ATKIN MEMORIAL LECTURE

BEEF AND LIBERTY: FUNDAMENTAL RIGHTS AND THE COMMON LAW

1. On 15 March 1776, James Boswell, brilliant biographer, indefatigable diarist, and not terribly successful barrister, was nearing the end of a journey by stage coach from Scotland to London.

2. Typically, he was consumed with anxiety caused by his own irresponsible conduct - on this occasion, the anticipation of a duel which he was due to fight on his arrival in London. His unease was enhanced by the information that within the preceding twenty four hours two southbound coaches had been robbed by footpads near Highgate - a wild and dangerous part of the country, notorious for its casual lawlessness.

3. Equally typically, he did not let these concerns interfere with his robust enjoyment of the journey, with all the opportunities which it afforded for socialising and entertainment.

4. Boswell tells us:

   "I got upon the coach box today from Stevenage to Hatfield. I was afraid I should fall and I accustomed myself to overcome fear. The coachman was a stately fellow, as well dressed as a country squire... There were two outside passengers, who sung and roared and swore as he did. My nerves were hurt at first, but considering it to have no offensive meaning whatever, and to be just the vocal expression of the beings, I was not fretted. They sang "A Hunting we will go" and I joined the chorus. I then sung "Hearts of Oak", Gee Ho Dobbin", "The Roast beef of old England", and they chorused. We made a prodigious jovial noise going through Welwyn and other villages."

5. Of course, Boswell was a Scot, as Johnson never tired of reminding him. But with that one qualification, it is hard to imagine a more quintessentially English scene than this: we can visualise it as looking rather like the animated lid of a tin of Quality Street, with the addition of a soundtrack consisting of the singing,

roaring and swearing which have always been typical features of groups of English lads travelling on public transport - as anyone who has been in a train carriage after a football match knows only too well.

6. But let's consider for a moment what the lads are singing in this riotous scene.

7. First: A Hunting We Will Go. Well, that speaks for itself, and would of course now be likely to fall foul of the Hunting Act 2004.

8. Next: Gee Ho Dobbin. This was not a song I was previously familiar with. But the internet informs me that the first verse proceeds as follows:

   "As I was a driving my waggon one day,
   I met a fair damsel, tight, buxom and gay.
   I kindly accosted her and gave a low bow,
   and I felt my whole body I cannot tell how:
   gee ho dobbin, hi ho dobbin, gee ho dobbin, gee up and gee ho".

   I think we all know where that's heading, don't we?

9. But it is the final two choices sung by Boswell and his jovial posse that are interesting. Hearts of Oak and the Roast Beef of Old England are, of course, still famous patriotic songs, and quintessential hymns to Englishness.

10. And they are songs which express the unique value of Englishness by stressing two things: first, the *liberty* of the English; and, second, the great *superiority* of the English by comparison, in particular, with the French.

11. So, in Hearts of Oak we have the lines: "To honour we call you, not press you like slaves/For who are so free as the sons of the waves?" While the Roast Beef of Old England contrasts the "robust stout and strong" English, with their diet of roast beef, with "all-vapouring France" - which the song tells us is suffering enfeeblement as the inevitable and tragic result of consuming ragout, and other disgusting messed about foreign food.

12. Boswell and his companions, the men on the Clapham stagecoach, took it for granted that liberty, like roast beef, was a fundamental characteristic of Englishness, to be affirmed and celebrated, and to be contrasted with the pitiful condition of Europeans in general, and the French in particular.

13. Indeed, at this time beefsteak clubs were formed in England, devoted to the consumption of beef. They included the Sublime Society of Beefsteaks, a club of which Samuel Johnson himself was a member, whose slogan was the immortal phrase: "Beef and Liberty".

14. They would thus have been astonished to read the view that now prevails in much of the British media, and amongst many politicians, and which has somehow crept into our popular culture as a received idea: that fundamental rights, human rights, are an alien, foreign ideology, which is imposed on our courts and legislators by a European court based in Strasbourg.

15. Let me make it clear: the topic of this lecture is not the controversy over the scope of the Human Rights Act, which has recently reached new heights over the burning question of whether or not an immigration judge had ruled that the unimpeded possession of a pet cat is a fundamental right.

16. Neither do I propose to enter into the debate which has been conducted in recent weeks by various distinguished judges, as to whether Strasbourg decisions are merely to be taken into account by English courts, or are in practice binding upon them.

17. Rather, today I want to invite you all to look away from Strasbourg, and from the human rights that have come to us through instruments of international law, including the European Convention on Human Rights.

18. I want to focus instead on what might be called our "roast beef" rights: the "robust, stout and strong" rights that are and always have been fundamental principles underpinning the common law, and upheld by English courts, and which may properly be called constitutional rights.

19. I want to suggest today that it may be that one effect of the human rights act has been to distract us from this inheritance; to focus the attention of courts, the Government and the media overwhelmingly on the Convention rights incorporated in English law by the Human Rights Act; and to equate human rights with Convention rights.

20. The consequential perceived "foreignness" of human rights is deeply unfortunate, as well as being simply inaccurate.

21. But there is an even greater danger in equating human rights with Convention rights.

22. It is important that we recognise the proper importance and scope of the our own common law rights, because there are circumstances in which these rights offer *greater* protection than Convention rights, and, specifically, protection which is both particularly appropriate and necessary to the operation of our own justice system: a system which is, of course, very different from the civil law systems operated in most European states.

23. The Convention sets the minimum level of rights and freedoms which ought to be available in all democratic European states. But it does not purport to detract from the ability of individual states to give greater rights or protections to their citizens, and neither does the Human Rights Act. Indeed, section 11 of the HRA makes it clear that reliance on a Convention right does not restrict any other right or freedom conferred by UK law.

24. There is a real risk that, if we simply focus on Convention rights, we may fail properly to appreciate or to protect our own common law rights, where these are more extensive than Convention rights, and that failing to understand those rights, their proper scope, and the reasons why they are important for the proper functioning of our own system, we may lose them.

What do I mean by fundamental common law rights?

25. I confess to a slight weakness for William Blackstone's Commentaries on the Laws of England, published in 1765.

26. It is no coincidence that in the definitive Western, the Man Who Shot Liberty Valance, this is the book which James Stewart, in the role of a young idealistic lawyer, carries into the Wild West in an attempt to establish the Rule of Law at the frontier, as an alternative to John Wayne and his Colt 45.

27. The concept of human rights is clearly discernible in Blackstone.

28. Book 1 of Chapter 1 is entitled "the absolute rights of individuals."

29. Blackstone says this:

> " For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these is clearly a subsequent consideration. And, therefore, the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple: and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to—though in reality they are not—than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

30. Blackstone identifies three principal absolute rights: security of the person (which includes life, health and reputation); liberty (principally protected, of course, by the great writ of habeas corpus); and private property. He identifies what he calls three further "auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property". These are first, the powers and privileges of parliament; second, the limitations on the royal prerogative, and third, the right of access to justice.

31. About this third auxiliary right, Blackstone says this:

> "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England, the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be

open to the subject, and the law be duly administered therein. The emphatical words of *magna carta,* spoken in the person of the King, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam* (to no man will we sell, deny, or delay justice or right)*:* "and therefore every subject," continues the same learned author, "for injury done to him without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."

32. So what is the significance of the recognition of a right as a fundamental constitutional right? The implication of the recognition of a right as a fundamental common law right or constitutional right is that such a right may not be interfered with or abrogated unless the power to do so is bestowed by Parliament, using statutory language that is both clear and specific, or, at the most, by necessary implication. A broad general power in a statute, even if it is not ambiguous, will be read down so as to be subject to fundamental common law rights.

33. This is the principle of legality, articulated by Lord Hoffman in *R v S of S for Home Dept ex parte Simms*, in the year 2000, shortly before the HRA came into force:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of

constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

34. This articulation of the principle of legality has become the classic recognition of the special status of common law constitutional rights: Parliament, which is sovereign, can override such rights, but only if it confronts the implications and political cost of doing so, and does so in clear and express terms.

35. It is interesting to note, however, that the same idea may be discerned in a much older source: one of the most famous of all common law cases in which the rights of the individual were upheld: *Somersett's Case*, the decision of Lord Mansfield on a writ of habeas corpus in 1772 by which it was ruled that the master of a slave who had brought him to England had no right to detain the slave after he had sought to escape, or to take him outside the jurisdiction.

    Lord Mansfield said this:

    "The state of slavery is of such a nature, that it is incapable of now being introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its rise from positive law; the origin of it can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion; reason, authority, and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly. The power claimed by this return was never in use here; no master ever was allowed here to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever; we cannot say the cause set forth by this return is allowed or approved of by the laws of this kingdom, therefore the man must be discharged."

36. So there can be no doubt that the common law has for generations recognised and protected a category of fundamental human rights, which are treated as having a special constitutional status, and which will prevail unless they are overridden by clear and specific statutory language, demonstrating a recognition by Parliament of the implications of its actions.

37. As I have said, I am concerned that one effect of the Human Rights Act has been to distract our focus from this vitally important national inheritance of rights and freedoms, and to give rise to the false perception that human rights only mean, and are limited to, Convention rights.

38. This perception may sometimes cause courts to fail to recognise instances where common law rights which are broader in scope than those protected by the Convention may be being breached; and may be open to exploitation by a Government which wishes to limit individual rights and freedoms, without incurring the political cost or any significant media resistance.

Secret evidence

39. I want to suggest that there is now a risk of these dangers materialising, in relation to a particular issue which has been much before the Courts recently, and which is currently under active consideration by the Government for the purposes of proposed legislation.

40. I refer to the use by the Government of secret evidence in cases involving issues relating to national security.

41. Briefly, the background to this issue is as follows:

42. In 1997, in a case called *Chahal v UK*, the European Court of Human Rights, criticised the procedures used by the UK in order to decide to detain a foreign national, who was considered to pose a risk to national security, pending his deportation. The decision to detain him had been taken by a panel, based on secret intelligence which had not been disclosed to him, and which could not be reviewed by national courts. The Court found that this was a breach of Article 5(4) of the Convention, which entitles all those detained to bring legal proceedings to determine the lawfulness of their detention.

43. As result of the judgment in *Chahal*, the UK sought to enhance the procedural protection given to foreign nationals who were to be deported as a risk to national security, and who wished to appeal against their deportation. A new court, the Special Immigration Appeals Commission, or SIAC, was set up to deal with such cases, and a special new procedure was devised, in an attempt to

balance the need to protect national security with the obligation to give a measure of procedural fairness to the individual appellant.

44. By statute, a new procedure was devised, known as the closed material procedure. Under this procedure, if the Government considers that disclosure of evidence to the appellant would harm national security, it may be withheld from him and his legal team.

45. Instead, the material may be disclosed to a special advocate, who is instructed to protect the appellant's interests, though he may not communicate with him at all without the permission of the Government, and in no circumstances about the secret evidence. The court then considers this secret material in the absence of the appellant and his legal advisers, but with the assistance of the special advocate.

46. The use of this procedure by SIAC was and remains highly controversial. The extent to which special advocates are able practically to assist appellants where they cannot take instructions, and where the appellant may have no idea of the case he has to meet, has been the subject of strong criticism by, in particular the Parliamentary Joint Committee on Human Rights.

47. Nevertheless, the scheme was extended by statute to a number of different forums. Closed material procedures came to be used in a variety of statutory contexts in which the state wished to deploy sensitive evidence without disclosing it to the other party. These included appeals against decisions to impose control orders on suspected terrorists.

48. Control orders may impose very stringent restrictions on the lives of British citizens, including their forced removal from their homes and families to a flat hundreds of miles away; stringent curfews; controls on their movements outside their home; bans on use of the internet or mobile telephones; and even bans on chance meetings or conversations with anyone except an approved list of individuals. These restrictions are imposed without the individual being convicted of a criminal offence, and under the closed evidence procedure could be imposed on the basis of entirely secret evidence, which the controlee had had no opportunity to rebut.

49. In the case of A v UK the European Court of Human Rights stated that, at least where serious restrictions on liberty were at stake, this process was a breach of the right to a fair hearing under the Convention. Secret evidence and the closed material procedure could be used, but at least sufficient material must be disclosed to the appellant to enable him to give instructions to the special advocate. The House of Lords applied this principle to control orders in a case called *AF (No 3)*. However, subsequent case law, including a decision of the European Court of Human Rights called *Kennedy v UK*, and a Supreme Court decision in *Tariq*, has held article 6 does not give a right even to minimum disclosure in all circumstances. A statutory claim seeking compensation for race discrimination may be held entirely in secret, in the absence of the claimant, if the government considers that disclosure of the relevant evidence would harm national security, and such a trial is not incompatible with article 6 of the Convention.

50. Now, you will have noted that I have referred so far to specific procedures, devised by Parliament through primary legislation, and scrutinised by the courts in accordance with Convention rights – in particular the right to a fair trial protected by Article 6 of the convention.

51. But English courts became used to the closed material procedure. They started to adopt it in cases in which there was no statutory provision expressly providing for it, such as claims for judicial review. And in doing so, they appear to have been reassured by the conclusion of the Strasbourg court in A v UK that a closed material procedure was not in itself incompatible with Convention rights.

52. And here the English courts went wrong.

53. The notion that, in the absence of a specific statutory provision, an English court may try a claim, taking into account secret evidence put forward by one party which the other party has not seen, is wholly contrary to a fundamental common law right.

54. The whole notion of the trial at common law, developed over centuries, depends on each party being fully informed of the case put against him by the other, and being permitted to confront the other party's case by means of the cross

examination of his witnesses. These are the essential elements of our adversarial system of justice, for both civil and criminal trials.

55. Unlike other European countries, we do not have an inquisitorial system where the judge's function includes the investigation of the evidence or taking depositions: our method of trial is based on the process by which each party tests the case of the other, by evidence and cross examination, and the judge acts as arbiter, not investigator.

56. In *Lee v The Queen* (1998) 72 AJLR 1484 High Court of Australia at paragraph 32 stated:

> "[T]he concern of the common law is not limited to the quality of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial."

The importance of knowing the entirety of the case put by the other side was, simply, regarded as one of the fundamental rules of natural justice, without which a trial could not be regarded as a trial. In *Re K (Infants)* [1963] Ch 381, 405-6 Upjohn LJ stated:

> "It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

57. There are many more similar citations from a mass of common law authorities – *Kanda v Malaya*, *Rice v Education Board* – the list goes on. You would have thought that this principle of natural justice was so deeply ingrained in judges that any attempt to dilute or undermine it would have been dismissed out of hand.

58. And yet, the combined effect of the gradual spread of statutory closed material procedures, the courts' familiarity with their use, and the apparent endorsement by Strasbourg of such procedures as not incompatible with convention rights led courts into precisely this error.

59. The high point was reached when a number of individuals who had been subjected to extraordinary rendition, torture and detention in Guantánamo Bay brought claims for damages against the UK government and the intelligence agencies, alleging that the government was liable to them for assault, negligence and other torts, because it had been complicit in their rendition, torture and unlawful detention.

60. The facts alleged in these cases were extreme. But the causes of action on which they relied were classic common law causes of action. These were in essence normal civil claims for damages, to be heard by the High Court.

61. There already exists a common law procedure for dealing with sensitive material in common law trials. It is the public interest immunity or PII procedure. If a minister objects to the disclosure of a document because he considers its production would harm national security, he can sign a certificate to that effect. The court will then consider the matter, looking at the document if necessary, and determine whether the interests of national security in favour of withholding the document outweigh the interests of justice in disclosing it. If the balance is determined in favour of disclosure, it is provided to all parties, though the trial may take place all or part in camera to protect the information. If the balance is determined against disclosure, the document may not be admitted into the proceedings at all, or relied on by either party. This is a process under which both parties, the state and the individual, are treated equally, and the court is the adjudicator. Either everyone may use the document, or no one can.

62. However, the Government in the Guantánamo cases was dissatisfied with the normal PII procedure. It successfully argued before a high court judge in these cases that the court had the power to permit the government to defend the claims using a closed material procedure.

63. It contemplated that the Government might serve a secret defence, which would not be disclosed to the claimants, and rely on secret evidence at the trial, to be heard in their absence. Their interests were to be protected by special advocates, as in the Special Immigration Appeals Commission and control order cases. At the end of the case, the court might give a secret judgment. The claimants would be informed whether they had won or lost, but some of the reasoning would be

withheld from them, and only made available to the Government and the special advocates.

64. This decision was appealed, and in the decision in *Al Rawi*, in July of this year, the Supreme Court reasserted in strong terms the full force of the fundamental common law right to know the case against you: a right which clearly goes further in our jurisdiction, and gives greater protection, than the minimum protection afforded by the Convention.

65. Typical of the content and tone of the decision is the observation by Lord Kerr, that "the right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. Without it, a trial between opposing parties cannot lay claim to the marque of judicial proceedings."

66. Lord Hope stated that "the Court has for centuries held the line as the guardian of fundamental principles, such as the right to a fair trial, the right to be confronted by ones accusers and the right to know the reasons for the outcome." He warned against the usurpation of fundamental rights that proceeds little by little under the cover of rules of procedure, and said "this is not the time to weaken the law's defences"

67. The Supreme Court recognised in *Al Rawi* that a closed material procedure, as an abrogation of a fundamental common law right, could only be introduced by parliament. Lord Hope said (para 74):

> "The proposition that a closed material procedure should only be introduced in ordinary civil litigation if Parliament sees fit to do so should not be seen as surrendering to Parliament something which lies within the area of the court's responsibility. Instead it is a recognition that the basic question raises such fundamental issues as to where the balance lies between the principles of open justice and of fairness and the demands of national security that it is best left for determination through the democratic process conducted by Parliament, following a process of consultation and the gathering of evidence. "

68. Nobody reading the judgments in *Al Rawi* could be left in any doubt as to the importance which the Supreme Court attached to the right of a litigant to know

the case put against him, and to its fundamental nature as part of the very bedrock of the identity of an adversarial trial.

69. You would expect that if the Government wished, following the delivery of that decision, to press on with the introduction of legislation abrogating or limiting that right, that its proposals would acknowledge the serious implications of what was proposed.

70. Well, we now have that proposal, contained in the Government's Justice and Security Green Paper, published about three weeks ago, for a three month period of consultation, and proposing legislation early next year.

71. The Green Paper thus proposes the enactment of legislation which would permit courts to try common law claims for damages using a closed material procedure, whenever a Government Minister, who is of course likely to be a party to the action, decides that disclosure of particular material would be damaging to national security: a decision which is to be subject to challenge only on the ground that it is irrational.

72. The Green Paper envisages that civil actions may be tried in circumstances in which one party does not know the other party's case; is not permitted to see their evidence or to cross examine their witnesses; and in which the judgment which follows may be wholly or partly secret, and withheld from one party.

73. And yet, remarkably, following the saga of *Al Rawi*, to which extensive reference is made in the Green Paper, you will find no reference anywhere in its pages to the fact that what is proposed undermines a fundamental constitutional common law right.

74. The only reference to the common law right is this passage (para 1.7):

"Protections to ensure procedural fairness and fair trials in the justice system have evolved gradually over the centuries. The rules of natural justice have developed over time, one of which is the right to know the opposing case. What this means will vary according to the circumstances."

75. Of course, that is not right. The right to know the opposing case in a civil trial does not vary according to the circumstances: it is a very clearly defined common law right, and a fundamental aspect of the adversarial trial, as was made clear in *Al Rawi*.

76. But the Green Paper then goes on to devote its focus to Article 6 of the Convention, and to rely on the fact that although under article 6 relevant evidence should generally be disclosed to the parties to civil proceedings "this right is not absolute, and limits on disclosure may be justified, for example in the interests of national security in order to protect the public from harm".

77. In other words, the Green Paper airbrushes away the stronger common law right to know your opponents case, which is essential to the proper functioning of our national adversarial legal system: part of Blackstone's third auxiliary right of access to justice, and instead relies on compatibility of the proposal with the weaker and qualified European Convention right in order to justify its proposal.

78. The Green Paper even suggests that the closed material procedure it proposes will enhance procedural fairness. It explains that under current procedures, if a judge considers that the harm done to national security by disclosure of a document outweighs the interests of justice in its disclosure, he must rule the document inadmissible, so that neither party can rely on it. It argues that it is preferable, and fairer, for the judge to be able to consider such material, even if the other party is unable to see it.

79. This is a point which Lord Kerr specifically considered and rejected in *Al Rawi*, where he said:

> "…the defendant's argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive – for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? the central fallacy of the argument, however, list in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result, that assumption is misplaced. To be truly valuable, evidence must be capable of

withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead."

80. Moreover, the Green Paper fails to consider at all the practicalities of conducting a trial in accordance with a closed material procedure.

81. Consider a case in which the claimant gives evidence. The defendant has secretly disclosed to the court and the Special Advocate a document which appears to be inconsistent with his evidence. But the claimant has not seen it. He has had no opportunity to explain it. He cannot be cross examined by reference to it. How is the judge in that situation to make a finding of fact as to the credibility of the witness, whose evidence has not been tested? How is he to decide whether the witness's evidence should be preferred to the document?

82. But the problems are not simply problems for the judge in the conduct of the trial.

83. It is impossible for me to adequately convey the frustration and helplessness felt by a barrister seeking to represent a client when a closed material procedure applies. I have sought to do it in control order and SIAC cases on many occasions. Most of your time is spent outside court, waiting to be allowed back in. When you are able to cross examine, you have no idea whether the questions you are asking are pertinent, or unhelpful. You do not know whether your submissions are on point, or wholly irrelevant. Representing a client in these circumstances has been described as like taking blind shots in the dark at a hidden target.

84. And in a civil claim there are other problems. Lawyers cannot give any advice on the merits of a claim if they do not know what evidence is being deployed against their client. This does not matter so much in SIAC or control order cases, where the appellant probably has no option but to pursue the appeal, but in civil litigation it is crucial. How is the case to be funded? Both legal aid and legal expenses insurance require accurate advice on the merits of claims, which will be impossible to give. Suppose that the other side makes an offer to settle the case. How are you to advise your client whether to accept or reject the offer, or to make a counter offer?

85. And what of the secret judgments, which this system necessarily envisages? How can a party decide whether to appeal if they do not know why they have lost their case? If there is an appeal, how are the Court of Appeal and the Supreme Court to conduct the appeal, if it is against a partially secret judgment?

86. More generally, the common law develops on a case by case basis, with principles being constantly tested and developed against new facts. How is this process to be reconciled with the accumulation of a body of secret case law, accessible only to the government and a small group of special advocates?

87. My point is that you cannot simply take the closed material procedure, developed for very specific statutory purposes, and apply it wholesale to a civil common law trial. A common law trial is designed to enable facts to be found on the balance of probabilities through an open adversarial process. If you bolt a closed procedure on to that, what you have is a process that is not adversarial, and not judicial. It may look and sound like a trial, but in fact it is nothing of the sort.

88. I would suggest that the Green Paper simply skates over the surface of these profound problems without even acknowledging that they exist, just as it fails to acknowledge the impact of its proposals on fundamental rights.

89. And how has the Green Paper been greeted?

90. Largely with indifference, or muted approval. The human rights organisations, Liberty and Reprieve, protested, as did The Independent newspaper. But most of the press were supportive, characterising this as no more than a legitimate move to prevent the Government from being forced to waste public money settling damages claims brought by terrorists. The Labour party has said it will support the legislation.

91. It troubles me that the Government can propose in this way without any controversy and little fear of contradiction to legislate for a secret process so alien to our judicial system.

92. It is a cause for concern that the descendents of Boswell's roaring lads on the London stagecoach, and the popular media who communicate with them, no

longer see the protection of their traditional liberties as an English value, but rather as a foreign imposition designed only to protect terrorists and criminals.

93. We have taken our eyes off the roast beef, and tasted too much of the ragout. As a result, it would seem that there may no longer be a significant political cost to abrogating fundamental common law rights.

To conclude

94. While preparing for this evening, I came across on the internet a number of previous Atkin lectures, which had been published after their delivery, which I read with great interest.

95. I noted that the 2008 lecture began with the speaker's expression of his own feelings of inadequacy when confronted with the distinguished identity of his predecessors.

96. My confidence was not improved by the fact that these self depreciating remarks turned out to have been made by Lord Clarke, who was at that time the Master of the Rolls, and is now, of course, a judge of the Supreme Court.

97. Previous Atkin lecturers have included Lord Bingham, Lord Slynn, Lord Hope, Lord Justice Sedley, Lord Phillips, Dame Rosalynn Higgins, and many others of great distinction.

98. In their company I can only feel both greatly honoured, for which I thank you and, frankly, a little incongruous. But I am fortified by the consideration that I have not stood alone tonight. I have sought to invoke the spirits of giants of the common law to support me: Sir Edward Coke, William Blackstone, Lord Mansfield, Lord Upjohn, Lord Hoffman and, of course, the spirit of Lord Atkin himself, whose famous dissent in Liversidge v Anderson, objecting to the imposition by executive decree of internment without trial, falls squarely in the great tradition of the protection by our judges of fundamental common law rights against the incursions of state power.

99. Like Rooster Byron at the thrilling climax of Jez Butterworth's extraordinary play, Jerusalem, which is at its heart an ode to the very essence of Englishness, I have called on our old English giants to defend our liberty:

"Rise up, rise up, Cormoran, Woden, Jack of Green, Jack in Irons, Thunderdell, Gog and Magog, Yggdrasil, Brutus of Albion. Come, you drunken spirits. Come you battalions. You fields of ghosts who walk these green fields still. Come, you giants."

DINAH ROSE QC, 2011