Public Order in Britain's Wartime Emergency, 1914–18: The Defence of the Realm Act

Patrick Graham*

The severe industrial discord and embittered politics of late Edwardian Britain subsided when, in August 1914, the kingdom declared war on the German Empire. The collective sacrifice demanded of a wartime society, however, made that domestic truce more precarious. The risk of sustained social disorder re-emerged. The British military had long impressed upon the government how crucial the maintenance of domestic public order was to an impending war effort. The predictable Diceyan rejoinder of successive governments – which emphasised the common law's utility and flexibility as a reservoir of unfixed emergency power – had the effect, however, of thwarting the War Office's efforts at codification of the military's emergency public order powers in a single parliamentary Act. This remained the government's stated position less than five weeks before the outbreak of war.[1] And yet, three days after Britain declared war on Germany, a profound change occurred in the government's approach to the regulation of public order in a national emergency. On 7th August 1914, the Home Secretary, Reginald McKenna, stood before parliament and introduced the Defence of the Realm (DOR) Bill. It permitted the government to issue regulations "as to the powers and duties of the Admiralty and Army Council…for securing the public safety and defence of the realm".[2] The deliberate military orientation of the DOR framework was immediately clear,[3] while its enactment represented an abrupt and unexpected disavowal of government policy which had, just a few weeks before Britain's declaration of war, focused on the malleable properties of the common law.

The rationale behind this sudden, eleventh hour change in policy is difficult to untangle from the archival material available. Thus far, only partial explanations have been offered in the few studies, relative to its weighty significance, which have examined the DOR framework. This paper submits a new account. I argue here that the first Defence

* School of Law, University of New England, Armidale, NSW 2351, Australia;

[1] The National Archives, Kew, London, United Kingdom (hereafter: "TNA"), CAB 16/31, "Emergency Powers in War: proceedings and memoranda" – E.P. 1: 'Minutes of the First Meeting held on 30th June 1914', pp. 1–7.

[2] 5 *Hansard*, LXV, cols. 2191–2193 (HC); 7th August, 1914.

[3] See also, C. P. Cotter, 'Constitutionalizing Emergency Powers: The British Experience', 5 *Stanford Law Review* 382 (1952–53), at 385.

of the Realm Act (DORA) was an impulsive measure, devoid of foresight, and symptomatic of the complacency and uncertainty that characterised the government's pre-war emergency planning more generally. The Act was ostensibly introduced as means of expediting the administration of criminal actions that might hamper the prosecution of the war effort. The government's enactment of further DOR statutes during the second half of 1914 – which extended quasi-judicial powers to both the military and executive over the civilian population – further demonstrates the dearth of strategic foresight which the civil authorities provided to the regulation of public order. The government's dramatic reversal of policy with regard to the introduction of courts-martial between November 1914 and January 1915 is also characteristic of the arbitrariness of the Asquith administration's strategy in the early part of the war. The amplification of the government's improvised approach to public order is the first trend explored here.

The second trend relates to the escalation of a power struggle between various government players over the direction of the state's response to public order emergencies. While senior army officers waged a relentless 'behind-the-scenes' campaign for the promulgation of additional legal powers, the Home Office countered with remarkable, longstanding consistency that the civil constabulary and local magistrates in all circumstances short of revolutionary upheaval or invasion should maintain public order. The civil power remained supreme in the event of disturbances, the Home Office argued, and the maintenance of public order remained the constitutional preserve of the police: when that bulwark failed, a requisition of military force would remain stringently under civil control. It is argued here that DORA was ultimately immaterial to the military's responsibilities in the event of a public order emergency. The powers conferred on the military by the DOR regulations were essentially pre-emptive in nature: by censoring, imprisoning, or deporting suspected subversives, for example, the military could forestall anticipated outbreaks of disorder. But in the event of a public order crisis, the civil power remained supreme as the agent responsible for controlling the state's response. The military's preference and petitioning for sweeping pre-emptive statutory authority over the public was primarily aimed at mitigating – through the exercise of powers of internment, censorship and appropriation of private property – the possibility that soldiers would again become mired in the restoration of public order in the very first place.

This paper begins with an account of the parliamentary process by which the DOR framework was enacted. It then traces the contours of the powers conferred to the executive and military authorities under the parent (or 'enabling') statute. This is followed by an exploration of the disparity between the government's repeated and formal opposition to a statutory emergency powers code and the eventual formulation of the DOR framework. I argue here that this inconsistency represents a continuation of a discernible trend in British constitutionalism: the design and application of *ad hoc*, malleable military powers in the field of public order.[4] By the spring of 1915, when the *entente*'s position looked increasingly precarious, a radical re–evaluation of Britain's war effort was undertaken. The DOR scheme was then adjusted and expanded further in order to legalise full state control over the Britain's industrial output thus fully engaging the civilian population in the war effort on the home front.

II. *Volte Face:* The sudden advance of the Defence of the Realm Act, 1914

After almost a decade of mounting Anglo-German antagonism, and ultimately provoked by Germany's invasion of Belgium, Britain declared war on the German Empire at 11pm on 4th August 1914. Three days later Reginald McKenna introduced the Defence of the Realm Bill before parliament: one of the most draconian pieces of legislation enacted in Britain and "perhaps the best known but least studied aspect of the wartime extension of state control."[5] Sir Samuel Hoare, one of McKenna's successors at the Home Office, recounted that he watched his predecessor speak to the House that day "without a draft of the Bill, with only half a sheet of notes in his hand".[6] The draft DOR Bill may well have been present on the 'half a sheet of notes' that McKenna possessed as it consisted of a paltry 172 words. McKenna explained that the DOR Bill proposed to allow the government to issue regulations "as to the powers and duties of the Admiralty

[4] The DOR framework must also be viewed alongside contemporaneous illiberal statutes which invariably stemmed from an escalating sense of 'Germanophobia' in Britain: such as the Official Secrets Act, 1911, and the Aliens Registration Act, 1914.

[5] D. Englander, 'Military intelligence and the defence of the realm: the surveillance of soldiers and civilians in Britain during the First World War', (1989) 52 *Bulletin of the British Society for the Study of Labour History* 24.

[6] 5 *Hansard*, CCCLI, col. 63 (HC); 24th August, 1939. Hoare recalled the event as he spoke before parliament almost exactly twenty-five years later (24th August 1939) and in an almost identical situation to McKenna: that is, to introduce what became the Emergency Powers (Defence) Act, 1939, one week before the outbreak of World War II. The DORA can be viewed as the first statutory ancestor to Hoare's emergency framework.

and Army Council…for securing the public safety and defence of the realm".[7] Furthermore, any person suspected to be in breach of a regulation that had been designed to prevent either communication with the enemy or the procurement of information that might jeopardise military operations, or for breach of a regulation designed to secure either the "safety of any means of communication" or the nation's transport infrastructure, could be tried "in like manner as if such persons were subject to military law and had on active service" committed an offence under s.5 of the Army Act.[8] The power to sentence an offender to death, as conferred under the aforementioned provision of the Army Act, was, however, suspended for the purposes of the DOR regulations. Insofar as the direction of the war on the home front can be painted as an enduring clash between Liberal values and illiberal exigency, the government surrendered the first battle with impulsive haste.

The Home Secretary attempted to underplay the significance and potential effect of the Bill's provisions. The powers that the government demanded were only of particular desirability "in cases of tapping wires or attempts to blow up bridges", McKenna explained, so that there could be an "immediate court to consider the offence of the offenders".[9] A week later, the Home Office's most senior official, Sir Edward Troup, echoed McKenna's sentiments when he wrote to the country's most senior police officers to demand that they endeavoured to "induce the public to submit quietly to the military requirements, pointing out that they can be imposed only for the purpose of securing the public safety and defence of the realm".[10]

The impetus behind the government's introduction of the Bill was, then, provided by the need for expedient practicality: "dispatch seemed in the mood of every one".[11] The powers were ostensibly to be applied only in cases of absolute necessity. The reality was rather different. After having received Royal Assent just a few hours after its First Reading, the Act conferred the British government with the wide-ranging and vaguely-defined authority to issue regulations by 'Order-in-Council': a form of delegated legislation that evaded usual standards of parliamentary scrutiny. This gave the

[7] 5 *Hansard*, LXV, col. 2192 (HC); 7th August, 1914.
[8] Ibid.
[9] Ibid., col. 2193.
[10] TNA, HO 45/10690/228849/5; "War: Defence of the Realm Acts and Regulations: 1912–14"; 14th August 1914 circular.
[11] H. M. Bowman, 'Martial Law and the English Constitution', (1916) 15 *Michigan Law Review* 93, at 95.

government an "immense advantage", recollected Troup, in that the regulations "could be altered from day to day as new demands arose…or new modes of evasion were detected".[12] In turn, the military authorities and, to a lesser extent, the police were charged with the application of the DOR regulations.

The first regulations were issued on 12th August 1914, five days after the DORA's precipitous passage through parliament. These regulations were primarily intended to define offences deemed necessary to enhance military security, or to confer discretionary powers upon "competent naval or military authority" in respect of the right to requisition private property and control the country's transport network.[13] The Act was the first in a framework of statutory measures that would incrementally extend the powers available to the British executive and military during WWI. Three weeks later the government passed the DOR (No. 2) Act. This amending act allowed those suspected of having breached a regulation designed to "prevent the spread of reports likely to cause disaffection or alarm" as well as those enacted to secure the safety of an area which the Admiralty or Army Council proclaimed to be in need of "safeguard in the interests of the training or concentration" of its forces, to be tried by court-martial. The Bill was necessary, explained Viscount Allendale,[14] a senior government whip, because the parent Act had been "hurriedly drawn, with the result that certain omissions took place".[15]

A radical extension of the existing DOR statutory framework was then made in November 1914 when the government introduced the DOR Consolidation Bill before parliament. This was the first concerted effort by the executive to systematise its burgeoning framework of statutory emergency powers.[16] The Consolidation Bill repealed the two previous DOR Acts and reproduced their provisions with considerable extensions. First, the Bill proposed to allow the government to issue regulations *for* "securing the public safety and the defence of the realm" and with regard to Admiralty and Army Council's powers and duties for that purpose: this is as opposed to the parent statute's award of authority to government to merely issue regulations *as to* the military

[12] C. E. Troup, *The Home Office*, (London: G. P. Putnam's Sons Ltd., 1925), p. 240.
[13] A. Pulling and C. Cook (eds.), *Manuals of Emergency Legislation: Defence of the Realm Manual* (London: H.M.S.O., 1914 – 1920), vol. 1, "To July 31, 1915", pp. iii–iv.
[14] Wentworth Beaumont, 1st Viscount Allendale. Elected Liberal MP for Hexham at the age of 24 in 1895. Appointed as a Lord-in-Waiting between October 1911.
[15] 5 *Hansard*, XVII, col. 521 (HL); 27th Aug. 1914.
[16] Supra n. 3, at 385.

authorities' powers. This evolution in vocabulary is of importance: it greatly expanded the nature of regulations that could be enacted by Order in Council.[17] Secondly, the Consolidation Bill allowed for all defendants charged with a breach of DOR regulations to be tried by court-martial, as opposed to those charged with breach of specific categories of regulations. Thirdly, and most fundamentally, under clause 1 (3), the Bill stated that where it is "proved that [an] offence is committed with the intention of assisting the enemy, a person convicted of such an offence by a court-martial shall be liable to suffer death".[18] The hitherto voiceless parliamentarians of the day were stirred and began to take careful notice. While perfunctory criticism was directed at the bill in the Commons, an alliance of Conservative and Liberal peers launched a scathing critique of government's proposals in the House of Lords. Given the change in government policy that their Lordships' admonition would engender, their defiance has yet to be given its due credit.

The Lord Chancellor, R. B. Haldane, introduced the bill before the Lords "so as to enable certain evils to be reached" as well as to give effect to "amendments which [were] asked for by the Admiralty and War Office".[19] The country was in a deeply perilous position, Haldane told the House: "[we] are fighting for our lives as a nation, and have to take exceptional powers".[20] Haldane's appeal did not, however, placate, amongst others, two eminent former Lord Chancellors who chose instead to lead a principled attack on the Consolidation Bill. With a distinguished career at the Bar behind him, and almost 17 years' experience as keeper of the Great Seal, a 91-year old Lord Halsbury[21] bemoaned the haste with which the government had acted since

---

[17] See, for example, see T. Baty and J. H. Morgan, *War: Its Conduct and Legal Results* (London: John Murray, 1915), pp. 101–104: "For four months we have been living under decrees of the military and naval authorities which were absolutely illegal". The DOR (Consolidation) Act was, Baty and Morgan continued, "a remarkable confession of the illegality of the regulations" enacted by Order-in-Council under the first two DOR Acts.

[18] The diary entry of George Riddell, the proprietor of the *News of the World*, and a close confidant of many senior Liberal ministers, at this time are also instructive: "The Defence of the Realm Acts are being consolidated. The drastic and unique provisions of this legislation have not attracted the attention they deserve. The legislation has taken place so rapidly that the measures have not been properly discussed. The press have been singularly ill-informed and lacking in criticism regarding a law which wipes out Magna Carta, the Bill of Rights, etc., in a few lines. We have got some alterations made, but trial by court martial still stands. A very dangerous innovation." G. A. Riddell, *The Riddell Diaries*, (ed., J. M. McEwen), (London: The Athlone Press, 1986), [20th November 1914 entry].

[19] 5 *Hansard*, XVIII, cols. 204–205 (HL); 27th Nov. 1914.

[20] Ibid., col. 207.

[21] Hardinge Giffard, the 1st Earl of Halsbury. Lord Halsbury served as Lord Chancellor on three separate occasions: June 1885–January 1886; August 1886–August 1892; June 1895–December 1905. Giffard's

Britain's declaration of war. He argued that the Consolidation Bill represented "undoubtedly…the most unconstitutional thing that has ever happened in this country".[22] Halsbury's sentiments were echoed by his Conservative colleague, Lord Parmoor.[23] Parmoor stated that the operation of courts-martial was constitutionally untenable when the civil courts "may be sitting within fifty yards". The Bill, Parmoor continued, gave power to the government analogous to that of a "conquered country or where soldiers alone have authority".

Parmoor's inference was clear: the Bill amounted to the unwarranted imposition of martial law by statute. This was a charge also made by academic commentators. Most notably, John Morgan, professor of constitutional law at University College London – as well as an appointee to the adjutant-general's staff after having volunteered for active service at the outbreak of WWI – wrote that the DOR scheme was "more specious but far less restricted than martial law".[24] Lord Parmoor implored the government to "preserve the safeguards…established by the experience of centuries and which it is our boast to have preserved" which trial by jury represented.[25] Courts-martial, argued Parmoor, "have neither the procedure nor the experience that our ordinary courts have" and therefore lacked the requisite constitutional safeguards that would "protect an innocent man who may be wrongly charged".[26] Adding to the chorus of censure, the Liberal peer Lord Weardale joined his colleagues in submitting that the proposed Bill was a "monstrous thing" and criticised his government for placing "a sword of

---

principled intervention is somewhat extraordinary given what Rande Kostal has described as his reputation as "one of Britain's most powerful, and politically reactionary, judges". – See R. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2008), p. 306.

[22] Supra n.17, col. 220.

[23] Charles Alfred Cripps, the 1st Baron Parmoor of Frieth. Of prodigious intellect, Lord Parmoor was a Unionist M. P. but received his peerage from the Liberals in January 1914. By the end of WWI he was a committed internationalist, and served as Britain's representative to the League of Nations in 1924. Parmoor changed party again in 1923 when he joined the Labour party following an invitation from Ramsay Macdonald. In his later career (June 1929–August 1931) he was also the Leader of the House of Lords

[24] *War: Its Conduct and Legal Results*, supra n. 17, p. 112. Proponents of the DOR framework also recognised its constitution novelty. Rossiter described the scheme as a "delegated dictatorship" which "came close to being a legislative declaration of martial law" and "brought the entire scope of English life and liberty under the control of the government". C. Rossiter, *Constitutional Dictatorship: Crisis government in the modern democracies*, (Princeton: Princeton University Press, 1948) p.153

[25] 5 *Hansard*, XVIII, col. 210 (HL); 27th Nov. 1914.

[26] Ibid.

Damocles" over the Lords' heads.[27] Parliamentary denunciation of the Consolidation Bill was not unanimous. Echoing Haldane's argument, the Conservative peer Lord Crawford[28] told the House that he had "no sympathy with those who prefer to adhere to ancient and honourable privileges of citizenship when they know the incalculable dangers by which we are threatened". The Bill, Crawford added, was a "measure of the dangers by which the country is confronted".

Crawford's counter-censure, as well as the slumberous inaction of the Commons during the passage of all three DOR Acts, adds weight to Charles Townshend's claim that the attack on the Bill led by Halsbury and Parmoor represented a "truly radical dissent from the national religion" of expediency and unconstrained award of sweeping executive authority.[29] This echoes Ewing and Gearty's verdict that the "war-time experience is generally one of parliamentary neglect and ineffectiveness."[30] Such conclusions, however, overlook the radical change in government policy which their Lordships' dissents provoked. Towards the Bill's Second Reading, Lord Loreburn[31] tabled an amendment which would allow all British civilians the right "to be tried by the ordinary courts of the law for *any*[32] offence punishable under or by virtue of this Act...and all such courts shall have jurisdiction to try such offences in accordance with Defence of the Realm regulations." Loreburn later withdrew the amendment after Haldane gave an explicit undertaking that no civilian would be executed after having been sentenced by court-martial before the House would have an opportunity to reconsider the bill: given that its discussion took place on the day on which the House adjourned for the Christmas break. The Consolidation Bill nevertheless received its Royal Assent the same day. Loreburn's persistence paid off. In January 1915 he received a commitment from the Liberals' Leader in the House, Lord Crewe,[33] that the government, having

[27] Ibid., col. 215.
[28] David Lindsay, 27th Earl of Crawford. Would later serve a brief stint as President of the Board of Agriculture in Asquith's coalition government. He also served as a junior minister across various departments in Lloyd George's post-war coalition government.
[29] C. Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993), p.42.
[30] K. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford: Oxford University Press, 1999), p. 50.
[31] Robert Reid, 1st Earl Loreburn. A reform-minded Lord Chancellor, December 1905–June 1912.
[32] Emphasis added.
[33] Robert Crewe-Milnes, 1st Marquess of Crewe. Leader of the House of Lords from April 1908–December 1916. He served in a number of ministries during his professional life. Most notably, he was Secretary of State for India (1910–1915), while President of the Board of Education in 1916.

considered the matter, would soon introduce a separate bill which would amend the DORA so as to enable British civilians to opt for a trial before the ordinary courts and, of course, before a jury.[34]

The Defence of the Realm (Amendment) Bill was introduced before the House of Commons on 24th February 1915. In presenting the Bill, Sir John Simon, the Attorney-General, stated that the first DORA had been proposed in order to "rapidly enforce those rules and regulations, vitally necessary as they were in the interests of the country, without any of the delay which is inevitable with the ordinary machinery of civil justice when we are dealing with very serious cases".[35] As the war had progressed for over six months, however, it was now possible, argued Simon, "with the help of that time to prepare measures" which balanced the competing needs of national security and "ancient and constitutional right[s]".[36] This is further revelation of the capricious and *ad hoc* nature of government's emergency planning. The Bill was intended to be as exhaustive as possible, Simon continued, to ensure that "at the bar of history" the government would not suffer any blame, but would instead receive commendation for ensuring that the provisions that it enacted "were adequate and sufficient" in light of the emergency that faced the nation.[37]

There are a number of remarkable aspects to Simon's statement. First, he ignored the labyrinthine framework of DOR regulations that were already in effect, as well as the litany of amending primary legislation passed under the DOR framework, that had been enacted by February 1915. The net of regulations was "so finely woven, so ingeniously designed", wrote Morgan, that it "enmesh[ed] every act of the citizen".[38] Secondly, the Bill proposed to re-establish a British civilian's right to trial by jury, if he or she so elected, for breach of any DOR regulation: the prize that a number of notable Lords had so vigorously demanded. This was subject to a suspension clause, however, in that if "the needs of public order, and by the over-riding principle of national defence and

[34] 5 *Hansard*, XVIII, cols. 338–339 (HL); 7th January 1915. It is worth noting that, after the government gave this undertaking, Earl Curzon of Kedleston, a Conservative peer, and later the Foreign Secretary in successive post-war administrations between October 1919 and January 1924, bemoaned Lord Halsbury's "abnormal" persuasive powers on the government. Curzon expressed very little surprise that the government had decided to "give way" to Halsbury after he had "direct[ed] his batteries on them" – at col. 341.
[35] 5 *Hansard*, LXX, col. 288 (HC); 24th February 1915.
[36] Ibid., col. 289.
[37] Ibid., col. 288.
[38] *War: Its Conduct and Legal Results*, supra n. 17, pp. 112–113.

security" so demanded, "military justice…becomes a necessity" and trial by court-martial would be inescapable. With regard to "who is to decide whether or not…the proclamation suspending the operation of the statute is to be made", there was only one possible answer, declared Simon: "of necessity, the executive must decide that; nobody else can decide it." A third aspect of Simon's account of the law is the most remarkable. As Solicitor-General in July 1913, he was required, in his role as one of the Law Officers of the Crown alongside Sir Rufus Isaacs, the then Attorney-General,[39] to submit a formal opinion on the need for the enactment of a statutory emergency powers bill in the event of war or imminent national emergency. The Officers concluded that this was completely unnecessary: the required powers in such an event could be found within the confines of the common law. Indeed, Simon expressed the same assessment at a key meeting of a sub-committee of the Committee of Imperial Defence (C.I.D.) on 30th June 1914. The government's stance as outlined in that meeting is at complete odds with the DOR scheme that it ultimately enacted and enforced just weeks later. Crucially, the DOR framework met the requirements that the military had so consistently lobbied for, but had, at every turn, been vetoed by the government. The outline of an explanation for this puzzling reversal in government policy lies at the heart of the next section.

III. The government's new departure

Having resisted the enactment of an emergency statutory code for over a quarter of a century, the executive had decided, at some point within the space of five weeks, to introduce a framework embodying much more austere and wide-ranging terms than had been demanded by the military. While the evidence is limited, the change in policy seems to have occurred at some point during the final few days of July. Maurice Hankey[40] recalled that, from 27th July 1914 onwards, he had been "extremely busy…working with [George] Macdonogh [a senior member of the War Office] and

[39] This was shortly before his appointment as Lord Chief Justice in October 1913.

[40] Maurice Hankey, 1st Baron Hankey. A former naval intelligence officer, Hankey was a career civil servant who spent 30 years working within the Committee of Imperial Defence: and served all but four of those years as its Secretary (1912–1938). He was pivotal and ever-present as the government conducted and exercised its pre-war and wartime strategic military planning. He was also a long-serving Cabinet Secretary throughout most of this period (1916–1938), and turned to ministerial office for a brief period during WWII when he was made Chancellor of the Duchy of Lancaster by Churchill in 1940.

parliamentary counsel on the Defence of the Realm regulations."[41] The first regulations were passed by Order-in-Council on 12th August: "we were a little late in this matter", Hankey recalled with some understatement,[42] and thus further revealing just how disordered government planning was in relation to the military's wartime powers over the civilian population. Simon recalled in his memoirs that:

> "…[DORA] had been commended to parliament as a necessary means for controlling by Order in Council miscreants who might tap telegraph wires and the like, but, by the time I took over [as Home Secretary in May 1915], it was already the parent of an ever-increasing progeny of regulations".[43]

Clearly, then, there was little grasp on the government's part in August 1914 of the enormous consequences that the DOR framework would soon harbour. Furthermore, the archival evidence available does not support Clinton Rossiter's claim – made in his seminal account of crisis government in the first half of the 20th century, *Constitutional Dictatorship* – that the "remarkable aggregation of emergency laws" which the British executive passed under the DORA had been "prepared in advance by the pertinent ministries or by the Committee of Imperial Defence".[44]

So far, very little inquiry has been undertaken by way of offering an explanation for this startlingly abrupt transformation in policy. There are two partial exceptions. For his part, Charles Townshend points to the role that the general population played during the war in shaping government policy: he views the British public as not only participants, but "prime movers" in the shift towards the abrogation of constitutional rights which DORA triggered.[45] Sacrifice, according to Townshend, "offered the only universally available means by which individuals could assert their identity with the threatened nation" in the absence of tangibly direct targets of German provenance. As such, "national sentiment, not government was the architect of this revolution". The only

---

[41] Baron Hankey, *The Supreme Command, 1914–1918* (London: George Allen and Unwin Limited, 1963), p. 154.
[42] Ibid.
[43] 1st Viscount Simon, *Retrospect: The memoires of the Rt. Hon. Viscount Simon* (London: Hutchinson, 1952), p. 104
[44] C. Rossiter, *Constitutional Dictatorship: Crisis government in the modern democracies*, (Princeton: Princeton University Press, 1948) p.153
[45] C. Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993), p. 61.

check to this unprecedented promulgation of emergency power was the "traditional moderation of the English establishment".[46]

Townshend's analysis echoes the explanation offered by Bowman in 1916. Parliamentarians, he claimed, "seemed to be speaking in assertion of the primal instincts of the people", while the government's "matter-of-fact, almost droning doing of the business was a perfect disguise" for the illiberal nature of the measures it proposed to enact.[47] "It seems," continued Bowman, that the DOR framework was "ratified by a public opinion of exceptional solidarity".[48]

This account, with its appeal to a sense of national 'sacrifice', is lacking. It is of course true that anti-German sentiment pervaded through British public life. This prejudice developed during the Edwardian period as a result of spy scares and the invariably absurd, but wildly popular, fictional writings of William le Queux.[49] Anti-German feeling then peaked in May 1915 following the sinking of the *Lusitania* and Zeppelin bombing raids over London and eastern England. "The Germans were in many ways", writes John Bourne in his account of the social history of WWI, "the perfect enemy – their conduct throughout the war seemed almost designed to offend British liberal sensibilities and to galvanise public opinion in support of the war effort".[50] That strength of feeling permeated right to the heart of the British establishment. Rufus Isaacs, the Lord Chief Justice throughout the war, reserved a particular dislike for the German people, as his son recounted some years later: "their arrogance as a nation outraged his tolerance and their grossness as individuals offended his fastidiousness".[51] This is a particularly unsettling viewpoint given Isaacs' role as a Treasury planner during the war and a judge in cases concerning the DOR regulations.[52]

The appeal to sacrifice narrative may account for the absence of any appreciable dissent towards government's enactment of the DORA in the war's initial stages. But it does not account for the startling reversal in government policy that its enactment represented

---

[46] Ibid., p. 62.
[47] H. M. Bowman, 'Martial Law and the English Constitution', (1916) 15 *Michigan Law Review* 93, at 97.
[48] Ibid., at 125.
[49] D. French 'Spy Fever in Britain, 1900–1915', (1978) 21 *The Historical Journal* 355, 356–358.
[50] J. M. Bourne, *Britain and the Great War, 1914–1918* (London: Edward Arnold, 1989), p. 210.
[51] The Marquess of Reading, *Rufus Isaacs: First Marquess of Reading, 1914–1935* (London: Hutchinson & Co., 1945), p. 9.
[52] See further, K. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford: Oxford University Press, 1999), pp. 81–83.

in the first place. Nor can it be forcefully argued that the government intended to wait until it was afforded the 'cover' of hostilities before it could enact such sweeping statutory powers: as the transcript of the 30th June meeting and records of C.I.D. meetings demonstrate, there was no indication that the administration intended to legislate on the matter until McKenna stood at the despatch box just days after Britain's declaration of war. As McKenna's only independent biographer notes, although there had been substantial planning for war in respect of military movements and the internment of aliens, "as McKenna knew to his cost, improvisation was the dominant impression".[53] Furthermore, the 'appeal to sacrifice' account overlooks the political constraints which limited government action in 1914: the introduction of conscription or comprehensive appropriation of the state's industrial output were, for example, by then still inconceivable prospects. Instead, the introduction of both measures came at a time when the initial sense of national unity had waned considerably. The enactment of two further anti-trade union measures in 1915 was also evidence of the fragility of the uneasy peace between the trade union movement and employers. The Munitions of War Act suspended the right to strike, while Regulation 42 of the DORA prohibited the right to picket at a site involved in the "production, repaid, or transport of war material, or any other work necessary for the successful prosecution of the war".

A succinct study undertaken by Gerry Rubin proffers a second possible explanation for the sudden transformation in government policy, at least with respect to the rationale which underpinned the expansion in the DOR framework which went beyond that which was intended in August 1914. Rubin writes that by the autumn of 1914 "even the most conservative of lawyers must have come to recognise that the nature of warfare had been transformed beyond recognition".[54] As such, Rubin added:

> "A war of attrition demanded vast quantities of men and *matériel* beyond the wildest imagination of pre-war planners. A war being fought by British troops on

[53] M. Farr, *Reginald McKenna: Financier among Statesmen, 1863 – 1916* (London: Frank Cass, 2008), p. 263.

[54] G. R. Rubin, 'The Royal Prerogative or a Statutory Code? The War Office and Contingency Legal Planning, 1885–1914' in R. Eales and D. Sullivan (eds.), *The Political Context of Law: Proceedings of the Seventh British Legal History Conference, Canterbury, 1985* (London: Hambeldon Press, 1987), at p. 158.

the continent of Europe was, for the first time in history, one which involved directly the civilian population."[55]

While the general point on the nature of warfare that Rubin makes is indisputable, it seems to me that Rubin ante-dates the government's grasp of this changing reality. This is demonstrated by the archival evidence which encompasses both the government's pre-war planning as well as its strategy in the months immediately following 4th August 1914. Furthermore, the form of the various DOR statutes casts additional doubt on Rubin's explanation. The government's complete refusal to heed the military's advice and give serious consideration to a statutory emergency powers code was symptomatic of the unfocused manner in which Asquith's administration conducted its pre-war contingency planning. Anglo-German antagonism ebbed and flowed in the decade that preceded the outbreak of armed hostilities. As Rossiter notes, however, of all the nations that went to war in 1914, "Great Britain was the least prepared to undergo the protracted and grievous rigours of the first of the total wars".[56] Asquith's consensual and somewhat hesitant approach was hardly suited to contingency planning that would have to include measures of a bellicose and illiberal nature.

The Liberals first gave meaningful consideration to the possibility of hostilities with Germany in November 1907. A few months previous to that, the former Prime Minister, Arthur Balfour, and now leader of the opposition following the Conservatives' electoral disaster in early 1906, wrote to Sir George Clarke, the inaugural secretary of the Committee of Imperial Defence, to express his desire for a formal investigation as to whether the country should take a "less sanguine view of our immunity from serious invasion".[57] The Committee was essentially an advisory body to the Prime Minister on issues of national defence and security although its ultimate efficacy is highly questionable.[58] Balfour had become increasingly concerned at what he perceived to be

---

[55] Ibid.

[56] *Constitutional Dictatorship: Crisis government in the modern democracies*, (Princeton: Princeton University Press, 1948), p.151.

[57] TNA, CAB 16-3A; "Reports and Proceedings of a Sub-Committee of the Committee of Imperial Defence appointed by the Prime Minister to re-consider the question of overseas attack"; 20th July 1907.

[58] The C.I.D., as its former Secretary of 26 years, Maurice Hankey, pointed out, owed its existence to former Prime Minister Arthur Balfour's "far-seeing initiative in 1904". *The Supreme Command, 1914–1918* (London: George Allen and Unwin Limited, 1963), p. 45. For a critical account of its preparations and ultimate effectiveness, see J. P. Mackintosh, 'The Role of the Committee of Imperial Defence Before 1914', (1962) 77 *English Historical Review* 490, as well as, more generally, D. French, *British Economic and Strategic Planning, 1905–1915*, (London: George Allen & Unwin, 1982),

Britain's potential vulnerability in light of Germany's increasing naval strength. Asquith duly formed a sub-committee of the C.I.D. tasked with investigating Balfour's concerns, and sat on its panel along with Lloyd George, Grey, Haldane and McKenna. The sub-committee held sixteen meetings between November 1907 and August 1908. In its final report, the sub-committee's members concluded that so long as Britain's "naval supremacy is assured against any reasonably probable combination of Powers, invasion is impracticable". If, however, Britain were to "permanently lose command of the sea…the subjection of the country to the enemy is inevitable".[59]

The Agadir crisis in July 1911, however, called into question the government's calculations and focused its attention on Germany's growing naval strength. For the first time Asquith was "forced to give serious thought to the main lines of British [defence] strategy".[60] As Kennedy notes, the incident led to a significant shift of power within both the British and German governing elites. On the British side, Agadir formally signalled Lloyd George's "defection" from the reductionist wing of his party, thus ensuring that alliance with France was now official government policy.[61] In Germany, the Agadir incident and Lloyd George's seminal Mansion House speech further circumscribed Chancellor Hollweg's "freedom of manoeuvre" as he became encircled by the demands of the jingoistic right and national corps.[62] It was at this point, Hankey colourfully recalled, that the government "really realised that the Angel of Fate was turning the spacious orb and that the nation might draw the lot of war": consequently, the signal was given to intensify the country's defensive preparations.[63] Even Hankey later admitted to defects in the government's contingency planning. While Asquith and the Foreign Secretary, Sir Edward Grey,[64] had "always believed that with patience, honesty and frankness the international difficulties with Germany might be

[59] TNA, CAB 16-3A; "Reports and Proceedings of a Sub-Committee of the Committee of Imperial Defence appointed by the Prime Minister to re-consider the question of overseas attack"; 'Final Conclusions' 20th October 1908.
[60] Mackintosh, supra n. 59, at 498.
[61] P. M. Kennedy, *The Rise of Anglo-German Antagonism 1860–1914*, (London: George Allen & Unwin, 1980), p. 449.
[62] Ibid.
[63] *The Supreme Command*, p. 118
[64] Edward Grey, 1st Viscount Grey of Fallodon. Foreign Secretary, December 1905–December 1916: the longest-serving tenure of any Foreign Secretary to date.

surmounted", the government still "put their money on sea-power" in the event of hostilities.[65] The government, wrote Hankey, had:

> "…always […] contemplated that, if war came, our role would be to retain command of the sea. On land our role was to be a secondary one, as the main responsibility would devolve upon the great land power with which we might find ourselves in alliance. We did not foresee their failure, which was destined to involve us in improvising an army on the continental scale".[66]

This failure was due to inexperience or lack of imagination, concluded Hankey, while the first half of 1914 – even as late as the assassination of the Archduke Franz Ferdinand – "gave little indication of the imminence of catastrophe".[67] The outbreak of war, however, revealed further complacency on the government's strategy. The intractable Churchill, who arrived at the Admiralty in October 1911 following his eventful tenure at the Home Office,[68] informed his department on 8th August 1914 that it "should proceed on the general assumption that the war will last one year, of which the greatest effort should be concentrated on the first six months".[69] There was one lone dissent to the general Cabinet consensus that war would be short: that of Lord Kitchener, a Conservative peer and military icon, who was invited to join the government as War Secretary in an attempt to bolster the Liberal administration's militarist credentials and engender a spirit of national unity. Grey recalled that Kitchener "foresaw to an extent that no one else did at first" that the war would last "for three years". That seemed, wrote Grey, "unlikely, if not incredible" to the rest of the Cabinet in August 1914.[70]

---

[65] *The Supreme Command*, p. 136.
[66] Ibid., p. 140.
[67] Ibid., p. 152.
[68] Churchill would remain as First Lord of the Admiralty until May 1915 when he was then demoted to the Chancellor of the Duchy of Lancaster after his role in the disastrous attack on the Dardanelles. Just a few months later, Churchill volunteered for active service on the Western Front.
[69] TNA, ADM 1/8388/235; "Duration of the War: Estimate of by the First Lord, as basis for preparations of plans etc. by Admiralty Departments, 1914–1915".
[70] Viscount Grey of Fallodon, *Twenty-five Years, 1892–1916* (vol. 2), (London: Hodder and Stoughton, 1925), p. 68. Grey could not understand how Kitchener could have reached such a conclusion as early as August 1914. Given Kitchener's surprise and horror at the development of trench warfare "from Switzerland to the sea", the only possible explanation, thought Grey, was that the Field Marshal "must have reached his conclusion about the duration of the war by some flash of instinct, rather than by reasoning".

Nevertheless, the Cabinet's sudden endorsement of Kitchener's plans for raising the voluntarist 'New Armies', as a means of supplementing the British Expeditionary Force sent to the continent at the outbreak of the war, was almost fatally undermined by its failure to reorganise the domestic economy accordingly. French notes that that if the government had wanted to regulate the implications of just over one million men leaving industry and suddenly joining the army it would have had to introduce conscription and then take control of the armaments and engineering industries: both eventualities were, however, "impolitic" – and an affront to Liberal sensibilities – in 1914.[71] French is also damning of government strategy:

> "The government's policy in the early months of the war, if something so ill-thought-out as what it did can be dignified with the name policy, represented a complete reversal of what it had intended to do before the outbreak of war. Without thinking through any of the implications, the Cabinet lamely agreed to Kitchener's drive to create the largest possible army".[72]

The archival evidence therefore indicates that, contrary to Rubin's suggestion, the government only fully grasped the severity of the situation in the spring of 1915: that its contingent of forces on the continent was insufficient, and that its management of the domestic economy – and, more specifically, its failure to direct the efforts of its civilian towards the war effort – was hopelessly deficient. Furthermore, it is only at this point that the government began to take intensive steps to refocus the war effort on the home front, with the introduction of measures that went far beyond dealing with those "miscreants" who might "tap telegraph wires and the like".

The transformation in strategic direction began in February 1915 when Lloyd George, still Chancellor of the Exchequer, presented a paper before the Cabinet outlining his "considerations on the conduct of the war".[73] It set a very pessimistic tone: the Russians have been "completely knocked out", wrote the Chancellor, while the Central Powers possessed a "huge numerical and technological advantage".[74] He was further alarmed at the implications of an outbreak of industrial unrest at shipyards and engineering works in Glasgow. The government's rallying maxim in the early months of the war – that of

[71] *British Economic and Strategic Planning*, supra n. 59, p. 128.
[72] Ibid., p. 132.
[73] TNA, CAB 37/124/40; "Some further considerations on the conduct of war"; February 1915 (undated).
[74] Ibid.

'business as usual' – was now thoroughly redundant. The government had "hitherto proceeded as if the war could not possibly last beyond autumn", wrote Lloyd George, and this was no longer sustainable. As the war could continue until at least 1917, the solution, he believed, was to make every effort to "increase the number of men whom we can put into the field" and to ensure that "all the engineering works of the country ought to be turned on to the production of war material". This would require the general population to "suffer all sorts of deprivations and even hardships" while such a process was undertaken.[75] Charles Hobhouse[76] recollected that Asquith had described Lloyd George's proposal as "indistinguishable from socialism" in a Cabinet meeting.[77] As French notes, "*laissez-faire* scruples were thrown to the wind".[78] Nevertheless, the Chancellor tasked G. R. Askwith, the Board of Trade's key arbitrator, with drafting a report on the subject in an attempt to lend further weight to his proposals. On 5th March 1915, Askwith recommended that the government refashion the DORA so as to empower the state to "assume control over the principal firms whose main output" was munitions and military equipment.[79] This would "restore the feeling of national unanimity which existed at the commencement of the war", thus putting an end to suspicions that employers were making "undue and abnormal" profits from the war, while further impressing upon the nation "a serious realisation of the fact that the country is at war".[80]

Accordingly, on 9th March 1915, Lloyd George introduced the DOR (Amendment No. 2) Bill before parliament which embodied the principles outlined in both his and Askwith's reports. If the spirit of national unity that existed at the beginning of the war was beginning to fracture in the country's industrial heartlands, then this was also reflected in parliament. Andrew Bonar Law, the Conservative leader and erstwhile supporter of the government's legislative initiatives to date, complained that the powers

[75] Ibid.
[76] Chancellor of the Duchy of Lancaster, 1911–1914. M. P. for Bristol East, 1900 – 1918.
[77] E. David (ed.), *Inside Asquith's Cabinet: From the diaries of Charles Hobhouse* (London: John Murray, 1977), p. 224.
[78] D. French, *British Economic and Strategic Planning, 1905–1915*, (London: George Allen & Unwin, 1982), p. 161
[79] TNA, CAB 1/11/46; "4th Interim Report to His Majesty's Government of the committee on Production in Engineering and Shipbuilding Establishments Engaged in Government Work"; 5th March 1915; co-authored with Sir George S. Gibb, a respected transport administrator and also a member of the Army Council during the war.
[80] Ibid.

contained within the bill were "probably the most drastic that have ever been put to any House of Commons."[81]

While the statutory abandonment of *habeas corpus* for non-nationals and the introduction of capital punishment by court-martial were not enough to provoke objections from the Honourable Members, state interference in the market evidently was. More revealing, however, is the criticism directed at government war's strategy from more than just the 'usual suspects'. Bonar Law also rebuked the government for the timing of the introduction of Lloyd George's initiative before parliament as well as, more broadly, the government's overall conduct of its war strategy:

> "…the fact that the government come on almost the last day of these sittings and ask us to rush it through in this way suggests that even the most vital things are being done in a casual way which does cause some ground for anxiety."[82]

Sir Frederick Banbury[83] echoed Bonar Law's concerns when he remarked that "we have been at war for seven months, and apparently the government have suddenly woke up to something which is of vital importance".[84] He also accused Lloyd George of "treating the House with disrespect" given the hurriedness with which he had proposed to enact the Amendment Bill.[85] Nevertheless, the bill received its Royal Assent one week later, on the same day that the initial amending bill – restoring the right to trial by jury to British citizens – received its Assent.

It is argued here that the government's *volte face* in introducing the initial DORA in August 1914 is evidence of a deeply unnerved administration. It was introduced with no strategic foresight and was endemic of the deficiencies in the government's pre-war planning. The government displayed no forethought in August 1914 that the scheme would, or had the potential to, soon develop into a colossal and invasive administrative structure. With the outbreak of hostilities, the government felt compelled to be seen to take some form of immediate action. Considerations of public opinion were, however, peripheral: while the government had bowed to both military and public pressure to introduce authoritarian legislation dealing with the alien population and suspected

---

[81] 5 *Hansard*, LXX, cols. 1274 (HC); 9th March 1915.
[82] Ibid., col. 1275.
[83] Conservative MP for the City of London, June 1906 – January 1924, when he was then elevated to the Lords as the 1st Baron Banbury of Southam.
[84] 5 *Hansard*, LXX, col. 1282 (HC); 9th March 1915.
[85] Ibid., col. 1283.

subversives in the form of the Official Secrets Act in 1911,[86] and thus displayed a willingness to extend the state's crisis governance powers with respect to public order, it was nevertheless unmoved to even begin to prepare a statutory public order scheme for use in an emergency situation despite repeated demands by the military. The only trace of concession came on 30th June 1914 when Simon begrudgingly agreed to consider the design a 'proclamation' that would outline the common law powers available to the military. As we have seen, Macdonogh's repeated demands for a statutory scheme were customarily dismissed as unnecessary and potentially counter-productive. As will be discussed in the next section, even with this unprecedented, illiberal award of legal authority, the military authorities still pressed for the further award of powers by the civil authority: even during wartime, however, the military's demands proved too much for the Home Office.

IV. Conclusion: carte blanche?

The military took full advantage of the government's impulsiveness and dramatically widened its powers over the civilian population under the DOR framework during WWI. The scheme was expanded with extraordinary haste as the state scrambled to bring some sort of order and direction to the war effort and regulations were passed governing an unfathomably broad range of policy areas. Paradoxically, the unprecedented powers granted to the military demonstrated that subordinate legislation possessed the very contingent adaptability that formed the basis of army officers' discontentment with the common law. The stark difference lay, however, in the fact that the elasticity in the parent DORA's wording allowed the military authorities to formulate their own legal regulations as practicality demanded. While the legality of DOR regulations were justiciable before the courts, and could be declared *ultra vires*, the judiciary's record on upholding the rule of law during the war is, unsurprisingly, unsettling: particularly with respect to individual and civil liberties, although its record in upholding private property rights is less disquieting.[87]

---

[86] See B. Porter, *The Origins of the Vigilant State: The London Metropolitan Police Special Branch before the First World War* (London: Weidenfeld and Nicolson, 1987), pp. 161–180.

[87] The following studies focus on judicial scrutiny of the application of DOR regulations in relation to an individual's rights and civil liberties: D. R. Lowry, 'Terrorism and Human Rights: Counter-insurgency and necessity at common law', (1977–78) 53 *Notre Dame Lawyer* 49, 53–61; C. Campbell, *Emergency Law in Ireland, 1918–1925* (London: Clarendon Press, 1994), pp. 112–119; K. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford: Oxford University Press, 1999), pp. 80–90. Gerry Rubin's excellent study focuses on the

Despite the new statutory warrant with which it had been afforded, the military authorities remained deeply reticent about the prospect of using force against the civilian population in a period of civil unrest. The War Office was also concerned that the legal powers exercisable in the event of public disorder remained inadequately defined. In November 1914 Bertram Cubitt, the Assistant Under-Secretary of State at the War Office,[88] wrote to the Home Office with a proposal to extend the military's powers still further and settle aspects of legal contention on the use of force during outbreaks of domestic civil disorder (although he failed to specify the exact form in which those powers were to be enacted). First, it appeared desirable to the Army Council,[89] Cubitt wrote, that "steps should be taken with a view to the organisation of 5,000 men who will be thus armed into formed bodies, possibly battalions" in the event of civil disturbances occurring in London during the war.[90] Cubitt's letter continued:

> "The Council feel sure that [the Home Secretary] will appreciate the advantages in…the occurrence of serious disturbances of having all the available forces under one Command – and that these armed police, organised as a military force, should be placed under the orders of the General Officer Commanding, London District".[91]

The scheme caused deep anger within the Home Office: it "goes further than anything [the War Office] proposed before", wrote Troup.[92] Instead of responding to the Army Council directly, however, Troup directed the Commissioner of the Metropolitan Police, Sir Edward Henry,[93] to write to James Wolfe-Murray, Chief of the Imperial General Staff (CIGS).[94] This was an astute and rather calming strategy on Troup's part: a response from the Home Office which rebuffed the scheme as contrary to constitutional

---

courts' adjudication on the state's appropriation of private property under DOR regulations – G. R. Rubin, *Private Property, Government Requisition and the Constitution, 1914–1927* (London: Hambledon Press, 1994), chapters 3–15;

[88] Cubitt had previously served as a Private Secretary within the Office before his appointment as Assistant Under-Secretary of State in 1914, a post he held until 1926.

[89] Chaired by the Secretary of State for War, the Army Council was the military's governing body and coordinated its administration. Created in 1904, it was renamed the Army Board in 1964.

[90] TNA, HO 144/1650/179987/12: 15th November 1914 letter from Cubitt to Troup.

[91] Ibid.

[92] Ibid., internal Home Office memorandum, 18th November 1914.

[93] The son of Irish immigrants who had settled in London, Henry was a career civil servant who spent considerable time overseas, particularly in India. He was appointed Commissioner in 1903 and resigned in August 1918 in direct response to the Metropolitan Police Strike.

[94] Wolfe-Murray's tenure was short-lived: promoted to CIGS in October 1914, he was replaced just under a year later after the army's disastrous Gallipoli offensive.

principles may well have reignited intra–Whitehall tensions during what was period of crisis. Instead, Henry was directed to highlight the practical reasons that made the military authority's proposal unworkable. The provision of 5,000 men "could be done only by dislocating the working of the whole police system, and would necessitate the doubling up of both night and day beats", wrote Henry.[95] The War Office eventually relented after Henry furnished the military authorities with a deluge of statistics and operational information.[96]

That is where the Home Office's restraint and patience ended, however, as the War Office opened up a new front of attack in spring 1915. In early March Cubitt once again wrote to Troup with a draft copy of a plan entitled "Scheme for the Suppression of Civil Disturbances in London".[97] The document envisaged a radical expansion of the military's powers in the event of civil unrest, while its central tenets stood in direct opposition to the common law and procedures for requisitioning military force codified in the *King's Regulations for the Army*. Due to the national war effort, chapter one of the document declared that there was a pressing danger that, in the early stages of public unrest, "reluctance on the part of the civil authorities to demand military aid might allow a serious state of disturbance to develop before the demand was made."[98] The existence of a state of war, the Scheme stated, "not only increases the probability of civil disturbances occurring…but also renders the suppression of such disturbances a matter of vital importance to the safety of the nation."[99] The *King's Regulations* "can hardly be taken to embrace the case of civil disturbance on such a [serious] scale, especially at a time when the country is engaged in a European war", the scheme continued.[100] The military authorities therefore argued that a greatly expanded interpretation of the threshold at which the civil power's ability to maintain order could be judged to have been breached must be adopted and operational procedures suitably amended:

> "It is therefore necessary to make special provision for coping with the unusual conditions, and arrangements have accordingly been made that on such a situation

[95] TNA, HO 144/1650/179987/12: 15th November 1914 letter from Cubitt to Troup.
[96] TNA, HO 144/1650/179987/13: 9th December 1914 letter from Sir Reginald Brade – Permanent Under-Secretary of State of War – to Troup.
[97] TNA, HO 144/1650/179987/15: 4th March 1915 letter from Cubitt to Troup.
[98] Ibid., "Scheme for the Suppression of Civil Disturbances in London" – dated March 1915.
[99] Ibid.
[100] Ibid., to which an anonymous Home Official remarked: "!!".

> arising the [Home Secretary] will request the military authorities to take over the responsibility of restoring the peace of London by such military operations as they think necessary. The position will no longer be that of the military authorities assisting the police, but of the police assisting the military authorities so far as their numerous normal duties and lack of arms will permit."[101]

In such an event, the military authorities would "become the sole arbiters of the task to be undertaken".[102] The Home Office reacted angrily: "there is something of the policy of 'frightfulness'" about the scheme, complained McKenna.[103] The Home Secretary also concurred with Troup's statement that the department could not abandon its constitutional responsibilities, even in a time of national emergency, and that it could only proceed with an considerably amended version of the scheme on the "only basis [that] we can legally accept – military aid to the responsible civil power".[104]

Troup formally responded on the Home Secretary's behalf on 10th March. The introductory chapters of the scheme – those which outlined the most radical extension of powers envisaged by the War Office – appeared, Troup wrote, "to have been drafted under a misapprehension" as to what had been agreed between the two departments in the years immediately before the war:

> "…neither then nor at any subsequent stage has it been contemplated that the military authority should take over the responsibility of the civil authority or that any arrangement should be made not in accord with the King's Regulations on the subject of military aid to the civil power…"[105]

It was crucial, continued Troup, that the War Office abided by the constitutional principle that the "civil authority must remain primarily responsible for the suppression of civil disorder in time of war as at all other times," and to underline that soldiers, if they were ever to be employed in such an event, would act "only in aid of the civil power".[106] The Home Secretary therefore advised that the military that the introductory chapters of the scheme should be

---

[101] Ibid.
[102] Ibid.
[103] Ibid., 9th March 1915, internal Home Office memorandum.
[104] Ibid., 8th March 1915, internal Home Office memorandum.
[105] Ibid., 10th March 1915 letter from Troup to Cubitt.
[106] Ibid.

> "…revised on the basis originally contemplated, that which accords with the law and the King's Regulations. He has no power to divest himself or the Commissioner of Police, as suggested in [the Scheme], of the primary responsibility for the maintenance of order in London which the law imposes upon them".[107]

The military authorities, faced with an obstinate Home Department, clearly realised that they had overreached their authority – or, at the very least, their capacity to amend legal policy so dramatically – and subsequently relented. Wolfe–Murray confirmed, on 25th March, that the military's Scheme would be re-written in accordance with the Home Office's wishes.[108] On 21st May, Cubitt wrote to Troup to confirm that the Scheme had been recast in light of the Home Office's stern objections.[109] Troup believed that the War Office had fundamentally misinterpreted the law: the department had, he wrote, "gone wrong" in considering that the state's response to an outbreak of public unrest consisted in the "'frightfulness' of the methods to be employed".[110] Instead, Troup believed that:

> "The real difference is that a local disturbance may be dealt with by calling the military *ad hoc*, whereas if there is a prospect of a general disturbance the military will have to arrange for stationing of troops all over London… The responsibility is the same in both cases, and the means of suppression will be the same except that in the latter case the action will have to be on a much wider scale and will require extensive co-ordination".[111]

Troup's application of the law was broadly accurate on this occasion. This marked a new phase in the Home Office's position with regard to the use of troops in aid of the civil power. After the impulsive aberration that occurred during the 1911 national railwaymen's strike, when the Home Secretary had – without legal authority – directed the use of troops across the country and employed the military in the absence of any request from the local civil power, the department had adopted an increasingly cautious policy with regard to the use of troops, as demonstrated during the 1912 miners' strike. In the following two years, while the department was peripheral to the debates which

[107] Ibid.
[108] Ibid., 25th March 1915 letter from Wolfe-Murray to Commissioner Henry.
[109] TNA, HO 144/1650/179987/17: 21st May 1915 letter from Cubitt to Troup.
[110] TNA, HO 144/1650/179987/16: 4th May 1915 letter from Troup to Commissioner Henry.
[111] Ibid.

raged between the War Office and government legal officers on the powers available to the military in a time of national crisis, the view which had prevailed clearly accorded with the more restrained approach now advocated by the Home Office. That is, the civil power remained supreme in matters of public order; the creation of new legal powers was unnecessary given the inherent flexibility of the common law; and, even on occasions when military assistance was required, troops could only be employed with the express permission of the civil authority.

There were also pertinent political and social considerations that profoundly shaped the Permanent Under-Secretary's formulation of wartime policy: matters that seemed inconsequential to the military calculations. If the War Office's plans had been enacted, Troup believed that the discretion afforded to military commanders to use force in the absence of both a formal requisition from the civil authorities and a significant level of unrest could lead to a "weak commanding officer" shooting at civilians without justification: the implications of such an event "would be far more serious to our government than the slaughter of the civil population of Belgium had been to the Germans".[112] Troup's sense of restraint is all the more surprising given that a sense of national crisis was absolute: with German troops just across the English Channel, and the belligerent's naval capabilities at their zenith, the United Kingdom was exposed to the threat of invasion in a sense that had not existed since the Napoleonic Wars one century earlier. In such a mood of national crisis and fear the powers awarded to the military and government ministers under the DORA were cast widely. The notorious DOR Regulation 14B, for example, enacted in June 1915 gave the Home Secretary the power to order than an individual of "hostile origin or association" must leave a particular area, be deported from the country or interned without trial solely on the basis of a recommendation from a senior military officer that such a course of action was required for public safety or the defence of the realm.[113] Regulation 14B was, as Brian

[112] Ibid.

[113] John Simon, who succeeded McKenna as Home Secretary in late May 1915, provided a valuable insight into the government's strategic thinking when he found himself defending official policy concerning regard to German citizens living in Britain as early as October 1914. In response to a sustained attack on anti-German press agitation and the government's failure to calm tensions by highly influential Liberal thinker Leonard Hobhouse, Simon stated that while he was sympathetic to Hobhouse's general point, the government had to take a wide view of the situation given the country's vulnerability in light of recent military developments: "…the position now, with German troops at Ostend, and only a narrow piece of sea between them and this country, is strategically quite different from the position at the beginning of the war, when there was the whole of Holland and Belgium

Simpson wrote, the direct result of a panic that a 'Fifth Column', the 'enemy within', operated in Britain: it was aimed at those alleged to be "concealed within the population of citizens who were enemy aliens, or had enemy alien connections, and a reaction to the knowledge that the evidence for the actual existence of such dangerous persons was generally too weak to produce convictions in a regular court".[114] The Home Office, however, brought a degree of adherence to the rule of law, at least in respect of the deployment of troops domestically, amid this atmosphere of national panic. "Military action to deal with rioters &c.", Troup explained to Cubitt, "should, whether the disturbances be isolated or widespread, be carried out in accordance with the King's Regulations".[115]

During the miners' strike, Troup had erred in his judgment by interfering in the workings of the legal and procedural framework that governed the requisition of military by local authorities: the exact frame of reference that he was now, in May 1915, expressing absolute fidelity to. A few years earlier the War Office was able to rely on that procedural framework to assert its primacy in the maintenance of law and order throughout the country where disturbances had occurred: the department was, Haldane informed the 1908 select committee, "in control of a number of people who are citizens as well as soldiers, and if they are requisitioned to assist the civil authority, then, if it is necessary that they should assist…they have to go".[116] A commanding officer had an element of discretion if public disorder happened to occur nearby: in that case, he may have had access to information that suggested that the disturbance was not one which required military intervention. In all other cases, however, soldiers were obliged to discharge its common law duty to assist the civil power. The War Office was "compelled" to allow soldiers to be employed in aid of the civil power, Haldane had also stated before the selected committee: "we have no choice; we have to obey the

---

between the two forces. If any attempt was made at raid or invasion, the distance to be traversed is trifling, and the thing would come very quickly. Experience has shown that the German Navy is extraordinarily well informed of our own movements, and though I have the greatest detestation of spy mania, I do not think it is open to doubt that there are a number of unidentified persons in this country, who have been making treacherous communications, and who were not known to us at the beginning of the war". The Bodleian Library, Oxford: MS. Simon 50/126, 26th October 1914 private letter.

[114] A. W. B. Simpson, *In the Highest Degree Odious: Detention without trial in wartime Britain* (Oxford: Clarendon Press, 1992), p. 15.

[115] TNA, WO 32/5270, 12th May 1915 letter from Troup to Cubitt.

[116] 'Report of the Select Committee on Employment of Military in Cases of Disturbances', Parliamentary Papers', 1908 (236) vii., p.386 , para. 103.

law".[117] By November 1914, however, Troup was able to faithfully apply the law to his department's advantage and reassert its primacy in the direction of the government's public order policy. The inverse of the common law regulation of the use of military force strictly required civilian oversight: soldiers were, after all, merely 'citizens-in-uniform' before the common law. The military's proposals offended that basic tenet.

Crucially, therefore, DORA was not the absolutist boon, from a military perspective, which it is often portrayed to have been. Rather, the War Office's consternation – and the Home Office's decisive victory – demonstrated that the military's powers over the civil population were, as far as the regulation of disorder was concerned, still abstractly defined, sourced in the common law of necessity and, ultimately, subordinate to the direction of the civil authority. Troup explained this point precisely to Commissioner Henry:

> "In case of serious public danger the military have power under the common law to take whatever means are necessary without proclamation: *the Defence of the Realm Act hardly touches the matter*".[118]

"Necessity was still the rule", concludes Charles Townshend: "even in wartime, the crowd remained the touchstone of normality".[119]

[117] Ibid., p.385.
[118] TNA, HO 144/1650/179987/16: 4th May 1915 letter from Troup to Henry. My emphasis.
[119] C. Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993), p.68.