

OF LIONS AND SQUEAKING MICE IN ANXIOUS TIMES

H P LEE*

I INTRODUCTION

In this lecture I would like to narrate the tale of how courts find it difficult to grapple with determining the degree they should venture to provide effective oversight of the exercise of extraordinary powers by the executive arm of government in crisis times. In this area maxims are bandied about. The welfare of the people is the supreme law according to the Latin maxim *salus populi suprema lex esto*; on the other hand there is the grand declaration that ‘amid the clash of arms, the laws are not silent’.¹ I will explore how apex courts in democratic countries, by scurrying from invocations of *salus populi* or ‘national security’ in a ‘highly deferential’² manner, have enabled the executive in a number of countries around the world to seize upon their judicial pronouncements to justify the manipulation of legal weapons to intimidate and incarcerate their political opponents.

I will start by reading out one of the most celebrated judicial pronouncements in legal history:

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. ... In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I.³

* Emeritus Professor of Law, Monash University. Sir John Latham Professor of Law, Monash University 1995–2014. This is a revised version of the 21st Lucinda Lecture delivered at Monash University Law Chambers on 8 October 2015. I have drawn extensively from a number of my published works for this Lecture: H P Lee, ‘Judges and Constitutional Government’ [2000–2001] *LAWASIA Journal* 30; H P Lee, ‘*Salus Populi Suprema Lex Esto*: Constitutional Fidelity in Troubled Times’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 53; H P Lee, ‘Constitutionalised Emergency Powers: A Plague on Asian Constitutionalism?’ in Victor V Ramraj and Arun K Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2010) 393.

1 *Liversidge v Anderson* [1942] AC 206, 244 (‘*Liversidge*’).

2 Oren Gross and Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 78.

3 *Liversidge* [1942] AC 206, 244.

II *LIVERSIDGE v ANDERSON*

Those well versed with crisis or emergency laws would no doubt identify the speaker of those words as the great jurist, Lord Atkin. He paid a personal price for uttering those words in a case called *Liversidge v Anderson*.⁴ During the Second World War, the United Kingdom Parliament enacted a law to empower the making of regulations providing for preventive detention. A regulation, reg 18B, provided as follows:

If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.⁵

Liversidge was detained by an order made by the Home Secretary pursuant to reg 18B. He instituted an action claiming damages for false imprisonment. He applied for particulars in respect of the ‘reasonable cause’ leading to his detention. It was refused by an order of the King’s Bench Division. The Court of Appeal affirmed the order. Liversidge appealed to the House of Lords.

A majority of the House of Lords held that the regulation conferred a discretion on the Secretary of State which could not be inquired into by a court of law and, consequently, Liversidge failed in his attempt to obtain particulars. Lord Macmillan stressed the importance of noting that the regulation was ‘a war measure’.⁶ He added:

in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure.⁷

‘The purpose of the regulation’ he added ‘is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm’.⁸

Lord Atkin, however, entered a vigorous dissenting judgment. This was the same Lord Atkin who had earned fame a decade earlier by his celebrated judgment in a landmark decision well known to all early-year law students, the case where a friend of the plaintiff, Mrs May Donoghue, at a café, ordered for her ‘ice-cream, and ginger-beer suitable to be used with the ice-cream as an iced drink’.⁹ As her friend was refilling her glass, a snail in a state of decomposition floated out of the opaque bottle, causing Mrs Donoghue to suffer shock and illness. In *Donoghue v*

4 Ibid.

5 *Defence (General) Regulations 1939* SR & O 1939/927, reg 18B(1).

6 *Liversidge* [1942] AC 206, 251.

7 Ibid.

8 Ibid 251–2.

9 As set out in the original Scots pleading and recited in Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983) 51–2.

Stevenson,¹⁰ playing the role of ‘demolisher of precedent’, Lord Atkin formulated the famous “‘Neighbour Principle” which he abstracted from St Luke’s Gospel and the parable of the Good Samaritan’.¹¹

As a side-note, Lord Atkin had an Australian connection. He was born James Richard Atkin on 28 November 1867 in Brisbane and, when he was three, he was brought back to Wales by his mother together with his two younger brothers. About a year or so later, his father, who had remained in Queensland, passed away. It is interesting to note that in 2012, Lord Atkin’s grandson and granddaughter visited Queensland to attend the ‘unveiling of a memorial plaque in the courtyard of the Commonwealth Courts, the site of Ellandale cottage, commemorating the birthplace of Lord Atkin’ and to mark the 80th anniversary of his judgment in *Donoghue v Stevenson*.¹²

Coming back to *Liversidge*, Lord Atkin asserted that the ‘plain and natural meaning of the words “has reasonable cause” import[ed] the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed’.¹³ He also said that if the legislative intention was to vest an unqualified discretion in the Minister the reference to reasonable cause would have been omitted and other expressions such as ‘if it appears’¹⁴ or ‘[i]f the Secretary of State is satisfied’¹⁵ could have been used.

Lord Atkin clearly did not endear himself to his judicial brethren by the following additional remarks:

I know of only one authority which might justify the suggested method of construction: “‘When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean, neither more or less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master — that’s all.”¹⁶

Justice Stable, a member of the English judiciary, wrote to Lord Atkin expressing his approval of his judgment in the following terms:

I venture to think the decision of the House of Lords has reduced the stature of the Judiciary with consequences that the nation will one day bitterly regret. Bacon ... said the Judges were the Lions under the throne, but the House of Lords has reduced us to mice squeaking under a chair in the Home Office ...¹⁷

For the Honourable members of the judiciary in the audience, it is very important to maintain good relations with your in-laws. In Lord Atkin’s case, his sister-in-

10 [1932] AC 562.

11 Geoffrey Luck, ‘The Story Behind Lord Atkin of Snail’ (2015) 59(1–2) *Quadrant* 66, 67.

12 *Ibid* 74.

13 [1942] AC 206, 228.

14 *Ibid* 232.

15 *Ibid* 233.

16 *Ibid* 245, quoting Lewis Carroll, *Through the Looking Glass and What Alice Found There* (Macmillan, 1875) 124.

17 Lewis, above n 9, 152; Sir David Keene, ‘Lions or Squeaking Mice?’ (2002) 42 *Amicus Curiae* 3, 3; ‘Is Justice Political?’ *The Economist* (London), 11 August 1984, 14.

law was indeed very prescient when she wrote to him a most supportive letter, saying: ‘I believe future generations will approve your dissenting judgment and condemn that of the majority’.¹⁸ Justice Michael Kirby, referring to this episode in his Boyer Lecture, said: ‘The other Law Lords refused to eat with Atkin. At one point they even refused to speak to him. Many felt that Lord Atkin never really recovered from this treatment before his death in 1944.’¹⁹

Professor Heuston, referring to various comments of Lord Atkin, remarked that it was their ‘passionate, almost wild, rhetoric’ which ‘seized the imagination of lawyer and layman alike’.²⁰ Professor Heuston stated his preference for the decision of the majority. On the other hand, the great Lord Denning, in his book, *The Family Story*, described Lord Atkin’s dissent as ‘after [his] own heart’.²¹ However, Denning’s deference to the national security interest in his judicial role is hard to reconcile with that assertion. When World War II was declared, Denning took up appointment as legal adviser to a regional commissioner with his work focused on the need to detain ‘fifth columnists’.²² Later on, in his Hamlyn Lectures, Lord Denning supported detention on suspicion under reg 18B, saying: ‘If there are traitors in our midst, we cannot afford to wait until we catch them in the act of blowing up our bridges or giving our military secrets to the enemy’.²³

He spoke proudly of his role in the detention of a Church of England clergyman who had accepted an invitation, expenses paid, from the Nazis before the War, to visit Germany. Upon questioning, the clergyman, known in his parish as the ‘Nazi Parson’, said that ‘he thought National-Socialism was excellent for Germany but that ... he would not do anything to help the Germans’.²⁴ He was detained as it was decided that ‘with the threat of invasion so near, no risks could be taken’.²⁵ In 1977, Lord Denning endorsed the position of the majority in *Liversidge* in a case called *R v Secretary of State for the Home Department; Ex parte Hosenball*.²⁶ Iris Freeman, the author of a biography of Lord Denning, found it ‘difficult to understand’ Lord Denning’s description of Lord Atkin’s dissent as ‘after [his] own heart’,²⁷ given his role in relation to the ‘Nazi Parson’. Iris Freeman pointed out that Lord Denning in his Hamlyn Lectures did not tell the audience that he, in fact, was the lawyer who had questioned the clergyman closely.²⁸

18 Lewis, above n 9, 153.

19 Justice Michael Kirby, *The Judges* (Australian Broadcasting Corporation, 1983) 42.

20 R F V Heuston, ‘*Liversidge v Anderson* in Retrospect’ (1970) 86 *Law Quarterly Review* 33, 36.

21 Lord Denning, *The Family Story* (Butterworths, 1981) 130, quoted in Iris Freeman, *Lord Denning: A Life* (Hutchinson, 1993) 130.

22 Denning, *The Family Story*, above n 21, 130; Freeman, above n 21, 128.

23 Sir Alfred Denning, *The Hamlyn Lectures: Freedom under the Law* (Stevens & Sons, 1949) 10, quoted in Freeman, above n 21, 128.

24 Denning, *Freedom under the Law*, above n 23, 12.

25 Ibid 13.

26 [1977] 3 All ER 452 (‘*Hosenball*'). See also A W Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford University Press, 1992) 419.

27 Freeman, above n 21, 130.

28 Ibid 129.

III SOUNDING THE DEATH KNELL OF THE MAJORITY APPROACH

The House of Lords finally interred the majority decision in 1980.²⁹ In a 1984 case, Lord Scarman said: ‘The classic dissent of Lord Atkin ... is now accepted ... as correct not only on the point of construction of regulation 18(b) ... but in its declaration of English legal principle’.³⁰ Sir Anthony Mason, Chief Justice of the High Court of Australia 1987–95, emphasised that, in the specific instance of preventive detention, the reasonableness of the ground on which the suspension of fundamental rights was based should be subject to ‘meaningful judicial review’.³¹ He referred to *George v Rockett* where the High Court in a unanimous decision endorsed ‘Lord Atkin’s famous, and now orthodox, dissent in *Liversidge v Anderson*’.³²

IV THE GLOBAL REACH OF *LIVERSIDGE v ANDERSON*

The majority decision in *Liversidge* had a global reach for many years. In many countries which emerged from the colonial cocoon with spanking new constitutions, the power of preventive detention was either entrenched in the constitutional framework, generally in a special section on emergency powers, or embodied in ordinary legislation enacted pursuant to such emergency or anti-subversion powers. It was clear that the courts in many of these countries were readily invoking the majority decision in *Liversidge* to cloak their unwillingness or lack of judicial courage to provide effective judicial oversight of the exercise of preventive detention powers.³³

The 1939 English precedent of *Liversidge* became ‘well known in African legal circles’.³⁴ The courts in countries such as Swaziland, Tanzania, Malawi, Uganda and Kenya were able to camouflage their fears of political retaliation by relying on *Liversidge* as ‘persuasive authority’.³⁵ *Liversidge* was clearly instrumental in shaping the ‘jurisprudence in Africa’ on the issue of judicial review of preventive detention orders.³⁶ It was only in the late 1980s that the South African courts ‘resurrected Lord Atkin’s dissenting opinion in *Liversidge* and began to assert more control’.³⁷

29 *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1011, 1025.

30 *Khera v Secretary of State for the Home Department* [1984] AC 74, 110.

31 Sir Anthony Mason, ‘Democracy and the Law’ in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 249, 252.

32 *George v Rockett* (1990) 170 CLR 104, 112; Mason, above n 31, 254.

33 Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa* (W W Norton, 2001) 118–19.

34 *Ibid* 118.

35 *Ibid*.

36 *Ibid*.

37 *Ibid* 119.

V MALAYSIA AND SINGAPORE

For a long time, the courts in both Malaysia and Singapore ‘persisted with the application of a “subjective test” when the power to order the preventive detention of a person [was] invoked’.³⁸ The Malaysian *Internal Security Act* provided for the detention power to be exercised ‘[i]f the Minister is satisfied’³⁹ and in the case of the Singaporean Act, ‘[i]f the President is satisfied’.⁴⁰ According to the subjective test, the only issue for the courts to consider in cases of detention under the respective *Internal Security Act* of Malaysia and Singapore was whether the executive was in fact satisfied (subjectively) that the detainee posed a threat to national security; they did not have to ask whether reasonable (objective) grounds existed to justify that belief. The problem with the subjective test, however, is ‘that it allowed the government to claim rule-of-law legitimacy for its actions despite the fact that under that test, governments could effectively exercise a wholly arbitrary power’.⁴¹ The majority decision of the House of Lords in *Liversidge* which affirmed the subjective test has continued to echo loudly in Singapore and Malaysia, even though a broad consensus had emerged elsewhere in the Commonwealth that Lord Atkin’s dissent represented the better legal position.

Half a century after it was decided, the subjective test of *Liversidge* was finally jettisoned in Singapore by the Singaporean Court of Appeal in *Chng Suan Tze v Minister for Home Affairs*.⁴² The Singaporean government’s response was swift. On 25 January 1989, within weeks of the decision, the Parliament of Singapore amended both the *Constitution*⁴³ and the *Internal Security Act* (Singapore) to restore the subjective test.⁴⁴ Given the entrenched status of this special power of preventive detention, the new provision in Singapore’s *Constitution* has virtually ousted any significant role of the courts in judicial oversight of the use of such a power.⁴⁵

The aim of the new constitutional provision was to bring the scope of judicial review in national security cases under the ambit of the *Internal Security Act*

38 H P Lee, ‘Constitutionalised Emergency Powers: A Plague on Asian Constitutionalism?’ in Victor V Ramraj and Arun K Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2010) 393, 404. See also Kevin Y L Tan, ‘The Law and Practice of Preventative Detention: Recent Developments in Malaysia and Singapore’ in Wu Min Aun (ed), *Public Law in Contemporary Malaysia* (Longman, 1999) 293.

39 *Internal Security Act 1960* (Malaysia) s 8(1) (*Internal Security Act* (Malaysia)).

40 *Internal Security Act* (Singapore, cap 143, 1985 rev ed) s 8(1) (*Internal Security Act* (Singapore)).

41 R Rueban Balasubramaniam, ‘Indefinite Detention: Rule by Law or Rule of Law?’ in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 118, 124.

42 [1988] 2 SLR(R) 525, 548–53.

43 *Constitution of the Republic of Singapore* (Singapore, 1999 reprint).

44 Tan, above n 38, 306.

45 *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) s 149(3) provides:

If, in respect of any proceedings whether instituted before or after 27th January 1989, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause.

(Singapore). And thus, in a parallel move, a new provision was added to the *Internal Security Act* (Singapore) which provides that the law governing judicial review of executive detention ‘shall be the same as was applicable and declared in Singapore on the 13th day of July 1971’,⁴⁶ the date on which the subjective test was affirmed by the Singaporean High Court in *Lee Mau Seng v Minister for Home Affairs*.⁴⁷ The complete freezing of the law was reinforced by the further declaration that ‘no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply’.⁴⁸

Following the amendments in Singapore, the Malaysian Parliament amended its *Internal Security Act* (Malaysia) in June 1989. The Malaysian amendment of the *Internal Security Act* (Malaysia) was ‘far more comprehensive’.⁴⁹

While the Singaporean amendments sought to freeze the scope of judicial review of executive decision as at the date of the *Lee Mau Seng* decision, the Malaysian approach was to ‘oust judicial review completely’.⁵⁰ I will set aside the constitutional arguments which can be raised to challenge the validity of these amendments.⁵¹

46 *Internal Security Act* (Singapore) s 8B(1).

47 [1971–1973] SLR(R) 135 (*Lee Mau Seng*).

48 *Internal Security Act* (Singapore) s 8B(1).

49 Tan, above n 38, 306. A new section 8B(1) was inserted into the *Internal Security Act* (Malaysia). It provided:

There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the [King] or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

50 Tan, above n 38, 307. See also *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461.

51 In canvassing these constitutional arguments, Professor Tan said that both approaches would give rise to distinct problems:

Let us first take the Singapore position. Requiring judges to interpret a law by legislatively binding them to a single High Court decision made at a certain point in time would, it is argued, be a usurpation of the judicial power conferred on the courts by Article 93 of the *Constitution*. It is tantamount to directing the court to decide cases in a certain way. Unfortunately, the legality of the legislative intervention was affirmed ... first in the High Court and then subsequently in the Court of Appeal. The Malaysian approach is problematic in the sense that like most other ouster clauses, the new section 8B(1) can be overcome on grounds of *ultra vires*. Neither approach makes legal sense, and it is hoped that the courts will one day strike down these legislative interventions as unconstitutional and void.

Tan, above n 38, 307.

On 15 September 2011, the *Internal Security Act* (Malaysia) was repealed and was replaced by the *Security Offences (Special Measures) Act 2012* (Malaysia) (*‘SOSMA’*). There are increasing concerns that this Act and other accompanying legislation amount to a re-introduction of the *Internal Security Act* (Malaysia) ‘through the back door’: see N Surendran, *Activist Arrested: Government Using SOSMA Against Political Opponents* (2 May 2014) Aliran <<http://aliran.com/civil-society-voices/2014-civil-society-voices/activist-arrested-government-using-sosma-political-opponents/>>.

VI *KOREMATSU v UNITED STATES*

Let me now turn attention to a case well known to most constitutional lawyers in the United States and beyond. The case of *Korematsu v United States*⁵² underlines the need for an independent judiciary not to abdicate its fundamental role of injecting rule-of-law moorings to such measures. For those who may not have any familiarity with the decision of *Korematsu*, let me provide a brief description of that case. On 7 December 1941, described by President Franklin Roosevelt as ‘a date which will live in infamy’,⁵³ Japanese naval and air forces launched a surprise attack on Pearl Harbor. On 19 February 1942, President Franklin Roosevelt signed Executive Order 9066. Under the authority of this executive order, over 110 000 Japanese-Americans were rounded up and sent to a number of internment camps. They included ‘immigrants, citizens, men, women, children and infants’.⁵⁴ Greg Robinson said:

The internment of Japanese Americans in the camps continued throughout the war years. Although two thirds of the internees were American citizens, they were incarcerated without any charge, trial, or evidence against them. Since they were permitted to take to the camps only what they could carry, they were forced to abandon their homes, farms, furnishings, cars and other belongings or to sell them off quickly at bargain prices. Thus, as a result of Roosevelt’s executive order, the vast majority of the West Coast Japanese Americans lost all their property.⁵⁵

The constitutionality of Executive Order 9066 was challenged by Fred Korematsu. Korematsu was born and raised in California. He attended and graduated from high school but dropped out of college for financial reasons. He subsequently worked as a shipyard welder. His attempt to enlist in the navy in June of 1941 was rebuffed. Following the attacks on Pearl Harbour, he lost his shipyard position when all Japanese members were expelled by the Boiler Makers:

When the evacuation order was issued, his family all reported to Tanforan Race Track Assembly Center. The horse stalls were hastily converted into barracks for the Japanese. Fred Korematsu chose to stay in Oakland so he could remain with his fiancée — Ida Boitano. He hoped to earn enough money so they could move together to the Midwest. Korematsu underwent plastic surgery from a disreputable physician so he would look less Oriental and not embarrass his wife when they left California. Despite his efforts, he was arrested on May 30, 1942 in San Leandro, California. After claiming to be of Spanish-Hawai’ian origin from Las Vegas, his story soon fell apart and he confessed his true identity.⁵⁶

The constitutionality of the executive order was upheld by a 6–3 decision of the Supreme Court. Black J, delivering the opinion of the Court, said:

52 323 US 214 (1944) (*Korematsu*). See also *Hirabayashi v United States*, 320 US 81 (1943).

53 President Franklin D Roosevelt, ‘A Date Which Will Live in Infamy’ (Speech delivered at a joint session of Congress, Washington DC, United States, 8 December 1941).

54 Neil Gotanda, ‘The Story of *Korematsu*: The Japanese-American Cases’ in Michael C Dorf (ed), *Constitutional Law Stories* (Foundation Press, 2004) 249, 249.

55 Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Harvard University Press, 2001) 4–5.

56 Gotanda, above n 54, 267.

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.⁵⁷

Jackson J, one of three dissenting justices, said:

Korematsu was born on our soil, of parents born in Japan. The *Constitution* makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.⁵⁸

Jackson J went on to say that ‘the principle of racial discrimination in criminal procedure and of transplanting American citizens’ would ‘[lie] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes’.⁵⁹

Another dissenting justice, Murphy J, said: ‘Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.’⁶⁰ He also remarked: ‘No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.’⁶¹ In the case of the Japanese Americans, it was written: ‘The determination of their disloyalty resulted not from any judicial finding or any reliable evidence of their individual or collective involvement in espionage or sabotage. In fact, not a single documented case of any such activity had come to light.’⁶²

The US Supreme Court’s 1944 decision in *Korematsu* was described by Professor Eugene Rostow in his 1945 *Yale Law Journal* article as a ‘disaster’.⁶³ Such a description was repeated by *The New York Times* in its 28 January 2014 edition.⁶⁴ Why this revival of interest in such an old case? The answer lies in the fact that *Korematsu* has never been overruled, even though it has been ‘thoroughly

57 *Korematsu*, 323 US 214, 219–20 (1944).

58 *Ibid* 242–3.

59 *Ibid* 246.

60 *Ibid* 233.

61 *Ibid* 241.

62 Robinson, above n 55, 108.

63 Eugene V Rostow, ‘The Japanese American Cases — A Disaster’ (1945) 54 *Yale Law Journal* 489, quoted in Mark Tushnet, ‘Defending *Korematsu*? Reflections on Civil Liberties in Wartime’ in Mark Tushnet (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press, 2005) 124, 124. The decision was also described as ‘[p]erhaps the greatest failure of American law during World War II’: Bernard Schwartz, *The Reins of Power: A Constitutional History of the United States* (Chatto & Windus, 1964) 182.

64 Adam Liptak, ‘A Discredited Supreme Court Ruling That Still, Technically, Stands’, *The New York Times* (New York), 28 January 2014, A15.

discredited'.⁶⁵ This led Professor Bruce Ackerman, from Yale University, to ask in the context of another terrorist attack: 'what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the "war on terrorism"?'⁶⁶ However, Justice Stephen Breyer said that 'it is hard to conceive of any future court referring to it favorably'.⁶⁷ Justice Antonin Scalia considered it 'as among the court's most shameful blunders'.⁶⁸

The executive order was finally revoked by President Gerald Ford in 1976.⁶⁹ A commission was set up by Congress. It published, in 1983, a report which stated that the decisions that followed the executive order were shaped by 'race prejudice, war hysteria and a failure of political leadership'.⁷⁰ In 1988, President Ronald Reagan signed into law legislation which provided 'for an official apology and a tax-free payment of \$20 000 to each person who had been evacuated'.⁷¹ The conviction of *Korematsu* was ultimately evaded by the Federal District Court.⁷²

In the Australian context, Justice Michael Kirby has highlighted *Korematsu* as a standout case which serves as 'a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability'.⁷³ Kirby J, dissenting in a case called *Al-Kateb v Godwin*,⁷⁴ said that *Korematsu* and like cases 'are now viewed with embarrassment in the United States and generally regarded as incorrect'.⁷⁵

VII THE ANXIOUS TIMES OF TERROR THREATS

The critical exigencies of World War II may explain a greater judicial deference to the role of the executive in deploying extreme powers, such as the power of preventive detention. We should not ignore the context in which the House of Lords heard the *Liversidge* case. As Geoffrey Lewis described it:

The argument took place in September 1941 and speeches were delivered on 3 November. It was a low point in the War. The Balkans and Crete had been

65 Stephen Breyer, *Making Our Democracy Work: A Judge's View* (Knopf, 2010) 193, quoted in Liptak, above n 64.

66 Bruce Ackerman 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1043, quoted in Liptak, above n 64.

67 Breyer, above n 65, 193, quoted in Liptak, above n 64.

68 Liptak, above n 64, citing *Stenberg v Carhart*, 530 US 914, 953 (Scalia J) (2000).

69 Robinson, above n 55, 251.

70 Commission on Wartime Relocation and Internment of Civilians, 'Personal Justice Denied: Recommendations' (June 1983) 5, quoted in Robinson, above n 55, 251.

71 Robinson, above n 55, 251.

72 Ibid.

73 *Korematsu v United States*, 584 F Supp 1406, 1420 (ND Cal, 1984), quoted in Justice Michael Kirby, 'Liberty, Terrorism and the Courts' (2005) 9 *University of Western Sydney Law Review* 11, 27.

74 (2004) 219 CLR 562.

75 Ibid 620 [163].

overrun; the invasion of Russia had carried the Germans close to Leningrad and Moscow; the British summer offensive in the Western Desert had failed; the Japanese menaced the Malayan peninsular and Singapore ... and the United States were not yet in the War.⁷⁶

In the face of the terror threats which are claimed to undermine national security, should the executive be given a blank cheque? Professor George Williams observed that in Australia the answer to the balance between security and freedom 'is provided almost completely by the extent to which political leaders are willing to exercise good judgment and self-restraint in the enactment of new laws'.⁷⁷ He added: 'This is not a check or balance that has proven effective in Australia when it comes to the enactment of anti-terrorism laws.'⁷⁸ Professor Michael Crommelin said '[i]ssues of national security threaten constitutionalism today',⁷⁹ just as they did, more than half a century ago, at the time of *Australian Communist Party v Commonwealth*.⁸⁰ He added: 'Executive power to deal with such issues is critical, yet problematic. In Australia, legislative controls on the exercise of that power are ineffective. The burden of maintaining constitutionalism falls heavily upon the courts.'⁸¹

The High Court of Australia rose to the challenge. In the words of Professor George Winterton, one of Australia's most outstanding constitutional scholars, 'Australian constitutionalism scored one of its greatest triumphs when the High Court invalidated the *Communist Party Dissolution Act 1950* (Cth)'.⁸² Dixon J in the *Communist Party Case* sounded a caution: 'History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.'⁸³ Professor Winterton called the High Court's 'epochal'⁸⁴ decision as 'probably the most important ever rendered by the High Court'⁸⁵ when note is taken of the following aspects: 'its confirmation of fundamental constitutional principles such as the rule of law, its impact on civil liberties, its symbolic importance as a reaffirmation of judicial independence, and its political impact'.⁸⁶

76 Lewis, above n 9, 132.

77 George Williams, 'Anti-Terrorism Laws and Human Rights: The 26th Annual McDonald Lecture in Constitutional Studies' (2015) 19 *Review of Constitutional Studies* 127, 144.

78 Ibid.

79 Michael Crommelin, 'Constitutional Challenges Posed by National Security: An Australian Story' (Research Paper No 51, Public Law and Legal Theory Research Papers Series, Faculty of Law, The University of Melbourne, 2003) 14.

80 (1951) 83 CLR 1 ('*Communist Party Case*').

81 Crommelin, above n 79.

82 George Winterton, 'The *Communist Party Case*' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108, 108.

83 (1951) 83 CLR 1, 187.

84 Winterton, above n 82, 129, quoting J M Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing, 1980) 71.

85 Winterton, above n 82, 129.

86 Ibid.

Is there a note of caution in the observations of Heydon J in a case called *Pape v Federal Commissioner of Taxation*?⁸⁷ Speaking in the context of the existence and scope of an inherent Commonwealth nationhood power to counter a fiscal emergency, he said:

Modern linguistic usage suggests that the present age is one of ‘emergencies’, ‘crises’, ‘dangers’ and ‘intense difficulties’, of ‘scourges’ and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse ... The public is continually told that it is facing ‘decisive’ junctures, ‘crucial’ turning points and ‘critical’ decisions ... The great maxim of governments seeking to widen their constitutional powers would be: ‘Never allow a crisis to go to waste.’⁸⁸

The courts, in seeking to assert a degree of judicial oversight, are confronted with the acute dilemma that it may lack access to the necessary information regarding matters of national security. There have been invocations of the words of Lord Fraser from his judgment in a case called *Council of Civil Service Unions v Minister for the Civil Service*.⁸⁹

The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security.⁹⁰

In *Hosenball*, Lord Denning said:

There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England.⁹¹

In *Liversidge*, Lord Romer pointed out that the discretion was conferred on the Secretary of State and ‘not some minor official holding a subordinate position’.⁹² Viscount Maugham elaborated on this: ‘I do not think he is at all in the same position, as, for example, a police constable.’⁹³ When a Secretary of State is empowered to detain a person or when a Minister is empowered to revoke a person’s citizenship should the courts act as lions or squeaking mice?

D N Pritt, the QC who had represented Liversidge, published his autobiography 25 years after the *Liversidge* decision. In it, he revealed the reasons proffered by the detaining authority for the detention of Liversidge. The reasons included the following: ‘You are suspected of having been in touch with persons who are suspected of being enemy agents’; ‘You are suspected of having been engaged in

87 (2009) 238 CLR 1.

88 Ibid 193 [551].

89 [1985] AC 374.

90 Ibid 402.

91 *Hosenball* [1977] 3 All ER 452, 461.

92 [1942] AC 206, 281.

93 Ibid 222.

commercial frauds'; 'You are the son of a Jewish Rabbi'.⁹⁴ It was therefore of no great surprise that *Liversidge* was released soon after the case in the House of Lords had ended.

Lawyers, who successfully sought to have the convictions of Korematsu, Hirabayashi⁹⁵ and Yasui⁹⁶ overturned, presented to the courts 'newly discovered proof of the War Department's knowing presentation of false information and its suppression and manipulation of relevant evidence in the wartime Supreme Court cases'.⁹⁷ In 2011, a 'confession of error' was issued by the then Acting US Solicitor General Neal Kumar Katyal that the government lawyers in the *Korematsu* case 'over the protests of underlings, had twisted and withheld evidence from the Supreme Court'.⁹⁸

The spirit of Lord Atkin's dissent in *Liversidge* lives on. In a 2003 public lecture, Lord Steyn declared:

Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination. In the context of a war on terrorism without any end in prospect this is a sombre scene for human rights. But there is the caution that unchecked abuse of power begets ever greater abuse of power. And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.⁹⁹

The spirit of Lord Atkin's dissent was most eloquently captured in the following pronouncements of President Barak of the Supreme Court of Israel:

This is the destiny of a democracy — it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.¹⁰⁰

94 D N Pritt, *The Autobiography of D N Pritt: From Right to Left* (Lawrence & Wishart, 1965) vol 1, 232–3.

95 *Hirabayashi v United States*, 320 US 81 (1943).

96 *Yasui v United States*, 320 US 115 (1943).

97 Robinson, above n 55, 251.

98 Liptak, above n 64.

99 Lord Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (Speech delivered at the 27th F A Mann Lecture, British Institute of International and Comparative Law and Herbert Smith, London, 25 November 2003) 3, quoted in Sir Gerard Brennan, 'Australia and the Rule of Law' [2003] *Australian International Law Journal* 1, 1. See also David Dyzenhaus and Rayner Thwaites, 'Legality and Emergency — The Judiciary in a Time of Terror' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 9.

100 *Public Committee Against Torture in Israel v Israel* HCJ 5100/94 53(4) PD 817, 845. See also Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 19, 148, quoting *Public Committee Against Torture in Israel v Israel* HCJ 5100/94 53(4) PD 817, 845. See also *A v Secretary of State for the Home Department* [No 2] [2006] 2 AC 221, 299 (Lord Carswell).

The case of *Korematsu* provides a cogent lesson about the need to ensure that measures, which are adopted in response to an emergency in a democratic polity, bear a sense of proportionality. George Santayana wrote in 1905: ‘Those who cannot remember the past are condemned to repeat it.’¹⁰¹

In 2015 we celebrated the 800th anniversary of the *Magna Carta*. It is important to remind ourselves of cl 45 which proclaims: ‘We will appoint as justices ... only men that know the law of the realm and are minded to keep it well.’¹⁰² Let me emphasise the words ‘and are minded to keep it well’. That phrase, in my view, means according proper and due judicial respect to Parliament and the executive, but it does not mean a total abdication of judicial duty as watchdog of the *Constitution*.

101 George Santayana, *The Life of Reason or the Phases of Human Progress* (Charles Scribner’s Sons, first published 1905, 1948 ed) vol 1, 284.

102 British Library, *English Translation of Magna Carta* <<http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>>.