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DETENTION WITHOUT TRIAL IN THE SECOND WORLD WAR: COMPARING THE BRITISH AND AMERICAN EXPERIENCES

A. W. BRIAN SIMPSON*

National security has long been advanced as a justification for the abrogation of civil liberties. In this lecture, Professor Simpson examines through the analysis of particular cases how two nations dealt with these competing values in the internment without trial of their respective citizens during World War II. Condemning the secrecy and lack of accountability of the authorities responsible for protecting the nation, Simpson issues a call for vigilance and a warning that patterns and habits of respect for liberty will serve better than mere forms of procedure to effectively insure that liberties are not again abandoned to ill-founded claims of defense necessity.

My interest in the detention of citizens, without trial, in Britain during the war of 1939-1945 arose as a byproduct of a more general interest. The study of cases has long been central to the common law tradition. But the legal dramas we examine so minutely are too often both contextless and dehumanized. Real people assume the masks of the law, becoming plaintiffs and defendants, offerors and offerees, grantors and contingent remainderpersons, concealed from us by the forms into which their problems have been packaged for legal analysis. Two English leading cases, decided by the House of Lords on November 3, 1941, strikingly illustrate this point. Their names are

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*Liversidge v. Anderson*¹ and *Greene v. Secretary of State for Home Affairs*.² In both cases individuals, Robert William Liversidge, alias Jack Perlsweig, and Ben Greene respectively, attempted to challenge the legality of their detention without trial under Regulation 18B of the wartime Defense Regulations.³ The defendants in the cases were Sir John Anderson,⁴ Home Secretary in 1939-1940, and his successor, Herbert Morrison, who took office in October 1940.⁵

These cases are regarded as major decisions in English and Commonwealth constitutional law. Their counterparts in the United States are the Supreme Court decisions concerning the treatment, including detention, of Japanese American citizens after the attack on Pearl Harbor on December 7, 1941, particularly the decisions in *Korematsu v. United States*⁶ and *Ex Parte Endo*⁷, both decided on December 18, 1944. These American cases at least reveal the official reason why the individuals were detained; their English counterparts give virtually no indication as to who Liversidge and Greene were, why the authorities had locked them up, and why the government lawyers had been prepared to resist their attempts to secure liberty. There is a real sense in which the reported decisions give no indication as to what the litigation was really about.

I have attempted to recreate the historical context of these cases and to locate them in the general history of civil liberty during the Second World War. This is in part a comparative study. Both in Britain, the original home of the common law, and in the United States of America, its present day principal place of residence, individuals were detained without trial in the name of military necessity or national security. Some few turned to the courts to vindicate that most basic of

1. [1942] A.C. 206, *aff'g* [1941] 2 All E.R. 612 (C.A.) (affirming an unreported decision of Tucker J. which in its turn affirmed a decision of Master Mosley). The litigation concerned interlocutory proceedings principally to compel the government to answer interrogatories; when they failed, the action was withdrawn.

2. [1942] A.C. 284, *aff'g* [1942] 1 K.B. 87 (C.A.). Greene represented himself up to the hearing in the Court of Appeal.

3. Emergency Powers (Defence) General Regulations, S.R. & O. 1939, No. 1681, 18B (Detention Orders).

4. Anderson, later Viscount Waverley (1882-1958), had been a professional civil servant, serving as Permanent Under Secretary of State in the Home Office from 1922-1932 before becoming Governor of Bengal until 1937. He returned to public life in Britain as a Member of Parliament, and in 1939 he became the minister in charge of the Home Office. See generally J. WHEELER-BENNETT, JOHN ANDERSON: VISCOUNT WAVERLEY (1962).

5. Herbert S. Morrison, later Baron Morrison of Lambeth (1888-1965), was a prominent Labour politician brought into Churchill's wartime government. See generally H. MORRISON, HERBERT MORRISON: AN AUTOBIOGRAPHY (1960); G. JONES, HERBERT MORRISON: PORTRAIT OF A POLITICIAN (1977).

6. 323 U.S. 214 (1944).

7. 323 U.S. 283 (1944).

all civil rights, the right to personal freedom. They had little success. In Britain, one individual, a Captain Budd, secured his liberty through habeas corpus proceedings in May 1941.⁸ Curiously enough, the score in the United States seems to have been the same, Mitsuye Endo having secured her complete liberty through legal action in 1944.⁹

The story of detention without trial in America differs from the story in Britain socially, politically and legally. There are nevertheless comparisons and contrasts which are not without interest, and perhaps value. I shall take the British story as my point of departure, and I must explain that I have not myself engaged in any original research into the treatment of the Japanese Americans. The subject has been very fully explored by numerous writers, and I have relied principally upon Peter Irons' *Justice at War*, published in 1983.¹⁰ As yet, no com-

8. The litigation by Budd which led to his release is reported only in *The Times* (London), May 18, 1941, at 9, col. 5. See generally *Ex parte Budd*, [1941] 2 All E.R. 749 (unsuccessfully contesting his rearrest), *aff'd*, [1942] 1 All E.R. 373; *Budd v. Anderson*, [1943] 2 All E.R. 452 (failed suit for false imprisonment). Additional information is in the Public Record Office Treasury Solicitor's papers (PRO TS) containing the files of litigation for the Government. See PRO TS 27/506.

Documents held in the Public Record Office are identified by a system indicating the department of origin. Materials concerning wartime detention are principally found in files labeled TS for Treasury Solicitor, HO for Home Office, and CAB for Cabinet Minutes. Within a departmental heading documents are assigned to a class number, such as HO 45, or HO 144, and a file, and sometimes subfile, number follow. Files are of varying lengths and may contain very large numbers of individual documents.

9. She was at liberty to leave the detention camp at the time of the litigation but remained, as she was still prohibited from returning to California because of the exclusion order. P. IRONS, *JUSTICE AT WAR* 312 (1983). On Sunday, December 17, 1944, the day before the announcement of the Supreme Court's decision in her case, the War Department announced that it intended to release all "[t]hose persons of Japanese ancestry whose records have stood the test of Army scrutiny during the past two years." *Id.* at 345.

10. Peter Irons gives a full account of the matter, and I have relied largely upon his research without any personal checking. P. IRONS, *supra* note 9. Irons' interpretations must be dealt with carefully, however, as he was counsel for Fred Korematsu, Gordon Hirabayashi and Minoru Yasui in actions to reverse their criminal convictions through petitions for writs of *coram nobis*. These cases were *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986) (granting the writ and vacating his conviction for failure to report to a Civil Control Station and denying petition regarding his violation of curfew), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987) (vacating both convictions) and *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating the conviction but noting that the original decision remains "the law of the case").

For reviews of Irons' *Justice at War*, see, e.g., Ball, *Politics Over Law in Wartime: The Japanese Exclusion Cases* (Book Review), 19 HARV. C.R.-C.L. L. REV. 561 (1984) (comments favorably, and incorporates material from his own research); Cohen, *Japanese American Internment* (Book Review), 19 SUFFOLK U.L. REV. 781 (1985) (uncritically praises a "fascinating new book"); Gotanda, "Other Non-Whites" in *American Legal History* (Book Review), 85 COLUM. L. REV. 1186, 1192 (1985) (welcomes new factual material, but argues that Irons' "simplistic moral condemnation lacks the interpretive power to move us beyond previous commentaries")

prehensive investigation of the British experience has been produced.¹¹

Investigation is not easy. Under the policy of freedom of information, a massive body of official American records can be consulted. In Britain, the general rule is that official records are open to public inspection in the Public Records Office after thirty years, but files can be closed for longer periods than this, even up to a century. There is no public accountability for such delay. One might imagine that British government departments would be happy to encourage the writing of the history of Britain's finest hour. Nothing of the sort is the case. Due to an an obsession with secrecy which characterizes the British government, many papers are still unavailable. This obsession is well illustrated by recent actions to prevent the publication and sale of Peter Wright's *Spycatcher*¹² and Joan Miller's *One Girl's War: Personal Exploits in MI5's Most Secret Station*.¹³ For many months I have been

and that "[h]is historical vision similarly fails to move beyond individuals to institutional dimensions"); Murphy, Book Review, 1 CONST. COMMENTARY 327, 328 (1984) (disputes Irons' charges of fraud or conspiratorial behavior on the part of the government and ACLU lawyers, suggesting that there were merely defects within the "normal limits of stupidity, negligence, and error on the part of lawyers"); Sullivan, Book Essay, 60 NOTRE DAME L. REV. 237 (1984) (accepts Irons' version of the factual record, but contends that Irons goes beyond justifiable inferences in arriving at his conclusions of blame and responsibility because of the incompatibility of his roles as historian and advocate); Sunahara, Book Review, 7 SUP. CT. L. REV. 559, 567-68 (1985) (finds *Justice at War* an excellent "example of how legal history can be written" though "by no means neutral," notes the parallel to the British situation in *Liversidge*, and cautions Canadians against the complacent belief that the mere presence of the Charter of Liberties "would prevent a recurrence of the experience of Japanese Canadians during the Second World War").

11. *But see* N. STAMMERS, CIVIL LIBERTIES IN BRITAIN DURING THE 2ND WORLD WAR: A POLITICAL STUDY (1983) (the fullest treatment to date); A. SIMPSON, RHETORIC, REALITY, AND REGULATION 18B (1987) (the Child & Co. Oxford Lecture 1987, dealing with many of the elements of the British detention program addressed here). *See also, e.g.*, B. DOMVILE, FROM ADMIRAL TO CABIN BOY (1947); O. MOSLEY, MY LIFE (1968); R. SKIDELSKY, OSWALD MOSLEY (1975); R. THURLOW, FASCISM IN BRITAIN: A HISTORY, 1918-1985 (1987) (contains much information and is well researched); Goldman, *Defense Regulation 18*, 11 J. OF BRIT. STUD. 120 (1973) (a sound and perfectly respectable effort, but necessarily incomplete as it was produced prior to the release of even the Home Office files now available); Note, *Civil Liberties in Great Britain and Canada During War*, 55 HARV. L. REV. 1006 (1942).

12. P. WRIGHT, *SPYCATCHER* (1987) (the American paperback edition credits the authorship to "Peter Wright with Paul Greengrass"). Wright's ghosted book is generally familiar as a best-seller in America, and is widely available in Britain though banned from publication there. The British government has engaged in unsuccessful efforts to suppress its publication. At the time of writing litigation concerning the book is still in progress in Britain.

13. J. MILLER, *ONE GIRL'S WAR: PERSONAL EXPLOITS IN MI5'S MOST SECRET STATION* (1986). Joan Miller, later known as Joanna Phipps, who died in June 1984, worked as an agent for MI5 ("Military Intelligence 5," the British internal security service) during the war, and in particular penetrated an organization known as the Right Club; her work helped lead to the conviction of one Anna Wolkoff, daughter of a Russian emigre, and Tyler Kent, an American Embassy official, for disloyal activities. *See infra* note 77. There is nothing in Miller's book which could conceivably injure British interests today. The book was published in Eire, the Republic of Ireland, and in later editions (at 157-60) contains an account of the British attempt to prevent its publication by court action.

locked in combat with the Home Office, the British ministry of the interior, on this matter. While I have secured access to some additional documents, I have only been granted what is called "privileged access"; therefore, I have not used this material for this lecture. No files of the British internal intelligence service, called MI5, have ever been released. Indeed, until quite recently the very existence of this institution was always denied by government ministers.¹⁴ Nor have the records of the Home Defence (Security) Executive, set up under Winston Churchill in 1940 to supervise all matters of internal security, ever been generally released, though some minutes are accessible. The Home Office currently holds many files and subfiles dealing with individual detainees, including fifty or so concerned with Ben Greene, to which I have not yet obtained access.¹⁵ Some papers have been destroyed, for reasons at which one can only guess, while others have been "weeded," to use the jargon of this evil trade. Writing the history of the 1940's is rather like writing medieval history—one is engaged in peering through keyholes. However, certain of the lawyers' files used in litigated cases contain copies of some documents otherwise unobtainable and form part of the Treasury Solicitor's papers in the Public Record Office.¹⁶ Some relevant Home Office files, known as the Mosley Papers, were released in June of 1985. Various other documents from withheld files have come to light through copies in available files, even sometimes in United States records. Mr. Edward Greene, son of the late Ben Greene, has also kindly given me access to

14. A valuable account of MI5 and its history is given in C. ANDREW, *SECRET SERVICE: THE MAKING OF THE BRITISH INTELLIGENCE COMMUNITY* (1985). MI5 officers may be either military officers or civilians, but are not police; thus, arrests are carried out by regular police officers belonging to the special branch of the metropolitan police which is under the direction of the Home Office. Andrew provides a bibliography to the considerable popular literature which deals with MI5. The official multi-volume history of British intelligence during the second war, edited under the direction of Sir Harry Hinsley, head of St. John's College, Cambridge, and himself a former intelligence officer, is gravely tainted by a policy of concealment and secrecy, and to date provides virtually no assistance to anyone interested in detention under Defense Regulation 18B, as it excludes consideration of internal surveillance. 1, 2 F. HINSLEY, *BRITISH INTELLIGENCE IN THE SECOND WORLD WAR* (1979 & 1981). No doubt permission to publish, given in 1979, was conditional upon accepting certain restrictions imposed by the government. The research for this work is managed by the Cabinet Office. In the wake of the *Spycatcher* controversy, a history of MI5 that Hinsley wrote with another former intelligence officer, Anthony Simpkins, has had its clearance removed, though he has permission to release his third volume of the more general history. Evans, *Official MI5 History is Shelved to Save Blushes*, *The Times* (London), Feb. 13, 1988, at 24, col. 1.

15. PRO TS 27/522 is, however, available. The case of Ben Greene is discussed in A. MASTERS, *THE MAN WHO WAS M*, at 141-67 (1984); J. MILLER, *supra* note 13, at 94; R. THURLOW, *supra* note 11, at 172, 204, 207, 212, 222.

16. *See supra* note 8.

an extensive collection of family papers, and I have gleaned information from personal interviews.

Both Great Britain and the United States detained or exercised lesser forms of control over noncitizen enemy aliens; the numbers involved in both countries were roughly comparable, approaching 30,000 in Britain and from 35,000 to over 40,000 in the United States.¹⁷ In Britain, the power to detain such people rested on the Royal prerogative, and its exercise could not be challenged in the courts. In the early part of the war a system of classification was adopted, and only very few individuals were actually detained.¹⁸ On May 10, 1940, Winston Churchill assumed office while the war was going very badly indeed. Denmark, Norway, Belgium, Holland, and, almost incredibly, France fell to German military might and the sense of impotence it generated. The British army in Europe was perforce evacuated from the beaches of Dunkirk in late May and early June. Located within artillery range and separated from England by only some twenty miles of sea, enemy forces were preparing to invade. There was widespread, if erroneous, belief that German success had been assisted by a Fifth Column of collaborators, spies, and saboteurs. I can recall the general belief in the ubiquity of spies and agents, and this even in the rather remote Yorkshire village of my childhood. It was in this context that, in June 1940, the government adopted a wholesale policy of interning enemy aliens. Many of these aliens were refugees, often Jews, fleeing from Europe, and the policy met opposition, particularly after the German U-boat commander, Gunther Prien, on July 2, 1940, sank the liner *Arandora Star*, killing

17. For a contemporary analysis of the treatment of aliens see Note, *Alien Enemies and Japanese Americans: A Problem in Wartime Control*, 51 YALE L.J. 1316 (1942). As to the numbers of aliens detained, Neil Stammers gives the figure of 27,000 in Britain, but notes that wartime conditions prevented accurate compilation of statistics. N. STAMMERS, *supra* note 11, at 34. In its statistical report on the relocation program, the War Relocation Authority gave the number of foreign born evacuees under its control as 38,709 on January 1, 1943, and noted an additional 50 already on indefinite leave, for a total of 38,759. WAR RELOCATION AUTHORITY, *THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION* 100 (1946). The Army's final report indicated that there were 41,089 alien Japanese on the West Coast prior to the evacuation, and gave the impression that all would be subject to evacuation, if not internment. UNITED STATES DEP'T OF WAR, *FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST: 1942*, at 84 (1943). Nanette Dembitz, who, according to P. IRONS, *supra* note 9, at 119, served as a staff attorney on the Alien Enemy Control Unit of the Justice Department, suggests that approximately 42,000 of those subject to restraints were aliens. Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945).

18. P. GILLMAN & L. GILLMAN, 'COLLAR THE LOT!' 42-46, 56, 150-53 (1980) [hereinafter GILLMAN].

some 661 aliens in transit to camps in Canada.¹⁹ By the end of 1940 the policy had in effect been reversed, and in the course of the next year large numbers of aliens were released while a serious attempt was made to separate out the minority who could, rationally, be viewed as a threat.²⁰ So far as Japanese aliens are concerned, around 100 out of the 500 or so living in Britain were detained in 1942 and, in the main, repatriated that same year.²¹ Although there is nothing to be proud of in this "bespattered page" of British history, at least it can be said that political and official pressure quite rapidly moved against its most objectionable features. Law and the courts played no part whatever.²²

The legal position of British subjects was quite different, though the political context was much the same. During the 1914-1918 war, when there was violent hostility to persons of German name or nationality, and even to German dogs, legislation in the form of the Defence of the Realm Acts had delegated to the government the power to legislate by Regulation. One such, Regulation 14B, had authorized the detention of British subjects on the ground of their "hostile origin or associations," on the initiative either of the military or an Advisory Committee.²³ Thus, while they could not be held under the Royal Prerogative, they could be held nonetheless. Very modest use had been made of this power. The average number of citizens under detention at any given time was about seventy, though many enemy aliens were detained. Regulation 14B was, at least initially, only used against people who, though technically British subjects, were in substance enemy

19. Prien had become famous when, on October 14, 1939, he penetrated the British fleet anchorage at Scapa Flow in the Orkney Islands off Scotland and sank the battleship *Royal Oak*. This was, by any standards, a remarkable feat, and thought at the time to have been made possible by the collaboration of a spy. The espionage element of the story is now thought to be wrong. See L. FARAGO, *THE GAME OF THE FOXES* 217-19 (1971).

20. See generally GILLMAN, *supra* note 18, at 220-23, 230-36, 257-62; R. STENT, *A BESPATTERED PAGE?* 240-51 (1980).

21. GILLMAN, *supra* note 18, at 286 (relying on the diary of Lt. Col. A. M. Scott, the commander of the detention camp at the time). See also C. HOLMES, *JOHN BULL'S ISLAND: IMMIGRATION AND BRITISH SOCIETY 1871-1971*, at 369 n.206 (1988) (citing HO 215/28, 215/503, HO 214/56).

22. See generally GILLMAN, *supra* note 18; R. STENT, *supra* note 20. There were a number of unsuccessful attempts to challenge detention in the courts. See, e.g., *Ex Parte L.*, [1945] K.B. 7. The case involved a spy called Leopold Hirsch and his wife Olga, who had been detained in Trinidad in 1941 on their way to establish an espionage network in South America. Some of their story can be followed in PRO TS 27/555. They argued that they were not enemy aliens, but lost.

23. Regulation 14B was made under powers conferred by the Defence of the Realm Act, 1914, 4 & 5 Geo. 5, ch. 29, § 1 and the Defence of the Realm (No. 2) Act, 1914, 4 & 5 Geo. 5, ch. 63, § 1. It was upheld as *intra vires* in *The King ex rel. Zadig v. Halliday*, [1916] 1 K.B. 738 (C.A.) *aff'd*, [1917] A.C. 260.

aliens. For example, a German woman who had only lived in Britain for a short time, but had recently married an English husband and who thus would have acquired citizenship, while protected from the exercise of the Royal prerogative, could have been detained under Regulation 14B.²⁴

In 1937, a civil service interdepartmental committee, reporting to the Committee of Imperial Defence, considered what laws and regulations would be needed for the next war and decided that wider powers might be needed to deal with pacifists and communists.²⁵ The interdepartmental committee produced a draft bill, authorizing the making of Defence Regulations by the executive through a mechanism known as an Order in Council. The bill authorized such delegated legislation for, among other things, "the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm."²⁶ The draft regulation allowed the Secretary of State (in effect the Home Secretary)²⁷ to make a detention or restriction order against anyone if the Secretary was "satisfied . . . that with a view to preventing him acting in any manner prejudicial to the public safety, or the defence of the realm, it is necessary to do so."²⁸ Any Order in Council introducing regulations would come before Parliament and could be rejected by an affirmative vote under a procedure known as a "prayer." Otherwise the regulations would become law.²⁹

There being no power of constitutional review in Britain, the limits controlling the secret scheme for national security dreamt up by the interdepartmental committee in 1937 and accepted by the Committee of Imperial Defence on April 21, 1937, were not legal, much less constitutional in the American sense. The constraints were primarily political. The planners feared that the scheme might be defeated if Parliament was able to consider its implications, and for this reason it

24. In the debate in the Commons, John Anderson suggested that the 1939 regulations would be applied in a similarly restrained manner. 352 *PARL. DEB.*, H.C. (5th Ser.) 1863 (1939).

25. The account of the committee, presided over by Sir Claud Schuster, a civil servant in the Lord Chancellor's Department, is based on PRO HO 45/20206, which discusses the position in the earlier war, and on PRO CAB 52/3. At this time it was not suggested that fascists would need to be detained. See generally N. STAMMERS, *supra* note 11, at 7-33.

26. PRO CAB 52/3.

27. British legislation conferring power upon ministers commonly confers power on "The Secretary of State" without specifying which one is intended; this enables any such minister to sign and authorize action in the event of illness or other absence. Of course ministerial powers are exercised on the advice of professional civil servants, and the minister may simply accept their advice without any real consideration of the matter.

28. PRO CAB 52/3.

29. *Id.*

was thought best to keep the scheme on ice until a crisis arose. There were further limitations, difficult to separate from political considerations, which arose from vague but significant principles of political and constitutional morality. These limitations arose in particular from respect for individual freedom and for the rule of law. The force of these principles depended upon their acceptance by the governing elite—ministers, important politicians, and senior civil servants. In a country which wholly lacks the restraints of a formal constitution, such conventions assume a particular importance. In the 1937 scheme these principles found expression in a plan to establish an advisory committee to review cases of detention and make recommendations to the Home Secretary. It was to be chaired by a high court judge, or former judge, and there was to be a right of legal representation before the committee. It was envisaged that two members of Parliament would sit with the judge.³⁰ So, although there was to be executive detention without any proof of wrongdoing, a spirit of legality was to be infused into the whole business through the advisory committee, a sort of watchdog protecting freedom.

As hostilities approached, the head of the internal security service, MI5, Vernon Kell, had Brigadier A.W.A. Harker produce a modest list of fifty potential detainees who would need to be locked up promptly when war came.³¹ The Home Office, with respect for the rule of law, refused his request for detention orders signed in advance “under a power which,” as the Head of the Home Office civil service, Sir Alexander Maxwell, acidly minuted, “does not at present exist.”³² Then in 1939 war came, and the Emergency Powers (Defence) Bill was rushed through a docile Parliament on August 24, 1939. The government faced little trouble, save for an attempt to restore the provision of the draft bill, deleted from the bill actually submitted to Parliament, that a High Court Judge would serve as the Chairman of the Advisory Committee. This attempt failed.³³ The right to legal representation had also been deleted. Later documents I have seen suggest that the civil servants may have been fearful that a real judge might not gracefully accept an advisory role, but I cannot document that this concern was felt in 1939.³⁴

30. *Id.* See also N. STAMMERS, *supra* note 11, at 8-13.

31. See generally C. ANDREW, *supra* note 14, *passim*; A. MASTERS, *supra* note 15, *passim*; R. THURLOW, *supra* note 11, at 182, 200-11. Kell's papers are in the Imperial War Museum; he was the first head of MI5 and was retired on June 10, 1940. He is usually said to have been “sacked,” but was probably merely retired to make way for a younger man.

32. PRO HO 45/25758 (863044) (letter from Maxwell to Kell, May 20, 1939).

33. 351 PARL. DEB., H.C. (5th ser.) 63, 74-76, 90-91 (1939).

34. In 1939, the administrative grade of the British civil service contained virtually no per-

The prepared code of defense regulations was passed into law in two stages. The less draconian, and thus less controversial regulations were passed into law by Order in Council on August 25, 1939. The more draconian, including Regulation 18B, passed into law on September 1 by a second Order in Council, which technically amended the earlier regulations. In order not to upset the numbering of the first set of regulations, those added at the second stage were distinguished by the addition of capital letters; to an original Regulation 18 concerning the designation of approved ports of entry and egress from the United Kingdom was added 18A and our regulation, Regulation 18B.³⁵ The House of Commons rose in revolt at the width and vagueness of the power of executive detention. The government bowed to the political storm and promised to substitute a less objectionable regulation.³⁶ If a vote had gone against the government, all the regulations in the second stage would have ceased to be law. On November

sons of university legal education in positions of seniority, save in the Lord Chancellor's Department. There were lawyer civil servants, but they were and are employed as lawyers, not as generalist civil servants. The explanation for this lies in the low status of legal education. This situation persists today. In the 19th century the position, so far as the Home Office was concerned, was different; the permanent head was always a lawyer barrister, though normally not one with a university legal education.

35. Defence Regulations, S.R. & O. 1939, No. 978 (amending S.R. & O. 1939, No. 927). Regulation 18B thus first appears in what is technically an amended version of the Defence Regulations. Regulations introduced on September 1, 1939 were laid before Parliament on September 5th. This gave an opportunity to object, but the regulations were already law in force.

36. 352 PARL. DEB., H.C. (5th ser.) 1830-1902 (1939). Herbert Morrison was later to administer the revised Defence Regulations as Home Secretary, but on their adoption he was not part of the government and was part of the storm. He challenged the original wording, stating that it gave the executive "really extraordinarily sweeping powers under which, it seems to me, anybody whom the Home Secretary did not like could be hanged, drawn and quartered almost without any reasonable or proper means of defending himself." *Id.* at 1846. Also instructive is this passage:

I am not going to use the argument usually put forward as a matter of courtesy that we do not believe the present Minister would be wicked but that we are afraid his successors might be. I think that any Minister is capable of being wicked when he as a body of regulations like this to administer. . . . Therefore, let us put aside the cant in which we engage that we are sure the present Home Secretary would not do wrong, but that we are not so sure of his successors. We believe that the present Home Secretary is capable of being wicked, and, therefore, the House should be guarded and careful as to the powers which they give to him.

Id. at 1846-47. While he was addressing the original wording of the regulations as a whole, and not specifically Regulation 18B, given the subjective standard applied by the courts to the requirement that the Secretary have "reasonable cause" to believe that an individual fell under the terms of Regulation 18B, knowledge of his earlier position probably would have given bitter amusement to many of those detained under his supervision. Likewise amused might have been those who heard the home secretary respond to criticism of the detainees' inability to challenge their anonymous accusers thus: "I dare say that it would be convenient to a lot of people to be told everything about everybody, but it would not be expedient for the security of the country." 377 PARL. DEB., H.C. (5th Ser.) 1257 (1942).

23, by which time only twenty-six detention orders had been made, an amended Regulation 18B was promulgated and found acceptable by the House of Commons.³⁷

The revised regulation differed from the first version in two important respects. First, it listed categories of people who could be detained. Detainees had "to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts."³⁸ Administrative practice treated all this as producing two basic categories—those of hostile association and/or origins on the one hand, and those who had recently been getting up to prejudicial acts on the other.³⁹ Second, the Home Secretary had to have "reasonable cause to believe" both that the detainee fell into one or more categories, and that "by reason thereof" it was necessary to detain him or her.⁴⁰ Furthermore, under the scheme, detained individuals were to have the right to make representations to the Home Secretary and to object to detention and place their case before the Advisory Committee. The committee chairman had a duty "to inform the objector of the grounds on which the order was made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case."⁴¹ Thus, on detention the detainee had to be informed of his rights, such as they were. In addition, the Home Office had to make monthly statistical returns to Parliament, indicating how many orders had been made and people detained and released (though not giving names), and setting out the degree to which the recommendations of the Advisory Committee had been acted upon.⁴² A very well-known barrister, Norman Birkett, was made chairman of the Advisory Committee.⁴³ To emphasize its inde-

37. Emergency Powers (Defence) General Regulations, S.R. & O. 1939, No. 1681, 18B(1) (replacing S.R. & O. 1939, No. 978, 18B(1)). In fact, detentions began before Regulation 18B was revised, and as of December 1939, 24 individuals then held had been interned under the original Regulation. Of these, 12 were suspected of espionage. PRO HO 45/25758 (863044/17).

38. Emergency Powers (Defence) General Regulations, S.R. & O. 1939, No. 1681, 18B(1).

39. PRO HO 45/25758. This file is the principal source for the ensuing discussion of the administration of Regulation 18B.

40. *Id.*

41. *Id.*

42. Emergency Powers (Defence) General Regulations, S.R. & O. 1939, No. 1681, 18B(6).

43. William Norman Birkett, later Baron Birkett (1883-1962) was featured in many causes celebres in the period 1920-1939. Birkett became a judge on November 24, 1941, and continued to act as Chairman. H. MONTGOMERY-HYDE, NORMAN BIRKETT 469-70 (1964). He was later a Lord Justice of Appeal and eventually a House of Lords judge. Birkett appears to have been a somewhat compliant individual, who maintained a cordial relation with the Home Office officials. In 1957, he issued an official report on telephone tapping which assisted in the legitimation of this practice, long organized by the Home Office and now much in use in Britain. COMMITTEE

pendence from the Home Office the Committee operated from distinct premises, and its Secretary was not a Home Office civil servant, but a retired diplomat, G.P. Churchill, who did the job for free.⁴⁴

Let us now compare what happened in America. On December 7, 1941, Japan attacked Pearl Harbor. The formal steps which led to the detention of American citizens were introduced, not in the relatively placid conditions of Britain in 1939—when, as I recall, we were cheerfully singing the popular song:

We'll hang out the washing on the Siegfried Line;
if the Siegfried Line's still there

—but in conditions of alarm at times bordering on panic, and worse. The states along the Pacific coastline, where the next attack was feared, contained many people of Japanese ancestry who had long been the target of feelings of racial hostility, and this hostility combined readily with invasion fears to drive reason from the field.

Introduced in this very different context the formal legal steps employed to legitimize military control, mass displacement, and eventual internment of Japanese Americans were, in comparison to their British equivalents, perfunctory. No attempt was made to set clear limits to the powers conferred. One can only speculate, but if the British Defence Regulations had been brought to Parliament in desperate conditions rather than in the placid, if tense, early days of the war,

OF PRIVY COUNCILLORS, INTERCEPTION OF COMMUNICATIONS, 1957, CMND SER. 4, No. 283. Birkett was actually the second chairman of the Advisory Committee. The first, Walter Monkton, had only served briefly, and by the time the Commons addressed the Order in Council, October 31, 1939, less than two months after the initial submission of the Defence Regulations, Sir John Anderson named both men as acting as chairman alternately. 352 PARL. DEB., H.C. (5th ser.) 1852-1856 (1939). Monkton was also a well-known barrister, having been the Duke of Windsor's adviser during the abdication crisis.

44. PRO HO 283/22 contains G.P. Churchill's account of the Advisory Committee's work. The Committee operated at first from 6 Burlington Gardens in London and later from the Berystede Hotel (still in business) at Ascot, near the winter quarters of Bertram Mills Circus, where detainees were held, replacing the elephants, tigers, and clowns who had resided there out of season in happier times. In March, 1941, G.P. Churchill was replaced by Miss Jenifer M. Fischer Williams, then a civil servant in the Home Office. The change in the staffing of the Committee represented a move towards incorporating it in the Home Office. Formerly private secretary to Alexander Maxwell, the Permanent Under Secretary at the Home Office, Miss Williams had worked on subjects connected with M15 activities prior to her appointment to the Committee. In 1941 she married H.L.A. Hart, then a lawyer employed by M15, though not in connection with detention, who after the war became an academic in Oxford. This discussion of the operations of the Committee is also based upon PRO HO 283/21, 283/22, HO 45/25754, TS 27/495, 27/501, 27/513, 27/514, and 27/542. The Home Office files deal with the procedures of the Advisory Committee generally, while the Treasury Solicitors' files provide information based on the handling of specific cases litigated in the courts. See also B. DOMVILLE, *supra* note 11; O. MOSLEY, *supra* note 11; R. SKIDELSKY, *supra* note 11; R. THURLOW, *supra* note 11, at 180-232.

perhaps they too would have been more perfunctory. As we shall see, once conditions in Britain became alarming in May and June of 1940, a definite air of muddle likewise became apparent. Be that as it may, on February 19, 1942, President Roosevelt issued Executive Order Number 9066, which provided that military commanders might prescribe military areas from which "any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military commander may impose in his discretion."⁴⁵ The stated reason for the order was "the protection against espionage and against sabotage of national-defense material, national-defense premises, and national-defense utilities."⁴⁶ On March 21, 1942, Congress gave teeth to orders made under the executive order by General DeWitt, the west coast military commander by enacting Public Law 503. The Act made it a misdemeanor for anyone knowingly to "enter, remain in, leave, or commit any act in any military area or military zone prescribed by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander."⁴⁷

Between March and May of 1942, General DeWitt issued a number of proclamations making the western states into military zones. Persons of Japanese ancestry, whether aliens or citizens, were subjected to a curfew and other restrictions. They were also progressively excluded from defined zones and told to report to collecting points for evacuation. By the end of October 1942, around 112,000 Americans of Japanese ancestry, over 65,000 of them United States citizens, were detained in camps outside the supposedly threatened zones.⁴⁸ Many

45. Exec. Order No. 9,066, 3 C.F.R. 1092 (1938-1943).

46. *Id.*

47. Act of March 21, 1942, ch. 191, 56 Stat. 173 (1942). No indication was given during the perfunctory debate on the bill that it was to be the basis for a policy of mass detention. P. IRONS, *supra* note 9, at 65-68. Nor was there any such notice in the text of the brief act:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both for each offense.

Act of March 21, 1942, ch. 191, 56 Stat. 173 (1942).

48. P. IRONS, *supra* note 9, at 68-73.

Americans of Japanese ancestry were simply American citizens; others enjoyed dual nationality under then Japanese law.⁴⁹ The justification advanced for their exculsion and detention was that the Japanese American population contained, to a greater extent than any other defined group, individuals who were potentially disloyal and who might engage in espionage and sabotage, and further that it was not possible to identify who they were, or at least not possible to do so quickly. Therefore, it was all too successfully claimed, that the only solution was to control, evacuate, and, eventually, detain them all.⁵⁰ Plainly, this justification reflected the racial stereotype of the inscrutable oriental. In conformity with this prejudice no attempt was made after hostilities began to establish individual potential for disloyalty, much less any sort of disloyal action. The results of earlier efforts to determine individual culpability or potential for such disloyalty on the part of Japanese Americans were ignored.⁵¹ The detainees were to spend between two and three years in camps under very disagreeable conditions.⁵²

What now seems bizarre is the absence, both in the Executive Order and in the legislation, of any explicit reference whatsoever to the establishment of a system of detention of citizens—without trial, without set term, and without any kind of safeguards. It seems to me quite inconceivable that anyone voting to enact Public Law 503 in 1942 could have supposed from its text that they were approving a system of mass detention. Nor was this indicated as the policy at the time.⁵³

By comparison with what happened on the west coast, the use of Regulation 18B in Britain was modest in the extreme. By the end of April 1940 only 136 orders had been made, and only fifty-eight persons remained in detention.⁵⁴ In the whole course of the war only

49. The legal background to internment and the law on dual citizenship is discussed fully in Note, *Alien Enemies and Japanese Americans: A Problem of Wartime Control*, 51 YALE L.J. 1316 (1942).

50. See P. IRONS, *supra* note 9, at 52-54.

51. Peter Irons details FBI and Naval Intelligence efforts to evaluate the loyalty of particular groups and individuals within the Japanese alien community prior to the war. A list with between 2000 and 3000 names was compiled. However, with the commencement of hostilities, the intelligence community's conclusions as to the scope of potential espionage activity were disregarded, as was its belief that the loyalty of Japanese Americans could be determined on individual grounds. *Id.* at 19-22, 280-87.

52. *Id.* at 73-74.

53. See J. TENBROEK, E. BARNHART, & F. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* 111-16 (1964) [hereinafter J. TENBROEK].

54. REPORT BY THE SECRETARY OF STATE AS TO THE ACTION TAKEN UNDER REGULATION 18B OF THE DEFENCE (GENERAL) REGULATIONS, 1939, DURING THE PERIOD 1ST APRIL, 1940, TO 30TH APRIL, 1940 (May 21, 1940), reprinted in 4 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1939-1940, at 203 (for Sept. 1939 through Sept. 1940). The other reports by the Secretary of State are

1,847 detention orders were made,⁵⁵ along with an uncertain number of restriction orders imposing limits on residence, requirements to report changes of address, and other requirements, such as curfew. A longer list of detainees, the "invasion list," existed, but was never implemented.⁵⁶ Early use of detention was largely confined to persons thought to be involved in espionage. Though some few members of the Irish Republican Army were arrested, they were released on condition that they return home.⁵⁷

The administrative arrangements in the early years of the war were characterized by a sort of bureaucratic elegance. The initiative for detention normally came from M15, though it could originate with the police, who made a recommendation to the Home Office. This converted the human being involved into the essential subject matter of bureaucratic action—a file. The civil servants in the relevant department of the Home Office then passed the file up the bureaucracy with recommendations noted on the docket. If they favored an order, it would end up on the Home Secretary's desk, passing first over the desk of the Permanent Under Secretary, Sir Alexander Maxwell. A draft order would be attached for signature. Sir John Anderson would then sign an order, after having looked at the file and no doubt discussing any points which arose with his officials. The order would be sent in triplicate to the local Chief Constable of Police, and the individual would be arrested by a police officer. Elaborate arrangements were set up to ensure that the detainee knew of his or her rights, and the individual received one copy of the order. A second copy would be given to the Prison Governor to justify his receipt of the detainee, and

also reprinted in the published Parliamentary Papers. 4 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1940-1941, at 247 (for Oct. 1940 through Sept. 1941); 4 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1941-1942, at 221 (for Oct. 1941 through Aug. 1942); 4 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1942-1943, at 345 (for Sept. 1942 through Sept. 1943); 3 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1943-1944, at 227 (for Oct. 1943 through Oct. 1944); 5 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1944-1945, at 75 (for Nov. 1944 through May 9, 1945)). These statistics may not be entirely accurate for the peak period of internment in the summer of 1940; there has been some suspicious weeding of files in the Public Record Office, and there is no doubt that the staff was then overworked. However, there is no reason to doubt that the figures are more or less right.

55. See PRO HO 45/25758.

56. See PRO HO 45/25718.

57. There are brief but clear references to this in the REPORT OF THE SECRETARY OF STATE AS TO THE ACTION TAKEN UNDER REGULATION 18B OF THE DEFENCE (GENERAL) REGULATIONS, 1939, DURING THE PERIOD 1ST SEPTEMBER, 1939, TO 30TH NOVEMBER, 1939 (Dec. 1939) and the REPORT OF THE SECRETARY OF STATE AS TO THE ACTION TAKEN UNDER REGULATION 18B OF THE DEFENCE (GENERAL) REGULATIONS, 1939, DURING THE PERIOD 1ST SEPTEMBER, 1939, TO 31ST DECEMBER, 1939 (Jan. 1940) reprinted in 4 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS 1939-1940, at 203, 205. The 11 individuals concerned were among the first detained. Returns after December 1940 make no special mention of detainees of Irish nationality.

the third copy returned to the Home Office endorsed with a note of the arrest and information as to the results of a personal search.⁵⁸ The case would then, if the detainee wished, go to the Advisory Committee. So far as I can judge, the Committee made the first extensive inquiry into the strength of the case made by M15, since MI5 recommendations were normally accepted by the officials in the Home Office unless they were on their face peculiar. The policy was to detain first and review later.

At this point, a document called the "Reasons for Order," setting out the "grounds" for the order and the "particulars," was prepared.⁵⁹ This was done by lawyers, recruited to work in M15 during the war, rather than by regular MI5 officers. These lawyers worked in a London prison, Wormwood Scrubs, early in the war, and later in Blenheim Palace near Oxford.⁶⁰ They had access to M15's extensive personal files.⁶¹ This "Reasons for Order" was given to the detainee. The "grounds" were legalistic and consisted of a recital of the relevant terms of Regulation 18B, indicating that the detention was based on "hostile associations" or "acts prejudicial" or whatever. The "particulars" consisted of a laconic statement amplifying the grounds, but never giving any indication of the evidentiary basis relied upon by MI5.

MI5 also prepared, for the use of the Committee, a much fuller document which the detainee did not see, called the "Statement of the Case." The "particulars" were an expurgated version of this longer document, normally produced by MI5's lawyers, but occasionally written by the Chairman himself or the Secretary. Using the "Statement of the Case," the Committee, usually in the person of Norman

58. The procedures were governed by a letter known as "the Maxwell letter," which had been drafted by Sir Alexander Maxwell and sent to all chief officers of police. Maxwell was the permanent head of the Home Office from 1938-1948. This letter is available in PRO TS 27/511. In Britain, the Metropolitan police force is under the direct control of the Home Office; other police forces are, by a sort of fiction, supposed not to be under ministerial control, though in reality they are regularly directed by the Home Office, which issues policy circulars. One of the advantages of the fiction is that the Home Secretary is not treated as responsible for provincial police forces.

59. The following discussion draws particularly on PRO TS 27/495, 27/507, 27/513, 27/514, and 27/542, but also reflects information obtained in personal interviews with participants and from the run of files found in the Public Record Office.

60. In the records of the Public Record Office, I have noted S.H. Noakes, E.B. Stamp, H.P.J. Milmo, G. St. C. Pilcher, and A.A. Gordon-Clark (better known as the popular novelist Cyril Hare) all of whom subsequently became judges, and J.L.S. Hale and T.M. Shelford, who did not. Other lawyers, such as H.L.A. Hart, who worked for MI5, were not engaged in this work. This list is only partial, but serves to indicate the character of MI5's legal department.

61. On these files, to which there was a card index, see C. ANDREW, *supra* note 14, at 241-43, 478-79. Some were lost to German bombing in November of 1940. See also A. MASTERS, *supra* note 15, at 113; J. MILLER, *supra* note 13, at 55.

Birkett, conducted an inquisitorial examination of the detainee. The detainees had the right to make whatever points they wished, so long as they could get a word in edgewise, for Birkett, like many English barristers and some law professors, was a powerful talker. The proceedings have been described as combining elements of a court martial with an ecclesiastical tea party.⁶² The detainee was never allowed to confront or question witnesses, and apparently only very rarely were any witnesses seen even in the absence of the detainee. Virtually never did the Committee, so far as I can tell, see MI5 agents, upon whose investigations many cases depended, or even the agents' case officers. A transcript was made, and the Committee then made its recommendation, principally on its feeling for the case after the examination, in a written report. It also might make suggestions, carefully distinguished from its formal advice, since the rate of compliance with suggestions was not required to be reported to Parliament.

Birkett explained in a memorandum at the time that all doubts were resolved "in favour of the country and against the individual."⁶³ He also explained that "the absence of legal assistance placed the appellant in no real disability, for they [the committee members] regarded it as a duty to assist the appellant to formulate and express the answers he desired to make."⁶⁴ No doubt this explained the happy relationship between the Committee and the Home Office. While Sir John Anderson was the Minister, that is until early October of 1940, all recommendations from the Committee, whether for release, release subject to restrictions, or continued detention, were accepted. In effect, Anderson was delegating the decisions to the Committee, which indeed did recommend release in a considerable number of cases. Given the fairly short interval between detention and appearance before the Advisory Committee, a matter of weeks only, the system did not operate too badly, and its operation was, at this period, scrupulously correct within the legal framework provided by the Defence Regulations. The principal difficulty faced by detainees was that under this procedure the case against them was never really revealed. The Committee did

62. See R. THURLOW, *supra* note 11, at 215-16.

63. PRO HO 45/25754 (memorandum of Jan. 10, 1940). Birkett's memorandum dealt with the evaluation of particular cases, but is strikingly paralleled by a memorandum prepared for United States Attorney General Biddle as part of the American policy making process. "In time of national peril any reasonable doubt' about the loyalty of Japanese Americans 'must be resolved in favor of action to preserve the national safety,' [Benjamin] Cohen [one of Biddle's advisors] and his colleagues wrote." P. IRONS, *supra* note 9, at 54 (quoting Memorandum, "The Japanese Situation on the West Coast," File 146-13-7-2-0, Records of the Alien Enemy Control Unit, Department of Justice).

64. PRO HO 45/25754 (memorandum of Jan. 10, 1940). Lawyers were allowed to assist a detainee in preparing his or her case.

not in any real sense investigate the case for or against the detainees, nor could it direct any investigation by MI5, which it did not control. All it did was interrogate the detainees and listen to their answers, and on this basis, and on the "Statement of the Case," express opinions.

In early summer of 1940 the "phoney war" ended and the real war began, producing conditions in Britain which appeared as, or more, desperate than conditions were to appear in America after the shock of Pearl Harbor. Winston Churchill took office on May 10, and on May 15 the policy of mass internment of aliens was authorized by the Cabinet; Churchill favored this at the time but later came round to a more liberal view.⁶⁵ The scale of detention under Regulation 18B also rose sharply in June and July of 1940 under these policies, again initially supported by Churchill.⁶⁶ At the end of May there were 131 detainees, at the end of July, 1378. The number remained above a thousand until the end of 1940, and then fell steadily as detainees were released.⁶⁷ In late 1940 and 1941 considerable conflict arose between MI5 and the Advisory Committee, which MI5 thought was far too liberal, but the Cabinet backed the Committee and release continued.⁶⁸ By the end of 1942, there were 486 detainees, by the end of 1943, 266, by the end of 1944, 65, and at the end of the War in Europe, 11, of whom 10 were at once released and 1, in fact an alien, deported.⁶⁹ These are dramatically below the American figures, and on average they involved shorter periods of detention. Most detainees were kept in camps, but a small number of prominent detainees and individuals regarded as difficult to control were housed in prisons, notably Brixton Prison in London. Officially, those interned under Regulation 18B were held in reasonable conditions, but in reality their situation was one of some considerable squalor.⁷⁰ The detained aliens

65. PRO CAB 67/7. At first the Home Office resisted any considerable increase in the scale of detention, but Anderson had to bow to political pressure. GILLMAN, *supra* note 18, at 131-45; N. STAMMERS, *supra* note 11, at 34-62. See also M. GILBERT, *FINEST HOUR: WINSTON S. CHURCHILL 1939-1941*, at 342, 420, 485, 491-98 (1983) [hereinafter *FINEST HOUR*]; M. GILBERT, *ROAD TO VICTORY: WINSTON S. CHURCHILL 1941-1945*, at 566-67 (1986) (referring to release of Sir Oswald Mosley).

66. Figures are taken from the returns to Parliament. See *supra* note 54.

67. See N. STAMMERS, *supra* note 11, at 66-68.

68. This can be followed in PRO HO 45/25754. By this time the original Advisory Committee had taken to sitting in three panels to enable it to catch up on the work involved.

69. This alien may have been Leopold Hirsch. A number of individuals of uncertain citizenship were detained under 18B, rather than under the prerogative, so as to be on the safe side if the legality of their detention was challenged. Hirsch was such an individual, since he, as a Jew, had been deprived of his German citizenship by Nazi racial laws and, if the English courts were to recognize these laws, he would not have ranked as an enemy alien. PRO TS 27/555. See also *Ex parte L.*, [1945] K.B. 7.

70. INSTRUCTIONS ISSUED BY THE SECRETARY OF STATE WITH REGARD TO THE DETENTION IN

were also kept in bad and sometimes appalling conditions.⁷¹

The paucity of available records makes it extraordinarily difficult to discover just which of its citizens the British government saw fit to detain without benefit of trial. Nor is it possible to make a detailed breakdown into categories. No nominal roll exists, and an internal history written by a Home Office civil servant after the war, originally intended to form part of a general departmental history, has, so I am assured, been destroyed.⁷² Why this act of vandalism occurred, or who authorized it, I have no idea. However, the largest single group of detainees consisted of former members of the British Union of Fascists, the leading fascist party, led by Sir Oswald Mosley. In 1939, it had around 20,000 members, many of whom were not very active.⁷³ On May 22, 1940, the Cabinet decided to intern twenty-five to thirty leading lights of the party, including Sir Oswald and his wife.⁷⁴ The probable reason for this, it has been suggested, was not the belief that Mosley and his followers were disloyal—they were indeed in the main ostentatiously patriotic. Nor was the reason their anti-Semitism. It was the belief, given the risk of invasion and the grim state of the war, that Mosley, in collaboration with a group of other fellow travellers of the right, hoped to arrange a negotiated peace with Hitler, one that

PRISON ESTABLISHMENTS OF PERSONS DETAINED IN PURSUANCE OF REGULATION 18B, 1939, CMND. SER. 3, No. 6162, *reprinted in* 10 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS, 1939-1940, at 87 (referring to the custodial rather than punitive purpose of their incarceration). For a particularly vivid account of the conditions facing the detainees at Brixton, see generally B. DOMVILE, *supra* note 11, detailing the indignities the author faced there.

71. See R. STENT, *supra* note 20, at 83-94, 134-55.

72. I know of only two published or available breakdowns later than a list compiled in December 1939 of 24 persons detained under the original form of 18B. In a debate in November 1941, Herbert Morrison said that of the 1,769 persons detained, 902 were detained on grounds of hostile origin or association, 753 were detained under 18B(1A) as members of the British Union of Fascists, and 114 were held for acts prejudicial to the realm, at least 14 of these having been associated with the Irish Republican Army (IRA). Of those totals detained, only 375 with hostile origins or associations, 217 Fascists, and 71 accused of engaging in prejudicial acts, including the IRA members, were still in detention. 376 PARL. DEB., H.C. (5th ser.) 849-52 (1941). Morrison later reported that of the 529 detainees remaining in July 1942, 322 were persons of hostile origins or associations, 14 were detained under 18B(1A) as members or former members of the British Union of Fascists, and 66 were detained for acts prejudicial. 381 PARL. DEB., H.C. (5th ser.) 1516 (1942).

73. Sir Oswald Ernold Mosley (1896-1980) was a brilliant, if maverick, figure in British politics, starting life as a left-winger and then moving to the far right. See O. MOSLEY, *supra* note 11 (largely a work of self-justification); N. MOSLEY, *RULES OF THE GAME* (1982) (more reliable, though by his son). An excellent account of Mosley's party is given by Richard Thurlow. Thurlow made extensive use of the large collection of papers connected with internment released to the Public Record Office in 1985 and known as "The Mosley Papers," though many do not in fact concern Mosley or his followers. These papers appear to have been extensively weeded, and one can only speculate as to why some have been released and others withheld. R. THURLOW, *supra* note 11, at 92-162, 305 (excellent guide to bibliographic information).

74. PRO CAB 65/7; see also *FINEST HOUR*, *supra* note 65, at 485-86.

would put Mosley in office as Prime Minister.⁷⁵ It is possible that the Duke of Windsor, formerly King Edward VII, was involved in some way in such a scheme, a fact which, if true, would do much to explain the official resistance to disclosure of records.⁷⁶ Much information on neofascist groups, particularly on an organization known as The Right Club, came to light on May 20, 1940, when intelligence officers searched the apartment of one Tyler Gatewood Kent, an American cipher clerk engaged in disloyal activities in the United States Embassy. This disclosure of rightist espionage may have triggered action.⁷⁷

What is, however, a little implausible about this explanation is that, had the war gone even worse, the people who would have likely negotiated a peace would surely not have been Oswald Mosley and his curious and politically insignificant bedfellows, such as Admiral Domville and the Marquess of Tavistock, but Conservative Party ministers, particularly Lord Halifax and Mr. R.A.B. Butler at the Foreign Office.⁷⁸ Even after Winston Churchill came to power, the Foreign Office continued to explore possibilities of a peace settlement. I incline to the view that since virtually nothing could be done to harm Hitler until the United States could be brought into the war, Churchill's enthusiasm for internment in 1940 was driven by his desire to appear to be taking ruthless and vigorous action. Thereby he sought to counter-

75. This is the view taken in R. THURLow, *supra* note 11, at 188-232. If so, the impetus for the detention would have come from MI5, the case officers particularly concerned being either Maxwell-Knight or Anthony Blunt, who later turned out to have been a Soviet agent. Evidence for the secret meetings exists in the diaries of Admiral Domville, now in the National Maritime Museum. I have not yet had an opportunity to consult these, and rely on Thurlow. *Id.* at 164, 180-86. Alternatively, the Gillmans suggest that political battles within the government were responsible for the handling of the Fascists. The opponents of Sir John Anderson are credited with perhaps having orchestrated his ouster in part through the management of the Tyler Kent and Mosley affairs. GILLMAN, *supra* note 18, at 115-29.

76. For information on the Duke's activities, see *FINEST HOUR*, *supra* note 65, at 698-709, 894, 1091 n.1. See also A. CAVE BROWN, "C" THE SECRET LIFE OF SIR STEWART MENZIES, SPYMASTER TO WINSTON CHURCHILL 272-76, 185-86, 676 (1987). After the war, in 1946 or 1946, Anthony Blunt is said to have recovered from Germany some documents embarrassing to the Royal Family, presumably connected with Blunt's wartime surveillance of British right-wing groups in 1940. See C. PINCHER, TOO SECRET TOO LONG 451 (1984) (Pincher relies on undisclosed sources. One of his sources was Peter Wright, author, or at least source, of *Spycatcher*); P. WRIGHT, *supra* note 12, at 273.

77. See L. FARAGO, *supra* note 19, at 338, 341-45; A. MASTERS, *supra* note 15, at 86-87; J. MILLER, *supra* note 13, at 21-38; R. THURLow, *supra* note 11, at 163-232. For an account of the sentences passed (the trial was in camera), see *The Times* (London), Nov. 8, 1940, at 2, col. 3. There is a transcript of the trial in PRO HO 45/25741, and one in the Yale University Library. See also *FINEST HOUR*, *supra* note 65, at 485-86. It must be noted that much of the literature of espionage and security during the war period is of a popular nature, and of necessity makes bricks with little straw. Such information as does exist tends to be recycled.

78. See *FINEST HOUR*, *supra* note 65, at 190, 598-99, 607, 694-95.

act the view adopted by, among others, United States Ambassador Joseph Kennedy, that Britain would soon capitulate. This ruthlessness was demonstrated most dramatically by the decision to engage and destroy major elements of the French fleet at Mers el Kebir and elsewhere early in July.⁷⁹ Whether this action was necessary has been much disputed since; what is clear, however, is that it effectively portrayed Britain as serious in its determination to continue the war.

For whatever reason, the government decided to cripple the party more effectively by detaining a further 350 or so local officials of the British Union of Fascists.⁸⁰ Somewhere around 750 individuals connected with the party, with other right-wing groups, or with resistance to the war were eventually detained (all numbers are of necessity only approximate). The discrepancy between the figure of detainees planned and the larger number actually detained reflects the fact that detention had gotten out of the control of both the security service and the Home Office. Those detained apparently included members of the Link, an organization of Anglo-German friendship founded by Admiral Sir Barry Domvile, the National Socialist League, a splinter group of the British Union, and the Right Club, in particular a Member of Parliament, Captain Maule Ramsay.⁸¹

The detention of members of the British Union could not lawfully be carried out under the existing Regulation 18B, since the Fascists were neither guilty of acts prejudicial nor were they of hostile origin or associations. The Regulation, therefore, was amended on May 22 to permit the detention of members, or past members, or supporters of certain organizations upon the ground of membership or support alone. Such organizations had to be, in the view of the Home Secretary, subject to foreign influence or control, or have leaders who had, or had had, associations with leaders of enemy governments, or who had sympathized with the system of government of enemy powers.⁸² The new section of the Regulation, 18B(1A), was only used against the British Union of Fascists, and not against other right-wing or left-wing groups. But the British Union was, in May of 1940, perfectly

79. *Id.* at 628-45.

80. See R. THURLOW, *supra* note 11, at 211. Thurlow, relying on PRO HO 45/25754, gives a total of 750.

81. See generally *id.*; R. GRIFFITHS, *FELLOW TRAVELLERS OF THE RIGHT* (1980). Captain Archibald H.M. Ramsay (known as Maule Ramsay) was the only serving member of Parliament detained; he had been indirectly involved in Tyler Kent's theft of documents from the United States Embassy. He may have been detained to silence him in Parliament, since he seems to have opposed Churchill's effort to bring the United States into the war. No peer was ever detained, though some might well have been—a speculation is that it was feared that a detained peer might have secured too much support from other members of the House of Lords.

82. Defence Regulations, S.R. & O. 1940, No. 770, 18B(1A) (Detention Orders).

legal. Somewhat belatedly, on June 26, a further Defence Regulation⁸³ allowed the Home Secretary to proscribe organizations, which he did in the case of the British Union on July 10, 1940.⁸⁴ By this time some 400 of its members had been detained for membership in a political party which had been entirely legal at the time they had been associated with it. Three hundred or more individuals with fascist connections, but who had never been in the party, were detained under the original 18B—the inadequacy of the records makes it impossible to say more than that some stretching of the conceptions of “acts prejudicial” or “hostile associations” must necessarily have been involved.⁸⁵

The second largest identifiable group of detainees, numbering between 550 and 600, comprised persons of British citizenship but Italian descent, many being members of the Italian Fascist Party.⁸⁶ Some may have only recently obtained British citizenship. They were detained after Italy entered the war on June 10, 1940, under an order signed earlier with the date left blank. Many of these individuals had joined the party through pressure exerted on relatives in Italy. Consequently membership in the party did not necessarily entail any actual commitment to fascism. As these persons could be lawfully detained as being of Italian origin or associations within the terms of the 1939 Regulation 18B, no new regulation was needed.

More than forty years later, around 550 other detainees remain largely unknown. The forces which led to the selective abridgement of the forms of ordered liberty were not entirely impartial or lacking in apparent caprice. Although at least one Communist, John Mason, is known to have been interned, members of the Communist Party were not detained simply because of membership.⁸⁷ This lack of suppression warrants some suspicion since, until Germany attacked Russia, the Communist Party actively opposed the war and would have been a likely subject of government attention. Although the party headquarters was bugged, Roger Hollis, the responsible MI5 officer, is said to have assured the Home Office of the loyalty of the Communist

83. Defence Regulations, S.R. & O. 1940, No. 1078, 18AA (Control and Winding Up of Certain Organisations).

84. S.R. & O. 1940, No. 1273.

85. See generally *supra* note 54 and accompanying text.

86. See PRO TS 27/509, HO 45/25758 (863044/59). The plan was to intern all members of the Fascio, and all persons of Italian origin between 16 and 70 years of age with less than 20 years residence in Britain. Some 4100 Italians were detained under the prerogative as enemy aliens.

87. See N. STAMMERS, *supra* note 11, at 65 (referring to R. CROUCHER, *ENGINEERS AT WAR* 92-93 (1982)); 369 PARL. DEB., H.C. (5th ser.) 273-74 (1941).

Party.⁸⁸ There are those who think that Hollis, later Sir Roger Hollis, and head of MI5 from 1956 to 1965, was a Russian agent.⁸⁹

The other detainees included some members of the Irish Republican Army, some persons suspected of espionage or sabotage, a miscellaneous group of admirers of Hitler, including some holding weird racialist and conspiratorial views, as well as people who simply seemed to the police better locked up. One is reminded of the *Casablanca* Police Chief's "usual suspects."

One such usual suspect was Harry Sabini, a small-time crook engaged in protection rackets with other members of the "Sabini gang" on greyhound racing tracks. Sabini has escaped the anonymity which cloaks most detainees because he sued. Further, while much weeded, his Home Office file has been released, perhaps because MI5 had nothing to do with the case.⁹⁰ Though his name was Italian, neither he nor any of his five brothers spoke Italian or had ever visited Italy. He was detained at the instigation of the London police as being of hostile, that is Italian, associations, which was quite untrue, and the "particulars" provided to him in the "reasons for order" said that "Harry Sabini (1) is of Italian origin and associations, (2) is a violent and dangerous criminal of the gangster type liable to lead internal insurrections against the country."⁹¹ On this ludicrous basis, Harry, who the police conceded had no interest in politics at all, was detained for some nine months. There were probably numerous other cases involving error or malpractice of one kind or another, though it is impossible to be sure. Lord Denning in his memoir, *The Family Story*, records another, the detention of a dotty parson. The individual was probably Rev. H.E.B. Nye, a harmless eccentric.⁹²

The increased use of detention in the summer of 1940 created many problems. The officials involved could no longer scrutinize each case, and the requirement that the Home Secretary should personally "have reasonable cause to believe" that the detainee fell into a detainable category became inoperable. In June of 1940, Sir John made 826 or-

88. See K. PHILBY, *MY SILENT WAR* 103-04 (1968); C. PINCHER, *supra* note 76, at 56-57.

89. This view has been prominently advanced by the journalist Chapman Pincher. See C. PINCHER, *THEIR TRADE IS TREACHERY* (1981); C. PINCHER, *supra* note 76. It has continued to receive attention in P. WRIGHT, *supra* note 12. Hollis was cleared, or rather the case against him was found not proven by an enquiry in 1974 headed by the former Cabinet Secretary, Sir Burke Trend; this report has not been published. See C. ANDREW, *supra* note 14, at 504. Hollis died in 1973. Richard White, former head of MI6, and a colleague of Hollis at MI5, has written a sympathetic account of Hollis' career for the *Dictionary of National Biography 1971-1980*.

90. PRO TS 27/496A and HO 45/25720. See also *The Times* (London), Jan. 21, 1941, at 2, col 7.

91. PRO TS 27/496A and HO 45/25720.

92. T. DENNING, *THE FAMILY STORY* 130 (1981).

ders, and if he spent ten minutes on each file, 137 hours of work would have been involved.⁹³ A Home Secretary at this period could not possibly have spent nearly so much time on one minor segment of administration. Indeed, merely signing the orders became a problem, and Miss Jenifer M. Fischer Williams and Mr. R.H. Rumbelow, officials in the Home Office, devised a new monster, the omnibus order, which required only one signature, but which could have schedules of names attached to it. The Italians were detained on such an order with three schedules, the first containing 275 names.⁹⁴ Later, during litigation, attempts were made to discover whether Sir John ever actually saw these schedules, but nobody could remember very clearly; it had been a very busy time.

Many formal errors were made. The text of an order might not correspond with the grounds provided by the Advisory Committee, and the grounds might not conform to the particulars. There were errors as to dates and failures to inform the detainees of their rights. Structurally, the gravest defect in the administration of Regulation 18B was that the Advisory Committee relied on MI5 to provide the grounds of the order and the particulars, but MI5 in fact never knew why Sir John had signed the Order; the Home Office never informed MI5 or the Advisory Committee as to what had motivated the Home Secretary, so MI5's lawyers just had to guess.⁹⁵ Next in gravity was the meager statement of the case revealed to the detainee which was the subject of criticism and hence embarrassment.⁹⁶ Furthermore, the delay between detention and appearance before the Advisory Committee grew longer as everyone was overwhelmed with work. Norman Birkett developed a gastric ulcer worrying about it all, and although the Committee was divided into a number of panels, the delays became a subject of criticism as well. The period before the appearance could run into many months, and some detainees, such as Admiral Domvile, waited more than a year.⁹⁷ Nor did bombing help.⁹⁸ The whole scheme

93. REPORT OF THE SECRETARY OF STATE AS TO THE ACTION TAKEN UNDER REGULATION 18B OF THE DEFENCE (GENERAL) REGULATIONS, 1939, DURING THE PERIOD 1ST JUNE, 1940, TO 30TH JUNE, 1940 (July 24, 1940), reprinted in 4 BRITISH SESSIONAL PAPERS: HOUSE OF COMMONS, 1939-1940, at 203.

94. See PRO TS 27/509, HO 45/25758.

95. See PRO TS 27/507, 542; HO 45/25754.

96. 367 PARL. DEB., H.C. (5th ser.) 868 (1941); 373 PARL. DEB., H.C. (5th ser.) 993-1015 (1941).

97. Domvile, who enjoyed a distinguished career in the Navy, serving as Director of Naval Intelligence, came to believe in a world conspiracy of Jews and Freemasons responsible for the war, communism, and his detention. B. DOMVILE, *supra* note 11, at 70-77, 80-91.

98. MI5 lost many of its records to bombing in November of 1940. See P. WRIGHT, *supra* note 12, at 37.

established by Parliament as a compromise between national security and civil liberty ceased to operate at all smoothly while the balance shifted even more markedly toward security.

Although detention of potential spies and saboteurs was generally acceptable, when detention became more widespread, with the internment of individuals who claimed with plausibility to be entirely patriotic even though they held strange or even offensive political beliefs, the practice of detention lost much of its semblance of legitimacy. More particularly, the availability of the catalogue of new offenses created by the Defence Regulations cast doubt on the need for detention without trial since troublesome people could perfectly well be prosecuted in the regular courts. These new offenses went very far—it became a crime, for example, to spread alarm and despondency.⁹⁹ The authorities had no shortage of weapons for suppressing the disloyal and the discontented. There existed, though I have not so far been allowed to see it, a legal opinion by the Attorney General dealing with the Duke of Bedford, formerly Marquess of Tavistock, which apparently argued that where prosecution was possible for an offense, it was improper to detain the offender under 18B. If government had actually accepted this position many detainees would have had to have been released as illegally detained.¹⁰⁰

One criticism of the use of 18B which could not have been made at the time, but which can be made now, is more sinister. The breaking of the German codes employed through the Enigma encoding machines, in combination with other intelligence sources, meant that the Prime Minister knew that the threat of invasion was gone by the end of 1940 and that he would know of any serious revival of this threat.¹⁰¹ Consequently, the justification for many of the internments of May and June 1940 no longer existed in 1941. It was no doubt convenient to keep troublesome people locked up, but the practice could no longer be justified on the ground of necessity. Of course, the information derived from decoded messages was closely confined for obvious reasons, so that those administering the system of detention were left to operate in the dark.

In the United States the situation was far worse than anything in Britain, both in the scale and duration of detention, and in the absence of any immediate threat of invasion or attack to the mainland,

99. Defence (General) Regulations, S.R. & O. 1940, No. 938, 39BA.

100. PRO HO 45/25698 (the Attorney General's opinion is mentioned in a memorandum of Alexander Maxwell, Jan. 6, 1941).

101. See 1 HINSLEY, *supra* note 14, at 189, 254; 2 HINSLEY, *supra* note 14, at 68, 93-94; *FINEST HOUR*, *supra* note 65, at 878-79, 889-90.

which might have justified draconian measures.¹⁰² It is astonishing to find that only seven individuals out of some 120,000 appear to have commenced legal proceedings of one kind or another to challenge the legality of their treatment.¹⁰³ I say this because litigation, today at least, plays so much larger a role in America than in Britain. Perhaps matters were different in the 1940's. From the suits of these seven litigants four cases eventually reached the Supreme Court, two being decided on June 21, 1943 (the *Hirabayashi* and *Yasui* cases)¹⁰⁴ and two more on December 18, 1944 (the *Koromatsu* and *Endo* cases).¹⁰⁵ Only Mitsuye Endo succeeded, and that only in a somewhat technical sense as she was already at liberty.¹⁰⁶ The dates of these cases are worth noticing. The *Hirabayashi* case challenged the legality of a punishment imposed for a breach of curfew and for failure to report to a center (called a Civil Control Station, a euphemism for a lock-up), in May 1942. Presence at the center was a first step towards evacuation and detention. The *Yasui* case arose out of punishment for breach of curfew, the breach having occurred somewhat earlier, in late March. Neither case addressed the legality of detention, nor the interference with personal liberty involved in the first step towards detention, turning up at what might be called the collecting point. So, over a year after this massive policy of detention had been implemented, the legal system had not gotten around to finally deciding whether it was lawful or not.

The *Endo* case, though successful, decided nothing of general importance; the majority opinion turned on the fact that the litigant was conceded to be a wholly loyal and law abiding citizen. The Court ruled that the powers derived from the Executive Order and Act of 1942 conferred no power to detain such a person.¹⁰⁷ In *Koromatsu*, the majority opinion explicitly did not pass on the legality of restraint of liberty whether in an "assembly center" (that is a collecting point) or in a camp (euphemistically called a relocation center).¹⁰⁸ That is to

102. P. IRONS, *supra* note 9, at 50-53.

103. *Id.* at 83, 87, 93, 99, 112, 114. In addition to the four litigants in the cases which reached the Supreme Court, the Americans of Japanese ancestry who brought suits challenging the government's infringement of their liberty were Mary Ventura and Ernest and Toki Wakayama.

104. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

105. *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944).

106. P. IRONS, *supra* note 9, at 344-46; J. TENBROEK, *supra* note 52, at 99-100, 101-02, 170-74, 252.

107. *Endo*, 323 U.S. 283 (1944).

108. Some use has been made of the term "concentration camp" in describing the places of detention of the Japanese Americans. See e.g., *Korematsu v. United States*, 323 U.S. 214, 223

say, it did not decide whether the massive detentions were lawful or not. The Court's decision was not delivered until well over two years after Korematsu's confinement began at the Tanforan Assembly Center, while he was still on probation and prohibited from returning to his home after over twenty months of internment. Seemingly oblivious to the preceding two years of actual relocation and expressing the spirit of Dickens's parody of interminable litigation in *Bleak House*, *Jarndyce v. Jarndyce*,¹⁰⁹ the Court in *Korematsu* said, "It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us."¹¹⁰

So the war came to an end without the Supreme Court having determined the real issue. Of course there are technical reasons which can be used to explain this, and the doctrine of judicial restraint urges courts not to decide tricky issues until they have to do so. But it seems to me important, especially for lawyers, not to be overly impressed with legal technicalities and dogma that produce a situation in which over 60,000 citizens are held in detention for up to three years, and indeed released at the end of it, before the legal system has gotten around to saying whether their detention violated the Constitution or not.

Since the war, efforts to remedy the wrongs done to the American citizens of Japanese ancestry have followed two paths. First, Japanese Americans have fought to have the government pay reparations to the interned citizens and their heirs in recognition of the illegitimacy of their confinement. Second, *Korematsu*, *Hirabayashi* and *Yasui* have instituted court actions to overturn their convictions.

In 1948 the American-Japanese Evacuation Claims Act provided compensation "for damage to or loss of real or personal property"¹¹¹ but not for personal injury, mental suffering, or for lost profits.¹¹²

(1944); A. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* (1967); R. DANIELS, *CONCENTRATION CAMPS USA* (1972); R. DRINNON, *KEEPER OF THE CONCENTRATION CAMPS: DILLON S. MEYER AND AMERICAN RACISM* 321 (1987) (defending the use of the term). Concentration camps, camps where people were concentrated, were invented by Britain in the Boer War. Dutch South Africans were concentrated in them as a military measure to impede their support of insurgents. Conditions were bad in these camps. They, and of course the American camps, were not extermination camps such as Treblinka, nor camps such as Belsen where neglect produced conditions not much better. It seems improper, therefore, to apply the term "concentration camp" to the American camps given its modern connotations.

109. C. DICKENS, *BLEAK HOUSE* (1853).

110. *Korematsu*, 323 U.S. at 222.

111. American-Japanese Evacuation Claims Act, ch. 814, 62 Stat. 1231 (1948) (codified as amended at 50 U.S.C. app. §§ 1981-1987 (1982 & Supp. II 1984)).

112. *Id.* § 1982.

Less than ten percent of the estimated \$400 million in evacuee losses was appropriated, and the settlement process was slow, extending through 1965.¹¹³

Within the ranks of the Japanese American activists, there was a split between those favoring further efforts to obtain cash reparations and those intent on a more symbolic form of redress through exposure of the full details of the internment.¹¹⁴ In 1976, President Ford issued "An American Apology," declaring that Executive Order 9066 ended with the end of World War II, and that "not only was that evacuation wrong, but Japanese Americans were and are loyal Americans."¹¹⁵ The sentiment was nice, but the effect negligible: nothing was done for the internees, and no specific admissions were made.

In 1980, the factions within the Japanese American community united to support the establishment of a Commission on Wartime Relocation and Internment of Civilians.¹¹⁶ The Commission had a dual purpose: to engage in extensive factfinding, and to "recommend appropriate remedies."¹¹⁷ The Commission held hearings and took testimony from participants, both internees, and interners. It produced a report on the internment conditions and political background and issued recommendations as to redress.¹¹⁸ These findings were the grounds for the Civil Liberties Act of 1988.¹¹⁹ This Act requests that the Attorney General recommend to the President the pardon of those convicted of violating the wartime orders.¹²⁰ It also provides for restitution in the sum of \$20,000 to all Japanese internees surviving as of the date of enactment.¹²¹ Through the mechanism of the public hearings and subsequent congressional validation of their findings, the

113. R. DANIELS, *supra* note 108, at 168-69.

114. B. HOSOKAWA, *JACL IN QUEST OF JUSTICE* 343-59 (1982).

115. Proclamation No. 4417, 3 C.F.R. 8 (1977).

116. B. HOSOKAWA, *supra* note 114, at 349-50.

117. Commission on Wartime Relocation and Internment of Civilians Act § 2, 50 U.S.C. app. § 1981 (1982).

118. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982) [hereinafter *PERSONAL JUSTICE*]; COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS* (1983).

119. H.R. CONF. REP. NO. 785, 100th Cong., 2d Sess. (1988). In addition to the record presented by the Commission on Wartime Relocation and Internment of Civilians, the Subcommittee on Civil Service, Post Office, and General Services of the Committee on Governmental Affairs of the United States Senate held independent hearings in which additional testimony concerning the conditions of internment and the politics which produced the policy of relocation. *Recommendations of the Comm'n on Wartime Internment and Relocation of Citizens, 1984: Hearings on S. 2116 Before the Subcomm. on Civil Service, Post Office, and General Services of the Senate Comm. on Gov't Affairs*, 98th Cong., 2d Sess. (1986).

120. Civil Liberties Act of 1988, Pub. L. No. 100-383, §102, 102 Stat. 903, 904-05 (1988) (to be codified at 50 U.S.C. § 1989).

121. *Id.* § 105, 102 Stat. at 905-08.

Japanese American internees have at last received both tangible and intangible redress for their ordeal.

The other effort to set the record straight, vacating the convictions through the writ of *coram nobis*, is still in progress. The common law writ of *coram nobis* allows relief akin to that of habeas corpus for individuals who have served their sentences and prove that an earlier challenge was unavailable, and that the error leading to his or her conviction was fundamental.¹²² The findings of the Commission and the researches of such authors as Irons have provided convincing evidence that the entire Japanese relocation and control program was unconstitutional as applied to citizens.¹²³ Not only did the FBI and Naval Intelligence believe that a limited group of individuals within the Japanese American community could be identified on the basis of potential disloyalty, they had compiled lists based on individualized suspicion.¹²⁴ In no case were reports of Japanese American sabotage or espionage during or after Pearl Harbor substantiated.¹²⁵ On the other hand, explicit racism on the part of the proponents of exclusion is well documented,¹²⁶ as are implicitly racist assumptions in the governments reasoning that it was impossible to distinguish loyal from disloyal among the inscrutable orientals.¹²⁷ The result was that in *Korematsu*, the very case in which the Court set forth the strict scrutiny test for laws infringing on the equal protection of the laws for racial minorities, the Court found "pressing public necessity," here military, justified the restriction on the civil rights of the Japanese.¹²⁸ This is because the Court also found that it had no business second guessing the military authorities since "Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this [carry out a program of detention]."¹²⁹ Thus, when the Solicitor General presented the claims of General DeWitt concerning Japanese espionage and the

122. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1454-55 (W.D. Wash. 1986)(the court defines six requirements).

123. PERSONAL JUSTICE, *supra* note 118; P. IRONS, *supra* note 9, at 36-62, 278-310.

124. P. IRONS, *supra* note 9, at 19-24.

125. *Id.* at 280-84. Indeed, a key Army figure, Col. Karl Bendetsen asserted that "[t]he very fact that no sabotage has taken place to date [early February, 1942] is a disturbing and confirming indication that such action will be taken," apparently suggesting that the Japanese organization was extraordinarily disciplined, and waiting to strike a crippling blow, perhaps in concert with invasion. UNITED STATES DEP'T OF WAR, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST: 1942, at 34 (1943).

126. See J. TENBROEK, *supra* note 53, at 68-96.

127. P. IRONS, *supra* note 9, at 216-18, 237.

128. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

129. *Id.* at 223.

impracticability of conducting individual loyalty evaluation as fact, even though he was aware of the contrary findings of both the military's own intelligence and the FBI, the Court did not inquire further. Thus the effect of the strict test was foiled by equally strict deference to a groundless claim of "necessity."¹³⁰

Minorou Yasui died, leaving Fred Korematsu and Gordon Hirabayashi to continue their appeals.¹³¹ While Yasui lost at the district court level, Korematsu's petition was granted.¹³² Hirabayashi's convictions were ultimately vacated in the Ninth Circuit Court of Appeals, after the district court sought to distinguish between the curfew and evacuation violations on the ground that the Supreme Court would have affirmed his conviction on the former charge even with accurate knowledge of the facts underlying the supposed military necessity for the control of Japanese Americans.¹³³ Yet the victory is not complete, for as the court said in granting Korematsu's petition for *coram nobis*:

The court's decision today does not reach any errors of law suggested by petitioner. At common law, the writ of *coram nobis* was used to correct errors of fact. It was not used to correct legal errors and this court has no power, nor does it attempt, to correct such errors. Thus, the Supreme Court's decision stands as the law of this case and for whatever precedential value it may still have.¹³⁴

Another group of Japanese Americans have also attempted to use the courts to press tort and takings claims against the United States government. They have had more success, however, in breaking new jurisdictional and procedural ground than in obtaining relief.¹³⁵ Given that the acceptance of the statutory compensation "shall be in full satisfaction of all claims against the United States" arising from the detention experience, there is some question as to the continued utility of the takings and tort claim suit.¹³⁶

In Britain there were more attempts by detainees to secure relief by action in the regular courts than there were in the United States. In

130. Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENTARY 35, 39-45 (1986).

131. *Hirabayashi v. United States*, 828 F.2d 591, 594 n.4 (9th Cir. 1987).

132. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

133. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *aff'g in part* 627 F. Supp. 1445, 1457-58 (W.D. Wash. 1986).

134. *Korematsu*, 584 F. Supp. at 1420 (citation omitted).

135. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) (holding all claims time barred), *aff'd in part*, 782 F.2d 227 (D.C. Cir. 1986) (allowing takings claim), *rev'd*, 107 S. Ct. 2246 (1987) (remanding to court of proper jurisdiction), *aff'd*, 847 F.2d 779 (Fed. Cir. 1988) (affirming district court denial of claims).

136. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 102, 102 Stat. 903, 905 (1988).

addition to the two leading cases which alone reached the highest court, the House of Lords, at least thirteen other actions were commenced before these two cases were decided. These cases were principally habeas corpus proceedings but also included actions for false imprisonment and one for an order of mandamus; there may have been six more actions commenced but never pursued.¹³⁷ Later in the war other suits were brought. However, these suits were not so much aimed at securing liberty as to obtaining compensation for the prison conditions in which detainees were held.¹³⁸ This very un-British rash of litigation, nonetheless, delivered only one release, and the British legal system, like the American, delivered virtually nothing to the detainees.

This British litigation was not organized by any group opposing detention. An institution called the Council of Civil Liberties took a considerable interest in Regulation 18B and engaged in some campaigning against it.¹³⁹ It appears to have been heavily under the influence of the Communist Party, and early in the war, party members were nervous over Regulation 18B. Once the Regulation was directed against fascists, the Council began to see the matter in a new light, and this may explain the failure to sponsor test cases. We may be confident that, had communists been detained for membership in the party, the Council would have been more active in the courts. In fact, most of the litigation was handled by one London solicitor, Oswald Hickson, who was not a fascist but merely a lawyer who seems to have been outraged by the notion that citizens could be detained without trial.¹⁴⁰ Hickson came into contact with detainees principally, I think, because his firm had long represented the Mosley family, and I understand still does.

In Britain no question of the constitutionality of the Defense Regulations could arise since no power of constitutional review exists. It

137. No list exists. These cases involved Mathilde Randall, PRO TS 27/495; Lieutenant Francis Fane, PRO TS 27/513; Captain Charles Budd, PRO TS 27/506; Arthur Campbell, PRO TS 27/507; Sir Barry Domville, Rita Shelmerdine, Harald de Laessoe, Emily Durell, William Sherston, PRO TS 27/491, 511; Harry Sabini, *see supra* note 90; Aubrey Lees, *see infra* note 148; John Smeaton-Stuart, PRO TS 27/491, 493, and John Mason, *The Times* (London), Feb. 9, 1941, at 9, col. 5. PRO TS 27/493 contains a note of six other actions pending, two of which involved Sir Oswald and Lady Mosley.

138. *See, e.g.,* Arbon v. Anderson [1943] 1 All E.R. 154.

139. Neil Stammers has consulted records kept at the University of Hull and gives an account of the Council's activities. The Council for Civil Liberties' records for the period are accessible in the University of Hull, but I have not yet had an opportunity to consult them. N. STAMMERS, *supra* note 11, at 78, 84 n.53.

140. Telephone interview with Carter Ruck, former solicitor with Oswald Hickson, Collier & Co. (Jul. 15, 1988). Oswald Squire Hickson (1877-1944) was senior partner in the firm of Oswald Hickson, Collier & Co., which still exists in London. *See also* 4 WHO WAS WHO 538 (1952).

was not possible to argue that the regulations dealing with detention were outside the powers conferred by the parent Act of Parliament, since they plainly were not.¹⁴¹ However, the courts could pass on the legality of the detention of particular individuals; detention would only be lawful if authorized correctly in accordance with the scheme of the regulations. Before the two leading cases involving *Liversidge and Greene*, there were three important decisions on the legality of the detentions. The first involved Harry Sabini, alias Harry Handley, alias Henry Handley, alias Henry S. and Harry Roy, the "small time crook."¹⁴² Along with his brother, Darby, he had been detained on June 14, 1940, and appeared before the Advisory Committee on December 3. I do not know the outcome, for the report has been lost or weeded from the file. At any rate, whatever the recommendation of the Committee, the Secretary did not release him. He sought habeas corpus before a Divisional Court of the King's Bench Division on December 20, 1940.¹⁴³ The order had described him as Harry Sabini, alias Harry Handley, and he swore an affidavit that he had never used the second name. Counsel based his case on mistaken identity; the police had arrested a person against whom no order had ever been made. The proceedings were adjourned until January 20, 1941 for the matter to be clarified by the Home Office. At the reconvened hearing, evidence was tendered to the Court which demonstrated that Harry had lied in his affidavit. The court rejected his application, but made it clear that in a case of real mistaken identity the detainee would be set free. This assumed a very limited power of review. Harry was indeed released by the Home Secretary in March of 1941, promptly rearrested, and charged with perjury, for which he received nine months imprisonment in July.¹⁴⁴

The second case was that of Captain Charles Henry Bentinck Budd, a distinguished and severely wounded army officer in the first war who was, at the time of his detention on June 15, 1940, once more serving his country as an adjutant in the Royal Engineers.¹⁴⁵ In the 1930s, Budd had been an official in Mosley's fascist party, but he had left the party in 1939. Budd had been included in a long schedule of names on an omnibus order based on membership, or recent membership, of the British Union. When arrested he had been served with a

141. *The King ex rel. Zadig v. Halliday*, [1916] 1 K.B. 738 (C.A.) aff'd, [1917] A.C. 260 (a decision on the corresponding Regulation 14B during the 1914-1918 war).

142. See *supra* note 90 and accompanying text.

143. *In re Sabini*, *The Times* (London), Jan. 21, 1941, at 2, col. 7 (K.B., Jan. 20, 1941) (case otherwise unreported).

144. PRO TS 27/496A; PRO HO 45/25720.

145. PRO TS 27/506; *The Times* (London), May 28, 1941, at 9, col. 5. See *supra* note 8.

supposed copy of this single order, but this did not correspond with the original, as it named an entirely different ground for detention. So his counsel argued and the court agreed, that Budd had been arrested and detained under an order which had never in fact been made, though there did, of course, exist another order under which he could have been arrested. This way of looking at the matter treated the ostensible basis of arrest as critical to the legality of arrest and was wholly formalistic. The court's order to release Budd indicated that the courts would insist upon precise formal conformity, so that what were essentially clerical or administrative errors could lead to release. Of course this did not prevent detainees from being re-arrested under new orders, as were Budd and eleven other individuals in whose cases the same mistake had been made.¹⁴⁶ Since there were many cases under other orders where formal errors had been made, this decision caused considerable alarm in the Home Office, where the officials did not relish being made to look sloppy and inefficient in the courts. An internal review of the Italian orders of June 10, 1940, revealed an alarming catalogue of mistakes, and it was felt prudent to keep quiet about this.¹⁴⁷ As detainees were released, the problem tended to go away.

The third case involved one Aubrey Lees, detained on June 20, 1940 under an order based on his membership in the British Union of Fascists.¹⁴⁸ Lees was a colonial civil servant who had served in Palestine under the Mandate. He was violently anti-Semitic, extremely right wing, and altogether a pretty nasty piece of work. But he was not, and never had been, a member of the British Union.¹⁴⁹ He sought habeas corpus and swore an affidavit to this effect. The government lawyers did not challenge this. But they replied by putting in affidavits from Sir John Anderson saying that he, on the basis of reports carefully considered by him personally, had clear grounds for believing, and did in fact believe, that Lees was a member, and that he believed that on this ground it was necessary to detain Lees. Regulation 18B required that the Home Secretary should have "reasonable cause to believe" that the detainee fell into a detainable category, and that by reason thereof it was necessary to detain him.¹⁵⁰ So the government

146. Budd contested his redetention and Mr. Justice Stable dissented, viewing the redetention as unlawful. See [1941] 2 All E.R. 749, 758-65.

147. TS 27/509.

148. *Ex parte Lees*, [1941] 1 K.B. 72, *aff'g* 57 T.L.R. 68 (C.A. 1940). See also PRO HO 45/25728; HO 283/45.

149. See R. THURLOW, *supra* note 11, at 185, 203-04.

150. Emergency Powers (Defence) General Regulations, S.R. & O. 1939, No. 1681, 18B(1) (Detention Orders).

lawyers were contending, in effect, that the legality of Lees' detention turned not on whether he was in reality a party member, but on whether the Home Secretary, when he signed the order, genuinely and reasonably thought he was.¹⁵¹

The court was not a little unsettled by this. Latent common sense must have prompted the feeling that, if Lees was telling the truth, his detention was unjustified, though the position of the government lawyers would seem to have conformed to a sort of Alice in Wonderland logic. This common sense theory assumed that the court had the power to examine the legality of detention and in doing so to examine the basis for the Home Secretary's belief. But this power, if exercised, would have involved the court in a general investigation of the MI5 reports, in effect establishing the courts, and not the Home Secretary, advised by his committee, as the arbiters of detention. From this unrestricted power of judicial review the court uneasily backed off; the investigation was fictionalized by being confined merely to reading the Home Secretary's affidavit. Sir John Anderson, so the court reasoned, said he believed Lees was a party member, and said he had reasonable grounds for this belief. That was enough to satisfy the court, at least on this particular occasion, for it ruled that no general rule could be laid down as to how the basis of the Minister's belief would be investigated in other cases.¹⁵² The practical effect of the *Lees* decision was that so long as the formalities were observed, the Home office could win almost any case by producing formal affidavits from the Home Secretary, affidavits involving an economical use of the truth, for it is not likely that more than a moment, if that, would in reality have been devoted to Lees's case by Sir John.

The language employed in *Lees*—to the effect that the basis of detention could be investigated—left open a slim chance that the courts would order the release of detainees who could, without securing access to confidential material in the Home Office and MI5 files, affirmatively show that there was no reasonable basis for their detention. One such situation would be a case of mistaken identity; another would be a case of detention for specific "acts prejudicial" where the detainee could show, without delving into Home Office files, a cast-iron alibi. *Lees* was not such a case, for by 1940 the membership records of the British Union, if indeed any existed, would have been hidden or in the custody of the intelligence service. Although the failure of the government lawyers to claim that Lees was a member of the

151. *Lees*, [1941] 1 K.B. at 78.

152. *Ex Parte Lees*, 57 T.L.R. at 68, 69-70 (C.A. 1940), *aff'd*, [1941] 1 K.B. 72.

party suggested that Lees was telling the truth, it could not be said that he had certainly demonstrated this by affirmative evidence.

The first of the two leading cases on detention without trial addressed just such a situation. Although Robert William Liversidge, alias Jack Perlsweig, appears in the law report as little more than a name, he was a real person.¹⁵³ He was born in London on June 11, 1904, the son of Asher and Sarah Perlsweig, who had emigrated from Russia to England sometime between 1895 and then no doubt in reaction to the violent anti-Semitism which developed in Russia at this period. Starting in somewhat humble circumstances, he rose in life to become, by the 1930s, a wealthy businessman. Other members of his family too had prospered; one of his brothers, Maurice Perlsweig, became a very distinguished rabbi prominent in the Zionist movement, working during the war in New York to help Jews who were victims of European fascism.

Liversidge got into some trouble in his youth, at one point fled from England to escape arrest on a fraud charge, and ended up running a recording studio in Hollywood. While the charge was dropped, and he had never been convicted of any offense, the London police had a file on him and viewed him with a jaundiced eye. Early in the 1930s he began to use the name Liversidge, which was the married name of his sister. He formally changed his name in 1938. In 1939 he volunteered to join the Royal Air Force, undoubtedly for purely patriotic reasons; being a Jew he had every reason to detest Hitlerism. Nervous lest his foreign parentage might tell against him, and perhaps because he feared anti-Semitism in the recruiting system, he falsified date, place of birth, and parentage, claiming to have been born a Liversidge in Canada on May 28, 1901.

He became an intelligence officer and, so his Commanding Officer, the Earl of Selkirk, assures me, a very good one.¹⁵⁴ He worked from February 27, 1940 at the headquarters of Fighter Command. Among other duties he was involved in maintaining records of aircraft strengths and in attempts to forecast enemy raids. However, the false statements regarding his background came to light, and he was ar-

153. Information on Liversidge is principally based upon PRO TS 27/501. I am also grateful to informants who include Air Commodore H.A. Probert, the Earl of Selkirk, Professor R.V. Jones and Professor DeLloyd Guth. See also REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO ALLEGATIONS REFLECTING ON THE OFFICIAL CONDUCT OF MINISTERS OF THE CROWN AND OTHER PUBLIC SERVANTS, 1949, CMND. SER. 4, No. 7616, at 6-8. Known as the *Lynskey Tribunal* after its chair Sir G. Justin Lynskey, the tribunal investigated Liversidge in connection with allegations of bribery concerning Mr. John Belcher, M.P. and found that Liversidge's involvement with Belcher in obtaining an "export license for paper cement bags" was not improper. *Id.*

154. Letter from Earl of Selkirk to A.W.B. Simpson (Dec. 10, 1986).

rested by the Air Force on April 26, 1940. Further enquiries revealed material in the police file. He could have been charged with the offense involved in his enlistment but, given the patriotic motive, this would not have led to any serious penalty. It is clear from papers which have been released that MI5 was not at all keen to take the initiative in having him detained.¹⁵⁵ One can only guess why, but Liversidge's associates and business interests suggest that he may have been, to put it no higher, of interest to the intelligence community. He had been involved in industrial diamonds, the brokerage of oil royalties, and an attempt to secure the patent rights in the first practical helicopter, the German Focke-Achgelis FW-6I, which first flew in 1936.¹⁵⁶ These were areas of considerable official interest at the time, in particular, oil. His codirectors in one company included Colonel Cudbert J.M. Thornhill (1883-1952), a former intelligence officer in Russia who had worked in the Political Intelligence Department of the Foreign Office in 1940-1946,¹⁵⁷ and Colonel Norman Thwaites (1872-1956), Britain's chief of intelligence in New York in the 1914-1918 war.¹⁵⁸ Liversidge also knew Sir William Stephenson, head of British intelligence in the United States during the Second World War.¹⁵⁹ Liversidge's brother had contacts with MI6. The intelligence community may have preferred to have Liversidge at large, and his connections may have meant that there existed an MI5 file on him before 1940. In the event, the Air Force authorities persuaded Sir John Anderson to order Liversidge's detention, which he did by an order of May 28, 1940, based upon his "hostile associations."¹⁶⁰

This ground was tenuous indeed. As a businessman Liversidge had European contacts and knew some persons of German nationality, but the Home Office knew that this was not the real reason the Air Force wanted Liversidge detained. The real reason was that in his work with Fighter Command he had had access to Fighter Command

155. PRO TS 27/501.

156. See C. GIBBS-SMITH, *AVIATION: AN HISTORICAL SURVEY FROM ITS ORIGINS TO THE END OF WORLD WAR II*, at 196, 209, Plate XXI (1970). In 1938 a British helicopter of very similar design, the Weir W5, flew.

157. See C. ANDREW, *supra* note 14, at 204-06, 217; 5 WHO WAS WHO 1085 (1961) (includes an impressive list of White Russian decorations).

158. See 5 WHO WAS WHO 1087 (1961). Thwaites wrote two volumes of memoirs. N. THWAITES, *VELVET AND VINEGAR* (1922); N. THWAITES, *THE WORLD MINE OYSTER* (which I know only by reputation). See also C. ANDREW, *supra* note 14, at 214; R. GRIFFITHS, *supra* note 81, at 52, 137.

159. See *supra* note 153. Sir William Stephenson features prominently in W. STEVENSON, *A MAN CALLED INTREPID* (1976) and H. MONTGOMERY HYDE, *THE QUIET CANADIAN* (1962). See also C. ANDREW, *supra* note 14, at 358, 465-67, 473. Sir William has retired to Bermuda and remains discreet.

160. PRO TS 27/501.

secrets, "very secret information" it was called, and that he was thought to be an untrustworthy person because of his false statements and police file. The Air Force wanted him isolated to obviate any risk that this information might be passed on. Even this reason was rather flimsy, since there was little or no reason to doubt his patriotism. Therefore, the order for his detention was an abuse of power, perhaps understandable in May of 1940, but an abuse nevertheless. The Advisory Committee realized this when they reviewed his case, but the Committee, adopting its settled policy, was not prepared to resolve their doubts in favor of Liversidge and against the Air Force.¹⁶¹ This decision was, of course, taken in October, 1940 at the height of the Battle of Britain. It was not a moment at which patriotic individuals were anxious to do anything whatsoever to weaken the air defenses of Britain. So Liversidge remained in detention.

Some doubt surrounds what secret information so worried the Air Force. It may have been normal operational information, including air strengths on which Liversidge worked; it may have involved information used to forecast German raids. Liversidge had successfully forecast a raid on the Fleet anchorage at Scapa Flow on April 10, 1940. It is even possible that there was fear that he had some inkling of the British success in reading the German Enigma codes, the biggest secret of the whole war, though I doubt this. Whatever the reason, Liversidge was detained in Brixton Prison, and his name was included on a list of prominent people detained which was supplied weekly to Winston Churchill in the summer of 1940.¹⁶²

The subject of the second leading case on detention without trial of British citizens, Ben Greene, had a very different background.¹⁶³ A member of the same family as were the novelist Graham Greene and the Director General of the BBC, Sir Hugh Carleton Greene, he was a Quaker pacifist who had been much engaged in philanthropic work in Europe. He had also been involved in Labour Party politics, having once been the private secretary to Ramsay MacDonald, the party leader. He was a prominent local citizen in Berkhamstead, where he was a lay Justice of the Peace and ran a business concern. He regarded the Treaty of Versailles after the 1914-1918 war as a disaster, and to that extent sympathized with Germany. There is no reason, however, to think that he was either anti-Semitic or fascist, indeed he

161. PRO TS 27/501. See also PRO HO 45/25754.

162. See PRO HO 45/25747. Curiously enough, the list also contains the name of Frederick W. Braune, a London solicitor of German extraction who was also detained, and who later represented Liversidge in litigation.

163. See PRO TS 27/522; A. MASTERS, *supra* note 15, at 141-67 (makes use of the Greene papers); J. MILLER, *supra* note 13, at 94; R. THURLOW, *supra* note 11, at 172, 204, 212.

had been active in refugee relief efforts. Greene regarded the war of 1939 as yet another disaster and, after leaving the Labour Party, campaigned against the war. He was a founding member and Treasurer of the British People's Party, but resigned in October 1939. This Party was chaired by the Marquess of Tavistock, later the twelfth Duke of Bedford, an ardent admirer of Hitler. Early in the war Greene had obscure connections with various individuals—some pacifists, some cryptofascists—who believed in a negotiated peace with Hitler. Sir Oswald Mosley, Admiral Sir Barry Domvile, Archibald Maule Ramsay M.P. and perhaps the Duke of Windsor, were involved, as was an organization called the Right Club, whose membership list was seized in May, 1940 but which has never been released.¹⁶⁴ It must be appreciated that in Britain in 1939 there were numerous individuals of some social prominence who sympathized with both Hitler and Mussolini, of whom only a minority would actually join the British Union of Fascists. Furthermore, since memories of the unspeakable horrors of the trench warfare of 1914-1918 were very much alive, it is hardly surprising that there were those who preferred peace.

Ben Greene was detained on May 28, 1940 on the basis of an order signed on May 18, 1940 which cited his "hostile association."¹⁶⁵ On July 15, in Brixton Prison, he was supplied with the "grounds" and "particulars" in the "Reasons for Order." These said the order was based on "acts prejudicial," a very grave accusation.¹⁶⁶ The particulars alleged action which indeed amounted to treason, including communication with the enemy. At this time treason was a capital offense for which one could still, in theory, be hanged, drawn, and quartered.

The case against Greene was based upon reports by two undercover MI5 agents, run by Charles Maxwell-Knight, a somewhat sinister and eccentric model (though not the only one) for "M" in the James Bond stories. He was noted for his strange pet animals, including Bessie the Bear, and after the war he became known as a popular naturalist.¹⁶⁷ One agent was Friedl Gaertner, alias Fraulein Stottingen, code name "Gelatine" ("Pretty Little Thing"), an Austrian who started public life as a Nazi agent, coming to join her sister Liesel, a stripper, in

164. See A. MASTERS, *supra* note 15, at 89; J. MILLER, *supra* note 13, at 21-37.

165. PRO TS 27/522.

166. One version of the text is in print in MASTERS, *supra* note 15, at 148-50. However the text, which I am sure Masters has obtained from the Greene papers, gives the amended "Reasons for Order" served on June 10, 1941, which conform with the order in giving the grounds as "hostile associations," and thus corrects the error made in the original "Reasons for Order" found in PRO TS 27/522.

167. See generally A. MASTERS, *supra* note 15; J. MILLER, *supra* note 13.

London before the war and ending up a double agent.¹⁶⁸ She appears to have been useful in this role, and MI5 was very keen to preserve her cover, as appears from papers connected with litigation by Ben Greene.¹⁶⁹ The other was Harald (later Harold) Kurtz, the impecunious grandson of an English baronet, Sir John Don-Wauchope (1816-1911).¹⁷⁰ He had worked in the BBC German section (which was presumably under the control of the intelligence services) and then as a stool pigeon in internment camps. He ended up as a historian, writing, among other things, a life of the Empress Eugenie.¹⁷¹ He died of drink in Oxford in the late seventies having attempted in his declining years, so I am credibly, but confidentially, informed, to support his habit by stealing manuscripts from libraries.¹⁷² Kurtz and Gaertner reported conversations with Greene on which charges of "acts prejudicial" were apparently based. Materials in the Public Record Office suggest that there were two other agents involved, but their names do not appear.¹⁷³

Greene brought habeas corpus proceedings, while Liversidge instituted an action for false imprisonment. Liversidge's action was, for technical reasons, the more important legally.¹⁷⁴ Liversidge's lawyer, Oswald Hickson, attempted to obtain an order for discovery of the

168. See A. MASTERS, *supra* note 15, *passim*; J. MILLER, *supra* note 13, at 86-89. Friedel may have married an American diplomat. J. MILLER, *supra* note 13, at 153. Liesel married Ian Menzies, the younger brother of Sir Stewart Menzies, head of MI6. A. MASTERS, *supra* note 15, at 71. On the wartime double agents operating in Britain the best source is J. MASTERMAN, *THE DOUBLE CROSS SYSTEM* (1972) (notes, but does not identify, "Gelatine"). Masterman was an Oxford academic who became Provost of Worcester College; he worked in MI5 during the war and apparently had been an unofficial intelligence agent in Oxford before the war. See also L. FARAGO, *supra* note 19, at 334. Farago notes "Gelatine's" connections with Major General J.H.C. Fuller, a well-known military writer and a fellow traveller of the far right, indicating that her duties included association with fascists. PRO TS 27/522 includes references to her as Fredericka Stottingen, and there is some doubt as to which of her names is real and which is an alias.

169. Liesel's marriage to Ian Menzies would put Friedel in contact with British official life.

170. R.F.V. Heuston claims that Kurtz's mother was the daughter of Sir William Don, but that he was of German nationality. Heuston, *Liversidge v. Anderson: Two Footnotes*, 87 L.Q.R. 161, 164 (1971) [hereinafter Heuston, *Two Footnotes*]. This may be correct; my identification is not based on firm evidence. Sir William Don (1861-1926) was not, however, a baronet.

171. H. KURTZ, *THE EMPRESS EUGENIE, 1826-1920* (1964).

172. See generally A. MASTERS, *supra* note 15, at 111-12, 141-42, 152-67; J. MILLER, *supra* note 13, at 91-94; R. THURLOW, *supra* note 11, at 204-05.

173. PRO TS 27/522.

174. Accounts of the passions to which the case gave rise amongst the judiciary at the time are given by R.F.V. Heuston. Heuston, *Liversidge v. Anderson in Retrospect*, 86 L.Q.R. 33 (1970) [hereinafter Heuston, *Retrospect*]; Heuston, *Two Footnotes*, *supra* note 170, at 163. These were based on papers exceptionally made available to Heuston by the Home Office, principally, I think, on a transcript of the case, which is also accessible in the Greene Papers. See also Allen, *Regulation 18B and Reasonable Cause*, 58 L.Q.R. 232 (1942); Keeton, *Liversidge v. Anderson*, 5 M.L.R. 162 (1941).

grounds upon which the Home Secretary thought him to be of hostile associations and a person who needed to be detained.¹⁷⁵ In an action for false imprisonment the onus of proof is on the defendant. The attorneys sought to prise out of the Home Office a fuller statement of the reasons for detention than that given in the "Reasons for Order." This statement could then be attacked in the eventual trial of the action, thus providing a basis upon which to challenge Liversidge's detention. However, the House of Lords, by a majority, ruled that no such order should be made, since it would bring before the court material which it was not the business of the court to consider.¹⁷⁶

The scheme of the Defence Regulations had given the job of deciding whether individuals fell into a detainable category to the executive, in the person of the Home Secretary, and not to the courts. Thus in the absence of formal irregularity or bad faith (which in practice could never be proved), the decision of the executive could not be reviewed by the courts. So the case was treated as having been decided by ascertaining that the executive rather than the judiciary had jurisdiction. This refusal to review largely disposed of the *Greene* case as well, the production of the Home Secretary's order being a sufficient answer to the action.¹⁷⁷ So far as the *Liversidge* case is concerned, the legal basis for the detention was very shaky indeed, and I find it difficult to acquit the government of something near sharp practice.

As it happened, after argument in the House of Lords, but before the opinions were delivered, Ben Greene's brother managed to lure Kurtz into Greene's lawyers' office. In front of Oswald Hickson, Kurtz withdrew his allegations against Greene, but it was too late to be used to put a different complexion on the case.¹⁷⁸ The names of the two agents, but not their whereabouts, had been provided to Hickson on the advice of the Attorney General of the day, since he feared losing the action if their identities were not released. I do not know why he took this view, but suspect that the very gravity of the wrongdoing alleged against Greene was such that it seemed quite improper to refuse him any chance to challenge the evidence on which the charges

175. In the House of Lords, Liversidge's leading counsel was D.N. Pritt, a Member of Parliament in the Labour Party, but as Pritt was not engaged when the case was first litigated, I assume that he did not devise this scheme. He gives an inaccurate account of the case in his autobiography. Pritt, a closet communist, was much involved with the Council for Civil Liberties, but that organization was not involved in the case. D. PRITT, *THE AUTOBIOGRAPHY OF D.N. PRITT, PART ONE FROM RIGHT TO LEFT* 232-33, 304-07 (1965).

176. *Liversidge v. Anderson*, [1942] A.C. 206.

177. *Greene v. Secretary of State for Home Affairs*, [1942] A.C. 284. See also A. MASTERS, *supra* note 15, at 162.

178. A. MASTERS, *supra* note 15, at 158-61.

were based, and that in this small regard, a respect for civil liberties prevailed in the face of the claims of security.

Greene was released on January 9, 1942, and the Home Office, under political pressure, publicly withdrew the allegations of treason.¹⁷⁹ Greene brought a further action for false imprisonment and libel, alleging bad faith against the Home Secretary, Sir John Anderson. This collapsed, partly because the sinister Kurtz, called as a witness, now testified that he had only withdrawn his allegations in Hickson's office under standing instructions from Maxwell-Knight to deny any involvement with MI5.¹⁸⁰ Liversidge had been released a little earlier, on December 31, 1941.¹⁸¹ The government fought the cases, not because it was really necessary to keep Greene or Liversidge in detention, but in the hope of securing a favorable decision which could be used to resist other challenges. To the officials, the value of the decisions lay principally in their protection of executive secrecy. A contemporary memorandum by one of the government lawyers puts it neatly. "[T]he value of a judgement in our favor in the House of Lords would be that we could avoid in the future this probing into reasons in cases in which it is embarrassing to give them."¹⁸²

Once the cases were won and the government's shield of secrecy had been preserved, the two detainees could be released. Thereafter more and more individuals were set at liberty.¹⁸³ Agitation against Regulation 18B died down; there were in fact many protests in November 1943, when Sir Oswald Mosley was released, the protests coming in particular from the Council for Civil Liberties.¹⁸⁴

What general conclusions can be drawn from the experience of executive detention of citizens in the two countries? The first point I should emphasize is the difference in the scale and duration of detention. It was much greater in America, despite much weaker justification in terms of military necessity. Here I am afraid that the explanation lies in that evil force, racial antagonism towards a large,

179. 377 PARL. DEB. (5th ser.) 441 (1942). Morrison, however, refused to acknowledge that Greene had been detained solely on a single informant's unsworn testimony and steadily refused calls to institute perjury charges against that informant. *Id.* at 904-05, 1255-57, 1575. Morrison maintained that merely because the Advisory Committee found an allegation unsubstantiated, "it does not follow either that such allegation was a malicious invention or that the original order of detention was unjustified." *Id.* at 1256.

180. See Heuston, *Retrospect*, *supra* note 174; Heuston, *Two Footnotes*, *supra* note 170. Material on this is also in the Greene Papers in the custody of his son, Edward Greene.

181. PRO TS 27/501.

182. PRO 45/25758 (letter from A.C. Newman to Norman Kendal of Sept. 3, 1941).

183. See N. STAMMERS, *supra* note 11, at 74 (noting an increase in political pressure for release after the *Liversidge* judgment).

184. *Id.* at 78-79. See also R. THURLOW, *supra* note 11, at 231.

identifiable ethnic group, "a discrete and insular minority."¹⁸⁵ In saying this I do not wish to appear chauvinistic. I am afraid that racism both today, and at earlier periods, has been influential in Britain too, but it was not a force on this particular occasion in the use of Regulation 18B. I must add, however, that regarding the treatment of alien refugees detained under the prerogative, a case can be made for saying that anti-Semitism played some part in influencing policy and treatment, but that is another story.¹⁸⁶

My second point is the complete failure of the regular courts to provide any substantial protection against misconduct by the executive, even granted the need for some measure of detention. In both countries the legal system simply failed to deliver, and again the position seems to have been worse in the United States than in Britain. This, to me at least, is surprising in light of the Constitution and power of judicial review. The British courts must get some modest number of Brownie points for at least emphasizing the need for procedural regularity. In both countries there was impassioned dissent—in Britain in *Liversidge* by Lord Atkin, in America in *Korematsu* by Justices Roberts, Murphy and Jackson. Here I feel that America comes out rather better in this regard. As I have argued elsewhere,¹⁸⁷ I do not think that Lord Atkin's dissent in *Liversidge* was principally motivated by enthusiasm for civil liberty; he was concerned rather over the relative status of the judiciary and the mandarins of the civil service. This can not be said of the dissenters in *Korematsu*. Furthermore, the legal community in America, both in criticizing the decision¹⁸⁸ and in seeking over the years since then to offer some redress for the wrongs then done, has surely something of which to be proud.¹⁸⁹ The idea that any sort of compensation should be offered to the 18B detainees has never even been mooted in Britain. No doubt the belief, which is not cor-

185. *Carolene Prods. Co. v. United States*, 304 U.S. 144, 153 n.4 (1937). In *Korematsu* Justice Black expanded and made explicit the principal that:

all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Korematsu v. United States, 323 U.S. 214, 216 (1944). As Irons has demonstrated, the American officials made quite economical use of the truth concerning public, here military, necessity, while the United States courts, like their British counterparts, willingly accepted the word of those officials at face value. P. IRONS, *supra* note 9, at 278-310.

186. See generally R. STENT, *supra* note 20.

187. A. SIMPSON, *supra* note 11, at 31.

188. See Dembitz, *Racial Discrimination and the Military Judgment*, 45 COLUM. L. REV. 175 (1945); ROSTOW, *The Japanese American Case: A Disaster*, 54 YALE L.J. 489 (1945).

189. See *supra* notes 111-34 and accompanying text.

rect, that they were all fascists who had it coming to them, is part of the explanation for this.¹⁹⁰

The third point is the fragility of law and constitutional rights in the face of strong political pressure, and the importance, which one can easily underestimate, of having deeply rooted conventions of political morality and acceptable behavior, held by those involved in the process of government. Indeed, the sordid story of wartime detention illustrates that the autonomy of law as an independent force, capable of controlling the exercise of coercive power, is merely an ideal state of affairs, and that in the real world ideals are never fully realized—particularly in times of stress. Insofar as Americans from Germany and Italy were not harassed during the Second World War, this was the result not so much of law or the legal system, but of other more subtle, often political, restraints; insofar as members of one group, the Americans of Japanese descent, were oppressed, it was because the evil force of racism overcame these cultural restraints.¹⁹¹ In Britain, the very modest use of the powers conferred by the Defense Regulations and the progressive release of detainees after the panic year of 1940 can only partly be explained by tighter legal arrangements. Along with the absence of a racial dimension in Britain, a more widespread commitment to civil liberty among those involved in government had more to do with Britain's relative adherence to liberal ideals than the formal legal niceties. But, I do not believe that such a commitment flourishes in an atmosphere of governmental secrecy in which, even in peacetime, there is extensive covert activity by government agents and acceptance of the overweening claims of national security. Thus I am not confident that in either Britain or America all is as it ought to be, or even as well as it was then. I hope I am wrong. But of one thing we can be quite sure, the successor to Regulation 18B is, as I speak, alive and well, and living in the Home Office, just off Hyde Park in London, ready for use if there is a next time.

190. See N. STAMMERS, *supra* note 11, at 76, 80-81.

191. See PERSONAL JUSTICE, *supra* note 105, at 28-44; J. TENBROEK, *supra* note 53, *passim*.

