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Responses to the Ten Questions

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7. HOW DO THE ABUSES OF CIVIL LIBERTIES UNDER THE GEORGE W. BUSH ADMINISTRATION COMPARE TO THE INTERNMENTS OF JAPANESE ALIENS AND JAPANESE-AMERICANS DURING WORLD WAR II?

I. INTRODUCTION

Historical comparisons, particularly of the negative variety, are hazardous. Was slavery worse than the Holocaust? Was the colonization of Native Americans worse than slavery? How does the Holocaust compare with the colonization of Native Americans? The correct answers are not self-evident: reasonable minds might well differ. The question posed here presents a similar conundrum. On the one hand, there is wholesale removal and internment of Japanese aliens and Japanese-Americans some seventy years ago ("the internment"), which is now widely regarded as a shameful chapter in American history.[1] On the other hand, there is the very recent history—indeed it is perhaps premature to

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1. *See, e.g.*, Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195 (2002); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002) [hereinafter *Lessons of History*].

call it history—of the excesses of the Bush administration's War on Terror.

If historical comparisons are so vexed, then why attempt them? In this particular instance, the reason is that the historical parallels between the two episodes are hard to ignore. The internment followed the attack on Pearl Harbor, which signaled the entry of the United States into World War II. President Bush declared the beginning of the War on Terror shortly after the terrorist attacks of 9/11. In short, both the internment and the various policies constituting the War on Terror were responses that followed moments of crisis in American national security.

Thus, when considering the question of what responses were appropriate in responding to the threat of terrorist attacks after 9/11, the internment loomed as an obvious historical precedent—or warning, depending on one's point of view. This comes through in much of the academic legal writing on the topics of terrorism and national security since 9/11.[2] The discussion in the academic literature was paralleled by a rekindling of popular debate over the internment, which by this time lay discredited as an irrational wartime overreaction. Two notable examples of this are U.S. Representative Howard Coble's 2003 comments justifying the internment[3] and the publication of conservative pundit Michelle Malkin's *In Defense of Internment.*[4]

More importantly, the internment's historical resonance in the post-9/11 age was not lost on former internees and their families. Fred Korematsu, the most famous of the Japanese-Americans to launch legal challenges to aspects of the internment, filed amicus briefs in support of terrorist suspects indefinitely detained without trial by the United States.[5] Similarly, Fred Korematsu's daughter, along with the children of internee litigants Minoru Yasui and Gordon Hirabayashi, filed an amicus brief in relation to litigation concerning the treatment of Muslim non-citizens rounded up and

2. *See, e.g.*, Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 106–07 (2003) [hereinafter *Inference or Impact*] and sources cited therein.

3. Christopher Marquis, *Threats and Responses: Detention; Lawmaker Says Interning U.S. Japanese Was Proper*, N.Y. TIMES, Feb. 6, 2003, at A23.

4. MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR "RACIAL PROFILING" IN WORLD WAR II AND THE WAR ON TERROR (2004).

5. Matt Bai, *The Lives They Lived; He Said No to Internment*, N.Y. TIMES, Dec. 25, 2005, at 6.

detained in the immediate aftermath of the 9/11 attacks.[6]

There is a further historical thread that connects the internment to the War on Terror. During the Cold War, Congress enacted the Internal Security Act of 1950[7] over President Truman's veto. Title II of the Act, known as the Emergency Detention Act of 1950,[8] drew its inspiration from the internment. The Emergency Detention Act authorized the President to declare an internal security emergency in certain exigent circumstances and to then have persons suspected of being security risks detained in internment camps. Several camps were prepared for this very purpose, including Tule Lake internment camp, which had held Japanese-American internees as late as 1946. Japanese-Americans, acutely aware of the potential danger the Emergency Detention Act posed, played an integral role in its eventual repeal.[9] In 1971, the Act was not only repealed but replaced by the Non-Detention Act, which stipulates that no citizen is to be detained absent the authorization from an act of Congress.[10] The Non-Detention Act of course would be central to the dispute over the legality of the detention of citizen enemy combatants after 9/11.

So, despite the limitations and pitfalls, there is value in comparing the internment with measures taken by the Bush administration in the name of the War on Terror. But before making that comparison, let me first sketch out in greater detail what is being compared.

II. WHAT ARE WE COMPARING?

A. *The Internment*

The basic facts of the internment are not in serious dispute.[11] On February 19, 1942, President Roosevelt signed Executive Order

6. Nina Bernstein, *Echoes of '40s Internment Are Seen in Muslim Detainees' Suit*, N.Y. TIMES, Apr. 3, 2007, at B1.

7. Pub. L. No. 81–831, ch. 1024, 64 Stat. 987 (1950) (codified as amended in scattered sections of 50 U.S.C.).

8. Pub. L. No. 831, tit. II, § 101(6), 64 Stat. 1019–20 (1950).

9. Roger Daniels, *The Japanese American Cases, 1942–2004: A Social History*, 68 LAW & CONTEMP. PROBS. 159, 165–66 (2005).

10. 18 U.S.C. § 4001(a) (2006).

11. This account is based on COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1–16 (1982) [hereinafter PERSONAL JUSTICE DENIED] and GREG ROBINSON, A TRAGEDY OF DEMOCRACY 92–132 (2009).

9066.[12] This now infamous order granted the Secretary of War and his military commanders the ability to create military zones, from which people could be excluded at the discretion of the military. Although not apparent from the text, the order was intended to authorize the removal of all Japanese persons living on the West Coast, a group that included both migrants from Japan (Issei) and first generation native-born citizens (Nisei).

In March of 1942, General John DeWitt, the commander of the Western Defense Command, announced the creation of the military zones. On March 21, Congress obligingly enacted a law making it an offense to "enter, remain in, leave, or commit any act in any military area or military zone . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander."[13]

With the legal framework in place, the Issei and Nisei were first subject to restrictions on their movement. This was followed by the removal of the Issei and Nisei from their homes on the West Coast to assembly centers. DeWitt's orders to remove all Japanese from the West Coast were carried out literally, and went to the extent of removing those with as little as one-sixteenth Japanese blood, and removing Japanese children from non-Japanese foster parents.[14]

From mid-1942, 110,000 Issei and Nisei were moved to euphemistically-named "relocation centers" located in remote areas of the United States. Most spent on average just under two-and-one-half years interned in the ten relocation centers, surrounded by barbed wire and armed sentries. For some who passed a loyalty test, there was eventually the possibility of parole under certain conditions.[15]

In a series of judicial decisions, the most infamous being *Korematsu*,[16] the Supreme Court largely turned a blind eye as a brave few challenged various stages of the internment, accepting instead the Government's assertion of military necessity. Subsequently, after more than forty years and the dogged efforts of many, the U.S. Government would apologize for the internment,

12. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).
13. Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942).
14. ROBINSON, *supra* note 11, at 126.
15. PERSONAL JUSTICE DENIED, *supra* note 11, at 12–13.
16. Korematsu v. United States, 323 U.S. 214 (1944). The other Supreme Court cases were: Hirabayashi v. United States, 320 U.S. 81 (1943), Yasui v. United States, 320 U.S. 115 (1943) and *Ex parte* Endo, 323 U.S. 283 (1944).

and pay $20,000 to each surviving internee.[17]

B. Abuses of Civil Liberties in the Bush Administration's War on Terror

It might be thought that for a foreign legal academic and periodic watcher of The Daily Show and The Colbert Report, there would be too much to choose from here. But given the difficulties of making historical comparisons identified earlier, I am excluding perhaps otherwise obvious candidates for discussion such as the USA PATRIOT Act and the Bush administration's Terrorist Surveillance Program, and limiting myself to racial profiling and the detention of terrorist suspects—two aspects of the Bush administration's War on Terror that can in my view sensibly be compared to the internment. I elaborate further on both of these counterterrorism measures below, while of course acknowledging that not all will necessarily agree with my characterization of any of these measures as amounting to abuses of civil liberties.

Racial profiling denotes the use of race, ethnicity, or color as a reason for singling a person out for some form of additional scrutiny or investigation. Prior to 2001, discussion about this subject in the United States focused on the stopping and searching of disproportionate numbers of African-American drivers by law enforcement officers, giving rise to the term DWB, or "driving while black." By 9/11, there was virtually a consensus that racial profiling was wrong. However, this consensus promptly evaporated after the 9/11 attacks; there were immediate calls—and widespread public support—for the racial profiling of Arabs and Muslims at airports.[18] Indeed, at the time, stories of airlines removing middle-eastern looking men from flights, sometimes at the demand of other passengers, were legion.

Additionally, the Bush administration implemented other measures that could be classed as forms of racial profiling. These include the post-9/11 sweep and subsequent detention of hundreds of non-citizens, the selection of 8,000 men from Arab and Muslim countries for voluntary investigative interviews, and the establishment of a special registration program for visitors to the United States who happened to be males from a list of mainly Arab

17. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 1, 102 Stat. 903, 905–06 (1988).

18. *Inference or Impact, supra* note 2, at 104.

and Muslim states.[19]

The internment obviously speaks to the issue of racial profiling. In the same way that an Arab/Muslim background (assuming that this can be discerned accurately from a person's appearance) is used as a predictor for increased dangerousness as a potential terrorist, Japanese ethnicity was used as a predictor for increased dangerousness as a potential fifth columnist.

As for the detention of terrorists, it bears noting that the Bush administration's policy of detaining terrorist suspects outside the criminal justice process had several different facets. In addition to those detained in the round up of mainly Arab and Muslim non-citizens in early days after the 9/11 attacks, the Bush administration detained several hundred persons as "enemy combatants" at various locales around the world, including Guantanamo Naval Base, Cuba. The detainees that were considered the most valuable, including the alleged plotters of the 9/11 attacks, were held for several years at CIA prisons (known as black sites) spread throughout the world.[20]

Among those detained by the Bush administration were two American citizens. Yaser Hamdi was captured in November 2001 in Afghanistan by the Northern Alliance, which turned him over to American forces. Initially detained at Guantanamo, Hamdi was later held as an enemy combatant at naval brigs in Virginia and South Carolina. Litigation begun on his behalf reached the Supreme Court, which held that the Authorization of Use of Military Force, passed by Congress shortly after September 11, 2001, impliedly authorized the detention of persons such as Hamdi, but that he had to be afforded greater opportunity to contest the facts underlying his detention.[21] In Hamdi's case, this never occurred, as the Government negotiated a deal with him whereby he was freed and sent to Saudi Arabia.

Jose Padilla was arrested by FBI agents at Chicago's O'Hare Airport in May 2002. Initially detained as a material witness, Padilla was subsequently designated an enemy combatant and transferred to military custody. The allegation at the time was that Padilla was part of a plot to launch a radiological "dirty bomb" attack on targets within the United States. Padilla's lawyer, who had been

19. *Id.* at 121–24.

20. *See generally* JANE MAYER, THE DARK SIDE (2008) (detailing the U.S. Government's post-9/11 pursuit of terrorists).

21. Hamdi v. Rumsfeld, 542 U.S. 507, 519, 538 (2004).

appointed to represent him in the earlier court proceedings, filed a writ of habeas corpus on his behalf. This began a long period of litigation that included one trip to the Supreme Court.[22] Shortly before his case was to be heard by the Supreme Court for a second time, the Bush administration transferred Padilla to federal court, where he was later convicted of participation in a conspiracy unrelated to the earlier allegations.

The internment entailed the detention of 110,000 Japanese in the United States, including some 70,000 American citizens in the form of the Nisei, ostensibly for reasons of national security. Consequently, it has an obvious relevance to the contemporary issue of detaining terrorist suspects, whether citizen or non-citizen.

III. POINTS OF COMPARISON

Having outlined what is being compared, I now discuss three points of comparison that help address the question of whether the internment was worse than the excesses of the Bush administration's War on Terror from a civil liberties standpoint. The first considers what triggered the state action in question, whether that be detention or extra security checks at the airport. The second considers the scope of the action, both in terms of its duration and how many people it affected. The third looks at the treatment of those detained.

A. *Trigger*

The internment was justified on the grounds of military necessity. This is captured in a passage of Justice Black's opinion in the *Korematsu* case:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have

22. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

> the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.[23]

The claim of military necessity was in fact spurious. Government individuals and agencies who had examined the loyalty of Japanese-Americans—John Franklin Carter on behalf of President Roosevelt, Commander Kenneth Ringle of the Office of Naval Intelligence, and the FBI—concluded that the claims of disloyalty had no basis in fact.[24] But DeWitt continued to allege otherwise all the same. A related canard about Japanese-Americans circulating at the time was that they were involved in sabotage. Although both the military and the FBI concluded that there had been no cases of sabotage by Japanese-Americans either during the Pearl Harbor attack or in the month after on the West Coast, the rumors of sabotage by Japanese continued to exhibit a life of their own.[25]

No doubt part of the explanation can be found in the pervasive fear of invasion, which is also alluded to in Justice Black's opinion. But the fear of invasion was also blown out of proportion. The military knew that there was no prospect of a Japanese invasion on the West Coast and had briefed legislators about this prior to President Roosevelt's issuing of Executive Order 9066. On February 3, 1942, General Mark Clark of the Army's General Staff, who had just returned from an inspection of the West Coast, and Admiral Harold Stark, chief of naval operations, attended an informal meeting with the House-Senate Committee on Defense of the West Coast. Both testified that the Japanese offensive capabilities amounted to launching sporadic attacks from submarines or small ineffectual raids. There was no prospect of invasion.[26] Japanese attacks around the West Coast during this time were in fact minimal and inconsequential, consisting of the occasional submarine attack on shipping off the Californian coast and the shelling of an oil refinery by a submarine in February

23. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

24. ROBINSON, *supra* note 11, at 54–56.

25. *Id.* at 80.

26. Eric L. Muller, *Hirabayashi: The Biggest Lie of the Greatest Generation* 39–43 (Univ. of N.C. Legal Studies Research Paper, Paper No. 1233682, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233682.

1942.[27]

Even if, contrary to the views expressed by General Clark and Admiral Stark, there had been a serious military threat to the West Coast, this still would not justify the internment. This is because the course of the war in the Pacific theater had turned decisively in favor of the United States after the Battle of Midway (June 4–7, 1942)—a point recognized by contemporary newspaper reports, including those on the West Coast. At this time, most of the Issei and Nisei internees had yet to be moved to the relocation camps: they were either still in their homes or at assembly centers relatively close to their homes. It was not until six to twelve weeks after the Battle of Midway that the majority of internees were moved to relocation camps.[28]

The justification based on military necessity therefore does not withstand scrutiny. The supposed link between the (enemy) Japanese Empire and the Issei and Nisei, as well as the supposed military threat posed to the West Coast by the Japanese Empire, lack a factual foundation and provide no reasonable justification for the internment.

What helps explain (but plainly not justify) the internment is racial prejudice on the part of DeWitt, other key actors, and society at large. The internment took place in the context of a long history of racism against Asian migrants. Fear of the yellow peril manifested itself in laws barring Asian migrants from naturalization and land-ownership. After World War I, nativist groups in California campaigned for the exclusion of all Japanese migrants, while media demagogues sowed the seeds of the myth of the divided loyalty of Japanese-Americans in the public mind.[29] It is no surprise that nativist groups and agricultural groups, whose members resented the economic success of the West Coast Japanese and stood to gain from their expulsion, were major advocates for the removal of the Japanese after Pearl Harbor.[30]

General DeWitt's decision to order the exclusion of the Issei and Nisei from the West Coast was also based on racial prejudice. In a recommendation to the Secretary of War, DeWitt stated, "The Japanese race is an enemy race," a fact that was not affected by

27. *Id.* at 10–11.

28. Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1413 (1999) (book review) [hereinafter *All the Themes but One*].

29. ROBINSON, *supra* note 11, at 17–19.

30. *Id.* at 72.

American birth and nationality.[31] In his *Final Report*, DeWitt also claimed that the removal of the Issei and Nisei was justified because it was simply impossible to discern a loyal Japanese person from a disloyal one; it was not a question of insufficient time. This damning portion of the report was subsequently altered to strengthen the Government's litigation position. The Government also failed to disclose in its briefs to the Supreme Court the existence of documents that detailed the conclusions of the Office of Naval Intelligence, the FBI, and the Federal Communications Commission, which all refuted DeWitt's claims of disloyalty and sabotage and undermined the case for the internment.[32]

In considering the role played by racial prejudice, it is instructive to consider the position of Germans and Italians living in the United States. A small number of German and Italian aliens were interned on an individualized basis, and only after hearings where they could attempt to establish their loyalty. There was also no equivalent mass removal and internment of German and Italian-Americans. This was despite the existence of the Bund, a pro-Nazi network with a claimed membership of 200,000 German-Americans, despite the fact that German saboteurs had actually landed on the Atlantic coast, and despite the fact that in the first half of 1942 German U-Boats were regularly sinking American shipping off the East Coast, often within sight of the shore.[33]

So it was 110,000 Issei and Nisei who were deprived of their freedom for years on the basis of an unverified—indeed contradicted—premise that their racial loyalty would trump their national loyalty.[34] It is hard to disagree with the verdict on the internment subsequently rendered by the Commission on Wartime Relocation and Internment of Civilians: "Executive Order 9066 was not justified by military necessity, and the decisions which followed from it—detention, ending detention, and ending exclusion—were not founded upon military considerations. The broad historical causes that shaped these decisions were race prejudice, war hysteria, and a failure of political leadership."[35]

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31. PERSONAL JUSTICE DENIED, *supra* note 11, at 6.

32. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 976–78 (2004).

33. PERSONAL JUSTICE DENIED, *supra* note 11, at 283–88; *see also* Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, CRIM. JUST., Summer 2002, at 52, 55–56.

34. *See Inference or Impact*, *supra* note 2, at 114.

35. PERSONAL JUSTICE DENIED, *supra* note 11, at 18.

Moving forward to the War on Terror, the calls from the highest levels of the Bush administration warning against racial and religious profiling were both notable and commendable. However, the actions of immigration officials and airport screening staff did not always live up to these lofty non-discriminatory sentiments.[36] The same could be said for the Bush administration's eventual establishment of the voluntary investigative interviews, which were directed at men from Arab and Muslim countries, and the administration's similarly directed special registration program.

The arrest and detention of mainly Arab and Muslim non-citizens in the immediate aftermath of 9/11 were ostensibly justified by the fact that the non-citizens concerned had committed various violations of immigration law. However, the Inspector General of the Department of Justice later found that the FBI did not take enough care to distinguish between those non-citizens whom it suspected of links to terrorism, and those who were guilty of no more than violating immigration law.[37] Thus, this policy was both a form of preventive detention, and since the decision to detain was effectively based on race, a form of racial profiling.

What of the detention of terrorist suspects at Guantanamo and elsewhere? The Bush administration's War on Terror detainees were detained because they were thought to be threats to American national security, and as such, needed to be stopped from launching further attacks on American interests. Yaser Hamdi and Jose Padilla, for example, were thought to be threats to the United States on the basis of acts in which they had allegedly already engaged. Likewise, many Guantanamo detainees were considered to be threats to the United States because they had allegedly fought on the battlefield against American and Coalition forces.

Few would disagree with the proposition that those who were captured while fighting on the battlefields of Afghanistan could be legitimately detained by the United States. Likewise, few would disagree with the proposition that those responsible for the 9/11 terrorist attacks could be legitimately detained with a view to trial. But the Bush administration's detention policies ranged much further and caught many whose links to terrorism were tenuous at

36. Daniels, *supra* note 9, at 169–70.

37. *See* DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 195 (2003), *available at* http://www.justice.gov/oig/special/0306/full.pdf.

best.[38] The Bush administration's detention decisions turned out in some cases to be based not only on sketchy factual evidence but also on a very broad conception of the class of person who was a sufficient threat to justify detention.

However, the Bush administration's mistaken and wrongful detention decisions in relation to some individuals in the course of the War on Terror differ from the decision to intern the Issei and Nisei in 1942 in one important respect. In the case of the War on Terror detainees, there is a core of detainees whose detentions are legitimate in the sense that they are a threat to the United States. It is difficult to sustain the same claim in the case of the Issei and Nisei interned en masse in 1942, given that their loyalty to the United States had been confirmed by several different investigative agencies and individuals, and that DeWitt's claims of collusion with the enemy and sabotage had been comprehensively refuted. Indeed, the approximately two thousand Japanese non-citizens that the Government considered dangerous, along with several hundred German and Italian non-citizens, were already in custody prior to the internment, having been arrested by the FBI in early December 1942 on the basis of a three-tiered compilation of suspect enemy aliens collected before the war known as the "ABC list."[39]

B. Scope

As noted earlier, the internment involved the removal and detention of 110,000 Japanese living on the West Coast of the United States, including some 70,000 American citizens. In order to appreciate the scope and scale of the internment, it is useful to compare the experience of Britain with internment during the same time period.

During World War II, the British government detained approximately 30,000 enemy aliens pursuant to the Royal prerogative. Additionally, about 2,000 British subjects considered security risks were detained under regulation 18B of the Defence (General) Regulations, which authorized the Home Secretary to order the detention of those considered risks to national security. Those subject to such orders included individuals with ties to the British Union of Fascists, and British Italians, particularly those with

38. *See* DAVID COLE & JULES LOBEL, LESS SAFE LESS FREE 103–05 (2007).
39. PERSONAL JUSTICE DENIED, *supra* note 11, at 54–55.

links to the Italian Fascist Party. Detainees received a small measure of due process in the form of the right to make written representations to the Home Secretary and also a right to an administrative hearing before the Advisory Committee. The Advisory Committee was supposed to inform detainees of the grounds for their detention, and having heard from the detainees, render non-binding advice to the Home Secretary.

In practice, the system was heavily skewed against those detained, but this patina of due process was still more than the interned Issei and Nisei received in the United States. Moreover, Britain faced a tangible prospect of German invasion. Although it had been promulgated at the beginning of the war, regulation 18B was used sparingly until April 1940, and its use only accelerated around mid-1940, a time when Britain's military situation was truly dire. By this time, much of Western Europe had fallen under the control of the Nazis; the defeated British Expeditionary Force had recently been evacuated from France. Britain was thus separated from occupied enemy territory by only the English Channel—a narrow body of water in comparison to the expanse of the Pacific Ocean that the Japanese Empire would have had to cross in order to invade the West Coast of the United States.[40]

Therefore, even though it had a more compelling case of military necessity, the British government detained a far smaller number of people, for shorter periods of time,[41] and afforded them more due process. In sum, the scope of the internment in the United States compares poorly with that of its wartime ally.

How then does the internment compare to the Bush administration counterterrorism policies under discussion? As far as the numbers of people affected go, the sums are roughly comparable, once the 8,000 men from Arab and Muslim countries subject to the voluntary investigative interviews, and the 80,000 males (again from mainly Arab and Muslim states) subject to the special registration program for visitors to the United States are taken into account.[42] But even if we stipulate that these measures are forms of invidious racial profiling—that is, that they involve singling out certain people for greater scrutiny on the basis of their

40. A. W. Brian Simpson, *Detention Without Trial in the Second World War: Comparing the British and American Experiences*, 16 FLA. ST. U. L. REV. 225, 230–46 (1988).

41. *See id.* at 265.

42. *See* COLE & LOBEL, *supra* note 38, at 107.

race or ethnicity—there is a world of difference between the burdens being imposed here (being made to answer extra questions at the airport, being subject to an investigative interview or additional registration requirements, and being refused entry onto an airplane) and the burdens imposed on the Issei and Nisei by the internment.

In terms of the burden imposed, the position of terrorist suspects deprived of their liberty without trial since 9/11 is more closely analogous to the predicament of the interned Issei and Nisei. This group includes: several hundred non-citizens rounded up immediately after 9/11, who were held for an average of eighty days before being cleared; the roughly 800 detainees or former detainees at Guantanamo, some of whom have been detained for a period longer than the duration of World War II; two American citizens, both detained for roughly three years each; and an uncertain number of terrorist suspects detained at the CIA's black sites and elsewhere. Regardless of precisely what the last figure is, it is clear that the number of people impacted by the Bush administration's detention policies under discussion is dwarfed by the figure of 110,000 internees.

C. Treatment

The Japanese internment imposed great hardship and injustice upon the Issei and Nisei. But while a terrible violation of civil liberties, it did not descend into the torture or starvation of the internees.[43] The initial removal of the Issei and Nisei to the assembly centers was handled by the military in a civilized and respectful fashion. But the internees' living conditions were austere. The assembly centers were crowded and unpleasant, with people being housed in facilities originally meant for horses and livestock.[44] Living conditions at the relocation centers themselves were also harsh. The basic facilities provided little respite from the extremes of the local climates; food was substandard. The internees did not have to pay for medical care, which actually represented an improvement in situation for some. But the medical facilities were basic and under-resourced, leading to the deaths of some internees from otherwise treatable illnesses.[45]

43. ROBINSON, *supra* note 11, at 1.
44. *Id.* at 129.
45. *Id.* at 155–58.

There were also instances of physical brutality towards internees, such as beatings and shootings at the Tule Lake and Manzanar relocation centers.[46]

The mistreatment of detainees is perhaps the largest black mark on the Bush administration's War on Terror. It is now well established that many persons detained by the United States in the course of the War on Terror were subject to treatment that was at least cruel, inhuman or degrading, and in some cases torture. Further, a number of detainees have died while in American custody, at least some as a result of mistreatment by their captors.[47]

In the case of the non-citizens apprehended immediately after the 9/11 attacks, it subsequently came to light that some of those detainees were abused, in some cases physically, by their captors.[48] While there may be some doubt as to whether this was the result of the work of a few bad apples, the same cannot be said of the Bush administration's treatment of other War on Terror detainees. The clearest example is the High-Value Detainee (HVD) program, whereby the CIA became involved in the interrogation of so-called "high value" al Qaeda detainees thought to have critical information about further attacks on the United States.

The first of these detainees to be captured was Abu Zubayda. The CIA developed a set of coercive interrogation techniques ("enhanced interrogation techniques" or EITs) and used them on Zubayda with the knowledge and at least implicit permission of President Bush's top advisors. This occurred prior to the completion of what is now known as "the torture memos," a series of legal memoranda from the Department of Justice's Office of Legal Counsel that purported to confer formal legal cover for the CIA's coercive interrogations. The CIA's program included slamming detainees' backs into a flexible wall, sleep deprivation, exposure to extremes of temperature, the use of bright lights and loud sounds, and stress positions. Three detainees were also subject to the much-discussed form of torture known as waterboarding.[49]

The use of coercive interrogation techniques subsequently

46. *All the Themes but One*, *supra* note 28, at 1408–09.

47. *See, e.g.*, HINA SHAMSI, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 5–19 (Deborah Pearlstein ed., 2006), *available at* http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf.

48. *Inference or Impact*, *supra* note 2, at 130.

49. *See* MAYER, *supra* note 20, at 139–81.

spread from the CIA to the military in places such as Bagram, Guantanamo, and of course Abu Ghraib.[50] The mistreatment of the Guantanamo detainees, for example, occurred as military commanders at Guantanamo Bay were pressured to obtain more intelligence from their captives, such as suspected "20th hijacker" Mohamed al-Qahtani. This resulted in the use of coercive interrogation techniques, which were authorized by Secretary of Defense, Donald Rumsfeld. The coercive techniques in question included subjecting detainees to sleep deprivation, stress positions and exposing them to extremes of temperature.[51]

IV. CONCLUSION

The fact that there was no attempted mass internment of Arab or Muslim Americans in the United States after 9/11 must be viewed as a positive. There may be several reasons for this. First, the 9/11 attacks fortunately proved not to be the first of a string of attacks on American soil. Second, Arab and Muslim Americans, in contrast to the Japanese-Americans in 1941, are more geographically spread across the United States, relatively well educated and prosperous, and generally integrated into American society. Third, history has rightly come to judge the internment harshly. Contrary to the fears expressed by Justice Jackson, *Korematsu* lurks not as a loaded weapon, but as a salutary anti-precedent.[52]

But it is important to remember how *Korematsu* became a legal pariah, and how the historical consensus that now exists about the internment came to be. It took a redress movement, the establishment of the Commission on Wartime Relocation and Internment of Civilians, the efforts of lawyers and other individuals to have the convictions of Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi overturned on the basis of government misconduct, and official acts of penitence in the form of the revoking of Executive Order 9066 and the enactment of the Civil Liberties Act.[53]

Inherent in this is also the passage of a considerable period of time. At present, the Bush administration is a very recent memory,

50. *See* ALFRED W. MCCOY, A QUESTION OF TORTURE 120–50 (2006).
51. *See* MAYER, *supra* note 20, at 182–212.
52. *Lessons of History*, *supra* note 1, at 586.
53. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

and fallout from some of its counterterrorism policies continues to be felt. President Obama is still trying to close Guantanamo. Similarly, the question of what, if anything, should be done with those who were involved in the torture or mistreatment of terrorist detainees is still a live issue. Perhaps at some point in the future, scholars will be able to examine both periods with the benefit of greater distance and hindsight. But for time being, let me state my conclusion the best I can.

Looking at the first two points of comparison, the internment was demonstrably worse than the aspects of the Bush administration's War on Terror I have been discussing here, namely racial profiling and detention without trial. The internment imposed greater burdens on a larger number of people, and its benefit to American national security was at best tenuous, if not non-existent. The only caveat here is the third point of comparison. How much difference does the torture or mistreatment of the Bush administration's War on Terror detainees make? There is no clear answer to this, although I suspect most will consider that the mistreatment and even torture of some War on Terror detainees is not enough to offset the greater scope of the internment and the invidious racial motivations that underlay it.

On this view then, the internment is the worse of the two things under consideration. To be clear, this is not to say that the Bush administration's indefinite detention of even a relatively small number of terrorist suspects was legal or a good idea, or that racial profiling at airports and elsewhere is either legal or advisable. Indeed, to say that something is not as bad as the internment of the Issei and Nisei in World War II is hardly an endorsement, and might rightly be seen as damning with faint praise.

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