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Detention without Trial in the Second World War: Comparing the British and American Experiences

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

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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.

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 *Liversidge v. Anderson* and *Greene v. Secretary of State for Home Affairs.* 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. The defendants in the cases were Sir John Anderson, Home Secretary in 1939-1940, and his successor, Herbert Morrison, who took office in October 1940.

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* and *Ex Parte Endo,* 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 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. 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.

The story of detention without trial in America differs from the story in Britain socially, politically and legally. These 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. As yet, no comprehensive investigation of the British experience has been produced.

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. Due to an obsession with secrecy which characterizes the British government, many papers are still unavailable. 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. 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. 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 1940s is rather like writing medieval history — one is engaged in peering through keyholes.

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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. 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. 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 some 661 aliens in transit to camps in Canada. 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. 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. 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.

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. 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 aliens.

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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. 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." The draft regulation allowed the Secretary of State (in effect the Home Secretary) 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." 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.

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 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. 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. 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." 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. The right to legal representation had also been deleted.

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. 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. On November 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.

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." 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. 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. 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." 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. A very well-known barrister, Norman Birkett, was made chairman of the Advisory Committee. To emphasize its independence 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.

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, 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." The stated

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reason for the order was "the protection against espionage and against sabotage of national-defense material, national-defense premises, and national-defense utilities." 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."

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. Many Americans of Japanese ancestry were simply American citizens; others enjoyed dual nationality under then Japanese law. The justification advanced for their exclusion 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. 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. The detainees were to spend between two and three years in camps under very disagreeable conditions.

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.

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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. In the whole course of the war only 1,847 detention orders were made, 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. Early use of detention was largely confined to persons thought to be involved in espionage.

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 MI5, 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 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. 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 MI5, 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. This was done by lawyers, recruited to work in MI5 during the war, rather than by regular MI5 officers. 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 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. 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." 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." 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 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. The scale of detention under Regulation 18B also rose sharply in June and July of 1940 under these policies, again initially supported by Churchill. 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. In late 1940 and 1941 considerable conflict arose between MI5 and the Advisory Committee, which MI5

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thought was far too liberal, but the Cabinet backed the Committee and release continued. 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. 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. The detained aliens were also kept in bad and sometimes appalling conditions.

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. 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 10,000 members, many of whom were not very active. On May 22, 1940, the Cabinet decided to intern twenty-five to thirty leading lights of the party, including Sir Oswald and his wife. 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 would put Mosley in office as Prime Minister.

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 Domvile and the Marquess of Tavistock, but Conservative Party ministers, particularly Lord Halifax and Mr. R.A.B. Butler at the Foreign Office. 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.

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. 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 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. But the British Union was, in May of 1940, perfectly legal, though in July the party was banned.

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. 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. 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.

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. 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." 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.

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 orders, and if he spent ten minutes on each file, 137 hours of work would have been involved. 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 (now married to Professor H.L.A. Hart) 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. 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. Next in gravity was the meager statement of the case revealed to the detainee which was the subject of criticism and hence embarrassment. Furthermore, the delay between detention and appearance before the Advisory Committee grew longer as everyone was overwhelmed with work.

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The whole scheme 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. The authorities had no shortage of weapons for suppressing the disloyal and the discontented.

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. Consequently, the justification for many of the internments of May and June 1940 no longer existed in 1941.

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, which might have justified draconian measures. 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. 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 1940s. 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) and two more on December 18, 1944 (the *Korematsu* and *Endo* cases). Only Mitsuye Endo succeeded, and that only in a somewhat technical sense as she was already at liberty. 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.

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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. In *Korematsu,* 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). That is to 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,* 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."

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.

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 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 prin-

cipally 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. 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. 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.

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

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. 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 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.

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. 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. 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. So the government lawyers were contending, in effect, that the legality of Lees's 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.

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.

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

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 satisy 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. 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 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. He was born in London on June 11, 1904, the son of Asher and Sara 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.

The first of Britain's two leading cases on detention without trial concerned Robert William Liversidge.

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. 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 arrested 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. 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. 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, and Colonel Norman Thwaites (1872-1956), Britain's chief of intelligence in New York in the 1914-1918 war. Liversidge also knew Sir William Stephenson, head of British intelligence in the United States during the Second World War. 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."

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 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. 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, an entirely loyal and patriotic person, remained in detention, and the Royal Air Force lost the services of an excellent intelligence officer.

The order for Liversidge's detention was an abuse of power, perhaps understandable in May of 1940, but an abuse nevertheless.

The subject of the second leading case on detention without trial of British citizens, Ben Greene, had a very different background. 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 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.

Ben Greene was detained on May 28, 1940 on the basis of an order signed on May 18, 1940 which cited his "hostile association." 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. 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.

Greene brought habeas corpus proceedings, while Liversidge instituted an action for false imprisonment. Liversidge's action was, for technical reasons, the more important legally. Liversidge's lawyer, Oswald Hickson, attempted to obtain an order for discovery of the grounds upon which the Home Secretary thought him to be of hostile associations and a person who needed to be detained. In an action for false imprison-

ment 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.

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. 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 one of the two MI5 agents, Harald 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. 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 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. 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. Liversidge had been released a littler earlier, on December 31, 1941. 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."

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, identifiable ethnic group, "a discrete and insular minority." 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.

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.

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

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 harrassed 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. In Britain, the very modest use of the powers conferred by the Defence 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.

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