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Race-based Civil Detention for Security Purposes

Jennifer Elsea
Legislative Attorney
American Law Division

Summary

The current crisis has caused concern that measures implemented to fight terrorism will have a disproportionate negative effect on innocent Arab-Americans, Muslims, and aliens with ties to the Middle East. The purpose of this report is to address the issues surrounding race-based civil detention for security purposes.

Introduction

The terrorist attacks of September 11, 2001 dramatically increased awareness of the need for more stringent security measures, but this awareness is tempered with caution against implementing measures that could undermine civil liberties. Because the source of the current foreign threat, there is some concern that measures implemented to fight that threat will have a disproportionate negative effect on innocent Arab-Americans, Muslims, and aliens with ties to the Middle East. The purpose of this report is to address the issues surrounding race-based civil detention for security purposes.

Civil Detention for National Security Purposes

One response to the current crisis calls to mind the measures taken against Japanese-American citizens during the Second World War, which were largely upheld by the Supreme Court in *Korematsu v. United States*.[1] The Japanese internment program has since been discredited[2] and its victims have received compensation,[3] but that racially based detention has never expressly been ruled unconstitutional. For non-citizens, the precedents

[1] 323 U.S. 214 (1944).

[2] *See* Personal Justice Denied: Report of the Commission on Relocation and Internment of Civilians (1982).

[3] Civil Liberties Act of 1988, 50 USCS App. §§ 1989b *et seq.*

are even less assuring. In questions involving immigration law, scholars note that the courts have never invalidated even blatantly racist measures affecting the rights of aliens.[4]

Detention During War.

After the attack on Pearl Harbor, the President issued Executive Order 9066 to address the threat. Among other things, it established the War Relocation Authority to effect the exclusion of persons of Japanese ancestry from essentially the entire West Coast, ostensibly to prevent sabotage. In *Korematsu*, the Supreme Court upheld the conviction of an American citizen for remaining in his home after the region was declared a "Military Area" and thus off-limits to persons of Japanese descent. The Court refused to consider the constitutionality of the internment itself, as Korematsu's conviction was for violating the exclusion order only. The Court, in effect, validated the actions of the President and their subsequent approval by Congress. The Supreme Court had previously found the curfew imposed upon persons of Japanese ancestry to be constitutional as a valid war-time security measure.[5] The Court thereby demonstrated its reluctance to interfere with executive decisions related to the country's war efforts,[6] validating the curfew and forced relocation of Japanese-Americans without questioning the assertion that these race-based measures were a military necessity.[7]

In *Ex Parte Endo*,[8] the Supreme Court distinguished *Korematsu* and ruled that the authority to exclude persons of Japanese ancestry from military areas did not encompass the authority to detain loyal Americans. Such authority could not be implied from the power to protect against espionage and sabotage;[9] the Court declined to decide the constitutional issue presented by the evacuation and internment program, instead interpreting the executive order, along with the Act of March, 1942 (congressional ratification of the order),[10] narrowly to give it the greatest chance of surviving constitutional review.[11] Accordingly, the Court noted that although the declaration of a "Military Area" was a valid exercise of the executive order's authority, detention in Relocation Centers was neither mentioned nor implied in the statute or executive order, but was developed during the implementation of the program. The authority to detain citizens must serve the ends Congress and the President had intended to reach, and since the detention of a loyal citizen did not further the campaign against espionage and sabotage, it was not authorized by law.

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[4] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 304 (2d ed. 1996).

[5] Hirabayashi v. United States, 320 U.S. 81 (1943).

[6] *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, 221 (1998).

[7] *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 944-945 (Kermit Hall ed., 1992).

[8] 323 U.S. 283 (1944).

[9] 323 U.S. at 302.

[10] *Id*. at 298 (citing *Hirabayashi* at 87-91).

[11] *Id*. at 299.

Post- World War II Detention.

Citizens. The *Endo* case, for all practical purposes, brought about the end of the Japanese internment program, but did not put an end to the idea of large-scale internment if necessary for national security. After the war, Congress passed the Emergency Detention Act[12] to authorize the maintenance of internment and prisoner-of-war camps so they could be used during future crises. It was not until 1971 that Congress repealed the Emergency Detention Act, enacting a new statute[13] intended to prevent the President from authorizing civil detention of citizens without an act of Congress.

Aliens. Aliens, even those lawfully admitted to the country, do not enjoy the same constitutional rights as citizens with regard to freedom from unreasonable seizures of their persons. Under the Alien Enemy Act,[14] during a declared war, aliens who are citizens of hostile nations may be summarily detained and deported, and their property confiscated.[15] Even during times of peace, undocumented aliens may be subjected to different treatment based on their nationality.[16] Deportable aliens probably have no constitutional right protecting them from selective deportation[17] and the First Amendment does not provide

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[12] 64 Stat. 1019 (1950) (authorizing the President to declare an "Internal Security Emergency," in the event of war, invasion, or insurrection in aid of a foreign enemy, which would authorize the Attorney General to "apprehend and by order detain each person ... [where] there is reasonable ground to believe that such person may engage in acts of espionage or sabotage."). Several detention camps were maintained at former prisoner-of-war camps throughout the country. *See* A Brief History of Emergency Powers in the United States, Sen. Special Comm. on National Emergencies and Delegated Emergency Powers 104-05 (1974).

[13] P.L. 92-128, codified at 18 USCS § 4001 (2001) provides:

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

[14] 50 U.S.C. § 21 *et seq.* (2001).

[15] 50 U.S.C.§ 21 provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

[16] *See* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (upholding INS regulations requiring Iranian students to report to INS).

[17] American-Arab Anti-Discrimination Comm. v. Reno, 525 U.S. 471 (1999).

protection against removal based on association.[18] Excludable aliens, that is, aliens seeking entry, have few, if any, constitutional rights in the context of immigration.[19] Aliens who have entered the country, however, are protected by the Constitution in deportation proceedings, though their rights may differ from those of citizens in other contexts.

In a recent case involving the detention of a deportable alien, the Court applied reasoning and rules of interpretation similar to those applied in *Ex Parte Endo* to decide the merits of a *habeas corpus* action. The petitioner was a deportable criminal alien who was being detained indefinitely by the Immigration and Naturalization Service (INS) because no other country was willing to accept him.[20] Citing the "'cardinal principal' of statutory interpretation" requiring that statutes with apparent constitutional infirmities be interpreted, if possible, in such a way as to avoid those constitutional problems, the Court read into the statute a reasonable time limit beyond which a deportable alien may no longer be detained. The legislative purpose of the post-removal detention statute at issue was to "ensur[e] the appearance of aliens at future immigration proceedings."[21] The government is not authorized to detain deportable aliens for a time longer than what was reasonably necessary to bring about the alien's deportation, which the Court set at six months.

Nothing in Congress' joint resolutions authorizing the use of military force[22] or expressing the sense of the Congress with regard to the September 11 terrorist attack[23] can be read as an explicit authorization by Congress to detain citizens without probable cause. However, these resolutions could be broadly construed to affirm executive action in the event that the Congress were to react to any such action with silence. If Justice Jackson's concurrence in the *Steel Seizure* case[24] has validity here, any action taken by the executive that is not unconstitutional on its face or precluded by an act of Congress is likely to be reviewed, if at all, with extreme deference to the President.

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[18] Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[19] *See* Knauff v. Shaughnessy, 338 U.S. 537 (1950)("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

[20] Zadvydas v. Davis, 121 S. Ct. 2491 (2001).

[21] *Id*. at 2499.

[22] Authorization for Use of Military Force, P.L. 107-40 (2001).

[23] P.L. 107-39 (2001).

[24] Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952). Justice Jackson's formulation of the relative powers of the President and the Congress is summarized:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. ...
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> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain....
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. ...

Id. at 635-39 (Jackson, J. concurring)(footnotes omitted).

The *Endo* and *Zadvydas* opinions appear to indicate a move toward a higher degree of protection of civil liberties for members of ethnic minorities and aliens than was apparent in *Korematsu*, but both opinions avoided an analysis of the constitutionality of laws that clearly curtailed civil liberties by reading into them reasonable limitations. Implicit in both decisions is that any statute that would expressly allow the government to detain any person without probable cause for a length of time beyond that necessary to serve its purpose would be invalid as unconstitutional. However, it also appears unlikely that the Court will change course to involve itself in national security matters by deciding civil liberties cases while the country is at war or during a state of national emergency.[25] The historical pattern has been that the Court's decisions are not issued until after the crisis has passed and civil liberties have already been infringed.[26]

Proposed Measures for Dealing with Terrorism.

The Justice Department now reportedly seeks additional power to detain aliens upon a finding that the immigrant poses a danger to national security. The proposal, which, according to published reports, is still under revision, would allow the Attorney General to certify that an alien is likely to engage in or support a terrorist act, or poses any other risk to national security, which certification would subject the alien to mandatory detention. Detention would be mandatory even for aliens who have been granted asylum. This may present problems, as the Court determined in *Zadvydas* that the government may not detain an alien indefinitely without a valid reason. If detainees are not allowed a meaningful opportunity to contest their likelihood of engaging in terrorist activity, due process problems would almost certainly arise. The proposal also would reportedly make it even harder for aliens to seek *habeas* relief, limiting that opportunity by requiring *habeas* petitions be brought in the District of Columbia Circuit. Again, as of this writing, the proposal is undergoing revision and the legislative situation is fluid.

Law Enforcement Stops

It is probably not realistic to expect that anything like the Japanese internment program would be instituted to detain citizens based solely on their Arab ancestry. It is, however, theoretically possible that the President could determine that a certain class of persons poses a greater threat to national security than others. If *Korematsu* were followed, such a finding might not be questioned by the judiciary, especially if Congress were to acquiesce or ratify the executive's actions. Any statutory language conferring the requested authority could avoid an overreaching interpretation by explicitly incorporating standards and procedures to be used to determine, on an individual basis, who poses the requisite degree of threat to the national security.

Under *Ex Parte Endo*, even if the law were changed to allow members of a designated "dangerous" class of citizens to be detained without probable cause that a crime has been committed, those citizens could not be detained longer than necessary to ascertain whether they pose a real risk. The greater risk is that generally applicable laws could be enforced unequally in practice.

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[25] *See* REHNQUIST, *supra* note 2, at 223.

[26] *See id.* ("Some Executive actions will be reviewed by the courts only after the fact, if at all.").

Racial Profiling.

In this highly charged atmosphere of crisis, there is concerns that standards of reasonable suspicion to suspect Arab-American citizens of criminal intent may be effectively lowered, or that institutional safeguards protecting Fourth Amendment rights may be loosened. For example, law enforcement entities might engage in racial profiling, subjecting citizens of apparent Arab ethnicity to more frequent or invasive security searches. Investigative stops, protective sweeps and detention following border searches or security searches at airports may be conducted based on reasonable suspicion of criminal conduct.[27] While race and religion are descriptive factors that a detaining officer may take into consideration to determine reasonable suspicion or probable cause, the detention may not be based solely on such a factor. Such a practice could be challenged as a violation of Equal Protection rights under the Constitution.[28] The permissible bounds of using race characteristics to determine reasonable suspicion are not clearly drawn.[29]

Racial profiling and other forms of disparate treatment may also be a violation of international law. Equal treatment is fundamental not only under the United States Constitution, but also as a basic human right under a number of international treaties and conventions. The protection of human rights is listed among the major purposes of the United Nations Charter, which rights, as enumerated under the Universal Declaration of Human Rights, include the right to "life, liberty and security of person," the "right to equal protection of the law," and the right not to be arbitrarily detained.[30] The United States is also party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[31] which exhorts states parties to "prevent and combat racist doctrines and practices" in all forms.[32] The United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992,[31] and is bound as a member of the Organization of American States (OAS) to recognize human rights. The CERD and ICCPR, however, were ratified as non-self-executing treaties and thus are not intended by Congress to create any rights enforceable in United States courts.[32]

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[27] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[28] *See* Whren v. United States, 517 U.S. 806, 813 (1996) (noting that selective enforcement of the law through practices like racial profiling violates the Constitution). However, the challenger must also prove that the search was not otherwise objectively reasonable. *See id.*

[29] *See generally, Racial Profiling: Legal and Constitutional Issues,* CRS Report RL31130 (Sept. 25, 2001).

[30] See Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948).

[31] 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (U.S. entered into force Nov. 20, 1994).

[32] *See id.* at preamble.

[31] 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[32] Some experts question whether these reservations have effect. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-self-execution, and the Original Understanding,* 99 COLUM. L. REV. 1955 (1999)