

**Civil Liberties vs. National Security in Times of Crisis: The Past Use of Internment Without Trial in the United States and the United Kingdom and the lessons for the ongoing ‘war on terror.’**

*History teaches that, in time of crisis, we have often sacrificed fundamental freedoms unnecessarily. The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties. This has been especially true in regards to internment without trial. Neither novel nor normal, internment is an emergency measure which has regularly been employed in times of national crisis. Through an examination of two historical models this project aims to identify some the difficulties associated with the application of a policy of internment. Given it’s ongoing use around the world in the ‘war on terror’ this exercise is a useful one. Rather than considering the modern use of internment in detail, the aim of the project is to consider the historical models in an attempt to identify general lessons which can be applied to the present situation.*

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## INTRODUCTION

“Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger from abroad.”<sup>1</sup>

*James Madison to Thomas Jefferson, 1798.*

Two centuries have passed since James Madison made this address to then Vice President Thomas Jefferson. During this time, what Madison perceived in 1798 to be a ‘universal truth’ has proven to be just that. A study of recent world history reveals innumerable instances in which countries, facing a serious threat to their national security, effect provisions to ensure their safety to the decrement of domestic civil liberties. As Kennedy<sup>2</sup> observes our own history is littered with examples. From the Defence of the Realm Act ushered into being during the First World War providing for imprisonment without trial to the War Powers (Defence) Act passed during the Second World War which hugely expanded censorship, history shows that when national security is threatened, or is perceived to be so, the climate becomes more favourable for the introduction of repressive legislation: Legislation that Kennedy suggests ‘would never be countenanced during peacetime.’<sup>3</sup>

The idea of states responding to incipient threats by way of repressive legislation was central to the work of German legal theoretician and political scientist Carl Schmitt. In his work, Schmitt offered a blueprint for emergency powers through what he termed the state of exception. This refers to the situation in which a state is ‘confronted by a mortal threat and responds by doing things that would never be justifiable in normal times.’<sup>4</sup>

Whilst a study of recent world history reveals numerous instances in which states impose measures *in extremis* to further national security, this is a practice of great antiquity. In his celebrated book ‘Constitutional Dictatorship,’ Rossiter traces it’s use to Roman times.<sup>5</sup> In times of military emergency the constitution of the Roman Republic provided for the temporary appointment of a dictator and the suspension of the constitution.<sup>6</sup> Laws of appeal and other safeguards of individual liberty had no force against this dictator. Since this early example of

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<sup>1</sup> Rakove, Jack. 1999. ‘James Madison: Writings: 1772- 1836.’ Library of America. p.588.

<sup>2</sup> Baroness Helena Kennedy QC. Member of the Bar Association’s International Task Force on Terrorism.

<sup>3</sup> Kennedy, Helena. 2004. ‘Just Law: The Changing Face of Justice and Why it Matters to Us All.’ Published by Vintage. p.31.

<sup>4</sup> Scheppele, Kim. 2004. ‘Law in a Time of Emergency: States of Exception and the Temptations of 9/11.’ Journal of Constitutional Law, University of Pennsylvania Law School. Volume 6:5. p.4.

<sup>5</sup> Rossiter, Clinton. 1948. ‘Constitutional Dictatorship: Crisis Government in the Modern Democracies.’ Princeton University Press. pp. 19-20.

<sup>6</sup> Created under the ‘lex de dictatore creando.’ The dictator was an extraordinary magistrate, possessing absolute power, appointed originally by the consuls, later by the Senate, in times of great public danger. Tenure was limited to six months or the duration of the crisis, whichever was shorter. The laws of appeal, and other safeguards of individual liberty, had no force against this magistrate.

national security trumping civil liberties in times of crisis there have been many more. Indeed, as Brinkley observes, ‘every major crisis in history has led to abridgements of personal liberty.’<sup>7</sup>

Today the major crisis facing countries worldwide is the threat posed by terrorism. While terrorism is not a modern phenomenon<sup>8</sup> the way in which we assess the threat it poses was profoundly and comprehensively altered by the events of September 11<sup>th</sup> 2001. The brutal attacks on the World Trade Centre and the Pentagon forced people to completely rethink their risks beliefs. As the Institute of Defence and Strategic Studies observed, ‘after 9/11 the threat of terrorism graduated from a public nuisance and a law and order issue into a national security threat.’<sup>9</sup> However, while the unprecedented scale of the 9/11 attacks were ‘beyond the possibilities that ordinary citizens contemplated,’<sup>10</sup> they came at a time when experts had been defining a new form of terrorism focused on visions of mass casualties.

In June 2000 the U.S National Commission on Terrorism published a report entitled ‘Countering the Changing threat of International Terrorism.’ In this report the commission warned that terror attacks were becoming ‘more lethal’<sup>11</sup> with a view to killing as many people as possible ‘without concern about alienating sympathizers.’<sup>12</sup> This represented a departure from the politically motivated terrorist organizations active in the 1970s and 1980s who tried to calibrate their attacks to produce ‘just enough bloodshed to get attention for their cause but not so much as to alienate public support.’<sup>13</sup> In general terms the finding of the commission was that attacks were becoming more lethal as terrorist motivation was increasingly based on fanaticism rather than political interests. Other Scholarly sources have reached similar conclusions.<sup>14</sup>

An examination of the reasons behind the shift in motivation of contemporary terrorists from

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<sup>7</sup> Brinkley, Alan. 2003. ‘A Familiar Story: Lessons from Past Assaults on Freedoms.’ In ‘The War on Our Freedoms: Civil Liberties in an Age of Terrorism.’ ed. Richard C. Leone, Greg Anrig. 2003. The Century Foundation. p.23.

<sup>8</sup> see David Rapoport, “rebel terror is very ancient, going back at least to the first century. Hinduism, Judaism, and Islam produced the Thugs, Zealots, and Assassins respectively-names still used to designate terrorists.” Rapoport, David. 1984. ‘Fear and Trembling: Terrorism in Three Religious Traditions.’ American Political Science Review. Volume 78 (September) 668-72.

<sup>9</sup> Gunaratna, Rohan. ‘International Terrorism: What Kind of Response?’ Institute of Defence and Strategic Studies, Singapore.

<sup>10</sup> Viscusi, Kip & Richard Zeckhauser. 2003. ‘Sacrificing Civil Liberties to Reduce Terrorism Risks.’ The Journal of Risk and Uncertainty. Volume 26, numbers 2-3 (March) 99-120.

<sup>11</sup> National Commission on Terrorism. 2000. ‘Countering the Changing Threat of International Terrorism.’ Washington, D.C. USGPO. p.3.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> see Matthew Morgan “ The practice of terrorism has undergone dramatic changes in recent years. The categorical fanaticism that is apparent in terrorist organizations across a spectrum of belief systems is a major part of this change. In the past, terrorists were more likely to be dominated by pragmatic considerations of political and social change, public opinion, and other such factors. Today, a phenomenon that was a minute rarity in the past—terrorists bent on death and destruction for its own sake—is more commonplace than ever.” Morgan, Matthew. 2004. ‘The origins of New Terrorism.’ Paramaters, (Spring) p.41.

the political to the fanatical is beyond the scope of this paper.<sup>15</sup> However, it represents what Walter Lacqueur, in the *Harvard International Review*, termed ‘terror’s new face.’<sup>16</sup> This new face of international terrorism, embodied by groups such as Al Qaeda and exemplified by the catastrophic attacks of 9/11 has become the most important national security problem facing not only the United States but countries worldwide. As Kofi Annan has stated, terrorism today is a threat to “all states and to all peoples.”<sup>17</sup> It is in the context of state responses to this threat that the time honoured debate regarding the balance of civil liberties and national security in times of crisis has once again come to the fore.

Just days after the 9/11 attacks, George Bush declared the United States as being at war, not against an identifiable nation-state but against terrorism. Whilst the legal status of this war is subject to debate,<sup>18</sup> its impact on civil liberties is unquestionable. While emergency powers have traditionally been used for defined periods,<sup>19</sup> the Bush administration has portrayed the ‘war on terror’ and the need for emergency powers as stretching into the infinite future. In this regard, the war on terrorism is an example of what political philosopher Giorgio Agamben terms the ‘normalisation of the state of exception.’<sup>20</sup> As a 2003 report by the US Lawyers Committee for Human Rights stated, ‘the expansion of executive power and abandonment of established civil and criminal procedures have become part of a “new normal” in American life.’<sup>21</sup>

The expansion of executive power and abandonment of established civil and criminal procedures in the war against terrorism have been well documented. The events of 9/11, accelerated by the attacks in London, Madrid, Bali, Egypt and elsewhere have led to a concerted effort to adopt measures to reduce the risks of future attacks. As Zeckhauser notes, many such measures ‘involve costs that are not financial’ but which ‘involve a reduction in civil liberties of various kinds.’<sup>22</sup> One such measure is that of executive detention.

In the context of the global war on terrorism the issue of detention and it’s human

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<sup>15</sup> see Bruce Hoffman. 1998. ‘Inside Terrorism.’ Columbia University Press.

<sup>16</sup> Lacqueur, Walter. 1998. ‘Terror’s New Face - The Radicalisation and Escalation of Modern Terrorism.’ *Harvard International Review*. (Fall) Volume 20. Number 4.

<sup>17</sup> UN Secretary General Kofi Annan. Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security - ‘A Global Strategy for Fighting Terrorism.’ Madrid, 10 March 2005

<sup>18</sup> See, e.g., Joan Fitzpatrick. ‘Jurisdiction of Military Commissions and the Ambiguous War on Terrorism.’ 96 *American Journal of International Law*. 346-50 (2002). “The Bush administration’s legal characterization of the war remains remarkably ambiguous.”

<sup>19</sup> In Roman times, the appointed dictator had a tenure limited to six months or the duration of the crisis, whichever was shorter.

<sup>20</sup> Agamben, Giorgio. 2005. ‘State of Exception.’ University of Chicago Press.

<sup>21</sup> Lawyers Committee for Human Rights. ‘Assessing the New Normal - Liberty and Security for the Post 9/11 United States.’ 2003, Published by Lawyers Committee For Human Rights. Full Report available at [www.humanrightsfirst.org](http://www.humanrightsfirst.org)

<sup>22</sup> Zeckhauser, Richard. 2003. ‘Sacrificing Civil Liberties to Reduce Terrorism Risks.’ *The Journal of Risk and Uncertainty*. Volume 26, numbers 2-3. (March)

rights implications has been the subject of much discussion, particularly in regards to those being held at the behest of the executive in Guantanamo bay and Abu Ghraib prison. However, rather than review what is already a congested literary field, this project will examine the historical use of executive detention. As Lord Bingham of Cornhill recently remarked,

freedom from executive detention is arguably the most fundamental and probably the oldest and most hardly won of all human rights. Yet, in times of emergency, crisis and serious disorder it is almost the first right to be curtailed.’<sup>23</sup>

As governments struggle to find the appropriate balance between national security and civil liberties in an age of increasing terrorist threat the issue of detention remains controversial. As part of this ongoing debate it is helpful to examine the past as this may help us to better reconcile national security and civil liberties today. As the American Constitution Society stated in its brief of Amicus Curiae to the US Supreme Court in the recent case of *Hamdi v. Rumsfeld*, ‘only by understanding the errors of the past can we do better in the present.’<sup>24</sup>

As the two pioneers in the global ‘war on terror’ this project will examine the past use of detention in both the United States and the United Kingdom. The two historical models of internment considered are the internment of Japanese Americans and Japanese nationals in the United States during World War Two and the internment of suspected terrorists in Northern Ireland during the period 1971-75. These two comparative models have been selected because they highlight specific difficulties associated with internment. The U.S model identifies the problem of racism and bias in the application of such a policy while the Northern Ireland experience was one marred by legitimacy issues and human rights abuses. Furthermore, these two models are useful in the ongoing ‘war on terror.’ The US model concerns a wartime response to a perceived threat posed by a group sharing racial characteristics while the Northern Ireland model is an example of a state responding to a real and significant internal terrorist threat. Separately each example can be distinguished from the current circumstances, combined, they provide a more comprehensive framework for analysing internment as a policy.

In examining the past use of internment this project will consider a number of key issues. Notably, are there any key problems associated with the operation of internment. In other

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<sup>23</sup> Bingham, Tom (Lord Bingham of Cornhill) ‘Personal Freedom and the Dilemma of Democracies.’ Romanes Lecture delivered at the Sheldonian Theatre, University of Oxford, October 2002.

<sup>24</sup> An amicus curiae (friend of the court) brief on behalf of Fred Korematsu was filed with the Supreme Court by American Constitution Society supporter Geoffrey Stone of the University of Chicago in the cases of *Odah v. U.S.*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*. On the brief with Professor Stone were Professors David Strauss (the faculty advisor of the ACS chapter at Chicago) and Stephen Schulhofer of NYU Law School. Brief available at <http://www.ratical.org/ratville/CAH/KorematsuBAC.pdf>

words, does history teach us anything about the use of internment? Secondly, what conclusions can be drawn about the operation of any modern internment procedure? However, before addressing these key issues through an examination of the two historical models, it is first necessary to place internment within the context of international law, particularly International Human Rights Law. As this project's examination of the historical use of internment without trial will involve consideration of international law and human rights principles such commentary is necessary.

## INTERNMENT AND INTERNATIONAL LAW.

The rules of international law which are applicable to internment are set out in International Humanitarian Law, Customary international law and International Human Rights law.

International Humanitarian Law, a set of rules known as the *jus in bello*, aim to protect any person caught up in armed conflict, whether civilian or combatant. In this manner International Humanitarian law serves as the 'gentle civiliser of nations'<sup>25</sup> by placing 'constraints on sovereign freedoms, prohibiting certain types of weaponry and regulating the conditions under which an occupied territory and its population are to be treated.'<sup>26</sup> In regards to internment, Humanitarian Law establishes minimum safeguards for the protection of prisoners of war. Most notable in this regard are the Geneva Conventions.

In addition to protections established under International Humanitarian Law, protections are afforded to detainees under Customary international law. Customary law results from a general and consistent practice of states followed out of a sense of legal obligation, so much so that it becomes custom. As such, it is not necessary for a country to sign a treaty for customary international law to apply. In this manner, prohibition on slavery and genocide are considered to be customary international law. Notable in regards to internment is the 1977 Protocol I to the Geneva Conventions. Under Article 75, 'any person detained or interned for reasons related to armed conflict shall enjoy the protection provided by this Article.'<sup>27</sup> As Sands observes, 'it is broadly recognised that Article 75 reflects a rule of customary international law.'<sup>28</sup>

The rules of international Humanitarian law deal with internment during periods of

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<sup>25</sup> Koskenniemi, Martti. 2001. 'The Gentle Civiliser of Nations.: The Rise and Fall of International Law. 1870-1960.' Cambridge University Press.

<sup>26</sup> Sands, Phillippe. 2005. 'Lawless World: America and the Making and Breaking of Global Rules.' Penguin Group. p.146.

<sup>27</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Part IV: Civilian population Section III -Treatment of persons in the power of a party to the conflict. Chapter I- Field of application and protection of persons and objects, Article 75.

<sup>28</sup> Sands, Phillippe. Above, n, 26. p. 150.

armed conflict. As such they do not address the issue of a policy of internment introduced by a state against its own nationals, or foreigners in situations where there is no armed conflict. The area of law which deals with this is International Human Rights Law.

As Davis suggests, a ‘fundamental component of human rights is the right to liberty.’<sup>29</sup> Enunciated in a series of Bills of Rights worldwide,<sup>30</sup> the right to liberty is enshrined in International Human Rights Law in the most fundamental rights documents, notably the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR). Article 9 of the ICCPR states that, ‘everyone has the right to liberty... No one shall be subjected to arbitrary arrest or detention.’<sup>31</sup> This document is of particular importance since it is ‘the most comprehensive and well established UN Treaty on civil and political rights’<sup>32</sup> and has been ratified by both the United Kingdom and the United States. It’s effect is to prohibit arbitrary detention and ensures due process rights for those detained. Article 5 of the European Convention of Human Rights (ECHR) also guarantees that ‘everyone has the right to liberty and security of person.’<sup>33</sup> This is of particular relevance to the UK since the UK ratified the convention in 1951 and incorporated it into UK law in 1998.

Documents such as the ICCPR and the ECHR provide the ‘positive’ legal basis of the right to liberty under International law. The guarantees provided in these documents would appear to prohibit the detention of individuals without trial. However, it is important to note that international law also recognises the duty of states to protect themselves and their citizens.<sup>34</sup> The conflict between the need to uphold human rights and the needs for states to protect themselves is dealt with through the process of derogation. Within the ICCPR the specific derogation clause is Article 4. This states that,

In times of public emergency which threatens the life of the

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<sup>29</sup> Davis, Fergal F. 2004. ‘Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel.’ (August 2004). <http://ssrn.com/abstract=575481>

<sup>30</sup> Davis cites numerous examples such as: Article 6 African Charter on Human and Peoples’ Rights (1981) ; Article 9.1, International Covenant on Civil & Political Rights (1966); Article 5.1 European Convention for the Protection of Human Rights and Fundamental Freedom (1953); Article 2 (1) Basic Law for the Federal Republic of Germany. (1949); Article 40.4.1, Bunreacht na hEireann- The Irish Constitution (1937) see Davis, Fergal. ‘Internment Without Trial: The Lessons from the United States, Northern Ireland & Israel.’

<sup>31</sup> Article 9.1 International Covenant on Civil and Political Rights (1966)

<sup>32</sup> Sarah Joseph, Jenny Schultz & Melissa Castan. 2000. ‘ The International Covenant on Civil and Political Rights:

Cases, materials and commentary.’ Oxford University Press. p.4.

<sup>33</sup> Article 5.1 ‘European Convention for the Protection of Human Rights and Fundamental Freedoms.’ (1953)

<sup>34</sup> In *Kilic v Turkey*, the European Court of Human Rights stated that States were ‘not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.’<sup>34</sup> Similarly in the Inter American system, the Court held that ‘the State has the duty to guarantee its security.’<sup>34</sup>

nation and the existence of which is officially proclaimed, the State parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.<sup>35</sup>

The issue of derogation under Article 4 has not been addressed by the Human Rights Committee (HRC)<sup>36</sup> very often. However, as Davis observes, in ‘one important and early decision the HRC did consider the issue of derogation.’<sup>37</sup> In the case of *Landinelli v Uruguay*<sup>38</sup> the HRC examined the necessary ingredients for a ‘public emergency.’ In doing so, the committee considered the issue of proportionality. As a result of *Landinelli*, it seems that for a derogation to be valid a verifiable emergency must exist and the measures adopted must be proportionate.

SUMMARY: INTERNMENT AND THE FRAMEWORK OF INTERNATIONAL LAW.

Within the field of international law, particularly International Human Rights Law, the general right to liberty is well established. Most notable in this regard is the ICCPR and the ECHR. The guarantees provided in these documents would appear to prohibit any policy of internment without trial. However, as shown, although the right to liberty is a fundamental human right with universal application, derogation is possible in limited situations. It is now possible to examine two situations in which internment without trial has been employed and to consider these examples in light of international law and the principles of human rights discussed. The first historical model of internment to be considered is the Japanese American internment.

## Section A: The Japanese American internment.

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<sup>35</sup> Article 4.1, International Covenant on Civil & Political Rights. (1966)

<sup>36</sup> The Human Rights Committee was established to monitor the implementation of the Covenant and the Protocols to the Covenant in the territory of States parties. It is composed of 18 independent experts with recognized competence in the field of human rights. The Committee convenes three times a year for sessions of three weeks' duration, normally in March at United Nations headquarters in New York and in July and November at the United Nations Office in Geneva. For a detailed analysis of the role of the Human Rights Committee see, Dominick McGolderick. 1991. ‘The Human Rights Committee: It’s Role in the Development of the International Covenant on Civil & Political Rights.’ Clarendon Press. Chapter 2, pp 47-51.

<sup>37</sup> Davis, Fergal F., "Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel" (August 2004). <http://ssrn.com/abstract=575481>

<sup>38</sup> *Landinelli v Uruguay*. Communication No. 34/1978. April 8 1981.

An often quoted maxim in any debate concerning the balance of civil liberties and national security in times of crisis is the Roman Law maxim of ‘Inter Arma Enim Silent Leges’<sup>39</sup> meaning ‘in times of war the law falls silent.’ In a Republic such as Rome the laws could fall silent in times of war. In times of military emergency the Consuls could appoint a dictator whose edicts were not subject to veto. This was thought to be the best mechanism for dealing with emergencies and a practice which Machiavelli believed ‘was always of benefit to the state.’<sup>40</sup> However, in a modern constitutional democracy such as the United States it would be an exaggeration to say that the laws fall silent in times of war. Perhaps a better proposition was offered by William Rehnquist, former Chief Justice of the Supreme Court of the United States, who remarked that “though the laws are not silent in wartime, they speak with a muted voice.”<sup>41</sup> This has been particularly true in regards to legal protection from executive detention, namely the writ of habeas corpus.

Rooted in Antiquity<sup>42</sup> and enshrined in the Constitution of the United States,<sup>43</sup> the writ of habeas corpus is regarded as the ‘fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.’<sup>44</sup> It is thus, as Blackstone commented, the ‘stable bulwark of our liberties.’<sup>45</sup> However, from the Alien and Sedition Acts of 1798, through Abraham Lincoln’s suspension of habeas corpus during the Civil War, to the Red Scare that followed World War Two, the compromising of this protection to further national security is a recurring theme in American political discourse. The most notorious and widely repudiated example is the mass internment of Japanese Americans, the majority of whom were U.S citizens, detained without charge during the Second World War. This, as Kuramitsu suggests, was ‘one of the darkest moments in American history.’<sup>46</sup>

Today, the Japanese American internment is often cited as a mass scale ‘gross

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<sup>39</sup> Cicero, Marcus Tullius. ‘Pro Milone’ Caput iv. In ‘Select Orations of Cicero’ ed. J.B Greencough and G.L Kittredge. Ginn & Co.

<sup>40</sup> Niccolo Machiavelli. ‘The Discourses.’ Bernard Crick ed. Pelican Classics 1970. pp.194-95.

<sup>41</sup> Remarks of Chief Justice William H. Rehnquist 100th Anniversary Celebration Of the Norfolk and Portsmouth Bar Association Norfolk, Virginia May 3, 2000

<sup>42</sup> Blackstone cites the first recorded usage of *habeas corpus* in 1305, in the reign of King Edward I. However, as he notes, it was ‘firmly based in the provisions of Magna Carta’ in 1215. See Blackstone, William. ‘Commentaries on the Laws of England. 1765-69. Private Wrongs. Book III Chapter 8. p.133.

<sup>43</sup> The Fifth Amendment of the Constitution of the United States of America enshrines the principle that no person shall be deprived of his liberty ‘without due process of law.’ U.S. Constitution - Amendment 5. Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

<sup>44</sup> Harris v. Nelson. 394 U.S. 286, 290-91 (1969).

<sup>45</sup> Blackstone, William. above n 42, p. 129.

<sup>46</sup> Kuramitsu, Kristine. 1995. ‘Internment and Identity in Japanese American Art.’ American Quarterly. Volume 47. Number 4. (December) pp. 619-658.

violation of human rights<sup>47</sup> and a warning of the dangers inherent in current measures and practices being used to counter the terrorist threat. However, before exploring the relevance of this historical episode in regards to the ongoing war on terrorism, it is first necessary to examine the internment and the factors which gave rise to its implementation.

## I. WHAT WAS THE JAPANESE AMERICAN INTERNMENT?

In the three days following the Japanese attack on the U.S naval base at Pearl Harbour, the United States Government rounded up more than 1,500 Japanese aliens it deemed especially dangerous. Separately, beginning in February 1942, the government began to ‘slip a tightening noose of confinement’<sup>48</sup> around the entire ethnically Japanese population of the west coast. The first step was the introduction of a dusk to dawn curfew and imposition of travel restrictions. Any persons of Japanese ancestry in the affected areas were forbidden to travel more than five miles from their homes without prior government permission.<sup>49</sup> These measures quickly gave way to temporary detention in the form of so-called ‘assembly centres.’ In the Summer of 1942 this temporary detention gave way to permanent detention in ten ‘relocation centres’ located throughout the United States. It is this program of indefinite detention in the relocation centres that is typically referred to today as the Japanese American Internment.

The internment of Japanese Americans was facilitated by the signing of Executive Order 9066. Signed by President Roosevelt on February 19 1942 this authorized the Secretary of War, and the military commanders to whom he delegated authority, to exclude any and all persons, citizens and aliens, from designated areas in order to provide security against sabotage and espionage. While the innocuously titled “Executive Order Authorizing The Secretary of War To Prescribe Military Areas” did not specifically mention “Japanese” or “Japanese Americans,” it was intended to apply to them exclusively. During the course of the war, the order facilitated the internment of 120 000 Japanese Americans. Those interned were both Issei ( First generation resident aliens) and Nisei ( The children of the Issei, American Citizens by birthright.) These citizens were held, without due process, in camps operated by a civilian agency, the War Relocation Authority.<sup>50</sup>

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<sup>47</sup> Feingold, Senator Russell D. 2003. Answers to Written Questions Posed to Professor Nadine Strossen, ACLU President, Following Her Testimony Before the Senate Judiciary Committee Hearing on November 18, 2003: “America After 9/11: Freedom Preserved Or Freedom Lost?” Available at <http://www.aclu.org>.

<sup>48</sup> Muller, Eric. 2003. ‘Inference or Impact? Racial Profiling and the Internment’s True Legacy.’ Ohio State Journal of Criminal Law. Volume 1:103.

<sup>49</sup> for an account of such measures and their impact on the Japanese population see John Oakie.1942. ‘Japanese in the United States.’ Far Eastern Survey. Vol 11, No.2. Jan 26 1942. pp.24-26.

<sup>50</sup> Indefinite detention in the ten ‘relocation centres’ in Idaho (Minidoka), Wyoming (Heart Mountain), Arizona (Poston& Gila River), Colorado (Amache), Utah (Topaz) California (Tule Lake& Manzanar) and Arkansas

The internment imposed years of physical, spiritual and economic deprivation on every man, woman and child of a single national ancestry. No regard was given to citizenship. Rather, Japanese Americans were interned on the basis of a simple inference about loyalty and potential subversion that the government drew solely from the fact of ancestry. By arbitrarily confining American citizens of Japanese ancestry, the government violated the essential principle of democracy: that all citizens are entitled to the same rights and legal protections. As Robinson notes, it may be difficult for us, in the 21<sup>st</sup> Century, ‘to conceive how government officials who were fighting a war dedicated to the preservation of democracy could have implemented such a profoundly undemocratic policy.’<sup>51</sup> However, an examination of the decision to intern those of Japanese ancestry reveals the true vulnerability of human rights and civil liberties in times of crisis. It thus requires discussion.

## II. THE DECISION TO INTERN.

In her recent and highly controversial book ‘In Defense of Internment’ Michelle Malkin warns that ‘even with the benefit of hindsight...it is not at all clear that the mass evacuation (of Japanese Americans) was unwarranted.’<sup>52</sup> Malkin defends the internment as a military necessity founded on information which revealed that Japan had organised untold numbers of Japanese resident aliens and their American-citizen children into a vast network of spies and subversives. To support her claim, she provides evidence in the form of intercepted and decoded Japanese diplomatic cables known as Magic cables.<sup>53</sup> These, as she argues, revealed a ‘meticulously orchestrated espionage effort to undermine national security utilizing both Issei and Nissei before and after the Pearl Harbour attack.’<sup>54</sup>

Since the declassification of several thousand Magic cables in 1977,<sup>55</sup> several historians have presented them as evidence in support of their revisionist claim that the Japanese internment was a justified military necessity. In this respect, Malkin’s book offers nothing new. By the author’s own statement her material is mostly if not entirely lifted from the

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(Rowher & Jerome)

<sup>51</sup> Robinson, Greg. 2001. ‘By Order of The President: FDR and the Internment of Japanese Americans.’ Harvard University Press. p 6.

<sup>52</sup> Malkin, Michelle. 2004. ‘In Defence of Internment: The Case for Racial Profiling in World War II and the War on Terror.’ Regnery Publishing. p.80

<sup>53</sup> In World War II, MAGIC was the United States codename for intelligence derived from the cryptanalysis of PURPLE, a Japanese foreign office cipher.

<sup>54</sup> Malkin, Michelle. 2004. ‘In Defence of Internment: The Case for Racial Profiling in World War II and the War on Terror.’ Regnery Publishing,

<sup>55</sup> In 1977, the U.S. Department of Defense published *The "Magic" Background of Pearl Harbour*. The multi-volume publication reproduced approximately 4,200 cable intercepts dated from February to December 1941, a small number of which referred to Japan's intelligence efforts in the United States. (United States Commission on Wartime Relocation and Internment of Civilians (CWRIC). *Personal Justice Denied*, report of the CWRIC, p. 476.

work of the late David Lowman who first tried in the 1980s to make the case that MAGIC cables justified the signing of Executive order 9066.<sup>56</sup> However, the revisionist claim made by Lowman and Malkin has been widely refuted on several grounds.

Firstly, Muller<sup>57</sup> contends that many of the men who proposed and implemented the internment did not have access to the ultra-secret MAGIC cables. Most notably, the commanding officer who directed the internment, Lt. Gen. John DeWitt, was not on the Magic intercept list. Whilst his superior, Secretary of War Henry Stimson, was on the list, it was Stimson who requested justification for the internment from DeWitt. This step would surely not have been necessary had the Magic intercepts contained the information that Malkin claims they did.

Secondly, perhaps the fundamental flaw in any revisionist suggestion that wartime necessity justified the internment is the fact that while the government forced all American citizens of Japanese ancestry into camps, action taken against American citizens of German or Italian ancestry was not of equal magnitude. Whilst the internment of Japanese Americans was wholesale, German and Italian Americans were deemed to be dangerous only in extreme individual instances. As General DeWitt stated,

You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area.<sup>58</sup>

In his dissent in the case of *Korematsu*, considered later in this section, Justice Murphy referred to this disparate treatment contending that “there was no adequate reason for the failure to treat Japanese Americans on an individual basis...as was done in the case of persons of German and Italian ancestry.”<sup>59</sup> Muller succinctly captures the practical implications of this disparity observing that ‘while Lou Shimizu and Joe Takahashi sat in camps, Lou Gehrig and Joe

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<sup>56</sup> As the author states in the August 3, 2004 entry on her website, [www.michellemalkin.com](http://www.michellemalkin.com): “After reading a book by former National Security Agency official David Lowman called *MAGIC: The untold story of U.S. Intelligence and the evacuation of Japanese residents from the West Coast during WWII*, published posthumously by Athena Press Inc., I contacted publisher Lee Allen, who generously agreed to share many new sources and resources as I sought the truth.”

<sup>57</sup> Eric L. Muller, Professor of Law, Yale Law School. Muller is a member of the *Historians' Committee for Fairness*, an organization of scholars and professional researchers, which charges that Michelle Malkin's book represents ‘a blatant violation of professional standards of objectivity and fairness.’

<sup>58</sup> Rostow, Eugene. 1945. ‘The Japanese American Cases - A Disaster.’ *Yale Law Journal*. Volume 54, Number 3, (June) p .521.

<sup>59</sup> per Justice Murphy (dissenting) in *Korematsu v. United States*, 323 U.S. 214 (1944)

DiMaggio played baseball.’<sup>60</sup>

In her book Malkin justifies this very briefly contending that European enemies posed a lesser threat to the U.S mainland than the Japanese. As she notes, ‘Japan was the only Axis country with a proven capability of launching a major attack on the United States and there was no evidence that Germany or Italy had organized a large-scale espionage network akin to the one described by Japan’s.’<sup>61</sup> However, these justifications defy reason. Germany was a more dangerous presence along the East Coast of the U.S mainland for a longer time than was Japan along the West Coast. It had twice landed saboteurs on eastern shores<sup>62</sup> and had a ‘network of spies whose existence did not need to be pieced together from vague references in decrypted diplomatic messages.’<sup>63</sup>

Perhaps a more viable reason for the incommensurate treatment of those of Japanese ancestry was racism. As Shayne observes, the Japanese were treated differently from German and Italian Americans because ‘they were not white and were not well integrated into mainstream American white society.’<sup>64</sup> In what Leone has termed an ‘openly racist time,’<sup>65</sup> anti-Japanese sentiment was reflected in public support for the internment.

A Gallup poll taken on December 30<sup>th</sup> 1942 found that ninety seven percent of Americans living in the Northwest supported the evacuation.<sup>66</sup> Similarly, research at the time indicated that only thirty one percent of Americans favoured allowing interned Japanese to return to their homes after the war.<sup>67</sup> Such hostility towards the Japanese was rooted in a larger anti-Asian feeling that began with the arrival of Chinese immigrants in 1850.

As gold fever gradually rescinded the Chinese began to take jobs as labourers, often willing to work for much less money than white workers doing the same job. Due to pressure

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<sup>60</sup> Muller, Eric. 2004. ‘Indefensible Internment: There was no good reason for the mass internment of Japanese Americans during WWII.’ available at <http://www.reason.com/0412/cr.em.indefensible.shtml>

<sup>61</sup> Malkin, Michelle ‘In Defence of Internment: The Case for Racial Profiling in World War II and the War on Terror.’ Regnery Publishing, p.64

<sup>62</sup> ‘Operation Pastorius,’ In June 1942 two German submarines carrying eight Nazi soldiers left Germany to land on the East Coast of the United States where they would stage terrorist attacks against American factories, bridges, tunnels, water systems and power plants. For an account see - Hans Trefousse ‘Failure of German Intelligence in the United States, 1935-1945.’ The Mississippi Valley Historical Review, Vol. 42, No. 1. (Jun., 1955), pp. 84-100

<sup>63</sup> Muller, Eric. 2003. ‘Inference or Impact? Racial Profiling and the Internment’s True Legacy.’ Ohio State Journal of Criminal Law. Vol. 1:103

<sup>64</sup> Shayne, David. ‘It Can’t Happen Here? A Look Back at a Sad Chapter in the Law.’ Washington State Bar Association. August 2003. Available at [www.wsba.org](http://www.wsba.org)

<sup>65</sup> Leone, Richard ‘The Quiet Republic: The Missing Debate About Civil Liberties After 9/11.’ In ‘The War on Our Freedoms: Civil Liberties in an Age of Terrorism.’ ed. Richard C. Leone, Greg Anrig. 2003. The Century Foundation. p.13.

<sup>66</sup> Slavik, Laura ‘Whispers From The Past: Remembering the Japanese Internment.’ June 14, 2004. Available at <http://www.seattleu.edu>

<sup>67</sup> Leone, Richard ‘The Quiet Republic: The Missing Debate About Civil Liberties After 9/11.’ In ‘The War on Our Freedoms: Civil Liberties in an Age of Terrorism.’ ed. Richard C. Leone, Greg Anrig. 2003. The Century Foundation. p.13.

from politicians and labour organizations fearful of Chinese immigration ‘destroying the white population of the coast’<sup>68</sup> the federal government signed the Chinese Exclusion Act in 1882 banning the immigration of Chinese labourers to the United States.<sup>69</sup> This resulted in a decline in the Chinese population in the country, particularly in California which in turn led to a labour shortage in the state.

At this time, Japanese labourers began arriving on the West Coast. While they were initially welcomed as a solution to the labour shortage they, like the Chinese before them, were soon seen as a threat by the American workforce . As San Francisco Labour Mayor Eugene Schmitz warned in a 1905 newspaper article, ‘the Chinese are dangerous enough but the Japanese would drive all competition out of business.’<sup>70</sup> Later that year concerns such as that articulated by Schmitz led to the creation of the first organized anti Japanese movement, the Japanese Exclusion League. Led primarily by labour groups who held the Japanese responsible for unemployment and low wages, it’s goal was the complete job exclusion of those of Japanese ancestry.

Anti Japanese feeling was prevalent throughout the early 20<sup>th</sup> Century<sup>71</sup> and reached it’s peak in the aftermath of the attacks on Pearl Harbour. Newspapers on the west coast propagated the existing racism. In a Los Angeles Times article discussing the problem of dealing with American born Japanese, the writer wrote ‘a viper is nonetheless a viper wherever the egg is hatched.’<sup>72</sup> Such sentiments were typical of the period, particularly on the west coast where anti Japanese feeling was deep rooted. However, such sentiments were not confined to the public, they were also prevalent amongst those responsible for the implementation of the internment.

In affirmation of the decision to proceed with the internment General DeWitt declared ‘the Japanese race is an enemy race and while many second and third generation Japanese born

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<sup>68</sup> An ‘Address From the Workingmen of San Francisco to Their Brothers Throughout the Pacific Coast.’ Workingman’s Party. 1888. Available at <http://memory.loc.gov/ammem/>

<sup>69</sup> President Chester A. Arthur signed the Chinese Exclusion Act, which barred immigration of Chinese labourers for 10 years. The law was extended another 10 years in 1892 and made permanent in 1902

<sup>70</sup> Special Correspondence of the Newspaper Enterprise Association. ‘San Francisco’s mayor wants exclusion act to bar the Japs.’ April 1905. Library of Congress. Printed Ephemera Collection; Portfolio 2, Folder 22a. Available at <http://memory.loc.gov/ammem/>

<sup>71</sup> As was the case with the Chinese, racism against Japanese was especially prevalent amongst the white workforce of the West Coast. see Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, who remarked in 1942, ‘We’re charged with wanting to get rid of the Japs for selfish reasons. We do. It’s a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. ... They undersell the white man in the markets. ... They work their women and children while the white farmer has to pay wages for his help,. If all the Japs were removed tomorrow, we’d never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don’t want them back when the war ends, either.’ Quoted by Taylor in his article ‘The People Nobody Wants,’ 214 Sat. Eve. Post 24, 66 (May 9, 1942).

<sup>72</sup> Anderson, W. H. ‘The Question of Japanese Americans.’ Los Angeles Times. Feb 2 1942.

on United States soil... have become 'Americanised,' the racial strains are undiluted.'<sup>73</sup>

Similarly, Secretary of War Henry Stimson remarked that 'their racial characteristics are such that we cannot understand or trust even the Japanese.'<sup>74</sup> Racism, therefore, not only accounts for the disparity in treatment of those of Japanese ancestry with those of German and Italian ancestry but was an important factor in the decision to intern.

This indeed was the finding of the Presidential Commission on the Wartime Relocation and Internment of Civilians in its 1983 report.<sup>75</sup> Together with racism the commission found that wartime hysteria was the other main factor in the decision to intern. While the Japanese were not liked, wartime hysteria was the catalyst for their exclusion. As Earl Warren warned,<sup>76</sup> 'the very fact that no sabotage has taken place to date is disturbing and confirming indication that such action will be taken.'<sup>77</sup> Such a statement is an articulation of war time hysteria, especially when one considers the findings of a government report prior to the attack on Pearl Harbour.

In a 1941 report authored by Curtis Munson, special representative of the State Department, it was concluded that most Japanese nationals and '90 to 98 percent' of Japanese American citizens were loyal. Munson wrote, 'there is no Japanese problem on the Coast ... There is far more danger from Communists and people of the Bridges type on the Coast than there is from Japanese.'<sup>78</sup> Similarly, Lieutenant Commander Kenneth Ringle, a naval intelligence officer tasked with evaluating the loyalty of the Japanese American population, estimated that 'better than 90% of the Nisei and 75% of the original immigrants were completely loyal to the United States.'<sup>79</sup> However, after the attack on Pearl Harbour, in an atmosphere of wartime hysteria, such reports were disregarded.

Amongst academics the consensus is that the Japanese American internment was the product of wartime hysteria and racism. The revisionist claim, as proposed by Malkin, that the

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<sup>73</sup> DeWitt, Lt. Gen. J.L. U.S. Army Final Report 'Japanese Evacuation from the West Coast 1942.' Appendix to Chapter III B pt.2. In: 'Final Report: Japanese Evacuation from the West Coast, 1942.' Headquarters Western Defense Command and Fourth Army, Office of the Commanding General, Presidio of San Francisco, California.

Washington, U.S. Govt. Print. Off. 1943. This report is dated June 5, 1943, but was not made public until January, 1944.

<sup>74</sup> Quoted in Caroline Chung Simpson. 'An Absent Presence: Japanese Americans in Postwar American Culture, 1945-1960.' Duke University Press. 2001. at 49.

<sup>75</sup> Report of the Commission on Wartime Relocation and Internment of Civilians 'Personal Justice Denied.' 'the promulgation of Executive Order 9066 was not justified by military necessity...the broad historic causes that shaped these decisions were race prejudice, war hysteria and a failure of political leadership.'

<sup>76</sup> Earl Warren, then California Attorney General, (later U.S. Supreme Court Chief Justice)

<sup>77</sup> Persico, Joseph. 2002. 'Roosevelt's Secret War.' Random House. p168

<sup>78</sup> Munson, Curtis B. 'Japanese on the West Coast.' November 7, 1941. In Congressional Commission on Wartime Relocation and Internment of Civilians (CWRIC) papers pp.3664-3681.

<sup>79</sup> Ringle, Kenneth 'Ringle Report.' 26<sup>th</sup> January 1942 In 'American and Japanese Relocation in World War II: Fact, Fiction & Fallacy.' Lillian Baker, Webb Research Group, Medford, 1990). p.215.

internment was a military necessity is widely regarded as speculative and unsupported by the facts. However, while Malkin's attempts to justify the internment as a military necessity are flawed, her reason for doing so is important.

Malkin has stated that she was 'compelled to write the book after watching ethnic activists, historians, and politicians repeatedly play the World War II internment card after the September 11 attacks.'<sup>80</sup> Muller, a notable critic of Malkin and her revisionist theory has expressed similar concerns and suggests that the author 'is correct in making the case that the civil liberties left have not helped anyone think clearly by attacking each step of the Bush Administration's domestic antiterrorism policy since 9/11 as a reprise of the worst mistakes of WWII.'<sup>81</sup> Most notable in this regard has been David Cole. In his article 'enemy aliens' he warns that 'by targeting persons based on their Arab identity' the government has 'fallen prey to the same kind of ethnic stereotyping that characterized the fundamental error of the Japanese internment.'<sup>82</sup> As Malkin asserts, 'we cannot win the war on terror as long as we keep learning the wrong lessons about World War II.'<sup>83</sup> Therefore, in order to learn from the internment, we have to understand what it's fundamental error was.

### III. THE FUNDAMENTAL ERROR OF THE JAPANESE INTERNMENT.

Those such as Cole who see the Bush administration as repeating the error of the internment focus on the racist inference at its core. For them, the fundamental error was that the government inferred from ethnicity something about the risk of subversion that a person of Japanese ancestry posed. However, this is not the only interpretation. In his article 'Inference or Impact' Muller suggests that the internments fundamental error was 'the scope of its impact, rather than the inference that supported it.'<sup>84</sup> As this has implications for current debates regarding measures used to countenance the terrorist threat, it is important to examine Muller's proposal. In regards to scope of impact he proposes several mistakes the Roosevelt administration made.

Firstly, the government not only inferred from race that Japanese Americans were of mixed, confused or lapsed loyalty, they inferred that a person's mixed, confused or lapsed loyalty would make that person more likely to engage in subversive conduct. In this regard, it

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<sup>80</sup> per Authors blog at [www.michellemalkin.com](http://www.michellemalkin.com)

<sup>81</sup> Robinson, Greg & Eric Muller 'In Defense of Internment, Part 4.' Available at <http://www.isthatlegal.org/>

<sup>82</sup> Cole, David 'Enemy Aliens.' 54 Stanford Law Review, issue 5 (2002) see also David Cole 'The new McCarthyism: Repeating History in the War on Terrorism.' 38 Harvard Law Review 1,3 (2003) ("In its basic approach the government today indeed is replaying the mistakes of the past.")

<sup>83</sup> Malkin, Michelle 'In Defence of Internment: The Case for Racial Profiling in World War II and the War on Terror.' Regnery Publishing.

<sup>84</sup> Muller, Eric. 2003. 'Inference or Impact? Racial Profiling and the Internment's True Legacy.' Ohio State Journal of Criminal Law. Vol. 1:103. p. 108.

could be suggested that the fundamental error may not be the inference based on ancestry but the breadth of what the government inferred from this. While this may appear to be a minor distinction, it is, as Muller suggests, ‘one thing to infer from the fact of a person’s ancestry that he or she has mixed national loyalties, and quite another to infer that a person’s national loyalties take him or her a step closer to becoming a criminal or spy.’<sup>85</sup>

Secondly, again in relation to scope, the government’s basic mistake may have been the selectivity of its inference. Unlike the Japanese, German and Italian aliens in the United States had never been barred from naturalization.<sup>86</sup> This meant that many of the German and Italian aliens in the Country in 1942 had chosen to hold on to their foreign citizenship. Their loyalties were thus open to question. Yet the government inferred disloyalty in the case of Japanese aliens and Americans.

Thirdly, it could be suggested that the fundamental error of the internment was not the inference but that the scope of the inference was not restricted to aliens. Every person of Japanese Ancestry along the West Coast was subjected to the measures culminating in indefinite detention. This led to examples of great indignity such as that reported by the Denver Post in 1942. In its April 10<sup>th</sup> edition the paper carried a story with the headline ‘Army Evacuates Jap who served thirty years in the United States navy.’ The 67 year old man, Isakichi Kanasawa, assumed he was exempt from the evacuation order and was found ‘hoeing in his garden when the military came to escort him to a relocation centre.’<sup>87</sup> Given the possibility of such indignities, Muller suggests that the line between citizens and aliens ‘might have served as a sensible stopping point for the inferences about loyalty and the likelihood of subversive action.’<sup>88</sup>

Finally, again in relation to scope, the government’s basic mistake might not have been the inferences alone but the enormity of the burdens and the extent of the suffering it inflicted on the basis of those inferences. The short term effects of the internment are well documented: Japanese Americans were removed from their homes and forced to live in overcrowded camps. Testimonies such as ‘Citizen 13660’ by Mine Okubo give a detailed account of a the internment experience and illustrate the dramatic adjustment of lifestyle that

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<sup>85</sup> *ibid.*, p 115.

<sup>86</sup> see *Takao Ozawa v. United States* 260 U.S. 178 (1922) This case affirmed that Japanese were ineligible for U.S. citizenship. The Supreme Court ruled that since Ozawa was neither a “free white person” nor an African by

birth or descent, he did not have the right of naturalization as a Mongolian. In regards to what was meant by ‘white,’ the Court’s opinion, delivered by Associate Justice Sutherland was that only Caucasians were white, and therefore the Japanese, by not being Caucasian, were not white and instead were members of an ‘unassimilable race,’ lacking provisions in any Naturalization Act.

<sup>87</sup> Army Evacuates Jap Who Served 30 Years in U.S Navy.’ Denver Post, April 10, 1942 at 5.

<sup>88</sup> Muller, Eric. 2003. ‘Inference or Impact? Racial Profiling and the Internment’s True Legacy.’ Ohio State Journal of Criminal Law. Vol. 1:103. p. 116.

Japanese-Americans had to make during the war.<sup>89</sup> However, the long term effects are harder to describe. During the internment precautions were taken to protect the property of those forced to move. The personal possessions of the Japanese were indexed, warehoused and the owners issued receipts. Farms were tended in their owners' absence, the products sold, and the proceeds deposited in the proper bank accounts. Despite this, however, many families still suffered heavy financial losses as a result of the internment and the 'deleterious effects on Japanese American individuals, their families, and their communities, went beyond monetary damages.'<sup>90</sup>

The Japanese American internment was wrong for all the reasons discussed above. However, in choosing from these mistakes the fundamental error of the internment, Muller proposes a thought experiment. He suggests we imagine the Roosevelt administration retooled it's policies in 1942 in order to fix one, and only one, of the problems that plagued the internment program. With that problem fixed, would we look back today and not deem the internment a tragic error?<sup>91</sup>

Had the government addressed the problem of selectivity by evicting and confining not just those of Japanese ancestry, but also those of Italian and German ancestry, we would still regard the internment as a tragedy. Similarly, had the government treated Japanese American citizens and Japanese aliens differently we would 'see a more cabined tragedy, but we would see a tragedy nonetheless'<sup>92</sup> as the toll in damaged and ruined lives would still have been enormous. However, had the government just let people of Japanese ancestry along the West Coast go about their lives (much as it did with people of German and Italian ancestry) but had required them to answer extra security questions before going in or near military installations or buying a firearm for example, we would, as Muller suggests, look back on such program and see 'nothing like the tragedy that has haunted us since the 1940s.'<sup>93</sup> As Livingston and Gross suggest, such measures would have been 'justified' and 'certainly preferable to the relocation and imprisonment that were in fact ordered.'<sup>94</sup>

Although the ICCPR was not in existence at the time of the internment, an application of it's principles is useful in showing the fundamental error of the internment was, as Muller suggests, the scope of its impact, rather than the inference that supported it. As outlined earlier in this project, although international law enshrines the right to liberty and would appear to

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<sup>89</sup> Okubo, Mine. 2001. 'Citizen 13660.' University of Washington Press.

<sup>90</sup> from Wikipedia, Open Source Encyclopaedia. <http://www.answers.com/topic/japanese-american-internment>

<sup>91</sup> Muller, Eric 'Inference or Impact? Racial Profiling and the Internment's True Legacy.' Ohio State Journal of Criminal Law. Vol. 1:103. p.117.

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*

<sup>94</sup> Gross, Samuel & Debra Livingston 'Racial Profiling Under Attack.' 102 Columbia Law Review (2002) 1413-1438. p.1424

prohibit the detention of individuals without trial, there is a competing view that states are obliged to protect themselves and their citizens from violence. This conflict is dealt with through the process of derogation. In applying Landinelli to the Japanese American internment Davis suggests that the actions of the United States were ‘discriminatory, and disproportionate and therefore incapable of being covered by derogation.’<sup>95</sup> The disproportionate burdens imposed on those of Japanese ancestry on the basis of racial inference can therefore be seen as the fundamental error of the Japanese American internment.

Consideration of the work of Eric Muller and a retrospective application of modern international law reveals that the fundamental error of the internment was not the inference that supported the program but the staggering burdens the program imposed on the strength of this inference. In regards to the war on terrorism, inferences from ethnicity and the burdens imposed on the strength of such inferences are controversial in two areas, racial profiling and executive detention. It is thus important to examine the lessons of the Japanese American internment in relation to both of these areas.

#### IV. LESSONS FROM THE INTERNMENT

##### A) Racial Profiling.

Profiling is based on an assessment of the statistical likelihood of people with particular characteristics committing particular crimes. During World War II, the United States government inferred from ethnicity that the Japanese and those of Japanese ancestry were of questionable loyalty and were thus likely to engage in subversion action. In essence, the government ‘associated Japanese Americans with the Japanese Empire.’<sup>96</sup> This was the central issue then and is a hotly debated topic today in regard to the association of Muslims with Al Qaeda.

For those such as Cole who view the fundamental error of the internment as being the inference at its core, the episode ‘dovetails nicely with the current broad condemnation of racial profiling as arbitrary.’<sup>97</sup> Claims from orthodox civil libertarians that any form of racial profiling today would serve only as a reprise of the mistakes of World War II are common. As Ridgeway has asserted, ‘the racial profiling that allows the government to keep tabs on

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<sup>95</sup> Davis, Fergal F., "Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel" (August 2004). <http://ssrn.com/abstract=575481>

<sup>96</sup> Wu, Frank. 2002. ‘Profiling in the Wake of September 11: The Precedent of the Japanese American Internment.’ *Criminal Justice Magazine*. Volume 17 Issue 2.

<sup>97</sup> Muller, Eric. 2003. ‘Inference or Impact? Racial Profiling and the Internment’s True Legacy.’ *Ohio State Journal of Criminal Law*. Vol. 1:103. p.108.

American Muslims may be the modern equivalent of a concentration camp'<sup>98</sup> Whilst such rhetorical arguments are powerful they do not help us to best decide how to counter terrorism today. In this manner, an understanding of the fundamental error as being the severity of the burdens imposed on the strength of a racial inference rather than the inference itself is important as it creates space within which to consider the use of racial profiling without opening ourselves to the 'conversation-stopping charge'<sup>99</sup> that we are repeating the mistakes of the past.

At this juncture it is important to note that Muller's proposal of the fundamental error of the internment does not teach us that anything short of internment is fine. As Frank Wu suggests this would serve as a 'fallacy of false alternatives'<sup>100</sup> in which anything short of internment is compared to the internment, 'as if to say it could be worse and there is no cause for complaint.'<sup>101</sup> However, neither does it embody the principle that any race or ethnicity based inference about a person's suspiciousness is invalid and unlawful. Rather, the Japanese American internment represents an 'outer limit'<sup>102</sup> and is a 'paradigm case of going off the deep end.'<sup>103</sup>

Today, Khawaja states that 'it is an undeniable fact that while most Muslims are not terrorists or even sympathetic to terrorism, the largest part of the terrorist threat we face comes from Muslims.'<sup>104</sup> That is to say that while most citizens of Arab countries and most Muslims reject and repudiate al Qaeda's views, all members of al Qaeda are Muslim. Therefore, in this post September 11 world, Muller suggests that 'it is just false to say that ethnic and religious identity do not matter. They do.'<sup>105</sup> Whilst an examination of the legality of racial profiling in the post 9/11 world is beyond the scope of this paper, the Japanese American internment offers a valuable touchstone for analysis in regards to the potential for such profiling to escalate. The internment teaches us not that any national origin based inference of suspicion is irrational, but that it might be nearly impossible for us to cabin state-sponsored discrimination to minor and proportionate intrusions.

In a period of six months in 1942, the impositions on Japanese Americans spiralled from a dusk to dawn curfew to indefinite detention in internment camps. In this regard, Muller compares the escalating burdens to that imposed on the Jews by the Nazi's, though 'milder in

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<sup>98</sup> Ridgeway, James. 2001. 'John Ashcroft's New America.' The Village Voice. Oct. 2, 2001, at 41.

<sup>99</sup> Muller, Eric. 2003. 'Inference or Impact? Racial Profiling and the Internment's True Legacy.' Ohio State Journal of Criminal Law. Vol. 1:103. p.11.

<sup>100</sup> Wu, Frank. 2002. 'Profiling in the Wake of September 11: The Precedent of the Japanese American Internment.' Criminal Justice Magazine Summer 2002 Volume 17 Issue 2.

<sup>101</sup> *ibid.*

<sup>102</sup> Above, n 99, p. 130.

<sup>103</sup> Khawaja, Irfan. 2005. 'Japanese Internment: Why Daniel Pipes Is Wrong.' History News Network. October 1 2005. Available at <http://hnn.us/>

<sup>104</sup> *ibid.*

<sup>105</sup> Above, n99, p. 120.

its methods and outcomes.<sup>106</sup> This pattern of escalation may be no historical accident. This is of relevance in regards to the modern framework of counter terrorism measures.

Council of Europe Guidelines state that ‘when a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.’<sup>107</sup> Similarly, in regards to countering the terrorist threat, the United Nations Security Council passed resolution 1373 which affirms that a ‘states principal objective is to find ways of reconciling other rights and interests with an appropriate respect for broader human rights, which may only be interfered with to the degree that is necessary and proportionate.’<sup>108</sup> In this regard, the Japanese American internment reveals that it may be difficult to cabin state measures designed to combat terrorism to ones that are proportionate. This lesson should serve as a policy consideration for the introduction of minor impositions based on ethnicity in the war on terrorism.

## B) Detention.

While the Japanese internment should not be used as evidence to support the argument that all forms of racial profiling, however minor, are arbitrary, it serves as historical precedent for the suggestion that heavy burdens should not be imposed on the basis of racial inference. The United States authorities, despite being in possession of excellent intelligence regarding the threat posed by Japanese espionage, notably the Munson report, chose to intern an entire population rather than attempt to identify those who posed an actual risk. In this regard the burden imposed on those of Japanese ancestry was disproportionate to the aim pursued. This has been acknowledged by the US Government.

In 1988 US Congress enacted the Civil Liberties Act. This act acknowledged that those interned ‘suffered enormous damages, both material and intangible...which resulted in significant human suffering.’<sup>109</sup> Signed into law on August 10 1988 by President Regan, the Act offered an apology for the internment and provided for restitution. The compensation program concluded in 1999 following the payment of \$1.6 Billion to more than 82000 persons of Japanese ancestry.<sup>110</sup>

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<sup>106</sup> Muller, Eric. 2003. ‘Inference or Impact? Racial Profiling and the Internment’s True Legacy.’ *Ohio State Journal of Criminal Law*. Vol. 1:103. p.124.

<sup>107</sup> Council of Europe Guidelines. ‘Human Rights and the Fight Against Terrorism.’ Adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies.

<sup>108</sup> Moraji, Maitri. 2005. ‘The Dual Imperative to Enhance National Security and Foster Human Rights: The United

Nations and the Adoption of Resolution 1373.’ Master of Arts in Law and Diplomacy Thesis. Available at <http://fletcher.tufts.edu/research/2005/Morarji.pdf>

<sup>109</sup> Civil Liberties Act of 1988, 50 U.S.C. app. 1989b–b-9 (2000).

<sup>110</sup> Department of Justice ‘Ten Year Program to Compensate Japanese Americans Interned During World War II

The wholesale internment of those of Japanese ancestry was a burden totally out of proportion to the aim pursued. This aim was the protection of America's national security. As the US government acknowledged in the Civil Liberties Act, the threat posed by those of Japanese ancestry was grossly overestimated. Detention is only legitimate if it is targeted at those who actually pose a risk. To ensure that only those who pose a risk are interned, Davis states that it is 'important that some form of review is possible.'<sup>111</sup> He suggests Judicial review is essential as it 'provides a clear independent review of Executive actions.'<sup>112</sup> In regards to Judicial review of executive action in times of crisis, the Japanese American internment offers valuable lessons for us today.

### C) The failure of the Judiciary.

In his article 'The Threat to Patriotism,' Ronald Dworkin observes that 'people's respect for human and civil rights is very often fragile when they are frightened.'<sup>113</sup> The verity of this observation becomes apparent when one considers surveys conducted in the wake of the 9/11 terrorist attacks. A national survey conducted by Davis and Silver concluded that when 'exposed to a high level of threat and vulnerability...citizens became more willing to accept restrictions on civil liberties for greater personal security.'<sup>114</sup> These findings are not surprising: As Brinkley observes, it is natural that citizens react to great crisis viscerally, often 'venting their fears in the form of demands for unconscionable actions.'<sup>115</sup> However, an important lesson to be learned from the internment of Japanese Americans in World War II is that Courts, who ought to be responsible for ensuring that society does not succumb to the fragility that Dworkin points out, often fail in this regard.

In tracing the history of United States Judicial responses to threats and attacks, Murray concludes that 'time after time, the courts, no different from the majority of other Americans, give their stamp of approval to infringements done largely in the name of national security.'<sup>116</sup>

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Closes its Doors.' (February 19, 1999) <http://www.usdoj.gov/opa/pr/1999/February/059cr.htm>

<sup>111</sup> Davis, Fergal F. 'Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel.' (August 2004). <http://ssrn.com/abstract=575481>

<sup>112</sup> *ibid.*

<sup>113</sup> Dworkin, Ronald. 2002. 'The Threat to Patriotism.' *New York Review of Books*, Volume 49 No. 3 February 28, 2002.

<sup>114</sup> Davis, Darren and Brian Silver. 2003. 'Personal Security vs. Civil Liberties after 9/11: Some Sobering Evidence from Sober Second Thoughts.'

<sup>115</sup> Brinkley, Alan. 2003. 'A Familiar Story: Lessons from Past Assaults on Freedoms.' In 'The War on Our Freedoms: Civil Liberties in an Age of Terrorism.' ed. Richard C. Leone, Greg Anrig. 2003. The Century Foundation. p.46.

<sup>116</sup> Nancy Murray & Sarah Wunsch . 2002. 'Civil Liberties in Times of Crisis: Lesson from History.' *Massachusetts Law Review* 1.09. *See also* Michael Klarman, Professor of Law, University of Virginia. In an

Whilst this is evident in numerous cases,<sup>117</sup> the most notorious instance came in a constitutional challenge to the Japanese American internment, the case of Korematsu. In legal circles today the Korematsu decision is regarded as a ‘powerful counterexample to any view that executive and legislative checks and balances, even in a system of separated and divided powers, is adequate to protect against excessive security measures.’<sup>118</sup>

In 1942 Fred Korematsu was convicted by the District Court for the Northern District of California for refusing to obey the wartime order to leave his home and report to a relocation camp for Japanese Americans. After his conviction was upheld in the Court of Appeal he appealed to the United States Supreme Court challenging the constitutionality of the deportation order. In a six to three decision the Court sided with the government, ruling that the Japanese American internment was not unconstitutional. In his majority judgement, Justice Hugo Black explained that although race-based compulsory exclusion was constitutionally suspect it was justified by the government's assertion of wartime necessity. As he remarked, “hardships are a part of war... Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.”<sup>119</sup>

While the Supreme Court famously rejected Korematsu’s argument six to three, what is less known is that the conference vote was much closer. Chief Justice Black, joined by Stone, Frankfurter and Reed voted to affirm Korematsu’s conviction. Roberts, Murphy, Jackson and Douglas voted to reverse. As votes are cast by seniority and the court was evenly divided, the final decision fell to Wiley Rutledge.<sup>120</sup> Although Rutledge has been heralded as a ‘champion of individual rights,’<sup>121</sup> in Korematsu, a case now regarded as an abomination,<sup>122</sup> he voted to

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article published in the New York Times he observed that ‘justices are part of the same culture that is willing, in times of war, to trade civil liberties for security.’ Michael Klarman, Quoted by Robin Tonner, 2001 “A Nation Challenged: The Terrorism Fight; Civil Liberty vs. Security: Finding a Wartime Balance.” New York Times, November 18<sup>th</sup> 2001. Late Edition - Final, Section 1A.

<sup>117</sup> see e.g. *Schneck v US*. This case concerned a constitutional challenge to the Espionage and Sedition Acts enacted by congress shortly after America’s entry into World War I. Charles Schenck, a socialist, had been convicted under the Espionage Act for producing a pamphlet maintaining that the military draft was illegal. He argued that his conviction was unconstitutional as the U.S Constitution states that ‘people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.’ However, in a unanimous decision, the Supreme Court held

Schenck’s Conviction to be constitutional. Delivering the decision, Mr Justice Holmes stated that “when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” *Schenck v. U.S.* 249 U.S. 47 (1919)

<sup>118</sup> Issacharoff, Samuel & Richard Pildes. 2004. ‘Emergency Contexts Without Emergency Powers: The United States’ Constitutional Approach To Rights During Wartime.’ *International Journal of Constitutional Law*. Volume 2. Number 2. pp.296-333.

<sup>119</sup> *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944)

<sup>120</sup> Justice Douglas later switched to join the majority in affirming the conviction of Fred Korematsu. The only remaining dissenters were Murphy, Roberts and Jackson.

<sup>121</sup> Green, Craig. 2005. ‘Wiley Rutledge and Executive Detention: A Judicial Conscience for His Time and Ours.’ *Express0 Preprint Series*. Paper 767. p.39.

affirm Fred Korematsu's conviction. The reason he did so offers a valuable insight into how Judges react like others when fearful.<sup>123</sup>

In a recent biography of Rutledge, John Ferren<sup>124</sup> suggests that what led the judge to affirm the decision in *Korematsu* was his conviction to legal principle. Rutledge saw *Korematsu* as conceptually inseparable from the case of *Hirabayashi*,<sup>125</sup> which had been decided by the Supreme Court the previous year. In this case the Supreme Court, in Rutledge's first year at Court, had unanimously upheld the race based curfew's application to an American citizen. While the dissenting Judges in *Korematsu* renounced their year-old votes, Rutledge did not see a satisfying basis for changing ground. As he stated, 'I had to swallow *Hirabayashi*. I didn't like it. At the time I knew if I went along with the curfew order I had to go along with the detention.'<sup>126</sup> None of this remotely suggests that Rutledge voted correctly in *Korematsu* but it does shift the error's location to *Hirabayashi*.

In his biography, Ferren cites a conversation Rutledge had with his law clerk Victor Brudney during the *Hirabayashi* case. Brudney had suggested that the court might benefit from an FBI report, which had expressed doubts about the need for mass curfews and evacuations. To this Rutledge replied,

the generals have said this (curfew) is necessary  
for the preservation and security of the country.  
Pearl Harbour was attacked and more may happen.  
Who are we to question this? What makes you think  
any of us will question this? Too much is at stake,  
and we are too far removed from the realities.<sup>127</sup>

Thus, in forming the decision in *Hirabayashi*, which would play a critical role in *Korematsu*, Rutledge can be seen as being influenced by fear: a fear which dominated the discourse of both the public and the courts. As judges cannot be immunized from such fear, in times of threat, they are often willing to condone infringements of public liberty. As Lord Akins observed, 'when face to face with claims involving the liberty of the subject (the Judges) often show

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<sup>122</sup> see Issacharoff, Samuel & Richard Pildes, "Korematsu is excoriated as one of the two or three worst moments in American constitutional history." Above, n117.

<sup>123</sup> see Green, Craig. 2005. 'Wiley Rutledge and Executive Detention: A Judicial Conscience for His Time and Ours.' *Expres0 Preprint Series*. Paper 767 "Revisiting the basis for Rutledge's mistake in *Korematsu* offers unique insight to assessing whether modern Courts are doomed to repeat it." p.22.

<sup>124</sup> John Ferren, Senior D.C. Circuit Court of Appeals Judge.

<sup>125</sup> *Hirabayashi v. United States*, 320 US. 81 (1943)

<sup>126</sup> Green, Craig. Above, n.121. p.37.

<sup>127</sup> Ferren, John . 2004. 'Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge .' University of North Carolina Press. p.246.

themselves more executive minded than the executive.’<sup>128</sup>

Today, in the ‘war on terrorism,’ the role of the judges is to ‘protect democracy both from terrorism and from the means used to fight terrorism.’<sup>129</sup> If they are to succeed in this task they must not succumb to the fragility that is evident in the decision in *Korematsu*. The danger of judicial weakness in times of crisis has been affirmed by Aharon Barak, President of the Israel Supreme Court. In his article, ‘the role of a supreme court in a democracy,’ Barak warns that a mistake by the judiciary in a time of war on terrorism is worse than a mistake of the legislature. As he explains, the ‘judiciary’s mistakes will remain with the democracy when the threat of terrorism passes.’<sup>130</sup> This threat was indeed acknowledged by Justice Jackson in *Korematsu*. In his dissent he warned that “once judicial opinion rationalizes such an order (9066) the principle then lies about like a loaded weapon for the hand of any authority that can bring forward a plausible claim for an urgent need.”<sup>131</sup>

The importance of the judiciary remaining strong in times of crisis was outlined by Lord Atkins in the 1941 House of Lords decision in *Liversidge v Anderson*.<sup>132</sup> In his minority opinion, Atkins affirmed that ‘it has always been one of the pillars of freedom, one of the principles of liberty... that the judges stand between the subject and any attempted encroachments on his liberty by the executive.’<sup>133</sup> The question before the House of Lords was a matter of the interpretation of Defence Regulation 18B which provided that the Home Secretary may order a person to be detained “if he has reasonable cause to believe” the person to be of hostile origin or associations. A majority of four held that if the Home Secretary thinks he has good cause that is good enough: a decision which has attracted much criticism. As Simpson observed, this case was one in which the ‘courts did virtually nothing for the detainees, either to secure their liberty, to preserve what rights they did possess under the regulation or to scrutinise the legality of Home Office action.’<sup>134</sup>

In recent cases concerning executive detention supreme courts have shown themselves to be more resilient. In the House of Lords case *A v Others*,<sup>135</sup> the courts decision suggests the ‘judiciary’s willingness to function as an ultimate safeguard against measures that contravene

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<sup>128</sup> *Liversidge v Anderson* 3 ALL E.R. 338 (1941) (Atkins LJ, minority opinion)

<sup>129</sup> Barak, Aharon. 2002. ‘A Judge on Judging: The Role of a Supreme Court in a Democracy.’ *Harvard Law Review*. Volume 116, Review 19.

<sup>130</sup> *ibid.*

<sup>131</sup> *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944)

<sup>132</sup> This case concerned the interpretation of Defence Regulation 18B during the Second World War, which provided that the Home Secretary may order a person to be detained "if he has reasonable cause to believe" the

person to be of hostile origin or associations.

<sup>133</sup> *Liversidge v Anderson* 3 ALL E.R. 338 (1941) (Atkins LJ, minority opinion)

<sup>134</sup> Simpson, A. W. B. 1994. ‘In the Highest Degree Odious.’ Clarendon Press, pp.418–19.

<sup>135</sup> *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department*. 2005 3 All ER 169

international human rights standards.’<sup>136</sup> Similarly, the US Supreme Court in a trilogy of cases decided in June 2004 put an end to the period in which the executive had enjoyed unfettered discretion to detain and interrogate, inside and outside the United States, persons it considered enemies in the war on terror. In this regard, it has been suggested that the actions of the United States government have ‘incurred a judicial backlash.’<sup>137</sup> The landmark consequences of the court’s essential holding was that in a democracy founded on the separation of powers the judicial branch is obliged, even in wartime, to check the executive. However, while these cases look promising, the idea of judicial review of executive detention is not universal. There are a number of jurisdictions in which executive detention is beyond the scope of judicial review.<sup>138</sup>

While the House of Lords in the United Kingdom and the Supreme Court of the United States have shown signs that they will not simply defer to the executive, other supreme courts continue to do so. In this regard, *Korematsu* should serve as a warning of the dangers of allowing the executive, acting in the name of emergency, unfettered power. As O’Connor warns, ‘an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.’<sup>139</sup> Nowhere was this more apparent than in regards to the internment of Japanese American citizens during World War II.

Much of the concern today in regards to executive detention at facilities such as Camp Delta at Guantanamo Bay is to do with human rights abuses carried out therein. The internment of Japanese Americans involved no such degree of physical torture or abuse. However, in regards to the Northern Ireland experience with internment in the period 1971-75, human rights abuses were part of the internments legacy. In this regard, an investigation of the Northern Ireland Internment is helpful in showing the repercussions such abuses can have in the fight against

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<sup>136</sup> Chirinos, Alexandra. 2005. ‘Finding the Balance Between Liberty and Security: The Lords’ Decision on Britain’s Anti-Terrorism Act.’ *Harvard Human Rights Journal*. Volume 18. pp.265-276.

<sup>137</sup> Katyal, Neal. ‘Executive and Judicial Overreaction in the Guantanamo Cases.’ *Cato Supreme Court Review*. pp.49-68. Available at <http://www.cato.org/pubs/scr/>

<sup>138</sup> Perhaps the most notable example is Malaysia. In the early 1960s the Internal Security Act (ISA) became law in both West and East Malaysia. This act confers the power of preventive detention for the promotion of national security on the Minister of Home Affairs who may detain a person for a period not exceeding two years (and renewable for two year periods indefinitely) on the suspicion or belief that the detention of that person is necessary in the interest of public order or security. No grounds need be given by the Minister for the initial order or the extension. Further, the executive detention order is not pursuant to Judicial decision. As affirmed in *Theresa Lim Chin Chin & Ors. v. Inspector General of Police*, ‘in the matter of preventive detention the executive alone is the best judge and that the court will not be in a position to review the fairness of the executive’s decision-making process having regard to the Constitutional bar on disclosure of the relevant information by the executive.’ Decided by the Supreme Court on 22 & 23.12.87 and 13.01.88; reported in (1988) 1 MLJ 293]

<sup>139</sup> *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.* US Supreme Court. No. 03-6696 (2004) (Judgement of Sandra Day O’Connor)

terrorism.

## Section B. The Northern Ireland Internment (1971-75)

Northern Ireland is a country with a long and unfortunate history of terrorist violence. However, an examination of this history provides a valuable insight as to the potential efficacy of current measures being employed to combat terrorism. From suspension of the right to trial by jury, through powers to stop and arrest, to search and seizure provisions, ‘almost every conceivable form of emergency power has been tried, retooled and enhanced’<sup>140</sup> in an effort to counter terrorism in Northern Ireland. One of the most controversial of these measures has been internment.

### V. BACKGROUND TO THE INTERNMENT.

The power to intern without trial has been on the statutes in both the north and the south since the partition of the island in 1921. Since this time internment had been introduced on three occasions in the North, 1931-34, 1938-45, and 1956-61.<sup>141</sup> On each of these occasions, the Minister for Home Affairs in the Stormont government, in consultation with colleagues in the Northern Ireland Cabinet, had exercised his powers of internment under existing legislation. The Civil Authorities (Special Powers) Acts 1922-43<sup>142</sup> permitted the Minister of Home Affairs to issue an internment order against a person ‘who is suspected of acting or having acted or being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland.’<sup>143</sup> In 1971, due to increasing terrorist violence within the province,<sup>144</sup> the Northern Ireland government reached the point where they felt it necessary to resort once again to the powers of internment. As then Prime Minister of Northern Ireland, Mr. Brian Faulkner, said

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<sup>140</sup> O’Connor, Michael & Celia Rumann. 2003. ‘Into the Fire. How to Avoid Getting Burned By the Same Mistakes Made Fighting Terrorism in Northern Ireland.’ *Cardoza Law Review*. Volume 24:4. 1657-1751. At 1750.

<sup>141</sup> for an account see John McGuffin. 1973. ‘Internment.’ Anvil Books Ltd. Chapter 5.

<sup>142</sup> Originally, the 1922 Special Powers Act was introduced to return civil order to the province. As Megaw stated in the House of Commons, “This is an exceptional time and requires exceptional measures.” Mr Megaw, ‘House of Commons debates Northern Ireland.’ 21<sup>st</sup> March 1922. However, as violence declined they were soon heralded as necessary to maintain the constitutional structure of the North. Regulations imposed under these Acts became a central grievance of the minority community. For an account see Donohue, Laura. 1998. ‘Regulating Northern Ireland: The Special Powers Acts, 1922-1972.’ *The Historical Journal*. Volume 41. Number 4. (December) pp1089-1120. Available through JSTOR.

<sup>143</sup> See Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5 (N. Ir.); Civil Authorities (Special Powers) Act, 1933, 23 & 24 Geo. 5, ch. 12 (N. Ir.); and Civil Authorities (Special Powers) Act, 1943, 7 & 8 Geo. 6, ch. 2 (N. Ir.)

<sup>144</sup> Between January 1 and August 8, 1971, 29 people were killed by political violence in Northern Ireland.

the terrorist campaign continues at an unacceptable level, and I have had to conclude that the ordinary law cannot deal comprehensively or quickly enough with such ruthless viciousness...I have therefore decided, after weighing all the relevant considerations... to exercise where necessary the powers of detention and internment vested in me as Minister of Home Affairs.<sup>145</sup>

Whilst internment had been introduced in the province on three previous occasions, following the deployment of British troops in 1969 the Northern Ireland government could not reintroduce internment in the manner which it had previously. Support of the British army was required and thus the consent of the British government was needed. As Minister of State for Defence Balniel commented, ‘a decision for internment is a decision taken by the Northern Ireland government after consultation with the government of the United Kingdom.’<sup>146</sup>

## VI. THE DECISION TO INTERN.

The unprecedented proportions of political violence in the province by the middle of 1971 was clearly the ‘dominant factor behind the decision to exercise the extra judicial Power of internment.’<sup>147</sup> However, three principal reasons for the decision have been suggested by the Government. These have been noted by the European Court of Human Rights.<sup>148</sup>

Firstly, the authorities took the view that the normal procedures of investigation and criminal prosecution had become inadequate to deal with the terrorists. It was felt that the ordinary criminal courts could no longer be relied on as the sole process of law for restoring peace and order.

The second reason given, which was closely related to the first, was that widespread intimidation of the population often made it impossible to obtain sufficient evidence to secure a criminal conviction against a known terrorist. In regards to the IRA, the difficulty of obtaining a conviction was exacerbated by the grip the organisation had on certain so-called “no-go areas” in the province. These were ‘Catholic strongholds where terrorists, unlike the police, could

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<sup>145</sup> Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971. Chairman : Sir Edmund Compton. Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty November, 1971. Published in London by, Her Majesty’s Stationary Office. 1971. Paragraph 8.

<sup>146</sup> Mr Balniel, Minister of State for Defence, Hansard, HC (Series V) vol. 823, col. 212 (23 sept. 1971)

<sup>147</sup> Ireland v UK. (1978) 2 EHRR 25. Paragraph 36.

<sup>148</sup> *ibid.*

operate in comparative safety.’<sup>149</sup> This greatly impeded the efficacy of police enquiries.

Thirdly, there was, in the judgment of both the Northern Ireland Government and the United Kingdom Government, no hope of winning over the terrorists by political means. The authorities therefore came to the conclusion that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activities but against whom sufficient evidence could not be laid in court.

## VII. OPERATION OF INTERNMENT.

On the 9<sup>th</sup> of August 1971, despite British army reluctance and British government misgivings,<sup>150</sup> Northern Ireland Prime Minister Brian Faulkner was given the go-ahead by London to reintroduce internment. While the decision to reintroduce internment was recognised as a political gamble, it was considered worth the risk if sufficient numbers of active paramilitaries could be taken out of action.<sup>151</sup> As Bell suggests, internment was ‘one of the few remaining unplayed cards that would... calm the majority with a symbolic triumph.’<sup>152</sup>

Operation Demetrius, the army code-name for the internment, went into operation at 4am on the morning of the 9<sup>th</sup> August 1971. The army, with police officers occasionally acting as guides, arrested 452 persons whose names appeared on the final list. In the event, some 350 persons were arrested in accordance with the Special Powers Regulations. These persons were taken to one of the three regional holding centres situated at: Magilligan Weekend Training Centre in County Londonderry, Ballykinler Weekend Training Centre in County Down and Girdwood Park Territorial Army Centre in Belfast. All those arrested were subjected to interrogation by police officers of the Royal Ulster Constabulary (RUC) and within 48 hours, 104 persons were released. Those who were to be detained were sent on to the prison ship ‘Maidstone’ docked in Belfast Lough or to Crumlin Road Prison.<sup>153</sup>

The initial internment sweep was a complete military failure. As McGuffin notes, ‘the IRA had known of it for some time and as a result virtually every senior IRA man was billeted

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<sup>149</sup> *ibid.*

<sup>150</sup> see Kieran McEvoy, “The chief danger, ultimately realized, as perceived by both the army and the politicians, was that if the operation was badly conceived it would provoke yet more hostility amongst the Catholics, increase support for the IRA, and actually miss many of the people at whom it was aimed.” McEvoy, Kieran. ‘Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release.’ Oxford University Press. p.210.

<sup>151</sup> see Andrew Roth “Under mounting pressure at both Stormont and Westminster for tougher measures to break the control the IRA had established of the Catholic streets and housing estates and to halt the toll of killings, Faulkner was persuaded to reach for the last resort policy, which he had opposed under Chichester-Clark, and introduce the internment of suspects without trial.” Roth, Andrew. ‘Heath and the Heathmen.’ London : Routledge and K. Paul. 1972. p.426.

<sup>152</sup> Bowyer Bell, J. 1993. ‘The Irish Troubles: A Generation of Violence.’ Dublin: Gill and Macmillan. p.208.

<sup>153</sup> For an account of these detention facilities see John. McGuffin. 1973. ‘Internment.’ Anvil books. Chapter 8 ‘Internment 1971: Those Detained.’

away from home.’<sup>154</sup> Further, the information upon which the operation was founded was later shown to be outdated. Many of those arrested had no connections with the IRA. Others, although Republican minded, had not been active in decades. In one instance in Armagh the British Army sought to arrest a man who had been dead for the past four years. The poor information on which the operation was founded has been acknowledged by the European Court of Human Rights which observed that due to ‘the scale and speed of the operation,’ ‘some persons were arrested and detained on the basis of inadequate or inaccurate information.’<sup>155</sup>

An important aspect of the internment operation was that Operation Demetrius was activated almost exclusively against suspected Republicans. As the British Home Secretary candidly stated in 1971, the aim of the internment was to ‘hold in safety, where they can do no further harm, active members of the IRA... to help the security forces in their job of protecting the public as a whole.’<sup>156</sup> Whilst the possibility of interning Loyalists was discussed in the preparatory stages the security forces were not of the opinion at this stage that there was any serious threat coming from the Loyalist quarter. It was IRA terrorism that was regarded as the ‘real menace to law and order.’<sup>157</sup> Protestant terrorist activity was seen by the authorities as ‘being on a minute scale in comparison and on a much less organised basis.’<sup>158</sup>

During the internment period of 1971-75, 2,060 suspected Republicans were interned.<sup>159</sup> Despite advice that the authorities should ‘add a few Protestants to the list,’<sup>160</sup> only 109 suspected Loyalists were interned.<sup>161</sup> This partisan approach to political violence generated outrage in the Catholic community. As Brady remarked, ‘the continued internment of “Catholics only” despite the campaign of slaughter by the UVF and its satellites is quite scandalous.’<sup>162</sup> The explanation offered by the British government for the disparate treatment was that Republicans were better organised than their Loyalist counterparts and were thus responsible for more death and destruction. However, as McEvoy notes, when one examines body counts as a measure for levels of violence, Loyalists too were responsible for a large

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<sup>154</sup> McGuffin, John. 1973. ‘Internment.’ Anvil Books. p.86.

<sup>155</sup> Ireland v UK. (1978) 2 EHRR 25. At 39.

<sup>156</sup> Hansard, HC (Series V) vol. 823, col. 8 (22 Sept. 1971) See also Hansard, HC (Series V) vol. 823, co. 322 (23<sup>rd</sup> Sept 1971) Prime Minister Edward Heath reiterated the exclusive focus on Republicans when he argued that Faulkner’s criteria for internment was such that no one was to be interned without his ‘being satisfied on evidence placed before him that the person concerned was and still is an active member of the Official or the Provisional wing of the IRA, or has been closely implicated in the recent IRA campaign. In McEvoy, Kieran. ‘Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release.’ Oxford University Press. 2001. p.212.

<sup>157</sup> Ireland v UK. (1978) 2 EHRR 25. Paragraph 37.

<sup>158</sup> *ibid.*

<sup>159</sup> Hogan, G & Walker, C. 1989. ‘Political Violence and the Law in Ireland.’ Manchester University Press. p.94.

<sup>160</sup> Bowyer Bell, J. 1993. ‘The Irish Troubles: A Generation of Violence.’ Gill and Macmillan. p.216.

<sup>161</sup> Hogan, G & Walker. *Above*, n.159. p. 94.

<sup>162</sup> Brady, Brian. 1975. ‘Internment 1971-1975.’ Published Dungannon : Fr. Denis Faul. P.11

number of deaths.<sup>163</sup> This perception of discrimination was considered by the European Court of Human Rights in 1978.

## VIII. INTERNMENT & THE EUROPEAN COURT OF HUMAN RIGHTS.

The issue of internment in Northern Ireland was brought before the European Court of Human Rights in 1978 in the case of *Ireland v UK*. In this case the Government of the Republic of Ireland brought an application before the Commission alleging, *inter alia*, that the extra judicial detention infringed Article 5 of the ECHR (right to liberty) and was not saved by the derogation provided in Article 15. Whilst the internment itself was held to be in violation of Article 5 it was recognised that derogation was permissible ‘in times of war or other public emergency.’ Applying this to Northern Ireland, the Court concluded that the requisite emergency existed. As such the internment procedure was upheld.

An important aspect to this case was that the Government of the Republic of Ireland also alleged that the use of the special powers primarily against IRA members constituted discrimination in violation of Article 14 of the ECHR. On the specific allegation of sectarianism the Court justified the difference in treatment noting that

There were profound differences between Loyalist and Republican terrorism... The IRA, with its far more structured organisation, constituted a far more serious menace than the Loyalist terrorists... [Also] although Loyalists were not extra judicially deprived of their liberty, they do not appear to have been able to act with impunity.<sup>164</sup>

This passage is quoted due to the importance of the points raised. As Davis states, ‘the allegation of sectarianism is a serious one.’<sup>165</sup> The acceptance by the Court that the disparate treatment did not imply discrimination is important as internment was thus held not to be in violation of Article 14. The right of the UK Government to utilise a policy of internment was thus upheld.

Although the European Court upheld the right of the UK Government to utilise a policy of internment, in doing so holding the internment to be non-discriminatory, this was the

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<sup>163</sup> Between 1971 and 1975 Republicans Killed 126, 255, 128, 98 and 102 while Loyalists killed 21, 103, 80, 104 and 115. See McEvoy, Kieran. ‘Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release.’ Oxford University Press. p.213.

<sup>164</sup> *Ireland v UK*. (1978) 2 EHRR 25. Paragraph 228.

<sup>165</sup> Davis, Fergal. 2004. ‘Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel.’ Available at <http://ssrn.com/abstract=575481> p.17.

feeling of those in Catholic communities. This perception of sectarianism manifestly contributed to the failure of internment in Northern Ireland.

## IX. THE FAILURE OF INTERNMENT IN NORTHERN IRELAND.

The decision to reintroduce internment in Northern Ireland has been referred to as ‘one of the most counterproductive decisions in the Northern Ireland conflict and peace process.’<sup>166</sup> Introduced as a measure to try and curb the terrorist threat it was, in practice, totally ineffective in this regard. Rather than reducing the level of political violence, internment fuelled it’s escalation. As Dickson remarked, the reintroduction of internment was ‘like pouring petrol on to smouldering embers in Northern Ireland.’<sup>167</sup> Statistical evidence shows that in 1972, the first full year of internment, Northern Ireland experienced it’s most violent year: There were 1,382 explosions and 10,628 shootings in the province.<sup>168</sup> This spike in violence has been documented in the work of Kieran McEvoy who observes that ‘the degree and intensity of the violence in the aftermath of internment has not been matched either before or since.’<sup>169</sup>

While the short term effect of the internment was an escalation in violence, it’s long term effects have proven to be more damaging. Speaking in 1975 Brady warned that the internment was ‘sowing dragon’s teeth and ensuring trouble in future generations.’<sup>170</sup> The variety of his warning becomes apparent when one considers the effect of the internment on the Catholic community.

Activated exclusively against suspected Republicans the internment was thus aimed ‘de facto against the Catholic community.’<sup>171</sup> Consequently, it had the effect of alienating a sizeable minority of the population. As Cushnahan observes, ‘despite the two-sided nature of the violence, the internment was exclusively directed against minority areas. At a stroke it alienated the entire catholic community overnight.’<sup>172</sup> This alienation was exacerbated by human rights abuses carried out within the detention facilities.

The human rights abuses carried out during the Northern Ireland internment are well

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<sup>166</sup> Schmitt, David. ‘The US War on Terrorism and Its Impact on the Politics of Accommodation in Northern Ireland.’ Delivered at Queen’s University, Belfast, June 11, 2004. Conference entitled “Interpreting ongoing crises in the Northern Ireland Peace Process: International Dimensions.” Transcript available at [www.qub.ac.uk/csec/Schmitt%20Paper.pdf](http://www.qub.ac.uk/csec/Schmitt%20Paper.pdf)

<sup>167</sup> Dickson, Brice. ‘The Protection of Human Rights: Lessons From Northern Ireland.’ The Paul Sieghart Memorial Lecture, British Institute of Human Rights. King’s College London. 6 April 2000.

<sup>168</sup> ‘Report of a committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland: Statistics of Violence.’ 1975. Chairman, Lord Gardiner. p.61.

<sup>169</sup> McEvoy, Kieran. 2001. ‘Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release.’ Oxford University Press. p.214.

<sup>170</sup> Brady, Brian. 1975. ‘Internment 1971-1975.’ Published Dungannon : Fr. Denis Faul. P.11

<sup>171</sup> McEvoy, Kieran. Above. , n169. p.212.

<sup>172</sup> Cushnahan, John. 2003. ‘Northern Ireland - From Despair to Hope: A Brief Historical Background to the Northern Ireland Conflict.’ Available at <http://www.asef.org/documents/cushnahan.PDF> p.4.

documented. Accounts of former internees reveal the brutal nature of interrogation carried out in the detention facilities.<sup>173</sup> Such abuses prompted international concern. Amnesty international visited in 1974 and in its report concluded that ‘maltreatment of suspected terrorists by the RUC (had) taken place with sufficient frequency to warrant the establishment of a public inquiry to investigate it.’<sup>174</sup> A similar report was made by the International Red Cross.

The Abuses documented in the reports of Amnesty international and the international red cross were substantiated in the case of Ireland v UK with the Government of the Republic of Ireland alleging, inter alia, that various interrogation practices, in particular the so-called ‘five techniques,’<sup>175</sup> amounted to torture and inhuman or degrading treatment contrary to Article 3.<sup>176</sup> Whilst the court held thirteen votes to four that ‘the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3,’<sup>177</sup> the practice was held to be both inhuman and degrading. It was inhuman in that the ‘five techniques were applied in combination, with premeditation and for hours at a time, causing at least intense physical and mental suffering and acute psychiatric disturbances.’ It was degrading as the ‘techniques were such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.’<sup>178</sup>

The Human rights abuses committed during the internment served to further alienate the Catholic community and led to deep feelings of resentment therein. In this regard, the internment served as ‘one of the best recruiting tools the IRA ever had.’<sup>179</sup> Numerous persons who had no previous terrorist affiliations were driven to join outlawed organisations due to the

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<sup>173</sup> see Interview with a former Republican internee. “I was arrested and taken to Girdwood Barracks and beaten by British soldiers and the RUC. I was forced to run a sort of obstacle course while I was beaten with batons and bit by army dogs. Then they took me into a room, placed a heavy bag over my head so I could hardly breathe. I was then handcuffed,, beaten and dragged into a helicopter where they beat me some more and then took off and kept dangling me out of the copter. It was a truly horrendous experience.” Interview with former Republican Internee. 12 May 1998. In McEvoy, Kieran. p.211.

<sup>174</sup> Report of an Amnesty International Mission to Northern Ireland (28 Nov - 6 Dec 1977) Available at <http://cain.ulst.ac.uk/issues/police/docs/amnesty78b.htm#conclusions>

<sup>175</sup> The term five techniques refers to certain interrogation practices adopted by the Northern Ireland and British governments in the early 1970s. These methods were adopted by the Royal Ulster Constabulary on the advice of senior intelligence officials in the United Kingdom government. These five practices were (1) wall-standing, forcing detainees to stand in a stressful position for hours on end. (2) forcing detainees to wear a hood over their head for long periods. (3) exposing them to loud noises. (4) depriving them of sleep. (5) withholding food and drink, or providing insufficient amounts. Although never committed to writing or authorised in any official document, the techniques had been orally taught to members of the RUC by the English Intelligence Centre at a seminar held in April 1971. see Ireland v UK (1978) 2 EHRR 25. at 97.

<sup>176</sup> Under Article 3 of the European Convention of Human Rights “ No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>177</sup> Ireland v UK. (1978) 2 EHRR 25. at 246 (4)

<sup>178</sup> Queen’s University Belfast. ‘International Decisions: Republic of Ireland v United Kingdom (Series A, No.25) European Court of Human Rights.’ Available at <http://www.law.qub.ac.uk/humanrts/ehris/ni/icase/intcaseA.htm>

<sup>179</sup> Former IRA Commander Jim McVeigh, quoted in M. O’Connor and C. Rumann, “Into the Fire: How to avoid getting burned by the same mistakes made fighting Terrorism in Northern Ireland” 24 Cardozo Law Rev. (2005). p.1662.

brutal treatment of internees. As Fields observes, 'when they were initially selected it was clear that many of the men had no political commitment or partisan preferences... The intense crowding and competition, the arousal of hatred and physical aggression, resulted in the polarisation of the internees into two groups, those sympathetic with and committed to the Official IRA and those committed to the Provisionals.'<sup>180</sup>

The internments alienation of a sizeable minority of the population of Northern Ireland not only served as an effective recruiting tool for the IRA but also had a deleterious effect on community cooperation with authorities. Virtually no one in Catholic communities would cooperate in any way with governmental authorities at this time, including groups such as the SDLP who were absolutely opposed to the use of violence.<sup>181</sup> In this respect, by undermining community cooperation with the government, the finding of Lord Gardiner was that the internment served to 'obstruct those elements in Northern Ireland society which could lead to reconciliation.'<sup>182</sup> The true failure of internment was summed up by Desmond Hamill, a member of the British Army who was closely involved in the enforcement of the internment policy. As he remarked,

The British army, as the instrument of internment has become the object of Catholic animosity. Since that day when internment was reintroduced...it has done little to provide a return to a semblance of law and order, a basis for a political solution to Ulster's problems. Ironically, it appears to have produced the opposite effect. . . . It has, in fact, increased terrorist activity, boosted IRA recruitment, Polarised further the Catholic and Protestant communities and reduced the ranks of the much needed Catholic moderates.<sup>183</sup>

After examining the failure of the policy of internment introduced in Northern Ireland during the period 1971-75 it is important to outline the lessons to be learnt from this episode.

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<sup>180</sup> Fields, Rona. 1973. 'A Society on the Run.: A Psychology of Northern Ireland.' Harmondsworth: Penguin. p 47.

<sup>181</sup> see Bew, Paul & Gordon Gillespie. 1993. 'Northern Ireland: A Chronology of The Troubles 1968-1993.' Gill and Macmillan. p.37.

<sup>182</sup> 'Report of a committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland.' 1975. Chairman, Lord Gardiner. Summary of Recommendations, Number 37. Published by HMSO.

<sup>183</sup> Hamill, Desmond. 1985. 'Pig in the Middle: The Army in Northern Ireland.' quoted in CAIN Web Service, Remarks by Serving British Marines Officer following Internment, August 1971, at <http://cain.ulst.ac.uk/issues/politics/docs/bmo9871.htm> (last modified Jan. 8, 2003).

## X. LESSONS FROM THE NORTHERN IRELAND INTERNMENT.

Terrorism exists only when there is some base of support for it within a community. Therefore, in order to counter the terrorist threat today it is necessary to weaken support at the community level. As the Council of Europe has asserted, ‘the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism.’ This is to be achieved by ‘promoting cohesion in our societies and a multicultural and inter-religious dialogue.’<sup>184</sup> However, as the Northern Ireland case shows, a government’s response to terrorism rarely takes the form of long term measures aimed at preventing the causes of terrorism. Usually, the response takes the form of short sighted legislation passed ‘in the superheated environment immediately following a terrorist attack.’<sup>185</sup> This pattern has long held true in Northern Ireland and is apparent in the reaction to the events of September 11 and subsequent terrorist attacks.

As the Northern Ireland case shows, measures introduced which violate human rights merely serve to perpetuate terrorist violence by sustaining community support for the terrorists. Speaking at a recent roundtable discussion at Queen’s University, Victor Ramraj affirmed that the Northern Ireland internment created a ‘perpetual cycle of violence.’<sup>186</sup> The acts of political violence committed by paramilitary organisations led to calls for greater powers to curb the violence. The introduction of Internment and the human rights abuses carried out by the security forces lead to further alienation of the community and an increase in terrorist activity. Today, in the ‘war on terrorism,’ this lesson must not be forgotten.

In fighting terrorism today we need the cooperation of Arab and Muslim citizens. Although the government has frequently protested that the war is not against Arabs or Muslims,<sup>187</sup> by targeting these communities within our society risk ‘alienating law-abiding citizens who would otherwise prove helpful.’<sup>188</sup> As Khan observes, Muslims have an enormous potential to become an important ally in the war against terrorism. If consulted and brought into counter terrorism planning, he suggests they can help us become ‘more effective, more focused,

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<sup>184</sup> Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism. Preamble, H.

<sup>185</sup> O’Connor, Michael & Celia Rumann. 2003. ‘Into the Fire. How to Avoid Getting Burned By the Same Mistakes Made Fighting Terrorism in Northern Ireland.’ *Cardoza Law Review*. Volume 24:4. 1657-1751. p. 1659.

<sup>186</sup> Queen’s University Belfast Human Rights Centre. ‘Human Rights, Terrorism and National Security: A roundtable discussion with Professor Brice Dickson, Professor Tom Hadden, Dr Victor Ramraj and Professor Phil Scraton.’ 24th October 2005.

<sup>187</sup> President George Bush, “ We are not at war with Muslims. We don't have a beef with Muslims. We want to be friends with Muslims and Muslim children.” Speech at Thurgood Marshall Extended Elementary School Washington, D.C. October 25, 2001. Transcript available at <http://www.whitehouse.gov/news/releases/2001/10/20011025-2.html>

<sup>188</sup> O’Connor, Michael & Celia Rumann. Above n.185. p. 1737.

and more cost effective' in our efforts to curb the terrorist threat.<sup>189</sup>

Today, early indications are not promising. As the House of commons Home Affairs Committee concluded, 'community relations have deteriorated...International terrorism and the response to it have contributed to this deterioration, particularly in relations between the majority community and the Muslim community.'<sup>190</sup> Similarly, in the United States, the U.S. Department of Justice Community Relations Service (CRS) has observed such a deterioration in relations.<sup>191</sup>

Internment at detention facilities such as Guantanamo bay and the human rights abuses committed therein serve only to perpetuate terrorist violence and are thus contrary to the aim of preventing terrorist attacks. As the Northern Ireland Commission for Human Rights has stated, 'the experience in Northern Ireland of internment without trial shows clearly that it is both ineffective and counter-productive.'<sup>192</sup>

## Conclusions.

Freedom from executive detention is, as Lord Bingham stated, 'the most fundamental... of human rights.'<sup>193</sup> As such, a general right to liberty is enshrined in the most fundamental rights documents, notably the ICCPR and the ECHR. However, throughout history, in times of emergency, crisis and serious disorder this right has been curtailed. The two models of internment examined in this project reveal the true vulnerability of civil liberties in such times.

The US, faced with a perceived threat to national security, adopted emergency powers culminating in the 'indiscriminate internment of an entire class based solely on their ethnic

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<sup>189</sup> Khan, Muqtedar. 'American Muslims as Allies in the War on Terrorism.' In '*A Practical Guide to Winning the War on Terrorism.*' ed. Adam. Garfinkle, 2004. Hoover Institution Press.

<sup>190</sup> House of Commons Home Affairs Committee. Sixth Report of Session 2004-2005. 'Terrorism and Community Relations: The Government's Response. Britain's communities and community relations.'

<sup>191</sup> see U.S. Department of Justice Community Relations Service. 'Annual Report FY 2004 40th Anniversary Edition: Forty Years of Advancing the Dream: 1964 - 2004' Available at [www.usdoj.gov/crs](http://www.usdoj.gov/crs)

<sup>192</sup> Statement by the Northern Ireland Human Rights Commission to the United Nations Commission on Human Rights' Human Rights In Northern Ireland.' 61st Session, Agenda Item 18(b), Geneva, April. See also, Comments of the Northern Ireland Human Rights Commission on the Fourth Periodic Report of the United Kingdom to the United Nations Committee Against Torture- "The very negative effects of internment without trial in Northern Ireland during the early 1970s gives the Northern Ireland Human Rights Commission a particular insight into the potential effects of the reintroduction of internment under ATCSA."

<sup>193</sup> Bingham, Tom (Lord Bingham of Cornhill) 'Personal Freedom and the Dilemma of Democracies.' Romanes Lecture delivered at the Sheldonian Theatre, University of Oxford, October 2002.

origin.’<sup>194</sup> This was unacceptable as has been recognised by the US government. The policy was biased in its application and disproportionate to the aim pursued. The internment policy implemented in Northern Ireland has also been criticised for its biased application. Although the European Court of Human Rights rejected the claim that the internment was discriminatory in its application, this was the feeling amongst the catholic minority in the province and this manifestly contributed to the failure of internment and the propagation of violence in the province. Therefore, both the US and Northern Ireland model have been widely criticised as being discriminatory. In the US case, this discrimination was racial while in the Northern Ireland case it was discrimination on the grounds of religious affiliation.

### **Lessons from the two models of internment.**

The two models occurred at different times in very different regions but common problems were encountered, allowing common conclusions to be drawn. Internment should only be utilised when it is absolutely necessary. It is a severe restriction on the right to liberty and thus should not be employed lightly. It is vital that up to date and accurate intelligence is gathered before any such information is employed. A lack of such information contributed to the failure of internment in Northern Ireland.<sup>195</sup> However, as the US model shows, it is vital that this information is used. As Davis observes, ‘one of the most disappointing aspects of the US model was that use of available intelligence could have avoided the racist application of the scheme.’<sup>196</sup> Internment must also be used against those who actually pose a risk. The wholesale internment of Japanese Americans was in this regard totally unacceptable. Detention is only legitimate if it is targeted at those who actually pose a risk. To ensure compliance with this it is important that judicial review is available. Such review was available in the US. However, the court simply deferred to the executive’s assertion of wartime necessity. In the modern war on terror, the Supreme Court must show itself to be more resilient to executive encroachments on civil liberties. The recent detention cases both in the UK and the US look promising. Finally, whilst internment is permitted under international law, its effects on society may nevertheless be contrary to the aim of combating terrorism. In Northern Ireland the existence of an emergency in the province was accepted by the European Court of Human Rights and as a result derogation under Article 15.1 was legally possible. Further, the court held that the policy of internment was

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<sup>194</sup> Davis, Fergal. ‘Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel.’ (August 2004). <http://ssrn.com/abstract=575481> p.19.

<sup>195</sup> as Davis suggests, ‘better quality intelligence would have resulted in an improved application of the policy.’ Fergal Davis, *ibid.* p.24.

<sup>196</sup> *ibid.*, p.25.

not discriminatory in its application. However, whilst to the lawyer derogation was permissible and the model non-discriminatory, when applied, the model caused deep and lasting resentment and questions about its legitimacy persist. These issues ‘go to the heart of the internment question.’<sup>197</sup>

In regards to today’s efforts to counter terrorism, the basic balance that must be drawn between civil liberties and national security has been outlined by the Office of the United Nations High Commissioner for Human Rights. Whilst recognising that it is the ‘duty of States to protect those living within their jurisdictions from terrorism,’ it has ‘placed a priority on the question of protecting human rights in the context of counter-terrorism measures.’<sup>198</sup> Similarly, when the Council of Europe adopted its ‘Guidelines on human rights and the fight against terrorism,’ the aim was to reconcile two requirements: ‘defending society and preserving fundamental rights and freedoms.’<sup>199</sup> A continuing area of controversy in regards to this balance is the issue of internment. In reconciling civil liberties today, the lessons from the past assaults on freedoms discussed must not be forgotten. As Stone observes,

That we have made mistakes in the past does not  
mean we should make mistakes in the present.

We should learn from our experience.<sup>200</sup>

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<sup>197</sup> Above, n 194. p.19.

<sup>198</sup> Office of the United Nations High Commissioner for Human Rights. ‘Terrorism and Human Rights: Introduction.’ <http://www.unhchr.ch/terrorism/>

<sup>199</sup> Council of Europe. ‘Guidelines on human rights and the fight against terrorism.’ Adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies.

<sup>200</sup> An amicus curiae (friend of the court) brief on behalf of Fred Korematsu was filed with the Supreme Court by American Constitution Society supporter Geoffrey Stone of the University of Chicago in the cases of *Odah v. U.S.*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*. On the brief with Professor Stone were Professors David Strauss (the faculty advisor of the ACS chapter at Chicago) and Stephen Schulhofer of NYU Law School. Available at [http://www.equaljusticesociety.org/Korematsu\\_amicus\\_brief.pdf](http://www.equaljusticesociety.org/Korematsu_amicus_brief.pdf) at page 18.

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