

THE FOURTEENTH ANNUAL SIR DAVID WILLIAMS LECTURE

NOT IN THE PUBLIC INTEREST?

Security and the Rule of Law after Snowden

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21 February 2014

I first met David Williams in the Autumn of 1980. I was a refugee from legal practice in the midlands of Ireland, hoping to extend my studies as a way of avoiding the legal practice to which I had dangerously exposed myself by qualifying as a solicitor. He was the new president of a newish college, a place without a high table or any of those superior attitudes which I had assumed would be rife and to which I had so carefully prepared myself to be hostile. Dinner in Hall was Tuesdays and Thursdays, junior members mucking in with senior, a joyous democratic noise presided over by the man to whom (as it turned out) I was to owe my career. I don't entirely mean that in the conventional Cambridge sense, though it was, I am sure, David's interest in having a lawyer about Wolfson that helped me to stay on to do a PhD (under his supervision) - and certainly it was David's support that enabled me to negotiate a tricky job interview for a fellowship at Emmanuel (the panel chaired by Edward Sands whom some of us will recall with a diffident smile). Nor was it, either, mainly that David engendered my first interest in the English bar, though he did introduce me to the chairman of the Bar (and afterwards Master of Magdalene) David Calcutt QC whose chambers I very nearly joined when still a PhD student.

No, David's legacy was to be primarily none of these, important though they all were. What I learnt from this first significant influence on my professional life was *an attitude*. David grew to be perhaps the most influential academic-administrator in the Cambridge of his day, professionalising the post of vice-chancellor and then serving in that office in a critical transitional period; sitting on large-scale government enquiries into this and that; entertaining royalty and foreign dignitaries – but throughout it all he never really changed from the man I first met (already important) in 1980, eager to know you, make you feel at home, interested – no matter who you were (or, more often, weren't). David loved young people, taught them brilliantly, surrounded himself with them – gave them chances to flourish with a kind of abandon that suggested such generosity was at his very core. Now of

course he was also the most, as we'd say today, 'networked' man I ever knew - the thirteen previous lecturers in this series are a roll-call of distinction and a testimony to that fact - great judges from around the world, philosophers of world class – David knew them all (and even played tennis with some of them) and they knew him, travelled here, did the lecture on his account and in his memory. I do the same, proudly, but occupying this space tonight not in the league of these predecessors but rather as a student of his, one of the many whose life has been touched so powerfully by his energetic warmth. (I should pause to say, too, that was also true of my late wife Diane - who had been a student of David's at Wolfson as well. Diane's last ever social occasion away from home was the dinner following this lecture three years ago (given by Jeremy Waldron): just two months before her death from cancer in July 2011.)

The attitude shown by David Williams that I have already mentioned was not just as a teacher; it was as a scholar too, and the mark here has been profound as well, and frames this lecture this evening. David wrote two books in the second half of the 1960s which opened up a space for a kind of historical writing about law and civil liberties that was fresh and innovative for its day and which still reads well today. In David's hands, law was neither a consequence nor a reflection of high theory, a grid of meaning imposed by a scholar for whom books had early become not only a source of learning but an escape too from the uncertainty generated by what a Cambridge colleague was later, in a title to one of his books, to call 'real people'. For David law was messy, uncertain, incomplete, packed full of the sorts of loose ends which theoreticians hate but lovers of humanity adore. David was an historian at heart and in his hands the law came alive as a series of stories about power, people and politics. I have taken the title of this lecture from his first book, *Not in the Public Interest*, published in 1965 and concerned with 'the passion for secrecy' in government manifested in 'the Official Secrets Act, the Fifty-Year rule [as it then was], the Security Service, the Press and executive secrecy, the Ombudsman, Crown privilege, D Notices, and nuclear disarmers.' The book had the kind of impact that would today have turned David into an iconic REF-case study, and as many of the subjects on this list indicate it has dated only because it is dated and not because of its themes. The final sentence in the introduction would be one any of us would be proud of today: 'The ultimate danger of executive secrecy in a much-governed country is that it denies the knowledge essential for an informed public opinion and that it inhibits effective scrutiny and criticism of the government and the administration.'

The book's subtitle was *The Problem of Security in Democracy*. What would David have made of the Snowden revelations, of the phenomenon of Edward Snowden? The facts are predictably murky but a legal opinion released last month commissioned by Tom Watson MP as chair of the All Party Parliamentary Group on Drones and written by Jemima Stratford QC and Tim Johnston of Brick Court Chambers has painted a picture of disturbing levels of surveillance and possible data transfer, all of which is in their view of dubious legality. The

word 'dubious' here is or ought to be surprising: the whole scheme of GCHQ activity revealed (or I should say, I suppose, 'alleged' since as these lawyers say the Government 'has refused to confirm or deny the existence of the programme' upon which they have been asked to advise) is not as you might have thought self-evidently unlawful. It may well be lawful – and lawful moreover in a way that is not on account of some peculiar prerogative or pseudo-legal dictate by a Minister of the sort that David Williams used to delight in exposing - but lawful rather on account of empowering legislation enacted by Parliament, in this case the Regulation of Investigatory Powers Act 2000 (or 'RIPA' as it is more commonly known). We have seen exactly the same with the ruling earlier this week (by one of my predecessors as David Williams lecturer Lord Justice John Laws) that the detention of David Miranda under the terrorism laws was in fact lawful – critics of the police power may not be as aware as the judges in the case had to be of quite how subjective the relevant enabling power in that law is. I shall return to this – to my mind important – possibility of legal legitimacy in cases such as these a bit later.

And what would David have made of a little noticed case decided at the end of December 2012 by Lord Justice Moses and Mr Justice Simon sitting in the Administrative Court (*R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin)). The Claimant had asserted that employees in GCHQ were and are providing intelligence to the US for use in drone strikes in (among other places) Pakistan and that as such they are at significant risk of being accomplices to murder and/or 'conduct ancillary to crimes against humanity or war crimes'. The facts as alleged were poignant: 'On 17 March 2011 [the claimant's] father Malik Daud Khan was presiding over an outdoor meeting of the local Jirga to settle, with other elders, a commercial dispute. A missile was fired from a drone and the claimant's father was killed with 49 others who were attending the Jirga.' Now it was surely inevitable and from a legal point of view right that the judges should have declined to be drawn into any discussion of the legality of the actions of a foreign power (and specifically and importantly for what follows a friendly one, the United States of America). The judges found it 'hard to see the point of any declaration which merely says that those who pass on intelligence may be at risk of breaking the law, if their activities and their state of mind fall within the scope of [the relevant sections] of the Serious Crime Act 2007' and so here it was 'not possible to produce a meaningful declaration which accurately identify[ed] the necessary *mens rea* without reference to specific facts.' Once again, as with Snowden, the court was not dealing with any kind of residual prerogative power. There was a committee in Parliament that looked at these things, and a special court - the Investigatory Powers Tribunal - that might plausibly also be brought into the equation. Available too were special Intelligence Services and Interception Commissioners, also established by statute. There was, therefore, simply 'no basis on which this court could or should conclude that a declaration would fill a void and impose the rule of law on a lawless territory.' And as for the Americans? As Lord Justice Moses put it, 'the claimant cannot

demonstrate that his application will avoid, during the course of the hearing and in the judgment, giving a clear impression that it is the United States' conduct in North Waziristan which is also on trial'. To go down this route would be 'damaging to the public interest without any countervailing justification or advantage... In short there is no need or reason ... to [in Moses LJ's exact words] "go there".'

There is a haunting resemblance here to the Gibson Report, finally published in the days before Christmas last year after a delay of some eighteen months. The chair Sir Peter Gibson and his team found evidence of British involvement in rendition and of awareness of ill-treatment of detainees by 'liaison partner from other countries'. It concluded that there were many questions left open about the training of key front-line staff and about how the government and the agencies went about providing information to Parliament. The report was explicitly interim with no fewer than twenty-seven questions set out in an annex which needed urgently to be addressed. But this is now not being done by the independent judge-led enquiry that had been promised and which had led to the establishment of the Gibson enquiry; rather as the government announced when finally publishing the report, it is to be the responsibility of a parliamentary oversight body, the Intelligence and Security Committee. Dame Janet Paraskeva, who sat alongside Sir Peter, has reportedly expressed deep disappointment at the transfer of responsibility, to a body moreover that has only on one occasion ever met in public. How right is she to 'remain hopeful that the detainees will get their chance to have their say before the ISC'? As Wolfson man the excellent Conservative MP Andrew Tyrie put it 'It is deeply shocking that Britain facilitated kidnap and torture'.

All these examples are not about direct engagement with what will strike many lawyers (and non-lawyers) as deeply disturbing behaviour, so much as they are about, as Andrew Tyrie grasps well, 'facilitation'. As compared with the past here is an important change in the nature of that which must not be disclosed. During the colonial period it was direct state violence by the British forces abroad that needed (in the name of security of course) to be denied, that it was 'not in the public interest' to acknowledge. This traditional kind of imperial cover-up has not entirely gone away: who cannot have been moved by the testimony of an array of elderly Kenyans giving direct evidence in an English court of their brutalisation at the hands of British forces, or have failed to have been affronted by the secrecy with which the Foreign and Commonwealth Office has continue doggedly to shroud its vast archives of colonial activity? If we include Northern Ireland within our remit we have of course many further examples immediately to hand of shocking British engagement in extended detention, police and army brutality and even what, if it were happening in a country we didn't like, we would have no hesitation in calling 'death squads'. There are also the many examples of the wrong people having been punished for terrorist crimes, and kept in jail long after the lack of safety of their convictions was evident to all.

During this (as I will call it here) ‘imperial period’ of direct executive wrongdoing, what public interest could there possibly have been in the protection of terrible wrongdoing from exposure and in the maintenance of a secrecy that allowed for none of the ‘effective scrutiny and criticism’ for which David Williams argued at the start of his book? Of course in each case there was the imperative of preserving the status quo (control of the colonies; an enforced peace in Northern Ireland) but how this was being done needed particularly to be hidden. Why? Answering this question about the past helps us, I think, to understand the present, the current vogue for ‘facilitation’. There is a marvellous chapter in the late Brian Simpson’s magisterial *Human Rights and the End of Empire* which gets right to the core of what I am discussing this evening: the Attlee administration of the 1940s was thinking about signing up to the European Convention on Human Rights at exactly the time that the British were seeking to reassert their global power as though the Second World War had never happened. The Colonial office (as it then was) put up stout resistance to the Convention. ‘You mustn’t’ they said (or words to that effect) and then (more or less) ‘Have you any idea of what we do abroad?’ In a way they were right to be cautious. They were what Michael Ignatieff in a controversial book about the 11 September attacks was later to call ‘the Carnivores’, the guardians at the gates who allowed the rest of us, ‘the Herbivores’, to enjoy our way of life, with all its apparent commitment to freedom, equality and the rule of law – while not having our belief in all three disturbed.

These Carnivores saw what was coming. The first case in the 1950s was damaging enough (involving Cyprus) but the document really began to throw its weight about only later - *Ireland v United Kingdom* in the 1970s shed light on the brutality of the interrogation of suspects in Northern Ireland and in the first decade of this millennium a succession of cases have held the authorities to account not only for inhumanely treating (and often killing) unfortunately innocent Iraqis but also brutalising (and almost casually killing) our own troops (through bullying for example, or recklessly dangerous training or drills, or the failure to provide adequate equipment when on patrol) – Strasbourg has been dealing with issues like these, to the fury of enthusiasts for the armed forces, they make war impossible has been a common cry.

The ‘public interest’ in keeping such matters under cover, the interest that explains the Colonial Office’s resistance to the Convention, is not about protecting individual soldiers or even generals from being held accountable. Every system can afford a few ‘rotten apples’, can even strengthen its sense of its own righteousness by occasionally throwing such aberrants to the lions of justice. What a system cannot afford to do is expose the extent to which it is constructed on what are after all a set of lies. That was what concerned the Colonial Office, rightly, in the late 1940s. It was all very well for the country to believe itself special, a place where justice reigned and civil liberties and the rule of law were the norm, where fairness and a respect for the individual were in the life-blood of the nation. These were important things to believe and they might even have been essential to having got

through the terrible war just ended. But the past and (it was hoped) future prosperity of the nation were built on a level of exploitation of the foreigner that was too terrible to be acknowledged. The universality of human rights and the turn to law that this shift seemed to signify were dangerous because they were potentially so destabilising to this nation's collective sense of self. Security demanded secrecy because too much truth could not be countenanced.

That is a strong public interest and, as I have earlier anticipated, I think it helps explain the present as well as the past. Direct action is more or less over, but facilitation remains. In truth the Cold War - which overlapped with these colonial and pseudo-colonial battles - was always mainly about facilitation, and when it ran up against the law it was the law that invariably buckled, not 'going there' as Moses LJ would have put it (with his characteristic and attractive frankness) had he been then a judge. Now of course this cost something – the rule of law appeared frayed at the edges, not as complete as theory required and as its enthusiasts so loudly claimed, not so majestically impartial as Dicey had said and as university tutorials sought constantly to ram home. But this was okay as long as the departures from the mainstream could be presented as just that – *departures from the mainstream* – 'one-offs', unusual, special facts etc. This was how even Dicey had explained why his theories about freedom (epitomised in the old Salvationist case *Beatty v Gillbanks*, a favourite of David's) did not, after all, apply to Irish nationalists. It is why it was possible for the Court of Appeal's collusion in the deportation of Dr Soblen to the US in 1962 to have been so quickly marginalised when as a contemporaneous comment in the *Criminal Law Review* put it ". . . Had the country demanding Dr. Soblen's return been Mexico, for instance, or Finland-the examples are random – the story would not have been the same. But it was a cold war situation, and the cold war is an enemy of decency and consistency." It was the same with the *Hosenball* case fifteen years later. David Williams's books were about looking to the margins and making them central, testing the truth of theory by checking when theory doesn't apply, and being unafraid to build a new truth as a result.

So what truth do we have today, when the rule of law and the protection of human rights have never been stronger and yet despite this the tentacles of the security state have become ever longer, more pervasive, and the desire to facilitate the Americans as pressing as it ever was when safety from Soviet attack was the central policy goal? It was war, hot, cold or colonial which held law largely at bay where foreigners and enemies were concerned, allowed us either to hide from view the actions of our guardian carnivores or explain away their bad conduct as aberrant when it was forced before our eyes. Without the credible alibi of war, law and human rights have certainly been able to make fast progress, but at what price? Recalling a remark made earlier, how can it even be arguable that what Snowden has revealed can have been lawful? Or Miranda's detention for nine hours? Where could the legal edifice come from that allows the Court of Appeal to dodge the

drones issue by pointing to statutory safeguards and - even - a special tribunal. How have law (and human rights) ended up in such a place?

The process started even before the end of the Cold War and began as far away from Smiley's people as it is almost possible to imagine, in a courtroom in Newington Causeway, where an antique dealer was on trial. Mr Malone was charged with (and later acquitted) of dishonest handling of stolen goods and in the course of his trial it emerged the police had been listening to his telephone conversations, under a ministerial rather than judicial warrant. Shades of *Entick v Carrington* though Megarry VC did not see this in a long judgment that exonerated the authorities and has perplexed generations of students from the moment it was handed down. Strasbourg came to the rescue condemning the action as an interference with privacy that was fatally unregulated by law. The law that resulted, the Interception of Communication Act 1985, put such snooping - and much else besides - on a statutory basis. Ex-judges were dragged in to oversee things. A complaints system was set up. And it worked. Strasbourg went away. Subsequent litigants lost out if their complaints could be categorised as covered by the new law. Catching the mood of the times with admirable foresight, the security service went down the same route just months before the fall of the Berlin wall. The Intelligence Service followed suit in 1994. Gone from the shadows they were (as Ian Leigh and Laurence Lustgarten were to put it in their well-known book) now 'In from the Cold'. Here is the Preamble to the 1994 measure.

An Act to make provision about the Secret Intelligence Service and the Government Communications Headquarters, including provision for the issue of warrants and authorisations enabling certain actions to be taken and for the issue of such warrants and authorisations to be kept under review; to make further provision about warrants issued on applications by the Security Service; to establish a procedure for the investigation of complaints about the Secret Intelligence Service and the Government Communications Headquarters; to make provision for the establishment of an Intelligence and Security Committee to scrutinise all three of those bodies; and for connected purposes.

The RIPA which is the stumbling block from clear illegality in the Snowden case followed in 2000, the same year as the terrorism Act which did for Miranda this week. The lesson was clear. If local and Strasbourg courts were intent – in the name of the rule of law as part of human rights – upon ensnaring with 'red tape' executive action that had previously been outside the law, then it was time to ensure control over the sort of 'red tape' that was to be required. The devil was in the detail – not a strongpoint of politicians and headline writers. New worlds of only-apparent openness were created; innovative functionaries who had judge-like qualities (might even be judges) were conjured from the ether to provide assurances. Parliamentary committees were created, their grandeur a mask for their impotence. And if courts managed to force their way in, their cases should be in secret. Lawyers can represent their clients certainly but without meeting them, and only after

having been vetted by the state: a new kind of quasi-independent official called a 'special advocate'. The Justice and Security Act of last year comes from the same stable: if people insist on suing the state for allegedly torturing them the state demands total secrecy (even extending to the litigant him or herself) as the price of such proceedings.

My point in summary is this. In the old days the war/emergency activities of the state stood apart from the legal - here were two domains that rarely if ever intersected. Bad behaviour could be hidden in total darkness, 'unknown unknowns'. The march of the rule of law has made such a position unsustainable, but in the process of reaching into this domain, law now finds itself irretrievably changed, drained of critical energy and fatally diluted in the safeguards it can offer those affected by the exercise of state power. In place of 'unknown unknowns', we now have 'known unknowns', the advocates who can't speak to their clients; the courts that won't let you in, the parliamentary committees that sit in private, the former judges that sign off on reports more redacted than informative.

Why have we allowed this to happen? There are no colonies to protect and not even Northern Ireland to prevent from declining into civil war. Who the 'we' here is is what I want to reflect on as I draw this lecture to a close. Of course it is to some extent all of us: the British like their past, are rather proud of it, see in the Second World War 'their finest hour', think of themselves as decent colonialists, and - nowadays - feel good as purveyors of human rights abroad, a vital link in the global war on terror, brainy facilitators of those with the muscle we no longer have. On the whole the British people, it seems to me, don't mind having all the ships and aircraft and soldiers and so on that make up the armed forces: they remind us that for all that has changed we still 'punch above our weight'. All true but not the whole reason for this drift of language into ethical abeyance. Democratisation in this country was always only roughly achieved. If we are to believe a *Guardian* supplement recently we have been at war every year since a decade or more before it was even achieved. War - hot; cold; imperial; colonial; counter-terrorist - has tamed the democratic instinct in this country, replacing one idea of security (social; human flourishing; potentiality) with another (national survival; fighting enemies). War has contaminated the wonderful possibilities of true equality, and the institutions it has justified have lingered on into peacetime, are now even recruiting onto their side a language - that of law and to an extent also human rights - that used to be energetic and spirited but which in their hands have become accomplices to secrecy and official impunity. It is understandable, I suppose, a kind of 'post imperial trauma and yearning'. But it is a pity, and certainly not in the public interest.