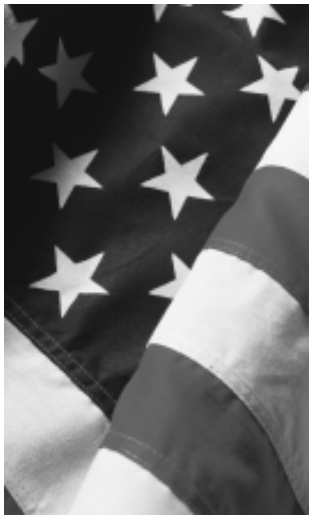
IMMIGRATION POLICY FOCUS
Volume 1, Issue 3 October, 2002






HAVE WE LEARNED THE LESSONS OF HISTORY?

World War II Japanese Internment and Today's Secret Detentions

AMERICAN IMMIGRATION LAW FOUNDATION

Photo credit: Ansel Adams, 1942

"...How could such a tragedy have occurred in a democratic society that prides itself on individual rights and freedoms?... I feel most deeply that when the war is over we as Americans are going to regret the avoidable injustices that may have been done."

Milton S. Eisenhower
Former National Director of the
War Relocation Authority (1942)

HAVE WE LEARNED THE LESSONS OF HISTORY?

WORLD WAR II JAPANESE INTERNMENT AND TODAY'S SECRET DETENTIONS

By Stanley Mark, Suzette Brooks Masters and Cyrus D. Mehta[1]

EXECUTIVE SUMMARY

In times of war or threats to national security, the delicate balance we strive to achieve as a nation between liberty and security inevitably tips towards security, and civil liberties tend to be compromised. In the aftermath of the horrific events of September 11, 2001, our leaders have begun exercising extraordinary powers to ensure our collective safety, sacrificing the personal liberties of some, particularly immigrants, in the process. Using invigorated surveillance and enforcement powers to promote homeland security, President Bush, Congress, and the Justice Department have selectively targeted and indefinitely detained significant numbers of Muslim, Middle Eastern, and South Asian non-citizen males living in the United States, stripping them of the most basic and fundamental due process protections. This increased scrutiny has caused significant apprehension among other immigrants, too.

There is no denying that the terrorist threat we face is grave and that methods need to be devised to protect us from harm. However, history teaches us that ill-conceived government policies during wartime, such as unfairly targeting certain persons because of their race, national origin, or religious beliefs, do not make us safer. Instead, they weaken our core values and alienate allies who can help us fight terrorism. Despite President Bush's soothing words urging Americans to be tolerant and to distinguish between immigrants and terrorists, Muslim, Arab, and South Asian men living in the United States were victimized in the weeks following the attacks,[2] and the Bush administration has pursued enforcement policies founded on religious, racial and ethnic profiling.

History teaches us that ill-conceived government policies during wartime, such as unfairly targeting certain persons because of their race, national origin, or religious beliefs, do not make us safer.

Early court decisions have weighed in on the side of liberty.

While there have been a number of dark periods in the last hundred years when our prejudice clouded our reason, and our hysteria and fear fueled division rather than unity – from the Palmer raids in 1920 to the spying and blacklisting during the Cold War – none is more glaring and a source of greater shame than the internment from 1942 to 1946 of 120,000 persons of Japanese ancestry living in California, Washington, and Oregon. Nevertheless, here we are, a mere sixty years later, equating ethnicity and religion with collective guilt, dispensing with the need for individualized suspicion of wrongdoing, engaging in secret detentions, and abrogating the civil liberties of those detained.

Early court decisions have weighed in on the side of liberty, but history tells us it is too early to tell whether the Supreme Court will allow this overreaching by government in the aftermath of September 11th to stand. Neither Congress nor the judiciary objected to the internment measures taken during World War II. Rather, they paid deference to the government's asserted need to curtail the liberties of people of Japanese ancestry and failed to scrutinize the basis for this alleged military necessity. It took nearly thirty years for a formal apology to be issued to those interned.[3] Our traditional system of checks and balances failed us then, and it could fail us again.

Chief Justice William Rehnquist, in his 1998 book *All the Laws But One: Civil Liberties in Wartime*, argues that historically presidents have pushed the limits of their legal authority during wartime, restricting civil liberties more than in peacetime. And he sees the trend continuing.[4] In a similar vein, Harvard Law School Professor Christopher Edley points out that the odds are stacked against vocal criticism of wartime excesses: wartime courts usually ratify security measures adopted by the political branches; oversight by Congress is unlikely to be potent; and the public can only denounce what it knows about. The way the war on terror is shaping up, there is much that the public will never know about and thus be unable to decry.[5] It remains to be seen whether the Supreme Court will fight this inexorable tendency or whether history will proclaim this period another sorry chapter in the unfolding of our national story. In anticipation of these inevitable cycles of civil liberties erosion, should institutional mechanisms be set in motion to better protect our individual rights in times of national crisis?

We hope that by revisiting the grievous errors committed by our political leaders and Supreme Court justices in the 1940s, and by contrasting those errors with more recent yet reminiscent measures adopted since September 11th, that policymakers will work harder to avoid repeating the mistakes of history.

COLLECTIVE GUILT:
THE INTERNMENT OF JAPANESE AMERICANS

War with Japan Unleashes Hysteria and Mass Detentions

On December 8, 1941, one day after the bombing of Pearl Harbor by Japan, the United States declared war on Japan. President Roosevelt issued Executive Order No. 9066 on February 19, 1942,[6] authorizing the Secretary of War and certain military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." With this broad authorization to banish from military areas anyone deemed dangerous to the national defense began the largest deprivation of liberty in United States history – the imprisonment in desolate internment camps,[7] without individual trials or hearings, of 120,000 Americans[8] and permanent residents who, by virtue of their Japanese ancestry, contained "enemy race" blood, including women, children and the elderly.

120,000 Americans and permanent residents, by virtue of their Japanese ancestry, were interned.

The military applied the Order selectively and *en masse* to residents of Japanese origin. The political leadership at the time ascribed to the view that residents of Japanese descent were incapable of true assimilation and therefore inherently disloyal. The fact that the detainees then living on the West coast of the United States had emigrated from Japan out of choice and had made their lives there for sixty years[9] was ignored, along with the need for any individualized evidence of wrongdoing to justify relocation and detention. In the end, no persons of Japanese ancestry residing in the United States were ever charged or convicted of espionage or sabotage, greatly undermining the credibility of those who used race as a lens through which to view national security matters.

All Branches of Government Supported Internment

All branches of government legally sanctioned this wholesale deprivation of fundamental constitutional rights and civil liberties. Congress ratified Executive Order 9066 in March of 1942,[10] the military continued to issue proclamations pursuant to the Executive Order,[11] and the Supreme Court upheld the

No persons of Japanese ancestry residing in the United States were ever charged or convicted of espionage or sabotage.

evacuation and internment of both citizens and permanent residents of Japanese ancestry in a series of cases decided in 1943 and 1944. Two of those cases in particular, *Hirabayashi v. United States* and *Korematsu v. United States*, provide great insight into the wartime mentality prevalent at the time and still resonate today as we struggle with racial stereotyping and deprivations of rights in the aftermath of September 11th.

Gordon Hirabayashi, an American citizen, was living in Seattle in 1942 and was subject to the wartime orders requiring all persons of Japanese ancestry, whether citizen or not, to observe a curfew and report for processing in connection with exclusion from the military area. Hirabayashi refused to honor the curfew or to report to the control station because he believed that the military orders were racist and unconstitutional. The Supreme Court in *Hirabayashi v. United States* unanimously affirmed his conviction, and accepted the government's position that the curfew was justified by military assessments of emergency conditions existing at that time.[12] Chief Justice Stone gave credence to the military's viewpoint that citizens of Japanese descent would have a great attachment to the Japanese enemy, observing that the Japanese who had come to the United States had not assimilated with the "white population" Ironically, he also acknowledged that federal legislation had denied them the means to obtain citizenship by naturalization.

The following year, a majority in a sharply divided Supreme Court in *Korematsu v. United States* applied the same military emergency rationale to uphold the exclusion of all citizens of Japanese ancestry from the West Coast.[13] Justice Black's majority opinion supported the exclusion, relying on the military's judgment that threats of invasion, espionage and sabotage existed and constituted "military necessity" for exclusion, while ignoring the fact that Imperial Japan was unlikely to be able to attack the West Coast after the defeat of Japan's navy at the Battle of the Midway in June 1942.

By failing to question the military's basis for reliance on stereotyping in lieu of individualized investigations, Justice Black sidestepped the race issue entirely.

> *"It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp be-*

cause of racial prejudice. Regardless of the true nature of the assembly and relocation centers — and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers that were presented, merely confuses the issue.

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 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 at time these actions were unjustified."[14]

In his dissent, Justice Murphy characterized the majority opinion as legalized racism and attacked the questionable qualification of military experts to make ethnic and sociological value judgments regarding the effects of racial ancestry. Murphy further argued that the eleven months spent to evacuate Japanese Americans was ample time to implement an orderly inquiry into the loyalty of those evacuated. As was later revealed, the Western Defense Command did in fact have enough time to determine loyalty but chose not to because of racist beliefs. Government officials and attorneys withheld this evidence from the federal courts.

Justice Jackson, in his powerful dissent, warned of the dangers of unquestioned judicial deference in times of crisis, deference that weakens our constitutional protections and the very fabric of our society.

"Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is [a] far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military

"A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution…"

—U.S. Supreme Court Justice Jackson

The Japanese American Redress Bill formally apologized for the camps, mandated the establishment of a trust fund for educational and humanitarian purposes, and provided compensation for 60,000 surviving Japanese American citizens and resident aliens who were interned.

emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes an order to show that it conforms to the Constitution, or rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination … The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need…. A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution…"[15]

Detention Finally Ends

The Supreme Court did reach the detention issue but did not reach the constitutional issue. Mitsuye Endo, a U.S. citizen who obeyed the exclusion order, asserted her loyalty, and challenged her continued detention.[15A] After her arrival at camp, she filed a petition for a writ of habeas corpus demanding her release in July 1942. Almost two and half years later, the U.S. Supreme Court ordered her belated release from the camp at Tule Lake, California. Because of her loyalty, she could not be subjected to an harassing leave procedure that amounted to an indefinite detention of a loyal citizen against her will.

Justice Douglas spoke for the majority and found that the War Relocation Authority (WRA), a civilian agency responsible for operating the camps, exceeded its authority granted by the Congressional Act of March 21, 1942 (Public Law 77-503) and Executive Orders 9066 and 9102 (which established the WRA). Justice Murphy concurred and labeled the detention of citizens as another unconstitutional form of racism inherent in the WRA evacuation program. Justice Roberts concurred in the result but not with this rationale. Although Congress did not appropriate a specific budget item for detention, both branches of government had detailed knowledge of the *en masse* detention and thus are responsible. He wanted the Court to face Endo's detention as a constitutional issue.

The Harsh Indictment of History

The *Hirabayashi* and *Korematsu* decisions have never held an honored place in our history. Although never overruled, they have been criticized by journalists, historians and scholars for not critically assessing the emergency at the time and for upholding the racial prejudice inherent in General DeWitt's orders.[16] A presidential apology would not be issued until 1976 and a

commission created by Congress to investigate the internment until 1980.[17] Eight years later, Congress also passed the Civil Liberties Act of 1988, popularly known as the Japanese American Redress Bill, which formally apologized for the camps, mandated the establishment of a trust fund for educational and humanitarian purposes, and provided compensation for 60,000 surviving Japanese American citizens and resident aliens who were interned. The reparations period ended in 1998.

Eventually, both Mr. Korematsu and Mr. Hirabayashi were able to vacate their convictions in 1984 and 1987 respectively, based on evidence not available at their original trials but later found in the government's own files.[18] This new evidence, amassed during the investigation conducted by the Commission on Wartime Relocation and Internment of Civilians, established that the government had engaged in misconduct by destroying the original DeWitt Final Report, altering the text of government briefs, and suppressing intelligence reports.

The Commission concluded that there was substantial credible evidence from a number of federal civilian and military agencies contradicting the Final Report of General Dewitt, *Final Report: Japanese Evacuation from the West Coast 1942,* and its premise that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have potentially been disloyal.[19] The original version of the report did not purport to rest on any military exigency, but instead rested on the assumption that it would be impossible to separate the loyal from the disloyal because of traits peculiar to citizens of Japanese ancestry, and that all would have to be evacuated for the duration of the war.[20] The Supreme Court, in upholding the conviction in 1943, had deferred to the government's military necessity arguments, based on DeWitt's final but doctored report.[21]

The Commission on Wartime Relocation and Internment of Civilians found that "broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership" and that, as a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II."[22]

The Supreme Court's deference to the judgment of the military and exercise of judicial restraint were tantamount to total abdication of its role in the face of very serious constitutional

"Broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership."

—Commission on Wartime Relocation

issues affecting the lives of an entire racial minority. By applying strict scrutiny and upholding the racial classification, the Court permitted a harsh discriminatory result based on racial ancestry to stand, just as Justice Jackson warned in his *Korematsu* dissent. Admittedly, no such policy to exclude has been aimed directly at a nationality in the aftermath of the September 11th attacks.

MORE COLLECTIVE GUILT: DETENTIONS OF ARABS AND MUSLIMS

Secrecy, Indefinite Detention and Racial Stereotyping

Since September 11, 2001, the Department of Justice has arrested, detained, and in some cases deported, over 1,200 people with Arab or Muslim backgrounds, under a veil of complete secrecy.

After Pearl Harbor, the Roosevelt administration implemented policies that blatantly resulted in the exclusion of people of Japanese ancestry. Admittedly, no such policy aimed to exclude has been aimed directly at a nationality in the aftermath of the September 11th attacks. Yet, despite commendable rhetoric by President Bush warning against intolerance of and violence against Arab Americans and Muslims living in the United States, his administration has implemented policies that fly in the face of his admonitions. In fact, since September 11, 2001, the Department of Justice, under Attorney General John Ashcroft, has arrested, detained and, in some cases, deported, over 1,200 people with Arab or Muslim backgrounds under a veil of complete secrecy.[23] Not even the names of those arrested have been released to date.

The adoption by the Justice Department of regulations and policies that make it easier to detain non-citizens indefinitely and deport them was a response to the fact that the nineteen alleged 9/11 hijackers were all men, citizens of Middle Eastern nations, living in the U.S. on temporary visas or as visa overstays prior to the attacks. Although on their face the new regulations are not directed at any particular nationality, the Department of Justice, largely through the Immigration and Naturalization Service, has used these expanded powers to selectively focus its investigations on persons of Arab, South Asian or Muslim backgrounds.[24] A report by Human Rights Watch released in August 2002 documents that most of the arrests were made because of the person's nationality and religion. According to this report, not a single person who has been arrested has been linked to the terrorist attacks of September 11.

The use of racial and religious profiling as a national security weapon has been tried before. It was unsuccessful during World War II – none of the interned U.S. residents of Japanese ancestry were ever charged with sabotage or espionage – and it is just as likely to be unsuccessful now.

The Bush Administration's Counterproductive Enforcement Blitz

Over the last year, the Justice Department has announced a series of enforcement initiatives that selectively target Arabs, South Asians and Muslims living in the United States and deprive them of the most basic due process protections. These measures have not only failed to improve our national security, but have antagonized the very immigrant communities who are in the best position to assist the government in rooting out terrorism.

"The courtroom must be closed … – no visitors, no family, and no press."

—Justice Department Directive for 9/11 cases

A mere nine days after the attacks, the Justice Department amended existing regulations to increase from one to two days the time the Immigration and Naturalization Service can detain a non-citizen without filing charges,[25] and allow for the extension of this period for an unspecified "reasonable" additional time in the event of an emergency or other extraordinary circumstances. After this rule took effect, there were reported instances of delays in charging non-citizens with immigration violations.[26] A day later, on September 21st, Chief Immigration Judge Michael Creppy, at the direction of the Attorney General, issued a directive to all immigration judges ordering that in certain "special interest" cases, which were not defined, "(t)he courtroom must be closed … – no visitors, no family, and no press." "This restriction," the directive continues, "includes confirming or denying whether such a case is on the docket." An INS rule prohibiting public disclosure by any facility, whether public or private, of any information regarding detainees only heightened the extraordinary secrecy already surrounding all of these proceedings.[27] It is estimated that over 1,200 non-citizens, mostly from Pakistan, Egypt and Yemen, have been incarcerated in these special interest cases.

Just over a month later, the Justice Department promulgated a regulation permitting INS prosecuting attorneys to override the decision of an immigration judge to release a non-citizen on bond when either the INS sets no bond or bond at $10,000 or more.[28] Thus, if the INS does not like an immigration judge's decision, it need only file a notice that it intends to appeal to

Immigration laws have been used to detain non-citizens so as to bypass the greater safeguards afforded to people subject to a criminal prosecution.

obtain a stay and extend the detention. Even if the Board of Immigration Appeals upholds the immigration judge's decision, the INS may certify the decision to the Attorney General until he has made a final decision. This may result in the non-citizen's indefinite continued detention.

Another technique used by Justice to circumvent due process has been to detain an unknown number of citizens[29] and non-citizens as "material witnesses." These detainees need not be charged with any violations, under the pretext that they have information relating to the terror attacks. One federal judge has released such a detainee, a young Muslim male, on the ground that the detention was unconstitutional,[30] but the practice remains unchecked and Human Rights Watch has identified 35 individuals held as material witnesses.[31]

To compound the damage already done by closed hearings and indefinite detention, the Justice Department now permits the government to eavesdrop on the conversations between lawyers and their clients in federal custody, including people detained for immigration reasons but not charged with any criminal offense, if there is a "reasonable suspicion" that information might be exchanged that could potentially deter future violent acts.[32]

The Bush Administration's "war on terror" has been implemented domestically by mass detentions of non-citizens conducted in secret, none of which, to date, has unearthed a link to terrorism, and by an almost exclusive enforcement focus on Middle Eastern and Muslim nationals. These have been designated as "special interest" cases. Even if one may argue that the detentions were justified because of visa violations, immigration laws have been used to detain non-citizens so as to bypass the greater safeguards afforded to people subject to a criminal prosecution.

The constitutional protections given to people under criminal law would include a requirement of probable cause for arrest and the right to court-approved counsel. Prior to September 11, minor visa violations would not have resulted in prolonged periods of detention. After September 11, the immigration laws have been used to facilitate a form of preventive detention, which is to arrest first and investigate later to uncover some violation. It is generally the other way around in criminal enforcement - one can only be arrested after probable cause is found that the individual was involved in criminal activity. Once the immigration violation is uncovered, the non-citizen can potentially be detained indefinitely under the government's expanded pow-

ers. However, the purpose of the detention is to probe into the noncitizen's potential involvement in terrorist activity or to expel the noncitizen from the country regardless of family ties or citizen children.

Furthermore, since last year, 8,000 young Arab and Muslim immigrants have been sought for "voluntary" interviews by the Federal Bureau of Investigation.[33] In addition, out of the more than 300,000 foreign nationals who have remained in this country following a deportation order, the Justice Department has prioritized the deportation of 6,000 non-citizens from countries where Al Qaeda support is strong.[34] And, in its most recent initiative, Justice promulgated an alien registration rule that would require the registration, fingerprinting and photographing of nationals or citizens of Iran, Iraq, Libya, Sudan and Syria.[35] Violation of these reporting rules could result in loss of status, deportation and inclusion in a national crime database.[36]

What is most remarkable about these administrative rules is that they have been utilized more frequently and effectively than the mandatory detention provision in the USA Patriot Act, which authorizes the Attorney General to detain, without a hearing and without a showing that the person poses a threat to national security or a flight risk, non-citizens whom the Attorney General has "reasonable grounds to believe" run afoul of the various anti-terrorism provisions of the Immigration and Nationality Act.[37]

The Bush Administration has circumvented the will of Congress and arrested non-citizens without bringing charges.

However, under the Patriot Act, charges must be lodged within seven days. Not surprisingly, the Bush Administration has issued new rules for use in the "special interest" cases giving the Attorney General even broader powers than those approved by Congress in the Patriot Act. Thus, by executive fiat, the Bush Administration has circumvented the will of Congress and arrested non-citizens without bringing charges. None of these arrests, to date, has unearthed a link to terrorism.[38]

As of this writing, at the request of certain Members of Congress, the General Accounting Office (GAO) has begun an investigation into a number of anti-terrorism measures and their potential impact on civil liberties, including the detentions after September 11th, the questioning of the 8,000 immigrant males, and the monitoring of attorney-client conversations. The GAO final report will be presented to Congress.

If there is one lesson that should have been learned from our country's shameful Japanese internment episode during

World War II it is that an enforcement and security policy that relies on racial stereotyping rather than case-by-case investigative work is doomed to failure. Profiling is easy and feels good but has been proven again and again not to be an effective investigative strategy. Such an approach casts too wide a net, lulls us into a false sense of security by making facile assumptions about our enemies, alienates entire communities of people who could be great sources of intelligence, and erodes our civil liberties and our constitutional principles.

Courts Have Held the Line On Secrecy

Media groups and other public interest organizations have challenged the government's secret and indefinite detention policies in court, claiming a violation of their First Amendment rights. The initial decisions appear promising, but it remains to be seen whether the courts will protect those persons who sue the government individually for violating their rights[39] and whether the Supreme Court will rule on these issues. Two forces are currently militating against the Supreme Court taking a strong stand against the government on these rights violations. First, the wartime tendency of the judiciary to defer to the executive is likely to come into play. Second, under the plenary power doctrine, courts have traditionally deferred to Congress and the executive in the exercise of their authority to regulate the admission and residence of non-citizens in this country.[40]

For the moment, the courts seem persuaded that open hearings are necessary to ensure governmental fairness.

Fortunately, in the recent challenges brought by the media, the courts have rejected the government's arguments justifying secret detention and closed deportation hearings. Just as General DeWitt justified the internment of Japanese Americans after Pearl Harbor with sweeping, unsubstantiated assertions, so too have FBI officials presented boilerplate affidavits to the courts to justify the secrecy of these hearings involving Arab and Muslim non-citizens. They argue in these affidavits that open hearings could lead to setbacks in the government's terrorism investigations and stigmatize "special interest" detainees should they ultimately be found to have no connection with terrorism.[41]

For the moment, the courts seem persuaded that open hearings are necessary to ensure governmental fairness given the gravity of deportation, which can lead to permanent banishment from the United States, and the fact that non-citizens in deportation hearings do not have the same level of rights as criminal defendants. Therefore, media and other public interest groups may be their only protection against governmental excess.

The most important court decision to have emerged recently is the Sixth Circuit Court of Appeals decision in *Detroit Free Press et. al v. Ashcroft*,[42] which recognizes the media's First Amendment right to attend a deportation hearing of a "special interest" detainee. Without prior notice to the public, the courtroom security officers announced that the hearing was closed to the public. The detainee was denied bail and has been in government custody ever since. The plaintiffs sued the government in federal district court to claim a public right of access to the removal hearing under the First Amendment of the Constitution. The Sixth Circuit Court of Appeals affirmed the lower court's ruling in favor of an open deportation hearing. The following introductory remarks of Judge Keith's opinion, writing for a three-judge panel, are worth noting:

> *The Executive Branch seeks to uproot people's lives, outside the public eye, and behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.*[43]

"The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings."

—Sixth Circuit Court of Appeals

The court argued that the deferential standard accorded under the plenary power doctrine to substantive immigration law does not necessarily apply to non-substantive immigration law and found the Creppy directive to be non-substantive. Even if the government presented a compelling interest to close hearings, the court held that the Creppy directive was not narrowly tailored, and the government failed to address why it could not close hearings on a case-by-case basis.

The government's "mosaic intelligence" theory – where an individual piece of information is not of obvious importance until pieced together with other pieces of information – was rejected by the court as being too speculative. The court also upheld the media's First Amendment access to a deportation hearing on grounds that deportation hearings have been traditionally open, and after the massive investigations following September 11, open hearings serve a "therapeutic" purpose as outlets for "community concern, hostility and emotions."

This ruling in the Sixth Circuit Court of Appeals came shortly after a similar positive ruling from a lower court, in *North Jersey Media Group, Inc. v Ashcroft*,[44] affirming the media's First Amendment access to a deportation hearing. The government appealed

the New Jersey case to the Third Circuit Court of Appeals, seeking a stay of the District Court's order, which was not granted. The government turned to the U.S. Supreme Court, which, without comment, granted the government's emergency request for a stay.

"Secret arrests are 'a concept odious to a democratic society' and profoundly antithetical to the bedrock of values that characterizes a free and open one such as ours."

—U.S. District Court for the District of Columbia

In a separate line of attack, several organizations have sued the government to obtain release of the names of non-citizen detainees under the Freedom of Information Act. In *Center for National Security Studies, et al v. U.S. Department of Justice*,[45] a federal district court in Washington, D.C. held that "secret arrests are 'a concept odious to a democratic society' and profoundly antithetical to the bedrock of values that characterizes a free and open one such as ours." It rejected the government's argument that releasing the names would deter the detainee from cooperating, hamper the government's investigation, and allow terrorist organizations to interfere with pending proceedings by creating false and misleading evidence. The Court ordered the release of the detainee names as well as those of their attorneys. However, it upheld the government's request to withhold the dates of arrests, detention and release, as well as the location of arrest and detention.

CONCLUSION

Who Will Preserve Our Liberties?

Ethnicity and religion should never be used as a proxy for individualized suspicion or guilt. Not too long ago, the Supreme Court in *Korematsu* upheld an emergency rationale made by the military to uphold the exclusion of citizens and immigrants of Japanese ancestry from the West Coast. To the nation's great embarrassment, military "justification" was found to be racial prejudice and government misconduct. Despite the pressure to ratify government action at times of conflict and crisis, the judiciary must not allow our nation to commit such acts of deprivation against American residents by virtue of their nations of origin or religious beliefs.

As the *Detroit Free Press* case makes clear, courts will scrutinize the non-substantive aspects of immigration law, such as the Creppy directive, and will strike some of them down as unconstitutional. To date, lower courts have been curbing the egre-

gious enforcement excesses of the Bush Administration. In defending its enforcement powers, the government can use national security arguments or the plenary power doctrine to justify its rules and policies over non-citizens. It is time to cast aside a doctrine which gives the government unreviewable power over immigration matters,[46] was first formulated for use against Chinese immigrants more than a hundred years ago,[47] and was reaffirmed during the McCarthy era.[48]

But can we trust the Supreme Court to uphold these lower court rulings? Chief Justice Rehnquist, in *All the Laws But One: Civil Liberties in Wartime*, suggests that while the internment of citizens of Japanese ancestry may not have been justified, the internment of Japanese immigrants may have been. He cites a little known law enacted in 1798, the Enemy Alien Act, which authorizes the President, during a declared war, to detain, expel, or otherwise restrict the freedom of any citizen 14 years or older of the country with which the United States is at war. While these are only the Chief Justice's private reflections in a history book, and the war on terrorism remains an undeclared war, it is hoped that Chief Justice Rehnquist and his colleagues will follow a long line of judicial precedents after 1798 that have recognized the due process rights of non-citizens living in the United States.

We learned from the Japanese internment experience that unquestioned judicial deference compounded grievous errors. Armed with that knowledge, today's courts must not allow the government's sweeping rhetoric regarding national security to be used to curb non-citizens' liberties without uncovering the facts, and any prejudice, behind the rhetoric. The government must present a compelling case against specific individuals, whatever their ethnic or religious background, suspected of terrorism, rather than engage in over-inclusive roundups of "enemy aliens" and persons of "suspect nationalities."

Today's courts must not allow the government's sweeping rhetoric regarding national security to be used to curb non-citizens' liberties without uncovering the facts, and any prejudice, behind the rhetoric.

This paper is authored for the American Immigration Law Foundation by Stanley Mark, Suzette Brooks Masters, and Cyrus D. Mehta. The views expressed are those of the authors and do not necessarily reflect the position of the Foundation.

ENDNOTES

[1] Stanley Mark is Program Director at the Asian American Legal Defense and Education Fund (AALDEF). He has represented and assisted Japanese Americans asserting claims for redress compensation, and has testified before the U.S. Commission on Wartime Relocation and Internment of Civilians. Suzette Brooks Masters is a senior program officer at the International Center for Migration, Ethnicity and Citizenship at New School University. She serves on the board of directors of the National Immigration Forum and the Lower East Side Tenement Museum and writes frequently on immigration topics. Cyrus D. Mehta practices immigration law in New York City. He is First Vice Chair of the American Immigration Law Foundation and chair of the Immigration and Nationality Law Committee of the Association of the Bar of the City of New York.

[2] Within three weeks of the September 11 attacks, more than 200 incidents of anti-Asian violence were reported to AALDEF.

[3] President Gerald Ford issued a national apology in 1976. Presidential Proclamation No. 4417, 41 *Fed. Reg*. 7741 (1976).

[4] William Rehnquist, *All The Laws But One: Civil Liberties in Wartime*, 1998, Chapter 18.

[5] Christopher Edley, "A U.S. Watchdog for Civil Liberties," *The Washington Post*, July 14, 2002 at B7. See also, Christopher Connell, *Homeland Defense and Democratic Liberties: An American Balance in Danger?* Carnegie Corporation of New York, 2002, page 9.

[6] 7 *Fed. Reg*. 1407.

[7] The term "concentration camp" has also been used in describing the internment camps. It was used by the Joint Chiefs of Staff in a classified memo dated February 12, 1942 and in other documents. Michi Weglyn, *Years of Infamy* (New York, 1976), page 175.

[8] About two thirds of those interned were American citizens.

[9] Significant numbers of Japanese laborers immigrated to the United States in the 1890s to work in agriculture, mining and railroads. By 1909, 40% of California's agricultural workforce was Japanese. Carey Mc Williams, *Prejudice: Japanese Americans-Symbol of Racial Intolerance* (Boston: Little Brown, 1944). Japanese immigration was restricted in 1907 and, by 1924, the Japanese were barred entry to the United States as "aliens ineligible for citizenship." Immigration Restriction Act of 1944, 43 Stat. 153. It was not until 1952 that the Japanese were permitted to become US citizens and until 1965 that Asians were granted the same immigration privileges as Caucasians. These restrictive immigration laws laid the groundwork for discriminatory state legislation that prevented foreign born Japanese from owning land, possessing firearms, procuring fishing licenses, and holding government jobs. The Supreme Court finally

overturned these restrictions in 1948 in *Oyama v. California*, 332 U.S. 633, and *Takahashi v. Fish and Game Commission*, 334 U.S. 410.

[10] Public Law 77-503, 56 Stat. 173, 18 USCA § 97a.

[11] General DeWitt, the designated Military Commander of the Western Defense Command, issued Public Proclamation No. 1 pursuant to Executive Order 9066, which stated that "the entire Pacific Coast…subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations." Thereafter, several other proclamations were issued, including Exclusion Order No. 34, providing that all persons of Japanese ancestry be excluded from areas specified as Military Area No. 1.

[12] See *Hirabayashi v. United States*, 320 U.S. 81 (1943).

[13] See *Korematsu v. United States,* 323 US 214 (1944).

[14] Id. at 223-224.

[15] 323 U.S. 214 at 245-246.

[15A] The Supreme Court case that decided Endo's challenge to her detention is *Ex parte Endo*, 323 U.S. 283 (1944).

[16] See generally, Eugene Rostow, "The Japanese American Cases – A Disaster", 54 *Yale Law Journal* 489 (1945).

[17] Pub. L. No. 96-317.

[18] See *Korematsu v. United States*, 584 F. Supp. 1406 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

[19] *Korematsu*, 584 Fed. Supp at 1416**.**

[20] General John L. DeWitt, the military commander in charge of the Western Defense Command, wrote and issued the Final Report to support military necessity and an indefinite detention policy. His recommendation constituted the factual basis for detaining both U.S. citizens and resident aliens of Japanese ancestry. He made the following statement in the Final Report: "The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted…. It therefore follows that along the vital Pacific Coast over 112,000 potential enemies of Japanese extraction are at large today." See Final Report of General John L. DeWitt, quoted in Jacobus ten Broek, Edward N. Barnhart & Floyd W. Matson, Prejudice, *War and the Constitution* 110 (1954).

[21] See *Hirabayashi,* supra, 828 F.2d 591, 592-602.

[22] Id. at 1417 (citing *Personal Justice Denied,* which presents the findings of the Commission on Wartime Relocation and Internment of Civilians).

[23] Adam Liptak, Neil Lewis & Benjamin Weiser, "After September 11, A Legal Battle On the Limits of Civil Liberty", *New York Times*, August 4, 2002.

[24] See generally, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Human Rights Watch, Vol. 14, No. 4(G), August 2002.

[25] 66 *Fed. Reg*. 48,334 (September 20, 2001), amending 8 CFR §287(3)(d). The 48 hour rule improperly reads the case law as allowing for 48 hours regardless of special circumstances. *County of Riverside v. McLauglin*, 500 U.S. 44 (1991). Procedures may still may be deemed unreasonably delayed, even if charges are brought within 48 hours if, for example, there are "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." Id. at 56.

[26] Dan Eggan, "Delays Cited in Charging Detainees", *Washington Post*, Jan 15, 2002.

[27] 8 C.F.R. Section 236.6 (*Fed. Reg*. 19508 (Apr. 22, 2002). In *ACLU of New Jersey v. County of Hudson*, 2002 WL 1285110 (NJ Super. A.D. June 12, 2002), the NJ Superior Court held that the federal rule preempted any inconsistent New Jersey state public disclosure laws under the federal preemption provision of the US Constitution, Article 6, which declares that "the laws of the United States…shall be the supreme law of the land..anything in the constitution or laws of any State to the contrary notwithstanding."

[28] 66 *Fed. Reg*. 54,909 (Oct. 31, 2001).

[29] It should be noted that this article has focused primarily on the legal issues surrounding the treatment of non-citizens. It has not addressed the use of military tribunals or the rights of U.S. citizens who are designated as "enemy combatants" such as Padilla and Hamdi.

[30] See *United States v. Osama Awadallah*, 202 F.Supp;. 2d 55 (S.D.N.Y. 2002) .

[31] See Human Rights Watch report, page 4.

[32] 66 *Fed. Reg*. 55,062 (Oct. 31, 2001). This rule has been criticized by the Ethics Committee of Association of the Bar of the City of New York in that the requirement of a judicial finding of probable cause should not be replaced with an executive finding of reasonable suspicion in allowing the attorney/client privilege to be breached. See *The Record of the Association of the Bar of the City of New York*, Vol. 57, No. 3, Summer 2002.

[33] See Memorandum For All United States Attorneys, All members of the Anti-Terrorism Task Forces From the Deputy Attorney General: Guidelines for the Interviews Regarding International Terrorism, dated November 9, 2001, posted November 27, 2001, at: www.detroitfreepress.com/gallery/2001/interviews/01memo1124.htm. See also, criticism of program, e.g., in William Glaberson, "A Nation Challenged: The Interviews: Legal Experts Question Legality of Questioning"; *New York Times*, November 30, 2001, at B6.

[34] Dan Eggen & Cheryl W. Thompson, "U.S. Seeks Thousands of Fugitive Deportees: Middle Eastern Men Are Focus of Search", *Washington Post*, Jan. 8, 2002, at A1.

[35] 67 *Fed. Reg*. 52583-52593 (August 12, 2002).

[36] *Id*. In its comments to these rules, the American Immigration Lawyers Association (AILA) stated, "Terrorism is not tied to a nationality. It is not even tied to the omnipresent 'alien.' It is tied to an ideology of hatred and destruction. To link Special Registration to nationality promotes the simplistic and dangerous view that our enemies in the war on global terrorism are cloaked in the guise of a passport or a stated place of birth."

[37] Section 412, USA Patriot Act of October 2001 (Public Law 107-56).

[38] See Human Rights Watch report, page 4.

[39] See Complaint filed on April 17, 2002, in *Turkmen v. Ashcroft*, 02-CV-02307-JG (E.D.N.Y 2002), available at http://news.findlaw.com/hdocts/docs/terrorism. Turkmen, a Turkish national, was given voluntary departure on October 31, 2001, but was kept in custody for nearly four months, until the FBI ensured he was innocent.

[40] See, *United States ex. Rel. Knauff v. Shaughnessy*, 338 U.S. 537 ("whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); But see, *Zadvydas v. Davis*, 533 U.S. 678 (2001), where the Supreme Court held that "the Due Process Clause applies to 'all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary or permanent."

[41] See Eg., Affidavit of James S. Reynolds, Chief of the Terrorism Crimes Section, submitted in *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002).

[42] 2002 WL 1972919 (6th Cir. (Mich.))

[43] Id. at 2.

[44] 2002 WL 1163637 (D.N.J.).

[45] 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002). The American Immigration Law Foundation is a plaintiff in this case.

[46] Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion And Its Progeny", 100 *Harvard Law Review* 853 (1987).

[47] 130 U.S. 581 (1889).

[48] *United States ex rel Knauff v. Shaughnessy*, supra, note 40.

RESOURCES

Japanese Internment

National Japanese American Historical Society, www.njahs.org
materials related to the history and culture of Japanese in the United States

Densho-Legacy Project, www.densho.org
collection of oral histories of internment survivors

Children of the Camps, www.pbs.org/childofcamp
documentary on the experience of children interned during World War II

William Rehnquist, *All the Laws But One: Civil Liberties in Wartime*, Vintage, 1998.

September 11 Immigrant Detentions

Human Rights Watch, "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees,"
www.hrw.org/reports/2002/us911/

Arab American Institute, "The Arab American Experience after September 11: Healing the Nation,"
www.aaiusa.org/PDF/healing_the_nation.pdf

Lawyers Committee for Human Rights, "A Year of Loss: Reexamining Civil Liberties since September 11,"
www.lchr.org/aftersept/loss/report.htm

National Immigration Forum, "Immigrants in the Crosshairs: The Quiet Backlash Against America's Immigrants and Refugees,"
www.immigrationforum.org/

David Cole, "Enemy Aliens," *Stanford Law Review* Vol. 54:953 (2002)

Christopher Connell, "Homeland Defense and Democratic Liberties: An American Balance in Danger?" 2002 Carnegie Challenge Paper, Carnegie Corporation.

The Record of the Association of the Bar of the City of New York, Responding to September 11, Winter/Spring 2002.

American Civil Liberties Union, www.aclu.org
"Civil Liberties After 9/11", published 2002.

Photo credit: Steven Rubin, 2002

"Because of our Constitution and our Bill of Rights, we like to think we are different from totalitarian states, like the old Soviet Union where people were dragged off in the middle of the night not to be heard from again. Given the way our government is treating terrorist suspects, however, it seems at times we are not so different after all."

—Editorial, Des Moines Register,
"The secret arrests," 11/9/2001

ABOUT THE FOUNDATION...

The American Immigration Law Foundation is a 501(c) (3) non-profit organization dedicated to increasing public understanding of immigration law and policy and the value of immigration to American society; to promoting public service and excellence in the practice of immigration law; and to advancing fundamental fairness and due process under the law for immigrants.

AMERICAN IMMIGRATION LAW FOUNDATION
918 F Street, NW, 6th Floor, Washington, DC 20004
P: (202) 742-5600 · F: (202) 742-5619 · E mail: info@ailf.org
Visit our website at www.ailf.org