastic character." *Id.*; *see also supra* text accompanying notes 78–83.

278 Norman v. Matthews, [1916–17] All E.R. Rep. 696 (K.B.); *Ex parte* Norman, (1916) 114 L.T. 232 (K.B.); *see supra* text accompanying notes 84–91.

279 [1917] 2 K.B. 254.

280 *Id.* at 272.

281 *Id.* at 274.

282 [1921] 2 Ir. R. 310 (K.B.); *see supra* text accompanying notes 207–08.

283 [1921] 2 Ir. R. 190 (K.B.).

martial testimony. Learning of the earlier testimony from a newspaper account, Murphy's attorney requested copies of the original depositions at the court-martial so that he could properly cross-examine the prosecution witnesses.[284] The Judge-Advocate refused.[285] The King's Bench conceded that the court-martial had committed an error of law in "a matter of vital importance,"[286] but it nonetheless ruled that a court-martial did not "exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence."[287] In the case of the Irish especially, refusal to correct error below did not signify subservience to the government but rather the judges' effectuation of their own moral preferences through the agency of the inferior courts.

On procedural issues arising initially in their own courts, the superior court judges also consistently interpreted wartime legislation to favor the prosecution. As the King's Bench unabashedly remarked in *Norman v. Matthews*,[288] a court could not construe an act passed "for securing the safety of the Realm with the same scrupulous nicety as, for instance, a taxing Act."[289] This judicial perspective was evident in a number of different contexts. Regarding the burden of proof, for example, judges in national security cases often inverted the usual rule and placed the burden on the defendant. *R. v. Denison*[290] considered the case of a German subject whom the military had banished from his home district out of suspicion that he might commit

284 *Id.* at 194.

285 *Id.* The Judge-Advocate relied on a rule promulgated under the Army Act, 1881, 44 & 45 Vict., c. 58, § 70, providing that testimony before an inquest was not admissible against the accused. Though the rule was obviously intended for the benefit of defendants, the military judge inexplicably used the provision to refuse to provide documents to defendant's counsel. Murphy's lawyer was so outraged at this ruling that he wrote a scathing letter to the Attorney General: "It seems almost an impertinence to point out to you as a lawyer the absurdity of this ruling. . . . Would anyone outside a lunatic asylum rule that I could not cross-examine out of the coroner's depositions?" *Murphy*, [1921] 2 Ir. R. at 192.

286 *Id.* at 221.

287 *Id.* at 226. The court maintained that all it had to deal with in the instant case was a "misapplication of the laws of evidence," not a "refusal to hear the defence." *Id.* at 228.

288 (1916) 32 T.L.R. 303 (K.B.).

289 *Id.* at 304. The courts also easily validated police conduct in searches and seizures authorized by DORA. *See, e.g.*, *Ex parte* Norman, (1916) 114 L.T. 232 (K.B.) (upholding the seizure of documents alleged to violate a press regulation); Maire Nic Shiublaigh v. Love, (1919) 53 Ir. L.T.R. 137 (C.A.) (affirming that there was an urgent necessity to enter plaintiff's premises and seize documents under DORA Regulation 51 rather than using ordinary legal procedure under Regulation 51A).

290 (1916) 32 T.L.R. 528 (K.B.).

acts harmful to public safety.[291] The judge concluded that the standard applicable to military conduct was that the officer merely entertain an "honest" rather than a "reasonable" suspicion. He further ruled that it was Denison's burden to prove that the military authority did not "honestly" suspect him.[292] A similar requirement pertained to prosecutions under the Alien Restriction Act,[293] where the courts concluded that defendants bore the burden of proving that they were not aliens.[294]

The courts also disadvantaged the defense in rulings on the admissibility of evidence. *Michaels v. Block*[295] concerned a DORA regulation authorizing an officer to arrest without warrant a person whose behavior gave "reasonable grounds for suspecting" that he was dangerous to the public safety.[296] The military authority had arrested Block pursuant to information about his antecedents that the Chief Constable of Portsmouth had provided. The defendant objected that the prosecution must prove "behaviour" by the best evidence, not simply information contained in a police dossier. In addition, he insisted that the arresting officer must witness the suspicious conduct himself. Mr. Justice Darling disagreed, holding that the police evidence was admissible because "behaviour" included all acts of which the military "may be credibly informed."[297] Noting that the regulation was "part of legislation passed hurriedly while the country [was] at war," he decided "to construe it according to the maxim, *salus populi suprema lex*."[298] This case was significant because it

291 *Id.* at 528–29.

292 *Id.* at 529. Similarly, in *Ronnfeldt v. Phillips*, [1918] W.N. 328 (C.A.), the Army ordered a coal exporter of German parentage to leave the Cardiff area, and the Court of Appeal affirmed the lower court's ruling that Ronnfeldt had the burden of showing that the military authority did not suspect him "honestly." *Id.* at 330.

293 1914, 4 & 5 Geo. 5, c. 12.

294 In *R. v. Kakelo*, [1923] 2 K.B. 793 (Ct. Crim. App.), where the defendant was charged with making a false statement under the Act, a critical issue was whether or not he was in fact an alien. The court held that the onus was upon the defendant to prove that he was not. *Id.* at 795. Similarly, in *Ex parte Weber*, [1916] 1 K.B. 280 (C.A.), the court placed the burden on a habeas petitioner contesting his internment to establish that he was not an alien. *Id.* at 282.

295 (1918) 34 T.L.R. 438 (K.B.).

296 DORA CONSOL. REGS., *supra* note 53, at Reg. 55.

297 *Michaels*, 34 T.L.R. at 438. In an action for false imprisonment, the burden of proving the existence of reasonable and probable cause ordinarily lay on the defendant. *See* CAMPBELL, *supra* note 97, at 42 n.188.

298 *Michaels*, 34 T.L.R. at 438.

permitted arrest even where there was no suspicion that an actual offense had been committed.[299]

As in *Whelan v. R.*, which applied a common law presumption to excuse a court-martial's failure to certify that it was validly constituted,[300] judges in their own courts used presumptions to exempt the prosecution from formal compliance with procedural rules. *R. v. Metz*[301] involved a conviction for conspiring to trade with the enemy under the Trading with the Enemy Act 1914,[302] a statute expressly providing that after a person's arrest no further proceedings could be taken without the consent of the Attorney General.[303] The prosecutor did not present formal proof of the Attorney General's consent at the trial. Untroubled, the court ruled that such proof would simply be presumed: there was a broad distinction, Lord Reading intoned, between "substance and mere technicality."[304] As will be shown, the use of the concept of "mere technicality" also pervaded judicial decisions on the adequacy of tribunal proceedings involving other categories of "undeserving" litigants.[305]

In sum, the superior court judges permitted, and at times instituted, serious restrictions on the procedural rights of criminal defendants during the war. Significantly, they supported individual rights for criminal defendants in only two instances, the right to jury trial and the right to habeas corpus, both contexts where affirming individual procedural rights advanced the judges' institutional objectives. In upholding the right to jury trial, the judges celebrated the distinctive procedure of their own courts, and in asserting the right to challenge detention by a writ of habeas corpus, they bolstered their own power to oversee executive and military conduct. Moreover, advancing these rights had only a minimal impact on the war effort since the right to jury trial was severely circumscribed and habeas petitions could always be denied after the court asserted jurisdiction. In all other circumstances, the courts treated defendants who breached national security as meriting only the scantiest of due process protections.

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299 *See* CAMPBELL, *supra* note 97, at 42, 114–15.

300 *See supra* text accompanying notes 207–08.

301 (1915) 84 L.J.K.B. 1462.

302 4 & 5 Geo. 5, c. 87, § 1(4).

303 *Id.*

304 *Metz*, (1915) 84 L.J.K.B. at 1464.

305 *See infra* Part II.C.2.

B. The Dual Moral Character of Enemy Alien Detainees

The disreputable status of criminal defendants accused of placing the state at risk was unequivocal. Enemy alien detainees, however, presented a more nuanced situation and elicited a more complex judicial response. If an interned enemy alien brought a civil lawsuit to protect private commercial or property rights, the court stripped him of his "enemy character" and expressly declared him to be "innocent." In contrast, if he sought release from internment through the writ of habeas corpus, the court treated him as a morally objectionable "enemy combatant." Flowing from these moral calculations, in the former situation the alien was allowed to litigate his case, while in the latter he was thrown out of court.

A major rationale for the court's decision in *Schaffenius v. Goldberg*,[306] which allowed an enemy alien detainee to sue in contract, was that an interned enemy was of "innocent" character. As Mr. Justice Younger wrote, "[i]t is common knowledge amongst us that the internment of a civilian alien enemy does not necessarily connote any overt hostile attitude."[307] He continued:

> Many such aliens have been interned at their own request and for their own protection; many others profess the strongest desire to become and many more have applied to be naturalized British subjects. And these professions may be, and in very many cases they doubtless are, quite sincere; the only justification in such cases for internment is that the State cannot take the risk that they are not.[308]

To intern a civilian, the court continued, was "a mere measure of police—a proceeding connoting no proof of hostile act or intent."[309] *Nordman v. Rayner*,[310] a case similarly upholding an enemy alien's capacity to sue in contract, explicitly referred to the internee's lack of moral culpability. The court noted that "the internment was not due to any moral default of the plaintiff" and therefore "could not be held to have operated to destroy his civil rights."[311]

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306 [1916] 1 K.B. 284; *see supra* text accompanying notes 28–33.

307 *Schaffenius*, [1916] 1 K.B. at 295.

308 *Id.*

309 *Id.* at 296.

310 (1916) 33 T.L.R. 87 (K.B.).

311 *Id.* at 88. The "deserving" character of the individual litigants in the civil cases undoubtedly influenced the court in their favor. In *Princess Thurn and Taxis v. Moffitt*, [1915] 1 Ch. 58, which allowed a defamation suit, the court noted that although the plaintiff's husband was at that moment "probably engaged in fighting against this

The moral calculus was entirely different, however, where an enemy internee sought a writ of habeas corpus. *Schaffenius* and *Rayner* were especially striking in light of an earlier case, *R. v. Superintendent of Vine Street Police Station ex parte Liebmann*,[312] which ruled that enemy aliens were not entitled to challenge their internments through the writ of habeas corpus.[313] In *Liebmann* the enemy alien detainee was not morally "innocent" and devoid of animus toward the English; on the contrary, he was a hostile "enemy combatant" and "prisoner of war" who posed a serious threat to national security:

> This war is not being carried on by naval and military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment on a scale hitherto unknown of carrier pigeons. Spying has become the hall-mark of German "kultur."[314]

In these circumstances, Mr. Justice Bailhache announced, a German civilian in the country "may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of submarines and Zeppelins."[315] Rather than being an innocent civilian preventively detained, in this context a German resident in England presented "a far greater danger, indeed, than a German soldier or sailor."[316] Another judge in the case, Mr. Justice Low, offered a similar opinion: when dealing with an enemy for whom "the acceptance of hospitality connotes no obligation" and

country," *id.* at 60, the plaintiff herself was "an American lady" who had involuntarily "become an alien enemy by virtue of her marriage" and was insisting "on a right which [was] individual to herself," *id.* at 61. Similarly, in the divorce case of *Krauss v. Krauss*, (1919) 35 T.L.R. 637 (Prob., Divorce & Adm.), the alien plaintiff was "innocent" in that he was domiciled in England, had two children born there, had sought to be naturalized, and whose wife had committed adultery while he was interned and was expecting a child at the time of the lawsuit.

312 [1916] 1 K.B. 268.

313 The court based its ruling on common law precedents holding that prisoners of war were not entitled to a writ of habeas corpus. *See, e.g.*, R. v. Schiever, (1759) 2 Burr. 765, 97 Eng. Rep. 551 (K.B.); Case of Three Spanish Sailors, (1779) 2 Black W. 1324, 96 Eng. Rep. 775 (K.B.); Furly v. Newnham, (1780) 2 Dougl. 419, 99 Eng. Rep. 269 (K.B.).

314 *Liebmann*, [1916] 1 K.B. at 275.

315 *Id.*

316 *Id.*

"no blow can be foul," it would be idle to wait for evidence of an overt act or "evil intent."[317]

The Court of Appeal in *Schaffenius* recognized and resolved the dilemma created by *Liebmann* by limiting that ruling to the context of habeas corpus petitions. As the Master of the Rolls pronounced, the habeas issue was "all that that case decided";[318] the right to petition for a writ was "a very different question"[319] from the right to bring a civil suit. To expand *Liebmann* and treat an interned German as losing "civil rights in respect of a lawful contract"[320] would "be an extension of the law which I cannot in any way countenance."[321] Another appellate judge, Lord Warrington, agreed that it would be "extravagant" to say that internment deprived a plaintiff of his civil rights, as that would imply "that the first man who came along might go and live in his house and . . . take possession of his property and deal with it as he pleased."[322] Thus, for purposes of enforcing commercial or property rights, enemy alien internees were ordinary respectable residents. For purposes of habeas applications, however, they were enemy combatants and prisoners of war, as dangerous to the realm as if they "had been captured in a German ship, or at some point in Flanders."[323] Moral character was contextual, and different causes of action seeking varying remedies produced divergent moral judgments and legal results. Enemy alien internees could legitimately enjoy the right to sue in their own economic interests, but it was another matter entirely to grant writs of habeas corpus that would set "dangerous" enemies at liberty.

317 *Id.* at 278. Moreover, as the court insisted in another habeas case, an internee was nothing but an alien enemy to whom a "temporary indulgence" had been granted. R. v. Commandant *ex parte* Forman, (1917) 87 L.J.K.B. 43, 45.

318 Schaffenius v. Goldberg, [1916] 1 K.B. 284, 301.

319 *Id.* at 304.

320 *Id.* at 302.

321 *Id.* at 301.

322 *Id.* at 304. As Lord McNair wrote in 1919, "[i]nternment merely curtails personal liberty, and does not destroy procedural capacity, and probably not contractual, proprietary, or testamentary capacity." Arnold D. McNair, *British Nationality and Alien Status in Time of War*, 35 L.Q.R. 213, 231 (1919).

323 *Schaffenius*, [1916] 1 K.B. at 301 (per Lord Cozens-Hardy, M.R.). Later in the war Lord Atkinson in the House of Lords embraced the moral perspective of *Schaffenius*, stating in *Johnstone v. Pedlar*, [1921] 2 A.C. 262, 285 (H.L.(I.)), that internment was a "measure of precaution" rather than a "punishment for crime that had been committed." Such innocent internment did not affect an alien's civil rights, in this case the right to sue the Crown to retrieve money confiscated from him upon his arrest. *Id.* at 286.

C. "Deserving" and "Undeserving" Litigants Before the Administrative Tribunals

The judges further effectuated their moral ideology by determining due process rights in the administrative tribunals according to the perceived moral worth of the applicant. Munitions workers, who were essential participants in the national enterprise of winning the war, enjoyed an entirely different moral status than the obvious "cowards" requesting exemption from military service. The courts intervened to secure procedural protections for the former, but they permitted the tribunals to treat the procedural rights of "undeserving" draft resisters as mere formalities that could readily be discarded.

1. Workers Pursuing Redress Before the Munitions Tribunals

In guiding the tribunals on the appropriate construction of the Munitions Acts, the High Court generally showed evenhandedness and even solicitude for workers. For example, it interpreted provisions of the Act in employees' favor in regard to labor mobility, often supporting workers' applications for leaving certificates. This approach was evident in *Bennett v. King's Norton Metal Co.*,[324] where a firm had closed for five days to take inventory and perform repairs. A provision in the 1916 Act required the employer to grant a leaving certificate if the worker had no opportunity to earn wages for more than two days.[325] Mr. Justice Atkin held that even when a factory closed for good reason, the worker had no such opportunity and was entitled to a leaving certificate. The court went even further in *Taylor v. Samuel Osborn & Co.*,[326] where the company had declared a holiday for ten days while it made repairs to a faulty engine. Employees of the company applied for leaving certificates, and the firm offered them temporary employment at a lower rate of pay than the standard district rate. The tribunal concluded that it was customary to excuse an employer from providing work if a closure was for good cause, and it further pointed out that the firm in any event had offered the men jobs as general laborers at "reasonable" wages.[327] On appeal, however, the High Court reversed the tribunal and granted the employees the requested leaving certificates. Mr. Justice Atkin reasoned that the statutory phrase "no opportunity of

[324] (1916) 1 Mun. App. Rep. 114.

[325] Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99, § 5(2).

[326] (1916) 1 Mun. App. Rep. 163.

[327] *Id.* at 164.

earning wages" must be read to mean no opportunity to earn "such wages as he might earn in his ordinary employment."[328] It did not, the judge warned, mean the opportunity to earn "any" wages or even "reasonable" wages.[329]

The judges also granted certificates in situations where workers, especially apprentices, wanted to seek better-paying employment. In *Donaldson v. H.W. Kearns & Co.*[330] the High Court allowed an apprentice to leave his job for a position paying full wages because, in its view, the object of the statute was to "give this advantage to a workman."[331] Mr. Justice Atkin's encouraging attitude toward worker ambitions was again on display in *MacDougall v. Wallsend Slipway & Engineering Co.*,[332] where he set forth important considerations that he hoped the tribunals would always bear in mind: that it was "desirable not to keep workmen down," and that tribunals should "give workmen who show a special skill in their trade free scope to rise to higher positions."[333] The High Court also issued decisions favorable to workers on wages,[334] work rules,[335] and notice requirements for discharging employees.[336]

328 *Id.* at 165.

329 *Id.* In *Acme Steel & Foundry Co. v. Stafford*, (1916) Scot. Mun. App. Rep. 53, 54, Lord Dewar held that workmen were entitled to a leaving certificate where employers closed their works for more than two days for repairs. He noted that paying wages during repairs might be hard on an employer but "would be even harder on a workman – who may have no resources beyond his daily wage." *Id.* at 54; *see* Dodds v. J.L. Thompson & Son, Ltd., (1917) 2 Mun. App. Rep. 63 (finding workers were entitled to leaving certificates when a firm closed down because of bad weather).

330 (1916) 1 Mun. App. Rep. 143.

331 *Id.* at 147.

332 (1917) 2 Mun. App. Rep. 27.

333 *Id.* at 29; *see, e.g.*, Gane v. Rees Roturbo Mfg. Co., (1916) 1 Mun. App. Rep. 129 (ruling that employers could not give out leaving certificates containing negative comments about the men's conduct); Padgett v. Richard Hornsby & Sons, Ltd., (1916) 1 Mun. App. Rep. 137 (concluding that an apprenticeship agreement could not outweigh the desire of a young worker to leave his work to obtain the standard rate of wages); Scottish Iron & Steel Co. v. Hands, (1916) Scot. Mun. App. Rep. 1 (ruling that a man employed intermittently was entitled to a leaving certificate to obtain regular work elsewhere); Merry & Cuninghame v. Paterson, (1916) Scot. Mun. App. Rep. 28, 36 (holding that an employer who imposed a forced holiday on his workmen "in the face of a protest from the whole body of his workmen" was required to give leaving certificates); Cook v. Haslam Foundry & Eng'g Co., (1917) 2 Mun. App. Rep. 8 (allowing a worker to transfer to another employment to earn overtime wages).

334 *See, e.g.*, Collins v. Brazil, Straker & Co., (1916) 1 Mun. App. Rep. 27; Taylor v. Samuel Osborn & Co., (1916) 1 Mun. App. Rep. 163; Morris v. Rudge-Whitworth, Ltd., (1917) 2 Mun. App. Rep. 107; Padgett v. Richard Hornsby & Sons, Ltd., (1917) 1 Mun.

In addition to supporting individual workers, the High Court judges also decided cases in favor of unions, holding that yellow-dog contracts were invalid and that strikes did not necessarily breach the employment contract. An illustrative case was *George v. Larne Shipbuilding Co.*,[337] where Mr. Justice Pim reversed a tribunal decision finding that workers who protested an employer's unilateral change in start time engaged in an unlawful strike. "I cannot hold," he declared, "that men are guilty of having taken part in a strike, technical or otherwise, if the employer is wrongfully attempting to vary the contract of employment."[338]

Employees prevailed before the High Court on procedural issues as well. Whereas in the military service cases, as will be shown, the judges eschewed legal technicalities only to benefit the Army, in the munitions context they lessened procedural burdens on the employee. *G. Inglis & Co. v. Walker*,[339] a particularly important case, held that a

App. Rep. 137; Boyd v. Climie, (1917) Scot. Mun. App. Rep. 75; Scott v. MacLellan & Co., (1918) Scot. Mun. App. Rep. 134.

335 *See, e.g.*, Gloucester Ry. Carriage & Wagon Co., (1916) 1 Mun. App. Rep. 81 (holding that a worker did not breach work rules by being absent from work on Sunday); John I. Thornycroft & Co., v. Stonehouse, (1916) 1 Mun. App. Rep. 166 (same regarding leaving early on Sunday); Nat'l Projectile Factory v. Fagan, (1917) 2 Mun. App. Rep. 75 (ruling that an employer could not unilaterally substitute piece work for time work).

336 The Munitions of War (Amendment) Act, 1916, 5 & 6 Geo. 5, c. 99, § 5(3), provided that where a workman was dismissed without notice, the tribunal could award him compensation not exceeding five pounds. The Munitions of War Act, 1917, 7 & 8 Geo. 5, c. 45, § 3(1), changed the compensation rule to a liquidated damages clause, providing that a worker's contract could not be terminated except by a week's notice or wages in lieu of notice. For judicial interpretations of these provisions favorable to employees, see Rawnsley v. Bradford Dyers Assoc., Ltd., (1916) 1 Mun. App. Rep. 103; Foden v. Jacquet-Maurel & Condac, Ltd., (1916) 1 Mun. App. Rep. 237; Holes v. Day, Summers & Co., (1917) 2 Mun. App. Rep. 17; Mallon v. Harland & Wolff, Ltd., (1917) 2 Mun. App. Rep. 1; Fairchild v. Heenan & Froude, Ltd., (1917) 2 Mun. App. Rep. 61; Lane v. Chief Superintendent of Ordnance Factories, (1917) 2 Mun. App. Rep. 117; Knight v. Navy & Army Canteen Board, (1917) 2 Mun. App. Rep. 139.

337 (1917) 2 Mun. App. Rep. 82.

338 *Id.* at 90–91; *see, e.g.*, Guillet v. E.H. Bentall & Co., (1916) 1 Mun. App. Rep. 86 (invalidating a company policy requiring every employee to sign an agreement not to join a union); Stierlin v. Gen. Stores & Munitions Co., (1916) 1 Mun. App. Rep. 124 (holding that a strike did not ipso facto terminate the men's employment and that workers were therefore entitled to leaving certificates); Morris v. Rudge-Whitworth, Ltd., (1917) 2 Mun. App. Rep. 107 (upholding a union official's claim that an employer had unlawfully changed the wage rate without the consent of the Minister of Munitions); Amalgamated Soc'y of Carpenters & Joiners v. Ramage, (1917) Scot. App. Rep. 71 (reversing a tribunal finding and upholding a union claim that workers were entitled to compensation under the Act).

339 (1916) Scot. Mun. App. Rep. 10; *see* Maclean v. Yarrow & Co., (1916) Scot. Mun. App. Rep. 5 (upholding workers' claims as timely on the ground that an employee was

worker was not required to make a formal statement of his claim in order to obtain relief. As Lord Dewar observed, a worker could not "be expected to present his case with legal precision";[340] it was sufficient if he lodged a general complaint without stating precise grounds.[341] Similarly, in *Swales v. Great Eastern Railway Co.*,[342] Mr. Justice Atkin expressed his displeasure with a tribunal's rejection of a worker's claim on the ground of res judicata. It was simply not wise, the judge cautioned, to introduce into a statute providing relief for workers "all the technical rules relating to causes of action."[343] The High Court also assisted employees by relaxing rules in evidentiary matters. In *Scottish Tube Co. v. M'Gillivray*,[344] where the employers protested that procedures in tribunal hearings were too informal, Lord Dewar concluded that sworn and elaborate testimony was inappropriate in cases involving leaving certificates. Munitions tribunals were "emergency Courts" that had to "administer justice in very difficult circumstances, and with all possible speed."[345]

Although the courts approved informality to benefit the worker, they forced employers to comply rigidly with procedural requirements. While *G. Inglis v. Walker* allowed and indeed encouraged employees to submit an informal complaint, *Shelton Iron, Steel & Coal Co. v. Hassall*[346] denied employers that same right. In *Shelton*, a munitions firm complained to the local tribunal that a worker had refused to follow a work instruction. The tribunal found the worker guilty of both failing to work diligently and defying a lawful order. On appeal to the High Court, the employee argued that he had not received notice that he was being charged with two different offenses on the same facts. Siding with the company, the Minister of Munitions relied on *G. Inglis* to argue that a written complaint was the only requisite formality. Mr. Justice Atkin

entitled to receive notice of the ground for dismissal in writing before he was required to lodge his claim).

340 (1916) Scot. Mun. App. Rep. at 12.

341 *Id.*

342 (1916) 1 Mun. App. Rep. 189.

343 *Id.* at 196. The court concluded, however, that the chairman of the tribunal was "substantially correct" in rejecting the application for a leaving certificate, as the case had already been decided on exactly the same materials. *Id.*

344 (1916) Scot. Mun. App. Rep. 16.

345 *Id.* at 17; *see* Colley v. Minister of Munitions, (1916) Scot. Mun. App. Rep. 21 (hearing a worker's appeal though the worker had pled guilty and technically had no right of appeal).

346 (1916) 1 Mun. App. Rep. 208.

conceded that the rules for munitions tribunals did not require a detailed complaint if "read strictly,"[347] and he further agreed that the whole procedure was devised to avoid technicality.[348] Nonetheless, in his view it was essential that the worker know the ground of the employer's charge so he could determine "what his rights really are."[349] Regardless of express requirements in the statute or regulations, the judge cautioned, general propositions "inherent in the administration of criminal justice"[350] were applicable to munitions proceedings. Requiring the employer to specify the precise nature of the charge was not a "mere technicality" but rather a matter that "ought to be attended to if justice is to be done between man and man before the tribunal."[351] The court thus went beyond the applicable statute and rules to grant workers extra protections based on fundamental principles of fairness.

The judges supported a worker's procedural rights not only with respect to bringing a complaint but also with regard to the hearing process. The High Court insisted that a tribunal must give an employee a full opportunity to present his case, ruling in *Kinder v. Delta Metal Co.*[352] that a failure to do so "would amount to a denial of justice."[353] In contrast, *Thompson v. Toolmakers & Light Machinery, Ltd.*[354] limited the employer's right to state his case to a single presentation. Here, a worker claimed compensation for dismissal, and his employers in turn charged him with misconduct. As the rules permitted, they submitted their evidence by letter rather than in person.[355] When the tribunal decided in favor of the employee, the employers asked to present evidence before the High Court. Mr. Justice Atkin rejected their request on the ground that an employer was expected to support a charge of misconduct by "evidence capable of being tested."[356] If he failed to do so for any reason, the employer could not expect the court to "give him facilities

347 *Id.* at 216.

348 *Id.*

349 *Id.* at 217.

350 *Id.* at 219.

351 *Id.*

352 (1916) 1 Mun. App. Rep. 46.

353 *Id.* at 52.

354 (1917) 2 Mun. App. Rep. 145.

355 TRIBUNAL RULES, *supra* note 110, R. 12(b).

356 *Thompson*, (1917) 2 Mun. App. Rep. at 147.

for further litigating the question of fact."[357] Along the same lines, the court in *Robinson & Co. v. Kerr*[358] rejected an employer's request to submit additional evidence. Observing that a party must attend punctually in his own interest, the court refused to excuse the employer's failure to appear in person due to alleged pressures of work. *G. Inglis & Co. v. Walker*[359] went even further, precluding an employer from presenting additional evidence even though the vagueness of the worker's complaint had misled him as to the nature of the charge. The High Court thus systematically molded procedures in the munitions tribunals to ensure a full judicial process for workers rendering patriotic service to the state, while at the same time demanding that employers comply with every procedural technicality.

2. Draftees Seeking Exemption from Military Service Tribunals

In striking contrast to the solicitude they displayed for munitions workers, the High Court judges exhibited unrelenting antagonism toward draftees seeking to quash a conscription order, and their antipathy permeated judicial decisions on both substance and procedure. As noted, *R. v. Central Tribunal ex parte Parton*,[360] the controversial decision holding that conscientious objectors were not entitled to absolute exemption, revealed the court's obvious repugnance toward applicants for exemption. During oral argument Mr. Justice Darling suggested that Parton had "the same objection to saving life as to taking it,"[361] since protection for life and property "finally depends on force."[362] Mincing no words, the judge lectured the courtroom that Parton "ought really to be an outlaw, ought he not?"[363] Parton seems to have aroused particular judicial disdain because he was financially dependent on his father, the managing

357 *Id.* In *Scottish Iron & Steel Co. v. Hands*, (1916) Scot. Mun. App. Rep. 1, the court again held that the employers were not permitted to offer further proof when they failed to do so below: "This Court has wide powers, and may call for inquiry at any stage; but that is a power which ought to be exercised with discrimination." *Id.* at 3; *see* Ritchie, Graham & Milne v. Dougan, (1916) Scot. Mun. App. Rep. 8 (holding that a statement in writing rather than a personal appearance was not sufficient to support an employer's charge of misconduct).

358 (1917) Scot. Mun App. Rep. 81.

359 (1916) Scot. Mun. App. Rep. 10.

360 (1916) 32 T.L.R. 476 (K.B.).

361 *Id.* at 476.

362 *Id.*

363 *Id.*

director of a munitions factory.[364] From a moral perspective, the substantive result in the case was entirely predictable.

Parton also lost on his procedural claim that the Central Tribunal was obliged to hear him in person,[365] and virtually every other applicant for a military service exemption suffered the same fate at the hands of the High Court. Repeatedly, the judges excused the Army from strict compliance with procedures mandated by statute or regulation. In *R. v. Lincolnshire Appeal Tribunal ex parte Stubbins*,[366] for example, both the King's Bench and the Court of Appeal held that the military representative need not satisfy notice requirements with rigor. Stubbins, the applicant, had received an award of total exemption from his local tribunal but lost it in the Appeal Tribunal. He complained to the High Court that he had not received proper notice of the military representative's appeal. In rejecting his claim, the court may well have been influenced by the applicant's particularly unattractive character. A bachelor, Stubbins cited virtually every available ground to obtain an exemption;[367] even more damaging, he was the chairman of his local tribunal and had presided over the session that considered his own application.[368] This behavior hardly endeared him to the High Court, which observed that it would have been "more in accordance with the spirit in which justice is administered in this country" if he had not presided that day.[369]

Deciding in favor of the military representative, the court held that giving notice to the applicant in the prescribed form was not required.[370] Eschewing "slavish adherence to the exact words"[371] of a regulation, Lord Reading declared that "it is not necessary to

364 *Id.* The Appeal Tribunal judges had reasoned that since Parton's income partly derived from the manufacture of munitions, he should not be exempted from noncombatant service. *Id.*

365 *Id.* at 477; *see supra* text accompanying notes 172–73.

366 [1917] 1 K.B. 1 (C.A.).

367 Stubbins argued that he was engaged in work of national importance, suffered from ill-health, worked in an exempt occupation, and had financial and domestic obligations. *Id.* at 3.

368 When the tribunal reached his own application, Stubbins stood alongside the new chairman while the tribunal decided the case. Hardly surprisingly, the tribunal granted him a certificate of total exemption. *Id.*

369 *Id.* at 7. The court observed that his behavior had given "colour to suggestion that the tribunal was influenced by his presence on the bench." *Id.*

370 *Id.* at 9.

371 *Id.* at 10.

comply with the letter when there is a compliance with the spirit of the regulation."[372] On appeal, the Court of Appeal agreed that the rules were "directory" rather than "imperative."[373] The regulations, which allowed a party to bring an appeal in a particular manner, did "not provide that it shall not be brought in any other manner."[374]

In other cases as well, the common law courts smoothed the Army's procedural path in taking an appeal from an adverse tribunal decision. For example, when an applicant contested an order reducing his period of exemption on the ground that the military representative had not given him the required notice of appeal, the court simply concluded that providing notice was not a condition precedent to considering the appeal.[375] The regulations could not be "disregarded and treated as useless," the judge conceded, but they were only intended to "serve as a guide."[376] Another High Court ruling gave the Army an additional opportunity to appeal to the Central Tribunal even though the Appeal Tribunal had already rejected the representative's request in open court and awarded the applicant his exemption.[377] In contrast, when the applicant for exemption sought a right to appeal, as in *R. v. County of London Appeal Tribunal ex parte Febbutt Bros.*,[378] the court quickly dismissed his claim. Observing that an appeal to the Central Tribunal was a matter solely within the Appeal Tribunal's discretion, the court

372 *Id.* at 9.

373 *Id.* at 15.

374 *Id.* at 14.

375 R. v. Leicestershire Appeal Tribunal *ex parte* Tivey, (1917) 86 L.J.K.B. 807.

376 *Id.* at 809.

377 R. v. Cent. Tribunal *ex parte* Syddall, (1917) 86 L.J.K.B. 1483. The tribunal had followed its oral rejection of the military representative's request to appeal with a later written decision granting it. The court reasoned that the later written decision was more "formal" than the oral courtroom decision and thus superseded it. *Id.* at 1485. Where it benefitted the military representative, apparently, more formality was required. The court noted that the fact that the applicant had already received his exemption might have been an "irregularity," but it did not affect the matter. *Id.* In another case, *R. v. Yorkshire Appeal Tribunal ex parte Barker*, (1916) 86 L.J.K.B. 599, the tribunal admitted that it had granted the applicant leave to appeal to the Central Tribunal "to get rid of him." *Id.* at 600. The court, suggesting that tribunal members "would have done better to have kept [the reason] to themselves," *id.*, let the appeal stand but refused to grant the applicant costs. As it observed with disapproval, "[t]he whole matter does not justify him in coming to this Court and setting its machinery in motion." *Id.*

378 (1917) 52 L.J. 62 (K.B.).

declined to issue a writ of mandamus even to correct an erroneous decision.[379]

The courts excused the military representative from compliance with formal requirements in other aspects of the tribunal process as well. Unlike in munitions tribunals cases, where the High Court placed a burden on the employer to explain the ground of his or her opposition,[380] in draft exemption cases it imposed no such obligation on the military representative. In *R. v. Wiltshire Appeal Tribunal ex parte Thatcher*,[381] for example, the court merely observed that when the applicant learned that "his claim for absolute exemption was coming on," he had received notice of "all that they were required to give."[382] Nor, as the court concluded in another case,[383] did the failure of the military representative to contest an exemption preclude the tribunal from acting adversely to the applicant. The King's Bench ruled that although the regulations prescribed a procedure for raising an objection, the military representative's failure to follow that procedure was of no consequence.[384]

The courts' procedural bias against applicants for military exemption was equally apparent in judicial rulings on the requisite evidentiary process at a tribunal hearing. The Army, it appeared, could prevail without providing any evidence at all. In *R. v. Cardiff Local Tribunal ex parte Granger*,[385] the court approved withdrawal of an exemption for essential employment even though the military representative had not proven that the applicant would better serve the national interest by joining the Army. The judge acknowledged that the regulations required the military representative to satisfy the military tribunal of this fact, but it interpreted the regulation not to "require that there should be any evidence adduced."[386] Conversely, the courts limited the draftee's ability to develop his factual and legal

379 *Id.* at 62.

380 *See supra* text accompanying notes 346–51.

381 (1917) 86 L.J.K.B. 121.

382 *Id.* at 139.

383 R. v. Grimsby Appeal Tribunal *ex parte* Daley, (1917) 86 L.J.K.B. 1253.

384 *See* R. v. Hampshire Appeal Tribunal *ex parte* Handley, (1917) 86 L.J.K.B. 1463 (ruling that the military representative's failure to give the applicant notice of his objection to an exemption did not compel a tribunal to grant the exemption).

385 (1918) 34 T.L.R. 553.

386 *Id.* at 554. Similarly, in *R. v. Lincolnshire Appeal Tribunal ex parte East*, (1916) 86 L.J.K.B. 598, where a farmer claimed that working his farm was in the national interest and noted that the military representative did not object or call evidence in opposition, the court ruled that the tribunal could still refuse to grant an exemption.

arguments. In *R. v. Wiltshire Appeal Tribunal ex parte Thatcher*,[387] the Court of Appeal allowed the tribunal to cut short the applicant's evidentiary case. "An applicant is not entitled to persevere for as long as he pleases,"[388] the court sternly announced, observing that tribunal members could ascertain the facts by drawing inferences from the applicant's other statements and were not bound to hear additional evidence.[389]

If the tribunal was not required to hear the whole of an applicant's presentation of facts, neither was it obligated to hear his entire argument on the law. In *R. v. Hendon Local Tribunal ex parte Watson*,[390] the draftee complained that a member of the tribunal had been absent for part of his solicitor's argument. The King's Bench held that although such conduct violated military service regulations, it was a matter of "technical infringement"[391] with which the court would not interfere. With monotonous regularity, the judges made clear that they would not intervene to remedy "technical infringements" of applicants' procedural rights.

Collectively, the import of these decisions was undeniable. Virtually without exception the judges gave the military representative the benefit of every procedural doubt but refused the same courtesy to the applicant. In *R. v. Westminster Local Tribunal ex parte Smart*,[392] for example, the King's Bench refused to excuse an applicant's failure to show up at his hearing even though he held an apparently reasonable belief that the hearing had been adjourned. Such a mistake, the court concluded, was no reason for the court to require the tribunal to adjudicate his application. But even meticulous attention to procedural detail did not necessarily avail the draftee, as it only aroused judicial concern that he would manipulate procedural devices to win an exemption. In *R. v. Hertfordshire Appeal Tribunal ex parte Hills*,[393] the tribunal refused to grant an exemption and subsequently denied the draftee's application for a rehearing. When the applicant appealed to the High Court, the King's Bench refused to hear the case. According to Lord Reading, depriving the tribunal of

387 (1917) 86 L.J.K.B. 121.

388 *Id.* at 138.

389 *Id.* at 140.

390 (1917) 86 L.J.K.B. 1256.

391 *Id.* at 1256.

392 (1917) 86 L.J.K.B. 738.

393 (1917) 86 L.J.K.B. 584.

the right to decide whether to rehear a case would lead to "manifest absurdity" because there would be no finality of decision.[394] An applicant, he claimed, could appeal repeatedly until the end of the war and would doubtless succeed eventually in obtaining the military service exemption that the tribunal had refused.[395] The court reached this decision over a strong dissent pointing out that the statute granted applicants an unrestricted right to appeal and contained no language whatsoever suggesting that a decision on rehearing fell outside its broad general terms.[396]

The courts' tendency to discriminate between applicants before the two types of tribunal was thus readily apparent. The superior courts shaped the legal process in the military service tribunals by relaxing requirements for the Army while holding the conscript to strict compliance, but in the munitions tribunals they promoted informality to support the worker while tightening procedural obligations on the employer. Whereas *Thatcher* excused the military representative from stating the ground of his objection to the exemption, *Shelton* concluded that a detailed statement of the employer's claim was necessary to avoid injustice. *Parton* denied the applicant the right to appear personally before the tribunal, but *Kinder* granted the worker a full opportunity to present his case. And though *Sydall* allowed the military representative an additional opportunity to appeal, *Febbutt Bros.* summarily rejected a similar request from the applicant. These and other divergent rulings are intelligible only by taking into account the wartime moral framework that informed the decisions. As in the case of superior court review generally, courts reviewing the actions of administrative tribunals denied procedural rights to litigants they perceived as "undeserving" while according "deserving" workers a full and fair judicial process.

394 *Id.* at 586.

395 *Id.* at 587; *see* R. v. Essex Tribunal *ex parte* Pikesley, (1918) 82 J.P. 1 (C.A.) (ruling that an application to the tribunal for a rehearing could not be granted after a man had been called up without the consent of the Army Council).

396 *Hills*, (1917) 86 L.J.K.B. at 589. He agreed on the merits, however, since apart from the question of a right to appeal, "I fail to see that the applicant makes out any case for a rehearing." *Id.*; *see* R. v. Hull & Yorkshire Appeal Tribunal, (1917) 87 L.J.K.B. 115, 118 (expressing concern about issuing a decision that would "multiply proceedings unnecessarily").

CONCLUSION

The English judiciary thus played a critical role in the transformation of British legal procedures and institutions during World War I. Although the government initiated wartime changes through statute and regulation, it was the judicial response to these measures that ultimately determined the contours of the legal process. Three particular developments threatened to undermine the position of the traditional courts and spurred effective judicial reaction: the loss of traditional jurisdiction over certain parties and offenses, the appearance of new executive bodies to adjudicate disputes regarding conscription and labor relations, and the emergence of rival institutions of military justice in Ireland. The judges met these challenges by quickly asserting jurisdiction over aliens, restoring jury trial in criminal cases, supervising the courts of summary jurisdiction, controlling the law and procedures of the administrative agencies, and establishing the principle of civil supremacy over both statutory courts-martial and military tribunals in Ireland. They brought potentially rival entities under their control by treating all judicial bodies, whether newly created or newly empowered, as inferior courts subject to their oversight. Rather than marginalizing the judges, the war impelled the superior courts to solidify and indeed amplify their institutional position.

An equally important question, however, was the end to which the judges directed their restored and even heightened powers. In addition to repulsing challenges to their authority based on institutional self-interest, they shaped the legal process in accordance with a distinctive moral ideology. Calculating the worth of the parties before them by employing nationalistic wartime criteria, they rewarded munitions workers and aliens advancing economic claims with a robust judicial process. Conversely, they circumscribed the procedural rights of criminal defendants, Irish rebels, draft resisters, and enemy alien detainees who challenged their internments. Rather than being complacent, peripheral, and subordinate to the executive, the judges forcefully molded the legal process to promote their dual objectives of enhancing their own institutional power and determining procedural rights pursuant to moralistic concepts of individual worth.

More broadly, an exploration of judicial conduct during World War I suggests that the conventional emphasis in historical scholarship on the fate of individual substantive rights such as personal liberty has obscured another important perspective. A full

historical understanding of legal developments in wartime requires attention to changes in the legal process—particularly shifts in the balance of institutional powers and allocations of procedural entitlements—as well as to formal evolution of legal doctrine. Viewing the conduct of the English judiciary during World War I from this perspective yields contemporary as well as historical lessons. The precise connection between judicial power and due process rights is indeterminate and elusive, and augmenting the power of judges is not necessarily the solution to the erosion of individual rights in wartime. In fact, the British experience suggests that the legal process is intensely vulnerable to distortion by judges driven by wartime imperatives rather than by neutral procedural principles. Judicial power during World War I produced a legal regime that was moralistic, selective, and discriminatory in its distribution of procedural entitlements. Understanding the contingent role of the judiciary during this first global conflict may encourage the heightened vigilance necessary to secure a fair legal process for all litigants in times of war.