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Proscribing Hate Speech in a Post-September 11 World: Enacting Effective Regulation of Anti-Muslim Invective in order to Stem Domestic Terror Threats

Rabia Hassan
May 1, 2013

Part I: Introduction:

In the wake of 9/11, maintaining domestic security has become a substantial and compelling governmental interest.¹ Against a backdrop of heightened anti-Muslim rhetoric, establishing a federal anti-hate speech code which proscribes certain religious slurs would most probably be justified. This action would be indicated to avoid the imminent threat of violence directed at Muslim communities living in the United States. Pundits from across the scholarly spectrum, supporters and debunkers alike, have conceded that there is some harm in “hate speech.”² In order to avoid the harm stemming from such hate speech necessitates the promulgation of an anti-hate speech ordinance which would restrict the use of religious slurs aimed at Muslims, Arabs and individuals of Middle Eastern descent following September 11th.

Affording Muslim communities extra protection in the form of an anti-hate speech ordinance is necessary because a post 9/11 backlash has left them vulnerable to mistreatment by the masses as well as increased regulation by the federal government. History provides the best

¹ See generally e.g. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME*, 236-239 (W.W. Norton & Co., Inc., 1st ed. 2005) (describing the different occurrences in United States history where during times of war there are heightened national security concerns and greater deference is given to the curtailment of 1st Amendment rights).

² See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 29-30 (Harvard University Press, 1st ed. 2012) (describing how individuals like Anthony Lewis, staunchly opposed to the promulgation of anti-hate speech ordinances, have diluted their opposition because we currently inhabit an age where “...words have inspired acts of mass murder and terrorism”. The danger does not just come from those who use words to incite violence but also from individuals towards whom such words of violence are directed and feel the only way to respond is by violence); Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 *TULSA J. COMP. & INT’L L.* 1, 2-3 (2008) (indicating that while free speech is of “fundamental importance for democratic societies,” it must be protected in a way which recognizes both the benefits and harm that stem from it).

reason why heightened protection is essential.³ The best example of this can be viewed from the treatment of Japanese-Americans in the wake of Pearl Harbor, which the Supreme Court did not condemn as indicated by their decisions in Hirabayashi v. United States and Korematsu v. United States. While the Supreme Court has been heavily criticized for its decision in the aforementioned cases, Geoffrey Stone's main point in his seminal work *Perilous Times*, still remains salient: during times of war or in the wake of national security threats, certain individuals are more vulnerable in the United States than others.⁴ This point is most apparent in the post-September 11th cases involving US citizens and US permanent residents suspected of being enemy combatants, where due to reasons of national security, the government has the right to constrict the due process rights of those individuals.⁵ In a post-September 11 world, unless there is a suspension of the government's "war on terror" or a similar abatement in the national security threat, Muslims in America are more susceptible to greater discrimination, verbal and physical attacks as well as hate speech than members of other cultural and religious groups. Because there is no seeming end to the aftermath of September 11th, nor the national security concerns stemming from it, relying on the marketplace of ideas to eradicate religious slurs directed against Muslims is impractical and will only be counterproductive.

Communities that are marginalized in the aftermath of a cataclysmic event are more apt to become targets of hateful speech. In those contexts, the speech must be prohibited in order to avoid the violence and incitement that the words in context are likely to elicit. Therefore, this paper proposes that one way to prevent the rise of domestic terror threats originating from the

³ See Stone, *supra* note 1 at 272-280 (describing the treatment of Japanese Americans after the bombing at Pearl Harbor on December 7, 1941).

⁴ See Stone, *supra* note 1 at 236-239.

⁵ See *e.g.* *Al-Aulaqi v. Obama*, 727 F. Supp. 1, 3-5 (D.D.C. 2010); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2716-2717 (2004).

ever growing marginalization of Muslims post September 11, is through the promulgation of an anti-hate speech ordinance. The proposed ordinance would be context specific and therefore effective until national security threats stemming from the September 11 events were no longer a concern for the United States. In addition, the proposed ordinance would only prohibit the use of specific racial and religious slurs normally directed at individuals who are, or appear to be, Muslim or of Middle Eastern origin. Both limitations are necessary as their inclusion enables the proposed ordinance to not present constitutional challenges to the First Amendment as long as domestic terrorism still poses a threat to the government.

The increased marginalization of Muslims post 9/11 and the effect of this marginalization on the Muslim community and the United States as a whole, necessitates an anti-hate speech ordinance. Employment discrimination statistics maintained by the Equal Employment Opportunity Commission, (EEOC) indicates that discrimination directed against Muslims and Middle Eastern individuals have increased significantly since September 11.⁶ The statistics reported by the EEOC demonstrate a significant increase of workplace discrimination directed against Muslims. However, the discrimination faced is most likely much larger than reported and to an extent, under-represents the degree of discrimination experienced given the inability and reluctance of members of minority communities to report harassment and discrimination.⁷ Many of the aforementioned cases filed with the EEOC were discrimination cases based on employer appearance policies, prohibiting employees from hearing religious headdress, such as

⁶ See *Equal Employment Opportunity Commission Statistics*, National Origin-Based Charges FY 1997-2007, <http://www.eeoc.gov/stats/origin.html>; *Equal Employment Opportunity Commission Statistics*, Religion-Based Charges FY 1997- 2007, <http://www.eeoc.gov/stats/origin.html> (indicating that pre- September 11, the EEOC received approximately 8,000 cases alleging discrimination based on national origin and religion whereas right after September 11 and up until 2007, the EEOC received approximately 12,000 such cases. Nearly all of the reported cases involved discrimination against individuals who were Muslims and also of Middle Eastern origin).

⁷ See Waldron, *supra* note 2 at 109.

headscarves, turbans or maintaining beards.⁸ However, several of the cases were also for hostile work environment claims created and maintained by religious and racial slurs, where plaintiffs were repeatedly subjected to disparaging names by coworkers and supervisors like “Taliban” or “towel-head,” even if they were Muslim but not of Middle Eastern origin.⁹

The 4th and 5th Circuits post September 11 dismissed the respective cases, citing procedural grounds.¹⁰ These judgments indicate a continued assault on their “dignity [or] social standing” within greater American society.¹¹ Signs on street corners or on stores reflect on the continued assault on the dignity of a community, which send different versions of this overall message: “[d]on’t be fooled into thinking you are welcome here. The society around you may seem hospitable and nondiscriminatory, but the truth is that you are not wanted and you and your families will be shunned, excluded, beaten and driven out, whenever we can get away with it.”¹² The man walking with his children on a “...city street in New Jersey...confronted with a signs [such as]: ‘Muslims and 9/11! Don’t serve them, don’t speak to them and don’t let them in...they are all called Osama [and] Jihad Central,’” cannot explain them to his children and tries to hurry past such slogans of hate speech.¹³ Faced with such signs on a daily basis however, undoubtedly assaults his dignity and erodes at his sense of belonging in America.¹⁴

Marginalization and isolation within a society does not necessarily beget domestic terrorists.

⁸ See *Equal Employment Opportunity Commission Statistics*, *supra* note 6.

⁹ See e.g. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 311-313 (4th Cir. 2008); *EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393, 396-398 (5th Cir. 2007).

¹⁰ See *id* (citing timeliness of the Complaint or lack of pervasive nature of the harassment as grounds for dismissal).

¹¹ See Waldron, *supra* note 2 at 5.

¹² See *id* at 2.

¹³ See Waldron, *supra* note 2 at 1-2.

¹⁴ See *id*.

However, violent reactions precipitated by feelings of discontent and perceived mistreatment do and have occurred within the past few years in the United States.¹⁵ In each of the noted incidents of domestic terrorism,¹⁶ the responsible individuals faced some of the post-September 11 backlash which hastened their feelings of social isolation, alienation, eventual radicalization and led them to respond using violence. Curbing the domestic terror threat posed by marginalized Muslims in a post-September 11 world is a top priority held by the United States government. In order to effectively achieve this national security goal, the promulgation of an anti-hate speech ordinance is crucial.

Part II: Historical & Theoretical Antecedents of Context-based Speech Regulation

Curbing individual First Amendment values is not a foreign concept within the history of the United States.¹⁷ In examining those particular moments where the Courts affirmed the curtailment of First Amendment values, it becomes apparent that each came about in the wake of devastating tragedies that shocked the American psyche and consciousness. One such tragedy was the bombing of Pearl Harbor on December 7th 1941, and its devastation comparable to world-wide calamities. There “...more than two thousand people [were killed] and...much of

¹⁵ See e.g. Andrea Elliot, *For Times Sq. Suspect, Long Roots of Discontent*, N.Y. TIMES, May 15, 2010, at A1 (describing the growing social and political isolation experienced by the Times Square Bomber, Faisal Shazhad after September 11 which ultimately pushed him to delve into religious radicalism and lash out by engaging in domestic terrorism); Erica Goode, *Boy at Home in U.S., Swayed by One who Wasn't*, N.Y. TIMES, April 19, 2013, at A1 (reflecting on the experiences of the Tsarnaev brothers, who carried out the Boston Marathon bombings in early April 2013 prior to the attack, highlighting the increased social and economic marginalization experienced by the older brother post September 11 as a Muslim man living in the United States, driving him to self-radicalize and lash out using violence); David Johnston, *U.S. Knew of Suspect's Ties to Radical Cleric*, N.Y. TIMES, November 10, 2009, at A1 (referring to shift and radicalization of US born Major Nidal Malik Hasan which led him to shoot to death 13 Marines at Fort Hood in Texas); A.G. Sulzberger, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. TIMES, February 23, 2010, at A1 (referring to the Afghan immigrant Najibullah Zazi who threatened to carry out an attack on the New York subway system after he felt and experienced increasing social isolation and hostility after September 11).

¹⁶ See *id.*

¹⁷ See Stone, *supra* note 1 at 237.

the Pacific fleet” lay in ruins.¹⁸ Almost immediately, in order to raise national sentiment and affirm a sense of patriotism, “...on February 19, 1942, President Roosevelt signed Executive Order no. 9066, which authorized the Army to ‘designate military areas’ from which any or all persons may be excluded.”¹⁹ Based on Congress’ immediate ratification of Executive Order no. 9066 and its speedy yet selective implementation particularly against individuals of Japanese descent²⁰, the order essentially only applied against the aforementioned community.²¹

No reason was given for the removal of individuals of Japanese descent from certain areas. The individuals, for reasons of national security were given temporary housing in “detention camps...which had been set up in converted racetracks and fairgrounds.”²² While the camps were given the label resettlement communities, the conditions were appalling and individuals housed there were isolated from the main population, “...surrounded by barbed wire and military police [for] three years,” making the conditions akin to a prison.²³ The reason for the isolation of Japanese Americans by the government stemmed from the public outcry and extreme agitation in the aftermath of the bombing of Pearl Harbor, propounding on conspiracy theories that individuals of Japanese descent were somehow responsible for the bombing. As Stone asserts, while racial prejudice existed against individuals of Japanese ancestry in the

¹⁸ See Stone, *supra* note 1 at 286 (describing the extent of the destruction caused by the Japanese when they bombed Pearl Harbor).

¹⁹ See *id.* at 286-288.

²⁰ See Stone, *supra* note 1 at 287 (describing how over the next few months after the enactment of President Roosevelt’s Executive Order, approximately 120,000 men, women and children, some of whom were US citizens but of Japanese were “ordered to leave their homes in California, Washington, Oregon and Arizona”).

²¹ See Act of June 25, 1948, Pub L. No. 722, 62 Stat. 683, 765 (repealed by Pub L. No. 94-412, 90 Stat. 1258 (1976)).

²² See Stone, *supra* note 1 at 287.

²³ See *id.*

several decades preceding Pearl Harbor,²⁴ the bombing allowed for overt displays of discrimination towards individuals of Japanese descent.

Such overt displays of discrimination or curtailment of the rights of individuals of Japanese descent were gradual: there was no mass internment of individuals of Japanese descent overnight after Pearl Harbor.²⁵ However, intelligence efforts which were directed at surveying the activities of Japanese Americans prior to the bombing of Pearl Harbor increased, and plans were made by the government to relocate such individuals into camps, for the sole purpose of military necessity. The government's curtailment of individual freedoms was supported by the Supreme Court and the "ugly abyss of racism" was allowed to triumph over constitutional freedoms.²⁶ In a series of decisions addressing the constitutional nature of orders given by the government under the justification of national security, the Supreme Court affirmed this defense and ruled in favor of the government.²⁷

One of the first such cases brought before the Supreme Court was *Hirabayashi v. United States*, involving plaintiff Gordon Hirabayashi, an American citizen who was born in Auburn, Washington.²⁸ In the aftermath of the bombing of Pearl Harbor, one of the measures imposed by the government under the justification of military necessity was a mass curfew on all individuals listed, namely, Japanese Americans living in specific zones in Hawaii and on the West Coast. Plaintiff decided to challenge the constitutional validity of the curfew, by turning himself in to the FBI and opted to get prosecuted.²⁹ Plaintiff was subsequently convicted for violating a

²⁴ See Stone, *supra* note 1 at 287-288 (stating that laws passed in the early 1900's showed the social and legal intolerance towards individuals of Japanese ancestry).

²⁵ See *id.*

²⁶ See Stone, *supra* note 1 at 296-297.

²⁷ See e.g. *Hirabayashi v. United States*, 63 S. Ct. 1375 (1943); *Korematsu v. United States*, 65 S. Ct. 193 (1944).

²⁸ See Stone, *supra* note 1 at 297-298.

²⁹ See *id.* at 298.

federal statute, promulgated in the aftermath of Pearl Harbor³⁰, essentially making “...it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by...Executive Order [no. 9066] of the President.”³¹ He was charged with failing to remain within his designated zone during the hours of 8:00pm and 6:00am, as per the curfew hours and therefore was in contravention of a Civilian Exclusion Order issued by the military commander of that particular area.³²

The Supreme Court was asked to evaluate, principally “...whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries,” in violation of the US Constitution.³³ The Supreme Court declined to find in favor of the plaintiff and instead justified the central premise given by the Government, that “...the adoption of [legislation] in the crisis of war and of threatened invasion, of measures for the public safety...is not to be condemned as unconstitutional merely because...racial distinctions” were made.³⁴ The Court further stated that “...in time of war, [constitutional government] is charged with the responsibility of our national defense [and should be] given reasonable ground for [acting on and] believing a threat [to be] real.”³⁵ Based on its aforementioned reasoning, the Court recognized as legitimate sparse evidence presented by the government in an effort to indicate that because Japanese Americans have maintained some cultural and linguistic ties to

³⁰ See 56 Stat. 173 (1942).

³¹ See *Hirabayashi*, 63 S. Ct. at 1378 (describing the charge against plaintiff stems from the mass curfew put in place in accordance with President Roosevelt’s Executive Order No. 9066).

³² See *id.*

³³ See *Hirabayashi*, 63 S. Ct. at 1378.

³⁴ See *id.* at 1385-1386.

³⁵ See *Hirabayashi*, 63 S. Ct. at 1383.

Japan, their loyalty is undoubtedly suspect and they are more prone to espionage.³⁶ In fact, the Court acknowledged that most of the evidence on statistics regarding Japanese-American cultural ties or dual citizenship is based on estimates, as “no official census is available.”³⁷ It still, however did not question the government’s purported rationale.

In its analysis, the Supreme Court similarly glossed over the curfew’s emphasis and application to citizens solely based on their ancestry. The Court stated that “...distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.”³⁸ However, the Court gave greater deference to the government’s compelling interest in protecting the nation from sabotage in areas they reasonably thought to be in peril from a Japanese invasion. The Court therefore carved out an exception to the prohibition of discrimination based on invidious categories, in times of military necessity, stating that there can exist “...facts and circumstances...in war setting[s] where...ground [exists] for differentiating [against] citizens of [other] ancestry from other groups in the United States.”³⁹ In particular, the Court stated that they “cannot close [their] eyes to the fact, demonstrated by experience that, in times of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in light of facts of public notoriety.”⁴⁰

³⁶ See *Hirabayashi* 63 S. Ct. at 1384 (where the Supreme Court took as credible evidence sparse numbers and conjectures presented by the government that because “large numbers of children of Japanese parentage are sent to Japanese language schools [or] sent to Japan [to study] or [maintain] dual citizenship,” they are immediately prone to disloyalty towards the United States).

³⁷ See *id.*

³⁸ See *Hirabayashi*, 63 S. Ct. at 1385-1386.

³⁹ See *id.* at 1386.

⁴⁰ See *Hirabayashi*, 63 S. Ct. at 1386.

All in all, it was “...enough that the circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made.”⁴¹ The aforementioned statement is particularly important because expressly states the lowest of standard of scrutiny the Court has applied and in the future will apply to governmental decisions curtailing even the most protected rights of individuals: rational basis review. Normally, in order to find constitutional a governmental measure which threatens the rights of individuals under the Fourteenth Amendment’s Equal Protection clause by discriminating against them on the basis of invidious categories, the governmental justification must be the least restrictive means to achieve a compelling governmental interest.⁴² While the Court attempted to skirt this proposition by scrutinizing the government’s curfew and Civilian Exclusion Order under rational basis review and only requiring the governmental interest be rationally related to the purported outcome, it failed to preserve the intense judicial scrutiny historically given to Equal Protection rights of individuals.⁴³ Therefore, in times of war the Courts will give excessive deference to the government and curtail individual rights as long as the justifications for curtailment appear facially plausible. The Courts will do so without thoroughly examining the evidence behind such justifications.⁴⁴ The deference historically accorded to the government in times of crisis, nearly guarantees that an anti-hate speech ordinance promulgated as a national security measure in the aftermath of September 11 would survive Supreme Court review.

⁴¹ See *Hirabayashi*, 63 S. Ct. at 1386.

⁴² See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (referring in footnote 4 to the levels of judicial scrutiny to governmental measures which threaten the Equal Protections rights of individuals).

⁴³ See *id.*

⁴⁴ See *Bakircioglu*, *supra* note 2 at 3 (stating that while free speech should be restricted in some contexts, it should be protected from arbitrary restrictions under the “pretext of national security”. In her opinion, the Supreme Court’s extreme deference to the government after the bombing of Pearl Harbor would qualify as an arbitrary and therefore an unconstitutional restriction of the plaintiff’s First Amendment rights).

Another case demonstrating the extreme deference given by Supreme Court to the government during times of war is *Korematsu v. United States*. In facts similar to *Hirabayashi*, plaintiff in this case was an American citizen, born and living in Oakland California.⁴⁵ On May 30, 1942 he was stopped by police in California, questioned for just walking down the street with his girlfriend.⁴⁶ While plaintiff did not initially claim to be of Japanese origin,⁴⁷ he did finally admit to his real name and ethnicity. His entire family had reported and was registered to a particular area, under Executive Order no. 9066, but he “had not reported, because he was trying to earn enough money to move to the Midwest with his girlfriend.”⁴⁸ Plaintiff was subsequently charged for violating Exclusion Order no. 34, which “...directed that all persons of Japanese ancestry must be excluded from the area under the supervision of the Western Command of the U.S. army.”⁴⁹ Using reasoning similar to their holding in *Hirabayashi v. United States*, the Supreme Court affirmed plaintiff’s violation of the Exclusion Order and upheld the validity of such Exclusion Orders.⁵⁰

At the outset, the Court proclaimed that it was bound by the precedent set in *Hirabayashi v. United States*, and therefore were “...unable to conclude that it was beyond the war powers of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”⁵¹ The underlying premise the Court adopts in analyzing a governmental interest which discriminates against individuals on the basis of their ancestry is one of extreme deference. The deference is extreme, so much so that the exclusion of an entire ethnic group

⁴⁵ See Stone, *supra* note 1 at 299.

⁴⁶ See *id.*

⁴⁷ See Stone, *supra* note 1 at 299-300 (indicating that when he was first questioned, plaintiff claimed he was of Spanish-Hawaiian origin and that his name was Clyde Sarah).

⁴⁸ See *id.*

⁴⁹ See Stone, *supra* note 1 at 299.

⁵⁰ See *Korematsu v. United States*, 65 S. Ct. 193, 194 (1944).

⁵¹ See *id.* at 194-195.

from a particular area, due to national security concerns, is deemed constitutional. Using the aforementioned as a starting premise highlights the extreme power the government has and broad agenda available to it, if postulated under the context of national security. As the Court noted that while “...exclusion from the area in which one’s home is located is a far greater deprivation than constant confinement to the home [the] imminent danger to public safety [posited by the military] constitutionally justifies” both.⁵²

As the war effort escalated and the government enacted more severe measures to counteract what they perceived to be a growing threat of disloyalty within the United States, the Court appeared to be mirroring and accepting such alarmist sentiment. Proceeding in their analysis, the Court accepts as necessary the “...exclusion of those of Japanese origin [solely] because of the presence of an unascertained number of disloyal members of the group,” a vague number which was stipulated by the military.⁵³ In doing so, then the Court attempted to reframe the issue from one of racial prejudice to wartime necessity.⁵⁴ Writing for the majority, Justice Black asserted that “[we] are not unmindful of the hardships...imposed upon a large group of American citizens. But hardships are part of war and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure.”⁵⁵ Therefore, individuals of Japanese descent, such as the plaintiff who was an American citizen, was not being racially discriminated against by the Exclusion Order based on the context in which it was issued. Justice Black continues to reframe the issue by stating that “...to cast this case into outlines of racial prejudice...confuses the issue. Korematsu was not excluded from the [West Coast] because of hostility to...his race [but] because the...military authorities...decided

⁵² See *Korematsu*, 65 S. Ct. at 195.

⁵³ See *id.* at 196.

⁵⁴ See Stone, *supra* note 1 at 300.

⁵⁵ See *Korematsu*, 65 S. Ct. at 195-196.

that the...urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were justified.”⁵⁶

The inherent weakness in the majority’s attempt to reframe the issue in order to justify their extreme deference to the government is captured by the dissent. The dissent urges that in order to deprive individuals of their constitutional rights is subject to greater scrutiny and therefore a greater standard of judicial review. Justice Murphy, writing for the dissent stated “[t]he judicial test of whether the [g]overnment, on a plea of military necessity, can validly deprive an individual of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so ‘immediate, imminent and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.”⁵⁷

While Justice Murphy requires less than the historically situated strict scrutiny of judicial review used by the Court in analyzing decisions discriminating against individuals based on invidious categories, he nonetheless challenged the validity of the Court’s level of deference to the point where he indicated that such deference demonstrates carelessness by the Supreme Court. This is apparent when he chastised the majority for accepting as evidence over-generalizations and stereotypes presented by the government. He stated that while, “...there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land...but to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is the deny that under our

⁵⁶ See *Korematsu*, 65 S. Ct. at 197.

⁵⁷ See *id.* at 202-203.

system of law individual guilt is the sole basis for deprivation of rights.”⁵⁸ Furthermore, even while holding the government to a lesser standard of scrutiny, Justice Murphy asserted that “...no adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from disloyal, as was done in the case of persons of German or Italian ancestry. [T]he factors of time and military necessity [do not appear] as urgent as they have been represented to be.”⁵⁹

The dissent pointed out that the Court essentially provided *carte blanche* to the government to discriminate based on national origin, based on the fact that the nation was in the midst of extreme turmoil and recovering from a catastrophic shock inflicted by Pearl Harbor. This however, did not hold weight in the grand scheme of events as the Supreme Court, in this and subsequent decisions continued to show deference to governmental decisions due to national security concerns. As Stone asserts, while the Supreme Court “...embraced a new approach to the constitutionality of laws discriminating against aliens,” it did not move away from demonstrating increased deference to the government when national security concerns were at bay.⁶⁰ Essentially, while the “morality and constitutionality of the [actual] internment” continued to be questioned, military necessity continued to exist as a viable governmental justification for either curtailing or relaxing constitutional guarantees heavily protected by the Courts.⁶¹

⁵⁸ See *Korematsu*, 65 S. Ct. at 205.

⁵⁹ See *id.* at 205-206 (referring to House Report No. 2124 from the 77th Cong., 2d Sess. at 247-252 where Justice Murphy highlights the disconnect in the government’s logic by indicating that had they been concerned with maintaining the rights of Japanese Americans and not discriminating against them based on generalities, the government would have seriously evaluated the threat by distinguishing disloyal from loyal members as they did with individuals of Italian and German ancestry).

⁶⁰ See Stone, *supra* note 1 at 303-304.

⁶¹ See *id.* at 307.

Based on theoretical and historical antecedents, under exigent circumstances such as national security threats posed to the United States, the Supreme Court has and most probably will uphold decisions circumventing individual liberty and constitutional rights. Even the most sacred of rights, the freedom of speech under the First Amendment, has been curtailed in order to protect the government in times of crises.⁶² The backlash caused by the events of September 11th continues to afflict the Muslim community in America, causing members to respond to hate speech and religious slurs through increasing radical and violent means.⁶³ In the wake of incidents such as the attempted bombing of Times Square and the Boston Marathon bombings, domestic terrorism is a real and ever-present threat to the security of the United States. It is essential that the coordinating branches promulgate an anti-hate speech ordinance to prevent the spread of domestic terrorism at the source: by stopping the increasing marginalization of the Muslim community caused by hate speech.

Part III: The Harm in Hate Speech: A Viable National Security Threat

The alignment of free speech with ideas of individual autonomy and the curtailment of increased government control over such autonomy is the main reason why First Amendment protections are heavily guarded.⁶⁴ This requires individuals to “tolerate” all forms of speech, even hate speech, because some believe that the freedom of such speech is directly linked to the freedom to think such thoughts.⁶⁵ It is the effect of the speech which is unequal and therefore

⁶² See *supra* Parts I and II.

⁶³ See *supra* Part I, note 15.

⁶⁴ See Waldron, *supra* note 2 at 32.

⁶⁵ See e.g. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 162-166 (Basic Books, 1st ed. 2007).

inhibits the other freedoms enshrined in the Constitutions which are guaranteed to each and every citizen of the United States of America.⁶⁶

The harm arising from hate speech “...is harm in the first instance [only] to the groups who are denounced or bestialized,” through such speech.⁶⁷ The targets of first instance are “polluted by [such] materials [to the point where they cannot] lead their lives, [or bring] up their children...in this social environment.”⁶⁸ Individuals subject to the aforementioned, who face and experience such intolerance, hate, animosity and basic indignities, become increasingly marginalized in society.⁶⁹ At some point the marginalization moves from the point of self-introspection to a direct response. An anti-hate speech ordinance is required in order to quell and prevent such a response as it would pose a domestic security threat and destabilize already precarious relations between the federal government and members belonging to Muslim and immigrant communities in the United States.⁷⁰ And it is due to its political necessity that it will not pose constitutional challenges to First Amendment values.

In his book *The Harm in Hate Speech*,⁷¹ Jeremy Waldron provides a compelling argument indicating that the psychological and collective harm to communities as a result of hate speech are akin to forms of physical abuse.⁷² Waldron reframes the case for hate speech

⁶⁶ See e.g. THE U.S. CONST., amends. I, XIII, XIV, XV.

⁶⁷ See Waldron, *supra* note 2 at 33.

⁶⁸ See *id.*

⁶⁹ See John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539-540 (2006) (describing the pervasiveness of hate speech as it impacts all areas of everyday life).

⁷⁰ See Shirin Sinnar, Trends in Post 9/11 Backlash Employment Discrimination, Address Before the Equal Employment Opportunity Law Panel (Mar. 23, 2005), available at <http://www.bnapbooks.com/ababna/eo/2006/sinnar.pdf>. (stating generally that in the post 9/11 era, discrimination, harassment and violence against Sikhs have risen because based on their beards and turbans, they were associated as being “Muslim”).

⁷¹ See Waldron, *supra* note 2.

⁷² See *id.* at 33.

legislation by moving away from arguments put forth by critics of hate speech legislation,⁷³ who state that advocates of such legislation essentially want to legally punish and “...forbid expressions of ‘extreme’ intolerance or ‘extreme’ dislike,” whenever this is viewed as a bad thing.⁷⁴ However, as Waldron states, advocates of hate speech legislation do not focus on forbidding extreme emotions or methods of expression, but rather focus on “...the predicament of vulnerable people who are subject to hatred directed at their race, ethnicity or religion.”⁷⁵ Furthermore, I would argue that advocates are equally concerned with the effect on society as a whole due to the reaction of vulnerable people to their constant subjection and experience of hate speech.

Waldron broadly describes the social harm caused by hate speech, concomitantly to the communities who are recipients of hate speech and society as a whole. Public expressions undoubtedly have an effect on people’s lives. While individuals have been given basic rights under the United States Constitution such as the freedom of worship, freedom to congregate, freedom from discrimination based on invidious categories, Waldron asserts that individuals additionally have the right to security. They have a right to be secure from public expressions of “...derision, hostility and abuse encouraged [and incited] by hateful propaganda [as this has] a severely negative impact on [an] individual’s sense of self-worth and acceptance.”⁷⁶ Waldron further asserts that the aforementioned sentiments caused by hate speech, in turn always engenders harsh and explosive reactions from marginalized communities. He asserts that “...the impact [of hate speech] causes target groups members to take drastic measures in reaction,

⁷³ See ROBERT POST, *Hate Speech* in EXTREME SPEECH AND DEMOCRACY 123-125 (Ivan Hare and James Weinstein eds., Oxford University Press 2009).

⁷⁴ See *id.*

⁷⁵ See Waldron, *supra* note 2 at 37.

⁷⁶ See *id.* at 84 (quoting *R v. Keegstra*, 3 SCR 697 (1990)).

perhaps avoiding activities which bring them in contact with non-group members,” leading to extreme isolationist tendencies.⁷⁷ In turn, the reactions of such marginalized communities “...bear heavily in a nation that prides itself on tolerance and fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups...in society.”⁷⁸

In addition, because hate speech attacks individual dignity, it is particularly corrosive and endangers general public welfare. As Waldron highlights, “...personal dignity is not just a decorative fact about [an] individual, [i]t is a matter of status and as such it is in large part normative: it is something about a person that commands respect from other and from the state.”⁷⁹ Personal dignity is defined only in part by individuals. It is also based on how individuals are regarded by the state and other members of society, determined by the “...recognition of ...rights or entitlements,” given to such individuals.⁸⁰ Hate speech besmirches the personal dignities of individuals and invariably affects their status in society overall because as targets of negative sentiments they do not receive the same treatment and therefore protections from the state. As the recipients of such comments they begin to believe that the state has accorded them second class status.⁸¹ Perceived feelings of inferiority or unequal treatment from the state are extremely dangerous as history indicates, because individuals of target communities begin to disassociate themselves as citizens of the state and experience a psychological break in loyalty.⁸² As hate speech creates negative solidarity and increases the wedges between members

⁷⁷ See Waldron, *supra* note 2 at 84 (quoting *R v. Keegstra*, 3 SCR 697 (1990)).

⁷⁸ See *id.*

⁷⁹ See Waldron, *supra* note 2 at 85 (quoting *R v. Keegstra*, 3 SCR 697 (1990)).

⁸⁰ See *id.*

⁸¹ See Waldron, *supra* note 2 at 87.

⁸² See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 61, (Lewis Coser trans., Free Press 1997) (describing how breaks in loyalty between members of different groups in society engenders “negative solidarity” instead of the ideal of “positive solidarity”. Negative solidarity is based on the idea that in order for some to prosper, the rights of others must be curtailed, while positive solidarity is rooted in the idea of in order to achieve mutual gain, individuals in society must work together and realize they are mutually limited).

of different communities, it adversely impacts members who are targets of such hate speech and society as a whole. Personal dignity is not defined as self-respect or self-esteem, but is defined as a reflection of the right to have an equal status and receive protection for that status in society.⁸³

It is the psychological harm posed by the assault hate speech inflicts on the dignities of individuals within a targeted community indicates the direct relationship between hate speech and the incitement of violence.⁸⁴ The distress caused to an individual's feelings is not what anti-hate speech legislation seeks to prohibit or remedy: it is the assault on an individual's personal dignity and character as a "citizen" within society which it seeks to preserve.⁸⁵ While an individual's feelings may be soothed through such a remedy, that effect is only secondary. The concept of preserving dignity and therefore prohibiting degrading treatment is recognized universally. The best example is seen in "...the International Covenant on Civil and Political Rights Article 7 and in Article 3 of the European Convention on Human Rights [each] primarily designed to protect people against being treated in ways that diminish their elementary status as persons."⁸⁶ As Waldron espouses, an assault on dignity is not just limited to one aspect of an individual's life and identity, "...it is linked to [other] aspects such as reason, understanding, autonomy, free will and normative self-regard. Degradation [therefore] is not possible without some conscious impact."⁸⁷

⁸³ See Waldron, *supra* note 2 at 105; Bakircioglu, *supra* note 2 at 5 (indicating that hate speech only causes members of the targeted group to suffer estrangement from society, a loss of cultural identity and group reputation).

⁸⁴ See Knechtel, *supra* note 69 at 546-549 (outlining the numerous events in history which decisively show that hate speech, the constant barrage of racial, religious and ethnic slurs, leads to immense violence from those who are targets of such violence. The examples cited as that of Nazi Germany in the 1930's and 1940's; the Bosnian war; the conflict in Rwanda and the Arab-Israeli conflict, to name a few).

⁸⁵ See *id.* at 108.

⁸⁶ See Waldron, *supra* note 2 at 109.

⁸⁷ See *id.*

While the United States has not adopted or ratified agreements such as the International Covenant on Civil and Political Rights, the Constitution has enshrined basic liberties and included protections against various forms of degradation⁸⁸ because of the debilitating impact of degradation on the human psyche and in turn society at large. Being exposed to continued degradation in the form of hate speech brings about “...a plethora of thoughts and emotions [rendering individuals unable] to differentiate terror from outrage, from offense, from insult, from incredulity, from acutely uncomfortable self-consciousness, from the perception of a threat, from humiliation, from rage, from a sense that one’s world have been up-ended, from sickening familiarity, from the apprehension of further assaults or worse...from the shame” caused by such rhetoric.⁸⁹

Due to the danger posed, it is “...tremendously important that assurance [against hate speech] be conveyed [to prevent people from feeling] insecure, unwanted or despised in social settings [and] in social interaction.”⁹⁰ Hate speech is particularly dangerous to the public welfare of society and most directly, a nation’s national security, because it attempts to “...negate the implicit assurance that a society offers to the members of vulnerable groups—that they are accepted in society.”⁹¹ In order to prevent the effect of hate speech on society, while taking into account the “...absolutist language of the First Amendment,” the best justification under which

⁸⁸ See U.S. CONST., amends. I- XVI.

⁸⁹ See Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POLITICAL STUDIES 410-411 (1987) (describing generally that being subjected to any form of degradation brings up a myriad of emotions which individuals cannot disentangle. Actions then taken while in such a state have the most disastrous consequences for individuals and the society which they inhabit).

⁹⁰ See Waldron, *supra* note 2 at 88.

⁹¹ See *id.*

an anti-hate speech ordinance can be promulgated is where the foundations of government are perceived to be at risk.⁹²

The Supreme Court decisions in *RAV v. St. Paul*⁹³ and *Snyder v. Phelps*⁹⁴ demonstrate that the promulgation of an anti-hate speech ordinance under the aforementioned circumstances would be accepted. In *RAV v. St. Paul*, the Court found the ordinance unconstitutional because it attempted to “...shield [acts] because they express[ed] a discriminatory idea or philosophy.”⁹⁵ The Court stated that the ordinance was facially unconstitutional because the language in the ordinance has not been precisely tailored to avoid impermissibly restricting individuals who could use proposed “fighting words,” should they be used by individuals in contexts other than those which would “arouse anger and resentment in others.”⁹⁶ The Court furthermore did not accept the argument put forth by the Defendants, asserting that the ordinance was “...intended, not to impact of the right of free expression of the accused, but rather to protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.”⁹⁷ While the protection of minorities against discrimination is a compelling state interest, the Court concomitantly stated that, balanced against the “...danger of censorship, presented by a facially content-based statute...[t]he dispositive question in this case [was] whether content discrimination [was] reasonably necessary to achieve St. Paul’s compelling interests.”⁹⁸ The Court, by subjecting the

⁹² See Knechtle, *supra* note 69 at 564-567 (listing the cases, apart from *Chaplinsky*, where the Supreme Court has upheld limitations on freedom of speech. Each of the cases listed demonstrated that the restriction on speech was allowed because the “foundations of the government” were at risk); see e.g. *Whitney v. California*, 274 U.S. 357, 371 (1927); *Bradenburg v. Ohio*, 395 U.S. 444 (1969).

⁹³ See *RAV v. St. Paul*, 112 S. Ct. 2538 (1992).

⁹⁴ See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

⁹⁵ See *RAV*, 112 S. Ct. at 2546-2547.

⁹⁶ See *id.* at 2547-2548.

⁹⁷ See *RAV*, 112 S. Ct. at 2549.

⁹⁸ See *id.*

ordinance to strict scrutiny, determined that there were other less restrictive means available to the state than restricting First Amendment rights. It is because the ordinance was subjected to the highest level of scrutiny that it failed. Had the state presented the ordinance under one of the limited exceptions to the bar against content restriction under the First Amendment, the ordinance would not have received the same treatment by the Court. Finally, because the anti-hate speech ordinance would be provided under a different basis and would be tailored to achieve the national security aims of the government, it would not receive the same treatment as the ordinance at issue in *RAV v. St. Paul*.

The Supreme Court's analysis in *Snyder v. Phelps* similarly indicates that the Court would treat an anti-hate speech ordinance enacted as a "war time" measure, differently than ordinances which provide content based restrictions on speech in order to protect the rights of minorities. The Court indicated that while there are instances where the prohibition of particular words will not receive First Amendment protections,⁹⁹ these instances must fall within the narrow exceptions to the broad application of the First Amendment. In addition, the Court acknowledged that Westboro's picketing was meant to coincide with Matthew Snyder's funeral, however; the church "did not itself disrupt that funeral," and the words did not rise to level of provoking imminent violence.¹⁰⁰ In the aftermath of 9/11 and rise of domestic terrorism, it cannot be said that hate speech, which has been conclusively linked to the rise in marginalization of Muslims in the United States, has not and will not provoke imminent violence.

⁹⁹ See *Snyder*, 131 S. Ct. at 1221.

¹⁰⁰ See *id.* at 1220.

Part IV: Reviving *Chaplinsky*: Putting “Fighting Words” Into a Contemporary Context

The concept of a “fighting words” doctrine within the context of hate speech first appeared before the United States Supreme Court in 1942 and was debated in *Chaplinsky v. N.H.*¹⁰¹. In the aforementioned case, the Court affirmed the conviction under the “fighting words” statute, finding principally that: (1) the appellant violated the statute and (2) the statute did not contravene the First Amendment.¹⁰² The statute at issue was Chapter 378, §2, of the Public Law of New Hampshire, which stated that “...no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or public place nor call him by any offensive or derisive name...to prevent him from pursuing his lawful business or occupation.”¹⁰³ It essentially outlawed the use or direction of offensive words which were intended to offend or annoy individuals and thereby affect their ability to pursue their livelihood.

Without citing any political exigency the Supreme Court affirmed the statute’s constitutionality, concomitantly affirming the validity of curbing certain forms of speech which would prevent individuals from pursuing their livelihood. Based on this precedent, establishing a federal ordinance which would similarly make it unlawful for individuals to direct certain slurs or epithets towards each other in public forums would be an alien or foreign concept. In addition, placing such a federal ordinance against the backdrop of September 11 and the need to protect, first and foremost, the government from domestic threats serving as reprisals by minority communities, provides even more motivation and necessity for such a doctrine.

¹⁰¹ See *Chaplinsky v. N.H.*, 62 S. Ct. 766, 767-768 (1942).

¹⁰² See *id.*

¹⁰³ See *Chaplinsky*, 62 S. Ct. 766, at 768.

Crafting an anti-hate speech ordinance in the context of September 11th would primarily curb the use of epithets used to degrade Muslims, individuals of Middle Eastern origin or those who “appear” to look Middle Eastern. The need for anti-hate speech legislation is great, as studies conducted by the Equal Employment Opportunity Commission and other reputable organizations demonstrate, employees alleging discrimination based on religion and national origin increased significantly right after September 11th and have held steady.¹⁰⁴ Apart from employees, ordinary Muslims and individuals of Middle Eastern origin have experienced increased discrimination as well.¹⁰⁵ An anti-hate speech ordinance overall, is beneficial and the most efficient remedy to combat such discrimination and protect the national security interests of the United States.¹⁰⁶

Temporarily outlawing the use of epithets involving individuals of the aforementioned communities, many of which overlap, narrowly tailors the type of speech restrained, to those most vulnerable in the aftermath of September 11th. As Waldron asserts, such an ordinance would not “...make decisions about the lawfulness and unlawfulness of certain speech acts on the basis of a case-by-case analysis of the emotions of particular victims. Instead [it would] identify categories and modes of expressions that...are likely to have an impact on the dignity of members of [these particular] vulnerable minorities” at this particular time.¹⁰⁷ Doing so provides protection against criticisms that the ordinance is over-inclusive. The sanctioned slurs would be

¹⁰⁴ See McCandless & Ngo, *Employment Discrimination on the Basis of National Origin and Religion in the Post 9/11 Era*, A.B.A., Jul. 2008 at 3-8 (referencing statistics showing a sharp increase in workplace discrimination Muslims after 9/11).

¹⁰⁵ See *id.* at 9-13; Barkircioglu, *supra* note 2 at 25-26 (indicating that following the September 11 attacks, anti-discrimination and basic freedoms of individuals were severely breached); Puja Kapai and Anne S.Y. Cheung, *Hanging in the Balance: Freedom of Expression and Religion*, 15 BUFF. HUM. RTS. L. REV. 41, 53-54 (2009).

¹⁰⁶ See Knechtle, *supra* note 69 at 570-573 (highlighting that because a government has the “fundamental obligation to protect its citizens...at a minimum it is within its powers to restrict speech that leads” or has the ability to lead to imminent violence.” When it comes to national security, Courts have allowed some political hyperbole or leniency is determine what constitutes a viable threat).

¹⁰⁷ See Waldron, *supra* note 2 at 113.

limited to ones stemming from September 11 and directed at individuals in public forums, with the intent to arouse anger and reasonably would provoke imminent violence.¹⁰⁸

Moreover, focusing on religious epithets and slurs directed at Muslims and those of Middle Eastern origin avoids the possibility that such an anti-hate speech ordinance will be void for vagueness. Listing the particular religious epithets or the general categories which would be banned would put the public on notice as to the prohibited speech. It additionally also allows for the ordinance to be based on an objective standard, where the prohibited slurs and epithets stem from what has been shown to be degrading and therefore is not dependant on how a particular individual of a vulnerable minority reacts to such language. Focusing on what is objectively degrading and therefore dangerous to society as a whole, adds greater veracity to the aim of such an ordinance: curbing the radicalization of marginalized communities and increases in incidents of domestic terrorism.

Another component of such an anti-hate speech ordinance which indicates that it would not impermissibly restrict the First Amendment rights of individuals is that it would be subject to a time limitation. Therefore, individuals who use religious epithets will be sanctioned as long as exigent circumstances stemming from the aftermath of September 11th exist. This tailors the restriction to specific contexts and for the specific purpose of protecting America as a whole, given the political circumstances of the times. Creating a time limit would qualify as a reasonable restriction, legitimizing the “domestic threat” justification provided by the federal government and over time help eliminate such speech from the marketplace, because it sends the message that it is of such low value or offensive that it should not be utilized. Once the government no longer feels that exigent circumstances do not exist to such a level where

¹⁰⁸ See *Snyder*, 131 S. Ct. at 1220-1221 (highlighting that “speech is powerful” and can be disruptive and provoke violence. In those instances, it is reasonable for speech to be curbed).

domestic terrorism is no longer a grave threat, the ordinance will cease to have effect. By that time, the marketplace of ideas will undoubtedly have generated a more tolerant and less divisive society. As Onder Bakircioglu asserts, while "...legal regulation or control [of hate speech] cannot cure [it from society], law [is the only sufficient] tool to regulate human conduct, including speech, which might at times be a deadly weapon."¹⁰⁹

The particular degrading words which would be ones which provide the most offense based on the antecedents with September 11th as well as misconceptions about Muslims and individuals who appear to "look" Muslims or are of Middle Eastern origin. Words derogatory of the national origin of such individuals (towel head, rag head, camel worshipper) and their faith (dog, terrorist, Osama lover, Jihadists, Islamists, anti-American, suicide bomber,) should be prohibited. Additionally, "fighting words" relating to the outwards appearance, religious apparel, institutions of worship and using epithets about a religion should be banned.¹¹⁰ While seemingly broad, the war-time context in which the proposed anti-hate speech ordinance is being proposed does not indicate that Courts will find it overly broad. Unlike in *RAV v. St. Paul*, however, the proposed ordinance restricts the use of certain words only because it falls under one of the narrow exceptions where the First Amendment protections may be contravened.¹¹¹

Finally, the sanctions for using prohibited slurs should be tailored so that they do not provide excessive punishment should individuals disobey the anti-hate speech ordinance. Therefore, acceptable fines which do not unduly burden the Courts, law enforcement or excessively punish individuals would be monetary fines and possible jail time, should the

¹⁰⁹ See Bakircioglu, *supra* note 2 at 48-49.

¹¹⁰ See *RAV*, 112 S. Ct. at 2539 (where the proposed anti-hate speech ordinance in this paper would be tailored similarly to the Minnesota ordinance, making it a misdemeanor to utter "fighting words" which a person knows or has "reasonable grounds to know espouses anger," fear or resentment because the link of the words to September 11th).

¹¹¹ See *id.* at 2544-2545.

violation of the ordinance be severe and pervasive enough to be viewed as a misdemeanor. The number of slurs used, frequency and nature of the violation should be taken into account when fining individuals who violate the anti-hate speech ordinance. While requiring some exercise of discretion by the Courts, the precise tailoring of such an ordinance and remedies available to victims of hate speech stemming from September 11th coupled with the national security concerns, is enough to ensure that such an ordinance will be upheld.

Part V: Conclusion

In sum, an anti-hate speech ordinance to prohibit certain words stemming from the aftermath of 9/11 put forth to curb national security concerns in the wake of September 11, would be one of the only conceivable ways to promulgate such legislation. It is the only conceivable method because it takes advantage of one of the narrow exceptions under which First Amendment protections will be circumvented by the Courts. The promulgation of such an ordinance provides advantages both to the United States government and members of the Muslim community in the United States. For the former, stopping the marginalization of Muslims post 9/11 by truncating assaults on their social reputation within the broader United States community, and showing tolerance is a crucial step in curbing domestic terrorism. For the latter, Muslims in the United States will be able to participate in American society as equals. This encourages and precipitates increased social harmony and therefore less of a need to resort to violent tactics or responses. Finally, as such an ordinance would be time limited and narrowly tailored in its proscriptions and remedies for violators, the Courts would be able to better enforce it without compromising the other rights afforded to individuals. In order to best protect the

national security interests of the United States and allow for the marketplace of ideas to root out hate speech, an anti-hate speech ordinance justified as a national security measure is required.