

Nottebohm's Nightmare: Have We Exorcised the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?

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This article has been revised from the version published in 2011 in order to reflect several corrections.

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Frederich Nottebohm was the subject of a famous decision by the International Court of Justice that is mentioned in almost every international law text book published in the United States.² The *Nottebohm* judgment deals with the narrow legal issue of whether Guatemala must respect Liechtenstein's hasty grant of citizenship to Mr. Nottebohm during World War II.³ However, the story of how Mr. Nottebohm's case came to the world court exposes a little known program run by the United States during World War II in which the United States pressured Latin American countries like Guatemala to identify persons of German nationality or ancestry and turn them over to the United States for internment for the duration of the war. Many of these persons were assumed to be Nazi sympathizers and were arrested and detained for lengthy periods of time on the basis of mere accusations unsupported by any real investigation or evidence. Sadly, as with the Japanese-Americans who were thrown into detention camps during World War II,⁴ U.S. and international law at the time allowed these arrests and detentions of persons of German ancestry or nationality without requiring any further proof of Nazi sympathies, much less subversive activities.

Originally, the U.S. Latin American Detention Program was primarily motivated by national security concerns, especially after the attack on Pearl Harbor on December 7, 1941. However, as time went on, the United States continued detaining persons who, like the Nottebohms, had been deemed to present little or no security risk because it was beneficial for the United States and Latin American governments to do so for economic reasons. Thus, what

² The *Nottebohm* Case (Liech. v. Guat.), 1955 I.C.J. 4 (1955). *See generally*, Janis & Noyes, *INTERNATIONAL LAW: CASES AND COMMENTARY* 340 (3d ed. 2006); Damrosch et al, *INTERNATIONAL LAW: CASES AND MATERIALS* 463 (5th ed. 2009).

³ The International Court of Justice (ICJ) held that Guatemala did not have to respect that grant of citizenship because Nottebohm lacked sufficient genuine links to Liechtenstein. *See id.*

⁴ *See* *Koromatsu v. U.S.*, 323 U.S. 214, 215 (1944) (American citizen of Japanese descent challenged constitutionality of "Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area."); *see also* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) and Proclamation No. 2525 (Dec. 7, 1941) (declaring all natives or citizens of Japan found in the United States to be enemy aliens subject to detention).

started as a national security measure evolved into a program aimed at increasing U.S. economic influence in Latin America.

This article begins by recounting the story of Mr. Frederich Nottebohm, a German-born businessman from Guatemala, and how he and his extended family came to be caught up in the U.S. Latin American Detention Program.⁵ It next relates the motivations behind the creation of the program and analyzes the legality of the program under both United States and international law existing at the time. The article then examines the extent to which the law has evolved and whether the changes in the law would lead to a different result today. The article draws parallels between the arrest, detention and trial of alleged “alien enemies” during World War II and those practices being employed today with respect to alleged “unlawful enemy combatants” in the current fight against terrorism. Finally, the article suggests some lessons that may be learned regarding the treatment of so-called “alien enemies” during times of conflict, especially relevant for current U.S. policies regarding the arrest, detention and trial of suspected foreign terrorists.

⁵ The historical records do not indicate an official name for this program so for convenience I use the descriptive title: “U.S. Latin American Detention Program.”

I. Frederick Nottebohm's Story

Frederich Nottebohm was born in Hamburg, Germany on September 16, 1881 into a family of eight children.⁶ After spending two years in South Africa as a young man, he emigrated to Guatemala in 1905 at the age of 24.⁷ Shortly thereafter, he entered into business with his brothers, Arturo and Juan, in Guatemala City in a firm called Nottebohm Hermanos.⁸ Nottebohm Hermanos was a very successful firm engaged in commerce and banking and which owned several coffee plantations in Guatemala.⁹ In fact, by the 1930s, Nottebohm Hermanos was the second largest coffee producer in Guatemala.¹⁰ The Nottebohm family had many other business interests in multiple countries and was considered one of the oldest, wealthiest, and most influential families in Guatemala and Central America.¹¹ Frederick became a partner in the firm in 1912 and later became head of the firm in 1937, upon the death of his brother, Arturo.¹²

The Nottebohm family and business interests first fell under suspicion for ties to Germany during World War I. The U.S. government, through the office of the Alien Property Custodian, declared Nottebohm Hermanos to be an alien enemy under the Trading with the Enemy Act (TWEA)¹³ and seized all property of Nottebohm Hermanos in the United States.¹⁴

The United States government believed that Nottebohm Hermanos was owned at least in part by

⁶ *Id.* at 13. Depending on whether the German, Spanish or English spelling of his name is used, Mr. Nottebohm's first name may appear as Friedrich, Frederico or Frederick.

⁷ "Memorandum for the Chief of the Review Section: Frederico Wilhelm Nottebohm" (Apr. 22, 1944), Box 758, DOJ Alien Enemy Case Files, RG 60, National Archives, College Park, MD.

⁸ Nottebohm, *supra* note 2. Juan Nottebohm is also known as Johannes Nottebohm.

⁹ *Id.*; *see also* "Memorandum for the Chief of the Review Section: Frederico Wilhelm Nottebohm," (Apr. 22, 1944), Box 758, DOJ Alien Enemy Case Files, RG 60, National Archives, College Park, MD.

¹⁰ David McCreery, RURAL GUATEMALA 1760-1940 234 (1994).

¹¹ *See* "Memorandum for the Chief of the Review Section: Karl Heinz Nottebohm" (Apr. 30, 1944), Box 716, DOJ Alien Enemy Case Files, RG 60, National Archives, College Park, MD.

¹² Nottebohm, *supra* note 2. Arturo's son, Karl Heinz Nottebohm, who had been born in Guatemala, also became a junior partner in the firm at this time. *Banker Tells of U.S. Seizure in Guatemala*, CHICAGO DAILY TRIBUNE 3 (Dec. 27, 1945) at 3; *see also* "Memorandum re Citizenship Status of Karl Heinz Nottebohm" (Oct. 17, 1949), Thomas Corcoran Papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.

¹³ 50 U.S.C. § 5(b) (2006).

¹⁴ *See* Nottebohm Hermanos v. McGrath and Clark, Civil Action 1509-50 (D.D.C.), Answer and Counterclaim, in Thomas Corcoran papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.

German nationals, who were deemed to be enemy aliens.¹⁵ Following the war, the Nottebohms were able to demonstrate to the U.S. government that only long-term residents of Guatemala had any interest in Nottebohm Hermanos and that the company was not an enemy or ally of an enemy within the meaning of the TWEA.¹⁶ Accordingly, the U.S. government released and returned the property to Nottebohm Hermanos pursuant to the settlement of the lawsuit brought following the war.¹⁷

Between 1905 and 1939, Frederich Nottebohm occasionally returned to Germany or visited other countries for business or vacation, but he continued to have his permanent residence in Guatemala.¹⁸ One of the other countries he visited during this time was Liechtenstein, where another brother, Dr. Hermann Nottebohm, had resided since 1931.¹⁹

In 1938, Guatemala passed a new law which allowed persons born in Guatemala of German parents to renounce Germany and obtain Guatemalan citizenship.²⁰ Frederich's nephews and junior business partners, Kurt and Karl-Heinz Nottebohm, took advantage of this

¹⁵ *Id.*

¹⁶ *Id.* The U.S. government later contested these representations, contending that Johannes Nottebohm, a resident and citizen of Germany, and Nottebohm & Co. of Hamburg Germany, held ownership interests in Nottebohm Hermanos at the relevant time. The government relied on these contested facts to resist return of the Nottebohms' property after World War II. Answer and Counterclaim in Civil Action No. 1509-50, Thomas Corcoran Papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C. As described in more detail below, the parties ultimately reached a settlement of the matter in 1958.

¹⁷ Agreement dated December 21, 1950, in Thomas Corcoran papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.

¹⁸ J. Mervyn Jones, *The Nottebohm Case*, 5 INT'L & COMP. L. Q. 230, 231 (Apr. 1956).

¹⁹ *See id.*; *see also* Nottebohm, *supra* note 2 at 8; Dr. Erwin Loewenfeld, *Nationality and the Right of Protection in International Law*, 42 TRANSACTIONS OF A GROTIUS SOCIETY, PROBLEMS OF PUBLIC AND PRIVATE INT'L L.: TRANSACTIONS FOR THE YEAR 1956, 5, 6 (1956).

²⁰ *Banker Tells of U.S. Seizure in Guatemala*, *supra* note 12.

law to become Guatemalan citizens,²¹ but because Frederich had been born in Germany, he remained ineligible for Guatemalan citizenship.²²

Perhaps sensing the coming of the war, in March of 1939, Frederich Nottebohm conferred a power of attorney on the firm of Nottebohm Hermanos and left Guatemala for Hamburg, Germany.²³ While Frederich was traveling in Europe, World War II officially began with Germany's invasion of Poland.²⁴ Shortly thereafter, Frederich traveled to Vaduz, Liechtenstein to visit his brother, Dr. Hermann Nottebohm, and to apply for Liechtenstein citizenship.²⁵ Nottebohm's citizenship application was quickly approved and on October 20, 1939, he received a certificate of naturalization as a Liechtenstein citizen.²⁶ Under both German and Liechtenstein law, Nottebohm lost his German citizenship by virtue of becoming a citizen of Liechtenstein.²⁷

Nottebohm then made preparations to return to Guatemala, including having the Guatemalan Consul General in Switzerland enter a visa in his new Liechtenstein passport.²⁸ Upon his return to Guatemala in early 1939, Nottebohm informed the Guatemalan authorities of his acquiring Liechtenstein citizenship and asked that the Guatemalan register of foreign

²¹ See Petition for Habeas Corpus filed in U.S. ex rel. Kurt Nottebohm v. W. S. Cook (U.S. Dist Ct. ND, Dec. 20, 1945), Box 540, DOJ Alien Enemy Case Files, "Nottebohm, Kurt," RG 60, National Archives, College Park, MD; see also Stephen Fox, AMERICA'S INVISIBLE GULAG: A BIOGRAPHY OF GERMAN-AMERICAN INTERNMENT & EXCLUSION IN WORLD WAR II 105 (2000) (discussing Kurt Nottebohm's Guatemalan birth and renunciation of German citizenship).

²² Guatemalan citizenship laws appear to have been amended several times in the inter-war period, such that there may have been a brief period of time when Frederich Nottebohm may have been eligible to apply for Guatemalan citizenship. However, he never did so. Regardless, by government decree in the 1940s, Guatemala decided not to recognize any changes in citizenship after 1938. See L.F.E. Goldie, *The Critical Date*, 12 Int'l & Comp. L Q. 1251, 1271 (1963); Loewenfeld, *supra* note 19 at 7.

²³ Nottebohm, 1955 I.C.J. at 13.

²⁴ *Invasion of Poland: German Attack Across All Frontiers*, THE TIMES (Sept. 2, 1939), available at http://archive.timesonline.co.uk/tol/viewArticle.arc?articleId=ARCHIVE-The_Times-1939-09-02-10-001&pageId=ARCHIVE-The_Times-1939-09-02-10

²⁵ Nottebohm, *supra* note 2 at 15. Frederich Nottebohm filed his Liechtenstein citizenship application on October 9, 1939. See Goldie, *supra* note 22 at 1269 (1963); Jones, *supra* note 18.

²⁶ Nottebohm, *supra* note 2 at 15; Jones, *supra*, note 18 at 232.

²⁷ See Loewenfeld, *supra* note 19 at 12; Goldie, *supra* note 22, at 1269.

²⁸ Nottebohm, 1955 I.C.J. at 16-17; Jones, *supra*, note 18 at 232.

nationals be changed to reflect this fact.²⁹ The Guatemalan authorities complied with this request on February 5, 1940.³⁰ Frederich Nottebohm then resumed his business activities in Guatemala.³¹

Meanwhile, the Allied powers were becoming concerned about opening a “fifth column” for Nazi Germany in Latin America fueled by Germans living in Latin America, but remaining sympathetic to Germany.³² The United States, in particular, worried about the prospect of Nazi sympathizers so close to home. Thus, despite the fact that the U.S. had not yet officially entered the war, the Americans joined the British in taking measures to sever any financial assistance to Germany, including the blacklisting of companies and persons within the jurisdiction of the United States who did business with Germany.³³ The United States froze the assets of these firms and individuals so they could not provide any resources that might fuel the German war machine.

As part of this effort, on November 1, 1939, England added Nottebohm Hermanos to a roster of blacklisted companies.³⁴ In May 1941, the *New York Times* published an article which called a purchase of land in El Salvador by the Nottebohm Trading Company a “Nazi purchase.”³⁵ On July 17, 1941, U.S. President Roosevelt issued a Proclamation creating a “Proclaimed List of Certain Blocked Nationals” consisting of “certain persons deemed to be, or to have been acting or purporting to act, directly or indirectly, for the benefit of or under the

²⁹ See Jones, *supra*, note 18 at 232.

³⁰ Nottebohm, *supra* note 2 at Annex No. 1 of Application to ICJ, p. 12; see also Jones, *supra* note 18 at 232.

³¹ Jones, *supra* note 18 at 232.

³² Max Paul Friedman, *NAZIS AND GOOD NEIGHBORS: THE UNITED STATES CAMPAIGN AGAINST THE GERMANS OF LATIN AMERICA IN WORLD WAR II* 2, 52 (Cambridge Univ. Press 2003). The term ‘fifth column’ derives from a comment by General Emilio Mola during the Spanish Civil War and refers to persons living within a community rising up to fight. See *id.* at 2. See also Fox, *supra* note 21 at 7-8.

³³ Presidential Proclamation 2497, 6 Fed. Reg. 3555 (July 19, 1941).

³⁴ *82 Concerns Added to Trade Blacklist*, *NEW YORK TIMES* 24 (Nov. 18, 1939).

³⁵ *Questions Nazi Purchase*, *NEW YORK TIMES* 31 (May 11, 1941).

direction of, . . . or in collaboration with Germany or Italy or a national thereof.”³⁶ Nottebohm Trading Co. of Salvador, along with two Nottebohm companies in Guatemala, Nottebohm Hermanos and Nottebohm & Co., were included on that “Proclaimed List of Certain Blocked Nationals.”³⁷

Following the Japanese attack on Pearl Harbor, the United States officially entered World War II in December 1941.³⁸ Guatemala also entered the war against Germany on December 11, 1941.³⁹ On December 8, 1941, President Roosevelt issued Executive Orders pursuant to the Alien Enemy Act (AEA),⁴⁰ declaring all natives, citizens, denizens, or subjects of Germany who are over the age of 14 to be alien enemies and proscribing rules of conduct for such persons found within the jurisdiction of the United States.⁴¹

In 1942, the U.S. government added Frederick and his nephews and business partners, Karl-Heinz and Kurt Nottebohm, to the U.S. blacklist,⁴² along with several more Nottebohm family businesses, including the Nottebohm Banking Corporation.⁴³ Much of the Nottebohms’ collective property located in the United States was later deemed to be vested in the U.S. government, meaning that it could be held, used, administered, liquidated or sold for the benefit of the United States.⁴⁴

In December 1942, both Karl-Heinz and Kurt Nottebohm were arrested in Guatemala as alien enemies despite the fact that they had been born in Guatemala and were Guatemalan

³⁶ Presidential Proclamation Authorizing a Proclaimed List of Certain Blocked Nationals and Controlling Certain Exports, 6 Fed. Reg. 3555 (Jul. 19, 1941).

³⁷ 6 Fed. Reg. 3555, 3568 (Jul. 19, 1941).

³⁸ Congressional Declaration of War on Japan, 55 Stat. pt. I, p. 795 (Dec. 8, 1941).

³⁹ *See id.*; *see also* Loewenfeld, *supra* note 19 at 7 (Guatemala entered war at end of 1941).

⁴⁰ 50 U.S.C. § 21.

⁴¹ Presidential Proclamation No. 2526 (Dec. 8, 1941).

⁴² 7 Fed. Reg. 2413, 2442 (Mar. 31, 1942) (Kurt); 7 Fed. Reg. 3275, 3295 (May 5, 1942) (Frederick and Karl Heinz).

⁴³ 7 Fed. Reg. 837, 875 (Feb. 10, 1942); *see also Banker Tells of U.S. Seizure in Guatemala, supra* note 12.

⁴⁴ *See, e.g.*, 11 Fed. Reg. 3023, 3043 (Mar. 22, 1946); Vesting Order No. 10185, 13 Fed. Reg. 1, 13 (Jan. 1, 1948). However, as explained in more detail below, some property was eventually returned to the Nottebohm family.

citizens.⁴⁵ In January 1943, U.S. military police in Guatemala City took them into custody and removed them to the United States.⁴⁶ The U.S. government initially placed them in an internment camp called Camp Kenedy in Texas and later transferred them to Fort Lincoln in North Dakota.⁴⁷

Some months later, on October 19, 1943, the Guatemalan police requested that Frederick Nottebohm appear before the Director of Police.⁴⁸ When he complied, he was informed that he and several other persons were to be deported to the United States and interned in a camp there.⁴⁹ Frederick protested that he was no longer a German citizen and showed the Guatemalan police his Liechtenstein passport.⁵⁰ He was told that he would be deported regardless of his Liechtenstein nationality.⁵¹ The Swiss embassy, on behalf of Liechtenstein, also protested his deportation to and detention in the United States, but to no avail.⁵²

⁴⁵ Petition for Habeas Corpus filed in U.S. ex rel. Kurt Nottebohm v. W. S. Cook (U.S. Dist Ct. ND, Dec. 20, 1945), Box 540, DOJ Alien Enemy Case Files, “Nottebohm, Kurt,” RG 60, National Archives, College Park, MD; Letter from Karl Heinz Nottebohm to Edward J. Ennis, Director, Alien Enemy Control Unit, dated May 5, 1944, Box 716, DOJ Alien Enemy Case Files, RG 60, National Archives, College Park, MD; *see also Banker Tells of U.S. Seizure in Guatemala*, *supra* note 12.

⁴⁶ Carl Wiegman, *A Citizen Seeks to Free His Son Interned by U.S.*, CHICAGO DAILY TRIBUNE at 4 (Jan. 11, 1946).

⁴⁷ *See id.*

⁴⁸ *See Jones, supra* note 18 at 232. Although this author uses the date of Nov. 19, he probably means Oct. 19, which is the date listed in U.S. government records. *See* U.S. Dept. of Justice, Immigration and Naturalization Service (INS), Report of Alien Enemy, Nottebohm, Friedrich Wilhelm, Feb. 12, 1946, Box 44, Dept. of State, Special War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: “Nottebohm, Frederico,” RG 59, National Archives, College Park, MD. *See also Goldie, supra* note 22, at 1269; Loewenfeld, *supra* note 19 at 7.

⁴⁹ *See Jones, supra* note 18 at 232.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² Letter from Robert Fischer, Swiss Consul, Consulate de Suisse, Guatemala, to the American Ambassador at the Embassy of the United States of America, Guatemala dated Oct. 20, 1943, Box 44, Dept. of State, Special War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: “Nottebohm, Frederico,” RG 59, National Archives, College Park, MD. The U.S. government replied to the Swiss Consul’s inquiry in March 1944, stating that while it was aware that Frederick Nottebohm had attempted to change his nationality to that of Liechtenstein, it questioned the authenticity of his Liechtenstein citizenship. U.S. Dept. of State Memorandum to the Swiss Legation, dated Mar. 28, 1944, Box 44, Dept. of State, Special War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: “Nottebohm, Frederico,” RG 59, National Archives, College Park, MD. After further investigation, however, the U.S. government later came to the conclusion that Mr. Nottebohm’s adoption of Liechtenstein citizenship was bona fide. Memorandum from J. Bingham, Chief, Alien Enemy Control Section, to Mr. Monsma, dated Jan. 10, 1946, Box 44, Dept. of State, Special

Frederich Nottebohm was taken to a United States military camp in Guatemala City and, shortly thereafter, was placed on a U.S. ship and deported to the United States.⁵³ He was interned at Camp Kenedy in Texas for approximately one year along with his nephews.⁵⁴ In December 1943, all three of the Nottebohms at Camp Kenedy were given the opportunity to be repatriated to Germany, but they refused repatriation because they preferred to return to Guatemala.⁵⁵ In July 1944, a civil alien enemy hearing board stated its opinion that Karl Nottebohm

has engaged in no political activities detrimental to the best interests of the hemisphere, and that he cannot be considered a security subject for political reasons. It appears that the only reason for keeping him in internment is the contention of the U.S. Embassy in Guatemala and the U.S. State Department that his release would be detrimental to the economic policy of the United States in Central America.⁵⁶

Despite the board's recommendations, Karl Nottebohm was not immediately released. In September 1944, the U.S. government closed Camp Kenedy.⁵⁷ As a result, the Nottebohms were

War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: "Nottebohm, Frederico," RG 59, National Archives, College Park, MD.

⁵³ See Jones, *supra* note 18 at 232.

⁵⁴ See *id.* Interestingly, the Warrant from the U.S. Attorney General authorizing Federich Nottebohm's detention as "a person [deemed] to be dangerous to the public peace and safety of the United Nations" was not issued until Nov. 13, 1943, long after Mr. Nottebohm's detention began. See Warrant to the Commissioner of the INS issued by Francis Biddle, Attorney General and dated Nov. 13, 1943, Box 758, DOJ, RG 60, National Archives, College Park, MD (NA).

⁵⁵ Letter to W.F. Kelly, Ass't Comm'r for Alien Control, INS, from I. Williams, Officer in Charge, Alien Internment Camp, Kenedy, TX, dated Dec. 23, 1943, Dept. of State, Special War Problems Div., RG 59, National Archives, College Park, MD. The Nottebohms were luckier in this regard than Maher Arar, a dual Canadian and Syrian citizen who was arrested while transiting through New York in 2002 and removed to Syria for interrogation despite the fact that he claimed he would be tortured there. *Arar v. Ashcroft*, 585 F.3d 589 (2d Cir. 2009). The Court dismissed his complaint for failure to state a claim under either the Torture Victims Protection Act or the Fifth Amendment and the Court refused to extend a *Bivens* action to a case of extraordinary rendition, in essence deferring to the political branches of government for reasons of foreign policy and national security. See *id.*

⁵⁶ Alien Enemy Unit Recommendation, "Karl Nottebohm," dated July 7, 1944, Box 716, DOJ Alien Enemy Case Files, "Nottebohm, Karl-Heinz," RG 60, National Archives, College Park, MD (NA).

⁵⁷ See German American Internee Coalition website: USDOJ Internment Facilities (stating that Camp Kenedy closed in September 1944).

transferred to Fort Lincoln in North Dakota, where the Nottebohms remained until their release following the end of the war.⁵⁸

In 1944, while the Nottebohms were detained in the United States, the government of Guatemala brought 57 sequestration hearings against Frederich Nottebohm as an enemy alien.⁵⁹ On December 20, 1944, the Guatemalan Foreign Ministry cancelled his registration as a national of Liechtenstein.⁶⁰

World War II came to an end in May 1945.⁶¹ Karl-Heinz Nottebohm was released in December 1945 and allowed to return to Guatemala.⁶² The government of Guatemala also requested that the United States release Kurt Nottebohm.⁶³ On January 10, 1946, U.S. District Court Judge Vogel ordered the U.S. government to release Kurt Nottebohm.⁶⁴ The U.S. government complied, only to immediately charge Kurt Nottebohm with unlawful presence in the United States in violation of the immigration laws.⁶⁵ They gave him 90 days to return to Guatemala.

After two years and three months in detention, the U.S. government released Frederich Nottebohm from Fort Lincoln in North Dakota on January 22, 1946.⁶⁶ The government concluded that it had no credible evidence of Nazi sympathies or activities by Frederich

⁵⁸ See Jones, *supra* note 18 at 233.

⁵⁹ Loewenfeld, *supra* note 19 at 7. Sequestration is the process by which the government takes into custody the property of a person until a legal matter is resolved. See Black's Law Dictionary 1225 (5th ed. 1979).

⁶⁰ Nottebohm, 1955 I.C.J. Rep. 4, 19.

⁶¹ Although Germany had been defeated and occupied since May 8, 1945, hostilities in World War II were not officially terminated until December 31, 1946. See Presidential Proclamation No. 2714, 12 Fed. Reg. 1947 (Jan. 1, 1947).

⁶² *Banker Tells of U.S. Seizure in Guatemala*, *supra* note 12 at 3.

⁶³ Carl Wiegman, *supra* note 46 at 4.

⁶⁴ See *id.*

⁶⁵ *Id.*; see also Edward J. Ennis, Director Alien Enemy Control Unit, Telegram to Honorable Powless W. Lanier, U.S. Attorney, dated Jan. 5, 1946, instructing Lanier to obtain release of Kurt Nottebohm, Box 540, DOJ Alien Enemy Case Files, "Nottebohm, Kurt," RG 60, National Archives, College Park, MD.

⁶⁶ Frederich Nottebohm was ordered released on January 15, 1946. See Letter from Jonathan B. Bingham, Chief, Alien Enemy Control Section, to Ugo Carusi, Comm'r of INS, dated Jan. 15, 1946, Box 44, Dept. of State, Special War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: "Nottebohm, Frederico," RG 59, National Archives, College Park, MD.

Nottebohm. A December 1945 Memorandum from the U.S. Embassy in Guatemala states that “Nottebohm’s name does not appear on the Nazi party list believed to be authentic, and there is no reliable evidence to indicate that he was a member of the party or even a sympathizer of Hitler.”⁶⁷ The U.S. government’s main evidence against Frederich Nottebohm was a purported copy of a letter allegedly written by him that expressed a desire to “fight for the greatness of Germany and its cause.”⁶⁸ For a variety of reasons, the U.S. government expressed “grave doubt” as to the authenticity of the letter.⁶⁹ Accordingly, the U.S. government ultimately recommended and arranged for his release.

Upon his release, Frederich traveled to New Orleans and applied for permission to return to Guatemala. Guatemala refused to readmit him.⁷⁰ Frederich appealed the Guatemalan Foreign Ministry’s decision to cancel his registration as a citizen of Liechtenstein, but was unsuccessful.⁷¹ Since he could not return to Guatemala, Frederich traveled to Liechtenstein and made his home there instead.

In 1949, Guatemala passed Decree Law No. 689 which retrospectively fixed the date of October 7, 1938 as the date on which enemy alien status should be determined.⁷² In other words, a person’s nationality as of October 1938 would remain that person’s nationality throughout World War II regardless of any actions to change it. Because Frederich Nottebohm was still a German national on that date, his attempt to change his nationality to that of Liechtenstein in

⁶⁷ See U.S. Embassy at Guatemala, Memorandum on Frederico Nottebohm dated Dec. 6, 1945, Box 44, Dept. of State, Special War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: “Nottebohm, Frederico,” RG 59, National Archives, College Park, MD.

⁶⁸ Confidential Memorandum, “Federico Weber Nottebohm (Guatemala),” dated Jan. 10, 1946, Box 44, Dept. of State, Special War Problems Div., 1939-54: Name Files of Interned Enemy Aliens from Latin Am. (1942-48), Folder: “Nottebohm, Frederico,” RG 59, National Archives, College Park, MD.

⁶⁹ See *id.* It was surmised that the fake letter was prepared to support the Guatemalan government’s decision to expropriate Frederich Nottebohm’s property.

⁷⁰ Jones, *supra* note 18 at 233.

⁷¹ See *id.*

⁷² Goldie, *supra* note 22 at 1271. Guatemala’s actions were consistent with the goals of the Committee for Political Defense, which was concerned about abuse of nationality laws by suspected German spies. See Part III below.

1939 was invalid in the view of the Guatemalan government and he was still considered a German national. Accordingly, the Guatemalan government took the official position that it was entitled to expropriate all of Frederich Nottebohm's property in Guatemala without compensation because he was an enemy alien.⁷³

In April 1950, Nottebohm Hermanos commenced a civil action against the United States government seeking return of its property that had been frozen in the United States during WWII.⁷⁴ In that lawsuit, the U.S. government asserted that German interests existed in Nottebohm Hermanos during the World Wars contrary to the claims of the Nottebohm family.⁷⁵ The U.S. government claimed Johannes Nottebohm, a citizen and resident of Germany, was also a partner, as well as Nottebohm & Co., a firm in Hamburg Germany, and that the Nottebohms had misrepresented these facts to the U.S. government following World War I in an attempt to persuade the government to unblock property seized during that war.⁷⁶ Because of these alleged misrepresentations, the U.S. government claimed it was entitled to keep the Nottebohm's property seized during WWII.

The Nottebohms and the U.S. government began a series of negotiations that resulted in an agreement to unblock the Nottebohm's assets. Pursuant to a Release Agreement dated December 21, 1950, the U.S. government entered into a settlement with the Nottebohms and released the claims of the United States against them.⁷⁷ The anticipated settlement would provide an amount of money that represented approximately half the value of Nottebohm

⁷³ See Loewenfeld, *supra* note 19 at 7.

⁷⁴ Nottebohm Hermanos v. McGrath, Complaint dated Apr. 4, 1950, Civ. Action No. 1509-50 (D.D.C.)

⁷⁵ Peyton Ford, Asst. to the Attorney General, Findings and Decision on the Record and Hearings Concerning Nottebohm Hermanos, Et Al., (Dec. 29, 1949), Thomas Corcoran Papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.

⁷⁶ Answer and Counterclaim in Civil Action No. 1509-50, Thomas Corcoran Papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.

⁷⁷ Release dated Dec. 21, 1950, signed by Harold Baynton, Assistant Attorney General, Director of Office of Alien Property and several of the Nottebohms, Thomas Corcoran Papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.

Hermanos' property that had been seized. However, much of the property was not actually released until 1958.⁷⁸

Frederich Nottebohm also persuaded the Liechtenstein government to take up his quest to return to Guatemala and reclaim his property. On December 17, 1951, Liechtenstein filed an application against Guatemala with the International Court of Justice alleging that Guatemala had wrongfully refused to recognize its grant of citizenship to Frederich Nottebohm.⁷⁹

Unfortunately for Nottebohm, the ICJ ruled that he did not have sufficient genuine links with Liechtenstein such that Guatemala had to honor the Liechtenstein grant of citizenship.⁸⁰ This decision was highly criticized by international scholars⁸¹ and its reasoning was later rejected by the International Law Commission in its Draft Articles on Diplomatic Protection.⁸²

Following the ICJ's decision, the Guatemalan Congress voted on November 23, 1956 to expropriate all German property without compensation.⁸³ The Guatemalan government, led by Carlos Castillo Armas, determined that virtually all German property confiscated during World War II would be registered permanently as state property to pay for Guatemala's "war damages."⁸⁴ As a result, Frederich Nottebohm was stripped of all of his property in Guatemala and received no compensation for his loss.⁸⁵

⁷⁸ See Department of Justice Office of Alien Property – Notice of Intention to Return Vested Property, 23 Fed. Reg. 9169, 9204 (Nov. 27, 1958) (listing the property of several members of the Nottebohm family including Frederich (Liechtenstein), Karl-Heinz, Carmen and Erika (Guatemala), and Kurt (El Salvador). Frederich's claim was later amended. See 24 Fed. Reg. 9303, 9325 (Nov. 18, 1959).

⁷⁹ Nottebohm, *supra* note 2 at 12.

⁸⁰ Nottebohm, *supra* note 2 at 26. The Court announced its judgment in April 1955. Mr. Nottebohm died the following year at the age of 75 in Hamburg, Germany on January 26, 1956. Email from Hansjoerg Meier, Director Civil Registry Office of Liechtenstein, September 12, 2008.

⁸¹ See Goldie, *supra* note 22 at 1272; Jones, *supra* note 18 at 231; Loewenfeld, *supra* note 19 at 5.

⁸² International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries* 32-33 (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

⁸³ See *Bonn Bars Ties with Guatemala*, NEW YORK HERALD TRIBUNE (Dec. 4, 1956). This action led to the December 1956 refusal of West Germany to establish diplomatic relations with Guatemala. See *id.*

⁸⁴ 'End of War' Act Aids Guatemala, NEW YORK TIMES (Nov. 25, 1956).

⁸⁵ Although Frederich Nottebohm was not compensated, the Guatemalan government did return 16 of the *fincas* (coffee plantations) to the Nottebohm family after his death in 1962. Friedman, *supra* note 32 at 187.

II. A Tragedy of Justice: The Creation of the Latin American Detention Program

Frederich Nottebohm was arrested, forcibly removed to the United States, interned for over two years, and stripped of his Guatemalan property (as well as some of his assets in the U.S.), without due process of law. The U.S. government never held a hearing at which Frederich was proved to be a German citizen or a threat to the national security of the United States. U.S. law at the time authorized the President to apprehend and restrain persons found in the United States who are natives or citizens of a hostile nation during war time.⁸⁶ The law did not require any showing of dangerousness in word or deed. Simply being a national or citizen of an enemy country by accident of birth or family was sufficient. As one Immigration and Nationalization Service (“INS”) official involved in the program stated, “the war thrust us into the shameful position of locking people up for their beliefs.”⁸⁷

Unfortunately, Nottebohm’s story is not unique. Over 4,000 persons of German nationality or ancestry living in Latin America during World War II were treated in the same way.⁸⁸ For example, in the Panama Canal Zone, the Panamanian government and U.S. military officials routinely cooperated to intern Axis nationals “without any inquiry as to the loyalty or

⁸⁶ 50 U.S.C. § 21. Of course, the AEA does not address the legality of the U.S.’ involvement in the arrest and forcible transfer of persons to the U.S., which was necessary to establish jurisdiction over the Nottebohms. And U.S. courts were reluctant to question the actions of foreign governments in this regard. In a case involving a German citizen arrested in Costa Rica and brought to the United States for internment, the U.S. Court of Appeals for the Second Circuit invoked the Act of State Doctrine in response to Von Heymann’s challenge to the lawfulness of his arrest and removal to the United States, holding that it could not review “the legality of governmental acts performed by a foreign sovereign within its own territory.” U.S. ex rel. Von Heymann v. Watkins, 159 F.2d 650, 652 (2d Cir. 1947), *citing* Underhill v. Hernandez, 168 U.S. 250,252-53 (1897).

⁸⁷ Arnold Krammer, *UNDUE PROCESS: THE UNTOLD STORY OF AMERICA’S GERMAN ALIEN INTERNEES* 129 (1997) (quoting Jerre Mangione, INS camp inspector).

⁸⁸ Friedman, *supra* note 32, at 2; Fox, *supra* note 21 at 89. “The United States interned more persons from Guatemala than from any other republic except Peru.” Stephen Fox, *THE DEPORTATION OF LATIN AMERICAN GERMANS, 1941-47: FRESH LEGS FOR MR. MONROE’S DOCTRINE*, 32 *Y.B. GER.-AM. STUD.* 17, 123 (1997). The treatment of Japanese from Peru was consistent with the treatment of Germans from Latin America. See Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 *Boston College L. Rev.* 275 (1998).

danger of the particular alien.”⁸⁹ According to historian Max Friedman, “only a minority of the deportees conceivably warranted the label of “dangerous enemy alien.”⁹⁰ “With only eight of the 4,058 German deportees even allegedly involved in espionage, and the record of sabotage “practically nil” according to the FBI, spying and sabotage were red herrings as far as the internments were concerned.”⁹¹ Thus, the counterespionage work of Allied intelligence did not result in a high positive rate of identification and internment of truly dangerous enemy aliens.

The historical record reveals three quite different reasons for the United States’ development and operation of the Latin American Detention Program during WWII. The first justification provided for the Program was national security. As noted above, the United States was concerned about the possibility of German subversives operating in its own backyard and was not confident that the Latin American governments were able or willing to sufficiently contain this threat.⁹² Second, the United States wanted to build up a reserve of German internees who could be traded for American prisoners of war.⁹³ Third, the United States hoped to eliminate German commercial interests in Latin America in part to make room for U.S. business interests to move in after the war.⁹⁴ Whether or not a person posed any security risk to the United States was largely irrelevant to these latter two goals.

Historian Max Friedman explains the United States’ motivation to create the program as follows: “The U.S. view[ed] Latin America as a vulnerable, dependent region where latinos [sic]

⁸⁹Friedman, *supra* note 32 at 111.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 9, citing Federal Bureau of Investigation (FBI), *German Espionage in Latin America*, June 1946, 862.20210/6-1746, RG 59, National Archives, College Park, MD.

⁹² Fox, *supra* note 88 at 119 (“In Washington in late 1938 officials believed that by themselves the republics would or could not resist the combined political, economic, and military threat from Germany.”).

⁹³ Kramer, *supra* note 87 at 91.

⁹⁴ *Id.* at 92; *see also* Fox, *supra* note 21 at 89 (“The United States did not remove the Germans from Latin America primarily for reasons of national security, which was the official explanation. Rather, the deportation program was a disingenuous plan . . . to replace German economic interests in the region with those of the United States and cooperative republics.”); *see also* Fox, *supra* note 88 at 123 (“The FBI later bragged (discreetly omitting the key role played by the United States) that the actions of the Guatemalan government after 1941 had ‘rid the Republic of the extensive commercial, economic, and financial control exercised by German nationals.’”).

are helpless and foreigners are the real actors.”⁹⁵ The United States believed that the quality of the intelligence operation that was supposed to find subversives to the south was poor; thus, it could not accurately assess the extent of the threat or the ability of the Latin American governments to deal with it.⁹⁶ Further, “Germans living in Latin America . . . were making inroads into Latin American markets. . . . As with the fear of military invasion, U.S. officials believed the German economic offensive depended on the collaboration of Germans residing in Latin America. . . . German competition was a security issue.”⁹⁷ Friedman summarizes the United States’ varying motivations as follows:

The removal of Latin America’s Germans evolved rapidly out of three related currents of policy. The first was the endeavor by the U.S. government to identify and neutralize dangerous Axis nationals in Latin America. . . . U.S. officials had no confidence that Latin American governments were able to discipline their own Axis nationals and believed that local internment would be inadequate. Dissatisfaction with the effectiveness of local controls would provide a rationale for transferring the aliens to United States custody. The second current flowed from the desire of the United States to destroy German power and of some of the Latin American leaders to turn the anti-Axis campaign into political or financial gain. . . . The third current emanated from a traditional wartime practice under which belligerents agree to repatriate enemy diplomats and bring their own diplomats home.⁹⁸

Each of these three motivations is explained in more detail below.

A. National Security

Immediately following the attack on Pearl Harbor in December 1941, the U.S. Ambassador to Panama, Edward Wilson, became concerned that the Panama Canal might be the object of a similar attack.⁹⁹ Accordingly, the United States requested that Panama detain and

⁹⁵ Friedman, *supra* note 32 at 4.

⁹⁶ *See id.*

⁹⁷ *See id.* at 4.

⁹⁸ *Id.* at 105.

⁹⁹ *See id.* at 108.

intern enemy aliens within Panama.¹⁰⁰ The United States effectuated similar roundups in several other Latin American countries, including Guatemala.¹⁰¹ President Ubico of Guatemala asked the U.S. Legation if it would assist him in expelling all Nazis of military age from his country, which the United States did.¹⁰²

The Roosevelt Administration perceived a possibility of Germans living in Latin America becoming a destabilizing force and presenting a “fifth column” for Nazi Germany.¹⁰³ “[T]he Roosevelt administration assumed Hitler might use the *Auslandsdeutsche* (Germans living abroad) to pave the way for a German invasion of the Americas.”¹⁰⁴

U.S. Assistant Secretary of State Adolf Berle “was the main force behind the [Latin American] deportation program.”¹⁰⁵ He supported the program primarily because he viewed Germans in Latin America as an external threat to the United States.¹⁰⁶ However, actual proof of subversive activities was not required. A U.S. State Department memorandum from November 1942 insisted that it was not necessary to distinguish between dangerous and non-dangerous enemy aliens because their national identity alone was sufficient evidence of their collective guilt.¹⁰⁷

Both Guatemala and the United States “misconstrued expressions of group solidarity and ethnic and national pride among the Germans of Latin America as a sign of their willingness to collaborate in war.”¹⁰⁸ In 1941, it was conventional wisdom that “Germans living in Latin

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.* Approximately 10% of Germans in Guatemala belonged to the Nazi party. *See id.* at 27.

¹⁰³ *See id.* at 2, 52-55; *see also* Fox, *supra* note 21 at 8.

¹⁰⁴ Friedman, *supra* note 32 at 45.

¹⁰⁵ *See id.* at 81.

¹⁰⁶ *See id.*

¹⁰⁷ “Memorandum regarding activities of the United States Government in removing from the other American Republics dangerous subversive aliens” 2 (Nov. 3 1942), Subject Files 1939–54, Box 180, Special War Problems Division, RG59, National Archives, College Park, MD; *see also* Friedman, *supra* note 32 at 119.

¹⁰⁸ Friedman, *supra* note 32 at 5.

America [were] the key to Nazi aspirations for dominating the region by military, political, or economic means.”¹⁰⁹ In 1942, the U.S. State Department declared that in Latin America, “all German nationals without exception. . . are all dangerous and should be removed from their present sphere of activity as rapidly as possible.”¹¹⁰

Many U.S. officials, including intelligence agents, ambassadors, and cabinet members, failed to understand Latin America and Latin Americans; they failed to speak the language and held many stereotypes and prejudices.¹¹¹ The media depicted Latin Americans as “inferior and childlike, feminized and vulnerable.”¹¹² Yellow journalism “contributed directly to the impressions held by policymakers in Washington.”¹¹³ The British also contributed to the misinformation regarding the Nazi menace in Latin America in order to persuade the U.S. government of the urgency of the threat posed by Germany and to try to bring the United States into the war.¹¹⁴

In retrospect, however, there was little solid evidence that many of these individuals presented any real danger.¹¹⁵ Postwar reports often lacked charges or reasons as to why certain individuals had been rounded up.¹¹⁶ In fact, some of those arrested and interned were Jews who had themselves fled from the Nazis.¹¹⁷

The contention that all Germans were dangerous is refuted by the United States’ own experience with the more than 300,000 Germans living within its own borders and its decision to

¹⁰⁹ *Id.*; Krammer, *supra* note 87 at 36 (the FBI is “now considered by historians to have been notoriously irresponsible and biased at the time of WWII.”).

¹¹⁰ “Memorandum regarding activities of the United States Government in removing from the other American Republics dangerous subversive aliens,” *supra* note 107 at 2.

¹¹¹ Friedman, *supra* note 32 at 48-49; Krammer, *supra* note 87 at 36.

¹¹² Friedman, *supra* note 32 at 49.

¹¹³ *Id.*

¹¹⁴ *See id.* at 58; Krammer, *supra* note 87 at 89.

¹¹⁵ Friedman, *supra* note 32 at 110; Krammer, *supra* note 87 at 89.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

intern less than 1% of them.¹¹⁸ If Germans were dangerous by virtue of their nationality alone, it would have made more sense to detain those already living in the United States in far greater numbers than to import Germans from Latin America for detention.

B. Bargaining Chips

A second reason the U.S. government brought Germans from Latin America to the United States for detention was a concern for American prisoners of war in Germany. Having Germans in custody opened the door for the possibility of prisoner exchanges and the repatriation of American POWs.¹¹⁹ In addition, it was hoped that Germans would treat American prisoners of war better if they knew that whatever treatment they provided would be reciprocated by the United States with respect to Germans in U.S. custody.

On December 16, 1941, John Moores Cabot, the Central America desk officer in the State Department summed up the arguments in favor of a regional program to intern Germans in the United States as follows:

“I feel that it is wise to clear as many young Nazis out of Central America as possible, because (1) it will definitely diminish the danger of subversive activities in Central America and the indirect threat they represent to the Canal, (2) *it will give us hostages who will serve as a brake on any measures taken against our citizens in enemy-occupied territory*, (3) it will please the governments of countries which are anxious to get rid of the Axis nationals, and it will be considered by them an act of practical cooperation, (4) it may serve as an inspiration for other countries which seriously fear subversive activities, (5) it will build up a vested interest in Germany’s defeat in the countries concerned, particularly if any property is seized, . . . While I do not think we should urge any government to deport Axis nationals, I see no harm in discreetly pushing the matter when an opening is given.”¹²⁰

¹¹⁸ Friedman, *supra* note 32 at 3, 111, 120; Krammer, *supra* note 87 at 173.

¹¹⁹ Krammer, *supra* note 87 at 91. Some obstacles to this plan, including a lack of ships for transportation, are described in Fox, *supra* note 88 at 126-9.

¹²⁰ Friedman, *supra* note 32 at 109 (quoting Memorandum from Cabot to Philip Bonsal, U.S. Dept. of State, dated Dec. 6, 1941). Cabot appears to equate “young Nazis” with Axis nationals, reflecting the view that all Germans were dangerous. However, Cabot later protested the excesses of the program. *See id.*

Thus, German citizens could be used as bargaining chips both to obtain the release of American POWs and to secure their decent treatment while in German captivity.

C. Commercial Gains

What began as a deportation program driven by national security concerns evolved over time “to focus increasingly upon individuals who could in no way be tied to Nazi activity, but had acquired significant economic positions.”¹²¹ It appears that economic issues gradually replaced security concerns near the midpoint of the deportation program. The United States was very interested in post-war U.S. dominance in Latin American markets, which is demonstrated by U.S. reluctance to return German detainees to Latin America following the war.¹²² Instead, some U.S. officials advocated for repatriation to Germany for the sake of “our long-range economic and political interests.”¹²³

Reactions from the Latin American countries were mixed. Some requested that the many detainees with family members in Latin America be returned home and reunited with their families.¹²⁴ Other Latin American leaders realized that “seizing the property of their German neighbors could be greatly simplified by calling them Nazis and handing them over to the United States” and not allowing them to return.¹²⁵

The targeting of the Nottebohm family for economic rather than political activities “vividly illustrates the way the deportation program had evolved during the war from an undertaking primarily motivated by the need to ensure security against subversion into a long-term project of permanently weakening German economic competition in a region long claimed as ‘America’s

¹²¹ Friedman, *supra* note 32 at 4-5.

¹²² *See id.* at 4-5; *see also* Krammer, *supra* note 87 at 92, 152; Fox, *supra* note 88 at 130-4.

¹²³ *Id.* at 131. *See also* Saito, *supra* note 88 at 298 (discussing same phenomenon with respect to Japanese from Peru).

¹²⁴ *See id.* at 132-3.

¹²⁵ Friedman, *supra* note 32 at 6.

backyard.”¹²⁶ Thus, while the United States was initially concerned with national security, economic concerns eventually became paramount. By way of example, in 1943, Albert Clattenburg, Assistant Chief of Breckinridge Long’s Special Division, completed a report after touring several U.S. internment camps, in which he discussed the original purpose of the program: “Our transfer of these enemy aliens to this country for internment is based on our sincere desire to extirpate the carefully-prepared organizations of the Axis governments in the other American republics and thus to ensure the political security of this hemisphere.”¹²⁷ He then concluded, however, that the program was corrupted by Latin American leaders who wanted to get rid of persons who were likely to foment internal opposition or in order to seize the business and property of the deported Axis nationals.¹²⁸

With respect to the Nottebohm family in particular, there is evidence in the files of the State Department on Karl and Kurt Nottebohm that these individuals were deemed not to be dangerous and that their removal from Guatemala was largely motivated by economic concerns. For example, one Department of Justice memorandum concerning the Nottebohm family acknowledges that there was no evidence they had been engaged in any political activities and that there was even some evidence that they were “actually anti-Nazi.”¹²⁹ The memorandum’s author, James Bell, further wrote that he did not support continued internment of the Nottebohms “because I believe that the economic end, the breaking up of economic power of certain Germans in Central America, has been served by the deportations of the subjects from Central America.”¹³⁰ Likewise, Kurt Nottebohm alleged in a petition for habeas corpus for release from

¹²⁶ *Id.* at 168.

¹²⁷ *Id.* at 221.

¹²⁸ *See id.*

¹²⁹ James D. Bell, Memorandum to the Chief of the Review Section on the “Nottebohm Family” dated Aug. 12, 1944, Box 716, DOJ Alien Enemy Case Files, “Nottebohm, Karl Heinz,” RG 60, National Archives, College Park, MD.

¹³⁰ *Id.*

detention that when he inquired of the U.S. government as to why he was being detained, he was told: “We have investigated your record and found nothing against you, but you must realize this is also a commercial war.”¹³¹ Thus, Karl and Kurt Nottebohm, both Guatemalan citizens, and Frederich, a Liechtenstein citizen, appear to have been detained for economic reasons far more than because of any security issues.

D. Expressions of Concern

Assistant U.S. Secretary of State Breckinridge Long was the most senior official at the U.S. State Department in charge of overseeing the deportation and repatriation of Germans from Latin America.¹³² “He and his like-minded subordinates in the Special Division helped bring Jews and other non-Nazis into the camps and ensured that they would not receive hearings or be otherwise enabled to argue their case” for release.¹³³ The State Department was not in charge of the camps, however. That duty fell to the Department of Justice (DOJ).¹³⁴

The DOJ lawyers made a greater attempt to discriminate between dangerous and non-dangerous Germans than did the State Department officials. The person in charge on the Justice side was Edward Eniss, the head of DOJ’s Alien Enemy Control Unit (AECU).¹³⁵ He opposed mass internment on principle, and with U.S. Attorney General Francis Biddle’s support, he tried to moderate the excesses of the program.¹³⁶ “Ennis found a sympathetic listener in James H. Keeley, Jr., the acting chief of the State Department’s Special Division, who was beginning to have some qualms of his own. Keeley had noted that enemy aliens in the United States received

¹³¹ Petition for Habeas Corpus filed by George Dix in U.S. ex rel. Kurt Nottebohm v. W. S. Cook (U.S. Dist Ct. ND, Dec. 20, 1945), Box 540, DOJ Alien Enemy Case Files, “Nottebohm, Kurt,” RG 60, National Archives, College Park, MD.

¹³² Friedman, *supra* note 32 at 156.

¹³³ *See id.* at 157.

¹³⁴ *See id.* at 158. *See also* Fox, *supra* note 21 at 9.

¹³⁵ *See* Friedman, *supra* note 32 at 158. The Alien Enemy Control Unit was a new division created within the Department of Justice to supervise alien enemies. Charles W. Harris, *The Alien Enemy Hearing Board as a Judicial Device in the United States During World War II*, 14 INT’L & COMP. L.Q. 1360, 1362, at n. 12 (1965).

¹³⁶ *See* Friedman, *supra* note 32 at 159; *see also* Fox, *supra* note 21 at 91, 131.

hearings, but those the State Department brought up from Latin America did not.”¹³⁷ Keeley wrote in November 1942:

Whether the man be innocent or guilty of subversive activities inimical to the safety of this hemisphere, it seems to me that he is entitled to have his case reviewed somewhere, [s]omehow. . . The aliens received from other American Republics have had scant, if any, hearings in the Republic from whence they came, and . . . they are apparently condemned to remain interned here for the duration of the war without the possibility of having the facts in their cases reviewed here or in the Republic from whence they came. I don't like it . . . It isn't in keeping with the principles of justice for which we are fighting. No one wants to be soft as regards to a dangerous enemy alien, but we need not copy the methods of our enemies by refusing to permit a man who claims to be innocent somehow to arrange for a hearing of his case on the merits. . . To give such aliens a hearing, or a rehearing in those cases where the semblance of a hearing may have been given in the Republic that sent them here, should not endanger the safety of the United States.¹³⁸

Keeley's efforts to provide hearings were rebuffed by his State Department colleague, Breckinridge Long, however.¹³⁹ But despite State's resistance, many of the detainees did receive administrative hearings, as described below.

III. Was the Program Legal?

A. United States Law

U.S. law at the time of World War II authorized the President during war time to apprehend and restrain persons found in the United States who are natives or citizens of a hostile nation.¹⁴⁰ The primary statutory authority relied upon by the United States in conducting the Latin American Detention Program was the Alien Enemy Act, 50 U.S.C. § 21, which provides:

Whenever there is 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

¹³⁷ Friedman, *supra* note 32 at 160.

¹³⁸ See James H. Keeley, Jr. to Miss Moore dated 12 November 1942, Alien Enemy Case Files, Nottebohm, Federico Wilhelm, Box 758, DOJ, RG60, National Archives, College Park, MD (NA).

¹³⁹ Friedman, *supra* note 32 at 160.

¹⁴⁰ 50 U.S.C. § 21.

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.¹⁴¹

The Alien Enemy Act was originally passed in 1798 and has changed little since then.¹⁴²

Pursuant to this statutory authority, the President is given extremely broad discretion to arrest, detain and remove “natives, citizens, denizens, or subjects” of a hostile nation found in the United States.¹⁴³ The purpose of the Act is to subject to Executive control all aliens, who, because of their nativity or feeling of allegiance, might be led to acts dangerous to the public safety of the United States if permitted to remain at large.

The AEA was implemented with respect to persons from Latin America by way of a series of Executive Orders. Execution of the program was assigned to a new governmental unit called the AECU, in the DOJ.¹⁴⁴ The head of the DOJ, Attorney General Francis Biddle, emphasized the need to conduct the program of investigation into enemy aliens as fairly as possible, consistent with democratic principles.¹⁴⁵ To that end, civilian alien enemy review boards were created to examine the evidence against an alien enemy and determine his or her fate.¹⁴⁶

¹⁴¹ *Id.*

¹⁴² *Ludecke v. Watkins*, 335 U.S. 160, 162 (1948).

¹⁴³ 50 U.S.C. § 21. The statute requires that the persons be found within the United States; hence, the need to bring the persons from Latin America to the United States for internment.

¹⁴⁴ Fox, *supra* note 88 at 133.

¹⁴⁵ Harris, *supra* note 136 at 1362.

¹⁴⁶ Krammer, *supra* note 87 at 45.

Accused alien enemies had no right to a hearing before the Board,¹⁴⁷ but many hearings were granted to allow an alien to present evidence on his or her behalf. A board was composed of three or more persons who were usually prominent citizens in the community.¹⁴⁸ There was no requirement that hearing board officers be lawyers or judges; although an attempt was made to have at least one attorney on each Board.¹⁴⁹

Accused persons had no right to counsel, but could bring a friend along as an advisor.¹⁵⁰ By contrast, the government was represented by the United States District Attorney for that particular judicial district (or his designee), along with a special agent from the FBI, and a representative from the INS.¹⁵¹

The FBI conducted the investigation of the alien and presented its evidence to the Board.¹⁵² The alien would be questioned about the evidence and could submit affidavits in his or her behalf.¹⁵³ Aliens could bring only limited challenges to their detention, such as alleging that they were not, in fact, of German nationality or were less than the statutory minimum of 14 years of age.¹⁵⁴

The Board was empowered to recommend one of three outcomes: internment, parole, or release.¹⁵⁵ The Board's recommendation was forwarded to the AECU, where it was reviewed, and forwarded to the Attorney General with a recommendation of the directors of the AECU.¹⁵⁶

¹⁴⁷ Harris, *supra* note 136 at 1362.

¹⁴⁸ *Id.*; Krammer, *supra* note 87 at 45.

¹⁴⁹ Harris, *supra* note 136 at 1363.

¹⁵⁰ *Id.* Although technically allowed to bring a friend or relative to attest to character or loyalty, some aliens claimed that their friends were denied access to the hearings. Krammer, *supra* note 87 at 47.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See, e.g., *Ex Parte Gilroy*, 257 F. 110 (S.D.N.Y. 1919) (holding that person born in Germany to naturalized U.S. citizen father is U.S. citizen and not enemy alien); *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (C.A.D.C. 1946); *Ludecke*, 335 U.S. at 171, n. 17 (willingness to review whether a person is 14 years of age).

¹⁵⁵ Harris, *supra* note 136 at 1363; Krammer, *supra* note 87 at 47.

¹⁵⁶ Harris, *supra* note 136 at 1363; see also Krammer, *supra* note 87 at 46.

The U.S. District Attorney would also make his own independent recommendation.¹⁵⁷ If the three recommendations were in agreement, the Attorney General normally concurred in their recommendations.¹⁵⁸ If there was disagreement, the Attorney General tended to side with the Board, which had actually observed the demeanor of the accused alien enemy.¹⁵⁹

One scholar who studied these Alien Enemy Review Boards concluded that:

While admittedly, the United States Constitution offers no protection to an enemy alien during the time of war, the position of the United States Government during World War II was that it did not want to sacrifice the substance of democracy while men battled in foreign lands to preserve it. The procedural aspects of its internment programme were designed to support this principle.¹⁶⁰

However, this scholar went on to describe the United States' use of these review boards as a "feeble gesture."¹⁶¹ They were informal tribunals with little or no applicable law to guide them. If the U.S. government thought a Board member was too lenient in favor of aliens, the Justice Department would remove the officer from the Board.¹⁶² Accordingly, the boards were forced to create and apply their own rules, acting as both judge and jury.¹⁶³

The constitutionality of the Alien Enemy Act was challenged in a number of lawsuits, including *Ludecke v. Watkins*, a post-World War II suit that reached the U.S. Supreme Court.¹⁶⁴ The plaintiff, Mr. Ludecke, had been born in Germany and had once been a member of the Nazi party.¹⁶⁵ However, he later disagreed with the Nazis and was imprisoned in a German concentration camp.¹⁶⁶ He escaped in 1934 and traveled to the United States, where he became a

¹⁵⁷ Harris, *supra* note 136 at 1363.

¹⁵⁸ *Id.* at 1368.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1369.

¹⁶¹ *Id.* at 1370.

¹⁶² Krammer, *supra* note 87 at 47.

¹⁶³ Harris, *supra* note 136 at 1370.

¹⁶⁴ *Ludecke*, 335 U.S. at 160.

¹⁶⁵ *Id.* at 163.

¹⁶⁶ *Id.*

lawful permanent resident.¹⁶⁷ His petition to become a U.S. citizen was denied in 1939, however, and, in 1941, he was arrested as an alien enemy whom the Attorney General deemed to be dangerous to the United States.¹⁶⁸ After unsuccessfully challenging his removal to Germany in administrative hearings, Mr. Ludecke brought a habeas corpus petition in federal court alleging that the Alien Enemy Act was unconstitutional.

By the time Mr. Ludecke's case reached the U.S. Supreme Court, World War II had been over for three years. Mr. Ludecke claimed that the statute did not authorize deportation of enemy aliens after hostilities had ceased. In addition, Mr. Ludecke claimed that due process required that the federal courts review the fairness of the administrative hearing at which he was determined to be a dangerous enemy alien.

In a 5-4 decision, the U.S. Supreme Court upheld the constitutionality of the Act, stating that, barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is a statute that precludes judicial review.¹⁶⁹ The Act "confers on the president very great discretionary powers" and "the very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion."¹⁷⁰ Thus, the Court accepted a very narrow role for judicial review.¹⁷¹

¹⁶⁷ *Ludecke*, 335 U.S. at 163, 173.

¹⁶⁸ *Id.* at 163.

¹⁶⁹ *Id.* at 163-64.

¹⁷⁰ *Id.* at 164. The U.S. Court of Appeals for the District of Columbia Circuit likewise stated: "Unreviewable power in the President to restrain, and to provide for the removal of, alien enemies in time of war is the essence of the Act." *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (C.A.D.C. 1946). The court further reasoned that a nation must have the power to remove enemies during war who are actually hostile or merely potentially so because of their allegiance to a foreign government. *See id.* And the government should not have to reveal confidential information about enemy activity with our borders in a judicial proceeding reviewing that action. *Id.*

¹⁷¹ The courts have been willing to review whether a person is a native, citizen, denizen or subject of a hostile nation within the meaning of the Act, *see, e.g., Ex Parte Gilroy*, 257 F. 110 (S.D.N.Y. 1919) (holding that person born in Germany to naturalized U.S. citizen father is U.S. citizen and not enemy alien); *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (C.A.D.C. 1946), and whether a person is 14 years of age, *see, e.g., Ludecke*, 335 U.S. at 171, n. 17. *See also* *U.S. v. Schwarzkopf*, 137 F.2d 898 (2d Cir. 1943) (finding accused alien enemy is citizen of Austria rather than Germany); *U.S. v. Steinvorth*, 159 F.2d 50 (2d Cir. 1947) (finding that when Costa Rica cancelled Steinvorth's citizenship, his former German citizenship was not restored.).

On the merits, the Court held that “[w]ar does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.”¹⁷² The Court further noted that it is often impracticable to deport an alien enemy during active hostilities.¹⁷³ Thus, the power to deport alien enemies continues beyond the end of the “declared war.”

As is evident from its text, the AEA does not require any showing of disloyalty in word or deed. Simply being a native or citizen of an enemy country by accident of birth is sufficient.¹⁷⁴ Interestingly, in *Ludecke*, the Supreme Court noted the fact that the statute did not require a showing of dangerousness, but also noted that this potential deficiency was cured by the President’s Proclamation requiring that only enemy aliens deemed dangerous by the Attorney General shall be removed.¹⁷⁵ The Court assumed that the President and the Attorney General would not act arbitrarily, but would imply a standard such as “dangerousness” in the exercise of this power.¹⁷⁶ This assumption leaves open the question of the statute’s constitutionality if a person is arrested, detained, and removed merely on the basis of nationality without any showing of dangerousness.¹⁷⁷

Outside the wartime context, such treatment likely would be considered unlawful discrimination based on race or nationality and a violation of due process. The Court spent little time on the issue of any potential violation of *Ludecke*’s individual rights, however, simply

¹⁷² *Ludecke*, 335 U.S. at 167.

¹⁷³ *Id.* at 166.

¹⁷⁴ *See* U.S. ex rel. Umecker v. McCoy, 54 F. Supp. 679, 682 (D.N.D. 1944) (“Nativity is determined solely by place of birth, not by allegiance, citizenship or duty. . . a person is a native of the place of birth and always remains a native of that place, regardless of anything he may do.”)

¹⁷⁵ *Id.* at 165.

¹⁷⁶ *Id.* at 166. Resolution XX of the Inter-American Emergency Advisory Committee for Political Defense discussed below recommends the internment of dangerous enemy aliens, which may be the basis for the inclusion of this language in the President’s Proclamation.

¹⁷⁷ Other attempts to challenge this assumption of disloyalty also were largely unsuccessful. *See e.g.*, *Minotto v. Bradley*, 252 F. 600 (N.D. Ill. 1918).

declaring that the Act is not “offensive to some emanation of the Bill of Rights” including the Due Process Clause.¹⁷⁸ The Court stated that if war powers are abused, recourse should be sought in the political branches, not in court.¹⁷⁹

The *Ludecke* decision was a close one with four justices dissenting, both as to the continuing application of the Act beyond the cessation of active hostilities and as to the ability of the court to review the fairness of the administrative procedures to ensure due process.¹⁸⁰ According to Justice Douglas, the procedures used to find Ludecke a danger to the public “must conform with the requirements of due process. And habeas corpus is the time-honored procedure to put them to the test. . . . Due process does not perish when war comes.”¹⁸¹ Unfortunately for Ludecke and the other German detainees, however, his was not the winning argument.

The Court’s decision in *Ludecke* is consistent with its historical reluctance to question the political branches of government in time of war. It also is consistent with the treatment of foreign nationals in U.S. immigration law.¹⁸² As a general rule, U.S. courts have declared that the federal government has plenary power over immigration, in part because of its connection to foreign affairs and national security issues.¹⁸³ As a result, courts have given the political

¹⁷⁸ *Ludecke*, 335 U.S. at 171. Lower courts agreed with the Supreme Court that individual liberties could be infringed in time of war. *Citizens Protective League v. Byrnes*, 64 F. Supp. 233, 234 (D.D.C. 1946); *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (C.A.D.C. 1946).

¹⁷⁹ *Ludecke*, 335 U.S. *Id.* at 172-73. *See also* *U.S. v. Hack*, 159 F.2d 552,554 (7th Cir. 1947) (affirming application of political question doctrine).

¹⁸⁰ *Ludecke*, 335 U.S. *Id.* at 173 (Black, J. dissenting, with whom Justices Douglas, Murphy, and Rutledge join. *See also* separate dissenting opinion by Justice Douglas, *id.* at 184).

¹⁸¹ *Id.* at 186-87 (Douglas, J., dissenting).

¹⁸² *See, e.g., Minotto*, 252 F. at 604 (stating that Congress’ plenary power to legislate for aliens includes the ability to legislate for alien enemies without “violating the provisions of our Constitution”).

¹⁸³ *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

branches significant discretion when it comes to defining the due process rights of non-citizens.¹⁸⁴

In *Shaughnessy v. United States ex re. Mezei*, a case arising shortly after World War II, the United States denied admission to a former long-term lawful permanent resident of the United States, who was returning from a trip abroad, on the basis of undisclosed national security concerns.¹⁸⁵ Because Mezei had been deemed a security risk by the United States, no other country would accept him, despite his best efforts to find another home. As a result, Mezei was stranded on Ellis Island indefinitely.

Mezei challenged his indefinite detention through a habeas corpus proceeding. Upholding Mezei's continued exclusion and detention, the Court stated: "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."¹⁸⁶ While acknowledging that aliens physically present on U.S. territory, even if illegally, are entitled to due process under the Constitution, the Court stated that Mezei was not entitled to due process because he had not "entered" the United States as that term is understood in immigration law. Accordingly, Mezei's continued exclusion and detention did not infringe any constitutional rights.¹⁸⁷

Nottebohm's case is analogous to that of *Mezei* in that Nottebohm, like Mezei, was detained on U.S. territory, but was never lawfully admitted to the United States. One main difference, however, is that Nottebohm did not come to the United States voluntarily seeking entry. Instead, he was brought here against his will by the U.S. government. Interestingly, the

¹⁸⁴ See, e.g., *Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁸⁵ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

¹⁸⁶ *Id.* at 210.

¹⁸⁷ See *id.* at 215.

United States appears to have used immigration law as additional support for the detention of the Latin Americans by charging those who were brought here with being illegally present.¹⁸⁸ The decision to use immigration law may have been very intentional given the wide latitude courts give to the political branches of government with respect to the treatment of non-U.S. citizens.

The Nottebohm case is unlike *Mezei* in another respect. While *Mezei* had no other country willing to accept him leading to his potentially indefinite detention, the Nottebohms all had other countries that were willing to take them in. Both Kurt and Karl-Heinz eventually returned to Guatemala; Frederich went to Liechtenstein. Thus, the Nottebohm case is unlike *Mezei* in that the Nottebohms were not asking the courts to allow them to enter the United States.¹⁸⁹ Instead, they were simply asking to be released from detention. How these foreigners might fare today is discussed in Part IV below.

B. International Law

International law as it existed during WWII also did not provide much assistance to the German detainees from Latin America. There is strong support for the proposition that it is a breach of international law for a State to send its agents into the territory of another State to apprehend persons accused of a crime without that State's consent.¹⁹⁰ However, the historical record of the Latin American Detention Program shows that the United States and the Latin American governments agreed to cooperate in the identification, arrest, and internment in other

¹⁸⁸ See *Banker Tells of U.S. Seizure in Guatemala*, *supra* note 12.

¹⁸⁹ The recent *Kiyemba* case raises the same issue as *Mezei* – can the U.S. courts order the federal government to admit Uighurs detained at Guantanamo Bay to the United States if they cannot be removed to an appropriate foreign country? The D.C. Circuit Court of Appeals recently answered that question in the negative and the U.S. Supreme Court refused to grant certiorari. See *Kiyemba v. Obama*, Case No. 08-5424, 605 F.3d 1046 (D.C. Cir. May 28, 2010); *Kiyemba v. Obama*, Case No. 10-775, 131 S.Ct. 1631 (Apr. 18, 2011) (cert denied).

¹⁹⁰ See *Sergio Euben Lopez Burgos v. Uruguay*, Comm. No. R.12/52, para. 12.3 (June 6, 1979), U.N. Doc. Supp. No. 40 (A/36/40), at 176 (1981), available at <http://www1.umn.edu/humanrts/undocs/session36/12-52.htm>; *Lilian Celiberti de Casariego v. Uruguay*, Comm. No. R.13/56, para. 10.3 (July, 17 1979), U.N. Doc. Supp. No. 40 (A/36/40), at 185 (1981), available at <http://www1.umn.edu/humanrts/undocs/session36/13-56.htm>; *United States v. Alvarez-Machain*, 504 U.S. 655, 678-80 (1992) (Stevens, J., dissenting).

countries of persons suspected of being enemy aliens. Thus, the program described herein was created with the full cooperation of all the involved governments, eliminating any concerns about breaches of sovereignty. Some scholars and authors have argued, however, that the kidnapping and mass deportations of civilians from Latin America to the United States violated international humanitarian law that existed during WWII.¹⁹¹ This next section will describe the creation and execution of the program in light of then existing principles of international law.

1. Pan American Union and the Committee for Political Defense

Cooperation between the United States and the other Latin American governments during this time period was largely carried out under the auspices of the Pan American Union. The Pan American Union was so named at the Fourth American Conference of American States in Buenos Aires in 1910. Through this umbrella organization, the American governments created a series of international agreements governing cooperation during war time and beyond. Pursuant to these agreements, the Latin American governments identified persons who were German nationals living in their countries, arrested them, and turned them over to U.S. authorities, who brought them to the United States against their will to be detained in internment camps for the duration of the war.

At the first meeting of the Ministers of Foreign Affairs of the American Republics held in Panama from September 23 to Oct. 3, 1939 following the outbreak of WWII, the governments adopted a recommendation on the coordination of police and judicial measures to prevent and repress unlawful activities that individuals may attempt in favor of foreign belligerent states.¹⁹² At the second meeting of the governments of the American Republics in Habana, Cuba in July 1940, the governments agreed to convene an international conference to further coordinate their

¹⁹¹ See Saito, *supra* note 88 at 304-05; Friedman, *supra* note 32 at 232.

¹⁹² Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 7 (July 1943).

efforts with respect to police and judicial measures for the defense of society and the American States.¹⁹³ The American governments further agreed to coordinate efforts “to eradicate from the Americas the spread of doctrines that tend to place in jeopardy the common inter-American democratic ideal.”¹⁹⁴ They proposed a variety of measures designed to tighten their defenses, including proposals for precautionary measures in the granting of passports and the exercise of vigilance over the entry of nationals of non-American States.¹⁹⁵

The Resolutions sought to defend the Americas against tactics practiced by the Nazis in Europe that led to the fall of several European States such as Czechoslovakia, Poland and Denmark.¹⁹⁶ In particular, the American Republics sought “to protect themselves against the vanguard of the totalitarian attack – against the spy, saboteur, the propagandist, and the political agent operating under cover of diplomatic immunity.”¹⁹⁷

The cornerstone of the political defense for the hemisphere was created at the Third Meeting of the Ministers of Foreign Affairs of the American Republics in Rio de Janeiro, Brazil in February 1942.¹⁹⁸ By that time, the United States had suffered the attack on Pearl Harbor and many of the American Republics had officially entered the war against the Axis powers of Germany, Italy and Japan.

At that Third Meeting, the governments recognized the need for ongoing and continuous communication. Accordingly, they created the Inter-American Emergency Advisory Committee for Political Defense (“CPD”) to study the problems relating to political defense of the Continent

¹⁹³ Second Meeting of the Ministers of Foreign Affairs of the American Republics, 35 Am. J. Int’l L. 1, 7 (Jan. 1941).

¹⁹⁴ *Id.* at 11.

¹⁹⁵ Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 7-8 (July 1943).

¹⁹⁶ *Id.* at 8.

¹⁹⁷ *Id.* at 8-9.

¹⁹⁸ *Id.* at 9. A summary description of the cooperation between the American Republics can be found in Fox, *supra* note 88 at 124-6.

and to recommend appropriate measures.¹⁹⁹ Members of the CPD were named by the Governments of Argentina, Brazil, Chile, the United States of America, Mexico, Uruguay, and Venezuela, who were to represent the interests of all twenty-one American Republics.²⁰⁰ The Ministers of Foreign Affairs approved three overall policy directives to be followed by CPD in carrying out its work. The second of these policy directives is most relevant here. It states: “Adequate defense against our fully identified aggressors is possible only if it is openly recognized that discriminatory measures must be taken against Axis nationals, since said aggressors use their nationals in the Americas as their first line of political attack.”²⁰¹

The CPD held its first meeting on April 15, 1942.²⁰² During the course of its work, it submitted twenty-one programs of action to the governments of the American Republics.²⁰³ Its work was organized into four primary areas: (1) control of dangerous aliens; (2) prevention of the abuse of citizenship; (3) regulation of entry and exit of persons; and (4) prevention of acts of political aggression, such as espionage, sabotage, and subversive propaganda.²⁰⁴ The CPD believed that peacetime legislation was insufficient to deal with the threat presented by “the Axis pattern of total attack, predicated on an intense and world-wide campaign of political aggression.”²⁰⁵ Accordingly, its work took the form of resolutions that would provide the basis of laws or decrees to be adopted by the governments in accordance with their own domestic legal systems.²⁰⁶

¹⁹⁹ Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 9 (July 1943).

²⁰⁰ *Id.* at 10-11.

²⁰¹ *Id.* at 10.

²⁰² *Id.* at 24.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 25. As discussed in more detail in Part V below, similar arguments about the need for new laws to address a new kind of threat were made in response to the terrorist attacks of September 11, 2001.

²⁰⁶ *Id.* at 24.

The CPD first recommended a system of registration and periodic reporting for all aliens as a method to help identify and control dangerous individuals.²⁰⁷ Violations of the program would be punishable by internment.²⁰⁸ The CPD also recommended that: “The security of the Hemisphere demands that all dangerous Axis nationals be totally deprived of their liberty of movement and of their power to undermine our institutions.”²⁰⁹ Accordingly, the CPD adopted Resolution XX, which recommends internment of dangerous Axis nationals within the Hemisphere for the duration of the emergency.²¹⁰ Pursuant to Resolution XX, internment could occur in well-guarded detention camps in non-vital areas of the country where the arrest occurred.²¹¹ Alternatively, some American Republics concluded bilateral agreements for the expulsion and transfers of dangerous Axis agents and nationals to other Republics for internment for the duration of the war.²¹²

Resolution XX also set forth a standard for “dangerousness.” According to the Resolution, “a national of a member State of the Tripartite Pact or a State subservient thereto, who by his present or past conduct, indicates a predisposition to aid a member State of the Tripartite Pact, should be regarded as dangerous” and thus subject to detention.²¹³ There was no requirement that a person actually engage in dangerous conduct, only that the person show a propensity to do so. Conduct deemed to indicate a “predisposition” included: (A) affiliation or

²⁰⁷ *Id.* at 25. Shortly after 9/11/01, the U.S. government similarly implemented a new registration program for noncitizen Arabs and Muslims living in the United States. *See* Part V *infra*.

²⁰⁸ *Id.* at 26.

²⁰⁹ *Id.* at 28.

²¹⁰ *Id.* at 28-29. The Committee considered the repatriation of Axis nationals, but decided against it because the repatriated nationals could provide valuable services to the Axis. As discussed in more detail below, this argument also parallels one made in the current fight against terrorism, where U.S. government officials have argued against the release of detainees held at Guantanamo Bay because they might return to the battlefield. *See* Part V *infra*.

²¹¹ *See* Resolution XX, Detention and Expulsion of Dangerous Axis Nationals ¶ 3 (May 21, 1943), *reprinted in* the Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 73 (July 1943).

²¹² *See id.* *See also* Explanatory Statement to Resolution XX, Detention and Expulsion of Dangerous Axis Nationals, (May 21, 1943), *reprinted in* the Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 73 (July 1943).

²¹³ Resolution XX, *supra* note 212 at ¶ 4.

support of a group that acts in the interest of a member State of the Tripartite Pact; (B) conduct giving sufficient grounds to believe that the person has or will engage in the illegal transmission or collection of vital information about the defense of the Hemisphere; (C) conduct giving sufficient grounds to believe that the person has or will commit acts of destruction or sabotage of materials or facilities vital to the defense of the Hemisphere; (D) conduct giving sufficient grounds to believe that the person has disseminated totalitarian propaganda or has incited others to act in the interest of a member State of the Tripartite Pact; (E) adherence to the totalitarian political ideology or pronounced sympathy therewith; (F) any other conduct indicating an intention to prejudice the defense and security of any American Republic in the interest of a member State of the Tripartite Pact.²¹⁴

Interestingly, the CPD acknowledged in its Explanatory Statement about Resolution XX that these practices had already been followed by the American Republics.²¹⁵ Thus, it appears that the arrest and detention practices predated the formal legal authority for same. In addition, the CPD stated that in exercising its powers of detention and expulsion, the American Republics “have wisely concluded that the Axis should not be permitted to take advantage of democratic respect for traditional concepts of International Law. . . using as a protection for their machinations the guarantees of the very democracy which they are seeking to destroy.”²¹⁶ On the other hand, the CPD recommended that the American Republics utilize the Geneva Convention of July 27, 1929 relative to the treatment of prisoners of war as a general guide for

²¹⁴ *Id.*

²¹⁵ See Explanatory Statement to Resolution XX, Detention and Expulsion of Dangerous Axis Nationals (May 21, 1943), *reprinted in* the Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 77 (July 1943).

²¹⁶ *Id.*

the detention of dangerous Axis agents to forestall any threats of mistreatment of Americans in Axis territory.²¹⁷

In addition to Resolution XX on Detention and Expulsion, the CPD also adopted a Resolution on the Prevention of Abuses of Nationality, which gave States like Guatemala additional legal cover for their refusal to recognize any changes in citizenship by former German nationals and expropriation of the property of such persons.²¹⁸ The United States and other Latin American governments believed that internal security was threatened by a multitude of Axis agents who were carrying on their subversive activities within the Western Hemisphere and were acquiring American citizenship to cloak their activities.²¹⁹ Thus, they recommended measures limiting the ability to acquire citizenship and providing for the loss of citizenship.²²⁰

All of this cooperative activity under the umbrella of the Pan American Union provided the legal basis for the United States to enter other Latin American countries, arrest accused alien enemies on foreign soil in cooperation with local authorities, and bring those persons to the United States for internment, as happened with the Nottebohms. However, these international agreements did not address the human rights of those arrested and detained pursuant to the program in part because little international human rights law existed at the time.

²¹⁷ See *id.* at 78. The United States was a party to the 1929 Geneva Convention, which permitted the internment of prisoners of war, subject to the requirements that they be interned for safety or health reasons (art. 9), that they be treated humanely and protected from acts of violence or cruelty (art. 2), that they be lodged in safe and hygienic conditions (art. 10), and that they be provided with food, water and clothing, (art. 11-12), as well as basic health care (art. 13-15). Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, 47 Stat. 2021 [hereinafter Geneva Convention]. See also Krammer, *supra* note 87 at 49.

²¹⁸ See Resolution XV, Prevention of Abuses of Nationality, *reprinted in* the Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 133 (July 1943).

²¹⁹ See Explanatory Statement to Resolution XV, Prevention of Abuses of Nationality, *reprinted in* the Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 133 (July 1943). In 1942, a U.S. State Department memorandum asserted: “Many Axis nationals have obtained naturalization in the other American Republics in order to cloak their pro-Axis activities.” “Memorandum regarding activities of the United States Government in removing from the other American Republics dangerous subversive aliens” *supra* note 107 at 4.

²²⁰ See *id.* at 135.

2. International Human Rights and Humanitarian Law Treaties

With the exception of certain principles in the laws of war, most modern international human rights norms which might have benefitted detainees such as the Nottebohm had not yet developed at the time of World War II. The United Nations (UN) Charter, the Universal Declaration of Human Rights, the International Covenants of Civil and Political Rights and Economic, Social and Cultural Rights, as well as the American Declaration of Human Rights, were all written after the war. Thus, the detainees had very little international human rights law to rely on during WWII.

One legal exception detainees could have possibly used was in the area of the laws of war, also known as international humanitarian law. The modern-day Geneva Conventions III and IV of 1949, which govern the treatment of prisoners of war (POWs) and civilians during armed hostilities, did not yet exist. Nevertheless, the Geneva Convention of 1929 set forth some basic rules with respect to the treatment of POWs.²²¹ And while there were no comparable treaties dealing with the alien enemy civilians interned in the territory of a belligerent nation,²²² as noted above, it was U.S. policy to treat detainees humanely in accordance with the 1929 Geneva Convention on POWs.

In addition to requiring that the detaining Power treat detainees humanely, the 1929 Geneva Convention set forth rules regarding trials and penal sanctions for POWs. Article 45 provides that POWs are subject to the laws, regulations, and orders in effect in the armed forces of the detaining Power.²²³ Article 61 provides for basic due process rights such as notice and

²²¹ 1929 Geneva Convention, *supra* note 217 at art. 2, 9, 11-15. Some scholars argue that at least some of the provisions of the 1949 Geneva Conventions codified customary international law already existing at the time of WWII and thus may be applied to that conflict. *See Saito, supra* note 88 at 305. This issue is discussed in connection with the 1949 Geneva Conventions below.

²²² Harris, *supra* note 136 at 1360.

²²³ 1929 Geneva Convention, *supra* note 217 at art. 45.

opportunity to be heard.²²⁴ Article 62 guarantees that the POW shall have the right to be assisted by a qualified advocate of his own choice. If the POW does not make such a choice, the Protecting Power may procure an advocate for the detainee.²²⁵ Also of relevance here, Article 75 of the 1929 Geneva Convention provides that POWs shall be repatriated as soon as possible after the conclusion of peace.²²⁶ However, none of these guarantees are referred to in the cases and materials relating to the alien enemy review board proceedings, suggesting that these due process guarantees were not extended to civilian detainees in that context.

In addition to the 1929 Geneva Convention, a few customary rules of international humanitarian law may have been applicable to the U.S. Latin-American Detention Program during WWII. For example, at least one scholar, Professor Natsu Taylor Saito, has argued that the prohibition on individual and mass forcible transfers, as well as deportations of protected persons (civilians) from occupied territory now found in Article 49 of the 1949 Geneva Convention already existed in the form of customary international law during WWII.²²⁷ He further argues that these prohibitions were applicable to the arrests, detentions, and deportations of Germans and Japanese from Latin America.²²⁸

One problem with Professor Saito's argument is that it assumes the individuals involved were innocent civilians. It is likely that the U.S. and Latin American governments responsible for these programs would have argued that they were only concerned with "dangerous enemy aliens" in accordance with the CPD's Resolutions, even if it was later discovered that there was insufficient evidence of dangerousness in individual cases. In addition, these rules of

²²⁴ *Id.* at art. 61.

²²⁵ *Id.* at art. 62.

²²⁶ *Id.* at art. 75.

²²⁷ *See* Saito, *supra* note 88 at 305-08.

²²⁸ Saito's case study focuses on Japanese from Peru, some of whom were forced to engage in slave labor in Panama and many of whom were sent back to Japan against their wishes. *See id.* The Japanese-Peruvians' situation thus involves additional levels of misconduct as compared to Germans who were not required to perform forced labor and who were ultimately allowed to return to Latin America.

international humanitarian law tend to be concerned with persons in an occupied territory, and neither Latin America nor the United States was an occupied territory. Accordingly, some of the customary international humanitarian law rules may not have been strictly applicable. And, as illustrated by the *Ludecke* and *Nottebohm* decisions, both domestic and international courts were extremely deferential to the political branches of government in wartime. Thus, it is likely that the government would have won any legal challenges based on customary international law.

In retrospect, not enough investigation was done to determine whether the accused alien enemies from Latin America were truly dangerous before removing them from their homes. However, it is difficult to conclude that the U.S. Latin American Detention Program was clearly illegal under international law existing at the time.

IV. Would the Result Be Any Different Today?

The Alien Enemy Act remains in the statute books unchanged to this day. However, the government has not relied upon the statute since World War II, most likely because the statute applies in times of declared war and Congress has not officially declared war since WWII. If the government were to invoke the AEA today as a basis for detaining enemy aliens, changes in U.S. statutory and constitutional law and international human rights law strongly suggest that a similar program today would not withstand judicial scrutiny. On the other hand, there are many aspects of the current program to identify, arrest, detain, and try suspected terrorists or “unlawful enemy combatants” that resemble the Latin American Detention program. Some of those aspects are currently being litigated. As a result, the legal status remains unclear and it is difficult to predict final outcomes. That said, there have been some changes in the law that require detainees to be given more rights than they were in the 1940s. This next section describes how the law has evolved and how detainees in the war on terror are or are not treated differently today as a result.

A. U.S. Law

1. Equal Protection and Due Process

Our understanding of the scope of rights protected by the Fifth and Fourteenth Amendments’ Due Process Clauses and the Equal Protection Clause have changed dramatically since World War II. Moreover, courts have indicated somewhat more willingness today to examine executive branch action during war time for consistency with basic human rights than they did in the 1940s. As the Supreme Court stated in *Hamdi v. Rumsfeld*, the Executive Branch does not have a “blank check” even in wartime.²²⁹

²²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

The most famous case from the World War II era challenging the constitutionality of the detention of civilians is, of course, *Korematsu v. United States*.²³⁰ There, the U.S. Supreme Court upheld Fred Korematsu's conviction for violating a 1942 military order excluding all persons of Japanese ancestry from certain portions of the U.S. West Coast.²³¹ The Court held that the pressing public necessity of preventing espionage or sabotage by disloyal persons of Japanese ancestry justified deference to the military's judgment that all persons of Japanese ancestry must be excluded from the Pacific Coast.²³² The *Korematsu* decision has since been highly criticized, including by the Supreme Court,²³³ as being contrary to equal protection, and Korematsu's conviction was ultimately vacated, along with the two other men convicted with him.²³⁴ In addition, on August 10, 1988, former U.S. President Reagan signed into law the Civil Rights Act of 1988, which ordered the payment of \$20,000 to the Japanese-American survivors of internment.²³⁵ Further, on October 1, 1993, former U.S. President Clinton issued a letter of apology to Mr. Korematsu calling the treatment of Japanese-Americans during the war "unjust" and "rooted deeply in racial prejudice, wartime hysteria, and a lack of political leadership."²³⁶

²³⁰ 323 U.S. 214 (1944).

²³¹ *Id.* at 217-18.

²³² *Id.* at 218.

²³³ See e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

²³⁴ A U.S. District Court in San Francisco, California vacated Korematsu's conviction on November 11, 1983; in October 1985, a federal court in Portland, Oregon vacated Minoru Yasui's conviction for violating curfew; and in 1986, a federal court in Seattle, Washington vacated Gordon Hirabayashi's 1942 conviction for violating wartime internment orders. See Historical Overview of Japanese Americans & the U.S. Constitution, <http://americanhistory.si.edu/perfectunion/resources/history.html>.

²³⁵ P.L. 100-383, 1988 H.R. 442. See also Historical Overview of Japanese and U.S. Constitution, <http://americanhistory.si.edu/perfectunion/resources/history.html>.

²³⁶ Letter from President Bill Clinton dated October 1, 1993, available at <http://www.landmarkcases.org/korematsu/leterofapology.html>.

No such apology has been offered to any other ethnic groups detained during the war, such as the Germans from Latin America.²³⁷

Since WWII, the U.S. Supreme Court has even more firmly established that strict scrutiny applies to classifications based on race.²³⁸ Similarly, it has repeatedly held that state laws that classify on the basis of alienage are subject to strict scrutiny.²³⁹ The reaction to *Korematsu* and the evolution in the Supreme Court's equal protection jurisprudence suggests it is likely the government would need a more compelling reason than just nationality or ancestry to justify removing persons from their homes, families, communities and jobs and placing them in indefinite detention today.

2. Arrest, Detention and Trial of Unlawful Enemy Combatants

In the current war on terror, the government has relied on various exercises of statutory and presidential authority as the basis for its arrest, detention, and trial of suspected unlawful enemy combatants and other suspected terrorists. For example, the government has used the Authorization for Use of Military Force (AUMF),²⁴⁰ coupled with the President's 2001 military order on the "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,"²⁴¹ the Military Commissions Act (MCA),²⁴² the Detainee Treatment Act of 2005

²³⁷ However, legislation to this effect has been proposed in Congress. *See, e.g.*, Wartime Treatment Study Act, H.R. 1425 (2009) (An Act "[t]o establish commissions to review the facts and circumstances surrounding injustices suffered by European Americans, European Latin Americans, and Jewish refugees during World War II").

²³⁸ *See e.g.*, *City of Richmond*, 488 U.S. at 507; *Adarand Constructors*, 515 U.S. at 214.

²³⁹ *See. e.g.*, *Graham v. Richardson*, 403 U.S. 365, 367 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973). In contrast, the Supreme Court has usually applied minimal scrutiny to federal laws that classify on the basis of alienage in deference to the federal government's traditional control over immigration. *See, e.g.*, *Matthews v. Diaz*, 426 U.S. 67 (1976). *But see* *Nguyen v. INS*, 533 U.S. 53, 60-61 (2001) (court applied intermediate scrutiny to a gender-based difference in the way mothers and fathers are treated under the Immigration and Nationality Act, but left open application for other cases).

²⁴⁰ Pub. L. No. 107-40, 115 Stat. 224 (2001) (note following 50 U.S.C. § 1541 (2000 ed., Supp. V)).

²⁴¹ 66 Fed. Reg. 57833 (Nov. 13, 2001). The November 13 Order vested in the Secretary of Defense the power to appoint military commissions to try certain persons when there is reason to believe the person is or was a member of Al-Qaeda or has engaged in terrorist activities aimed at or harmful to the United States. *See id.*; *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁴² 10 U.S.C. § 948a, amending 28 U.S.C. § 2241 (Supp. 2007).

(DTA),²⁴³ the Military Commissions Act of 2009,²⁴⁴ and various Executive Orders.²⁴⁵ Some of the relevant provisions of these authorities and how they have been interpreted by courts is described below. In particular, the issues of indefinite detention, fair trial, and a right to counsel are the focus of this discussion because of the parallels between the treatment of accused alien enemies in the Latin American Detention Program and the treatment of suspected terrorists today.²⁴⁶

a. Indefinite Detention

Shortly after the terrorist attacks of September 11, 2001, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations or persons he determines” are responsible for those terrorist attacks.²⁴⁷ The President then issued a Military Order on November 13, 2001 authorizing the detention and trial by military commission of non-citizens in the war on terror.²⁴⁸

In *Hamdi v. Rumsfeld*,²⁴⁹ the U.S. Supreme Court rejected a challenge to the President’s authority to detain persons for the duration of the conflict in which they were captured as a “fundamental and accepted incident of war.”²⁵⁰ In that case, an American citizen was captured by members of the Northern Alliance in Afghanistan and turned over to the U.S. military there. The U.S. government accused Hamdi of being an “enemy combatant” and asserted the authority to hold him indefinitely without formal charges or proceedings.²⁵¹ U.S. authorities initially

²⁴³ Pub. L. 109-148, 119 Stat. 2739.

²⁴⁴ The MCA of 2009 was part of an omnibus spending bill - “NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010” - Pub. Law 111-84. The MCA is Title 18. It is codified as 10 U.S.C. §§ 948a - 950t.

²⁴⁵ See, e.g., Exec. Order No. 13567, 76 Fed. Reg. 13277 (March 7, 2011).

²⁴⁶ This article is not an attempt to address all the procedural aspects of trials by military commissions, but only a few where sufficient information is available to compare WWII practices to current practices.

²⁴⁷ AUMF, *supra* note 240.

²⁴⁸ 66 Fed. Reg. at 57833.

²⁴⁹ 542 U. S. 507 (2004).

²⁵⁰ *Id.* at 518.

²⁵¹ See *id.* at 510.

brought Hamdi to Guantanamo Bay, but then transferred him to a U.S. Navy Brig off the U.S. coast upon learning that he was a U.S. citizen.²⁵² When Hamdi challenged his detention without a hearing, the U.S. Supreme Court held that while a U.S. citizen may be detained as an enemy combatant, that detention cannot be indefinite. Citing Article 118 of the Third Geneva Convention,²⁵³ the Court stated that the detention may only last as long as hostilities.²⁵⁴ The Court further held that the Due Process Clause of the U.S. Constitution requires that a U.S. citizen be given a meaningful opportunity to contest the factual basis for his detention before a neutral decision-maker. Accordingly, the Supreme Court remanded the case to the lower court for further proceedings.²⁵⁵

Likewise, in the civil immigration context, the U.S. Supreme Court has disallowed statutory authority that would have permitted the indefinite detention of both admissible and inadmissible noncitizens.²⁵⁶ The Court stated that such indefinite detention would raise “serious constitutional problems” under the Fifth Amendment’s Due Process Clause and thus interpreted the statute to imply a reasonable limit to the amount of time an alien may be detained following an order of removal.²⁵⁷ Thus, while the executive may detain persons deemed to be

²⁵² *See id.*

²⁵³ Geneva Convention Relative to the Treatment of Prisoners of War art. 118, August 12, 1949, 75 U.N.T.S. 135 (1950) (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”). The United States is a party to all four 1949 Geneva Conventions. A full list of States Parties is available on the website of the International Committee for the Red Cross (ICRC) at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

²⁵⁴ *Hamdi*, 542 U.S. 520-21. However, given the potentially endless nature of the war on terrorism and the precedent of *Ludecke*, that detention has no certain ending point in sight. *See* Stephen I. Vladeck, LUDECKE’S LENGTHENING SHADOW: THE DISTURBING PROSPECT OF WAR WITHOUT END, 2 J. Nat’l Sec. L. & Pol’y 53, 94 (2006).

²⁵⁵ After the court’s decision, the U.S. released Hamdi and allowed him to travel to Saudi Arabia in exchange for renunciation of his U.S. citizenship.

²⁵⁶ *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (involving an alien who was admitted to U.S.); *Clark v. Martinez*, 543 U.S. 371 (2005) (involving an inadmissible alien).

²⁵⁷ *Zadvydas*, 533 U.S. at 682.

dangerous,²⁵⁸ both the U.S. Constitution and international law place limits on that power of detention.

b. Trial

As of this writing, hearings for suspected unlawful enemy combatants are being conducted by way of military commissions.²⁵⁹ The most recent regulations for the conduct of military commissions under the Military Commissions Act of 2009 were issued in the form of a revised Manual for Military Commissions (MMC) in April 2010 and are just now being implemented.²⁶⁰ This section will first describe some of the legal issues that arose under the DTA of 2005 and then how the new MCA and MMC address those issues.

Section 1005 of the DTA authorizes the creation of Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards for the purpose of determining the status of the detainees held at Guantanamo Bay and to provide annual reviews to determine the continued need to detain aliens there.²⁶¹ The U.S. Secretary of Defense is charged with creating the procedures for the CSRTs. However, the DTA also provides that the person designated as the final review authority be a civilian; that the procedures provide for the consideration of any new evidence that may become available regarding the enemy combatant status of a detainee; and that there be consideration of the probative value of any detainee's statement that may have been obtained by coercion.²⁶² The DTA limited appeals of decisions from CSRTs and military commissions, providing in particular that no court shall have jurisdiction to hear an application

²⁵⁸ Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6) (permitting detention of aliens beyond removal period if considered a risk to the community).

²⁵⁹ While maintaining support for criminal trials in federal court, on March 7, 2011, President Obama issued an Executive Order authorizing the continued use of military commissions and establishing a periodic review for detainees. See Executive Order 13567, *supra* note 245.

²⁶⁰ U.S. Dept. of Defense, Manual for Military Commissions (2010 edition) [hereinafter 2010 MMC], available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdfhttp://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf.

²⁶¹ DTA, *supra* note 243 at § 1005.

²⁶² *Id.*

for habeas corpus filed by a detainee and that the U.S. Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision by the CSRTs.²⁶³

Hamdan v. Rumsfeld challenged the constitutionality of the statutory scheme set up by the DTA.²⁶⁴ In *Hamdan*, a Yemeni national, who was allegedly Osama Bin Laden’s chauffeur, was captured by militia forces in Afghanistan and turned over to the U.S. military. He was taken to Guantanamo Bay in 2002; determined to be eligible for trial by military commission over a year later; and, in mid-2004, charged with one count of conspiracy to commit offenses triable by military commission.²⁶⁵

Hamdan filed a writ of habeas corpus in U.S. federal court, alleging that the military commission the President convened lacked authority because neither Congressional action nor the laws of war support trial by military commission for the crime of conspiracy.²⁶⁶ The Court upheld the President’s power to establish military commissions under both U.S. law and the laws of war.²⁶⁷ However, the Court held that the President’s power to convene such commissions is also limited by the U.S. Constitution, U.S. statutes such as the UCMJ, and the international law of war.²⁶⁸

Ultimately, the Court agreed with Hamdan that the military commission convened to try him lacked power to proceed because its structure and procedures violated the UCMJ and the Geneva Conventions.²⁶⁹ More specifically, the Court held that Common Article 3 of the Geneva Conventions applied and that the military commission was not a “regularly constituted court

²⁶³ *Id.*

²⁶⁴ 548 U.S. 557 (2006).

²⁶⁵ *See id.* at 566.

²⁶⁶ *See id.* at 567.

²⁶⁷ The Court stated that the President’s power derives from Article 21 of the UCMJ, the DTA, the AUMF, and the President’s own powers as Commander in Chief under Article II of the U.S. Constitution. *See id.* at 592-95.

²⁶⁸ *See id.* at 597-612.

²⁶⁹ *See id.* at 567.

affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” as required by that article.²⁷⁰ Of relevance here, the Court held that the procedural protections provided for detainees were insufficient because (1) the accused may be excluded from learning what evidence is presented against him; (2) the rules permit the admission of any evidence that in the opinion of the presiding officer has probative value; and (3) a two-thirds vote will suffice both for a guilty verdict and a sentence (other than the death sentence).²⁷¹

The requirement of Geneva Convention Common Article 3 of “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” was reaffirmed in *Boumediene v. Bush*, another case involving the DTA.²⁷² There, the U.S. Supreme Court struck down portions of the Act because it unconstitutionally suspended the writ of habeas corpus.²⁷³ In addition, the Court noted several procedural deficiencies with CRSTs, including that: (1) detainees are assigned a “personal representative” who is not the detainee’s lawyer or even advocate; (2) government evidence is accorded a presumption of validity and there are no limits on the admission of hearsay evidence (except that it be relevant and helpful); (3) the detainee is allowed to present “reasonably available” evidence, but his ability to rebut government evidence is limited by circumstances of confinement and lack of counsel; and (4) the detainee can only access the unclassified portion of the “Government Information” and so may not be aware of critical allegations against him.²⁷⁴ These recent detainee cases are remarkable in that the Supreme Court was willing to provide accused alien

²⁷⁰ *See id.* at 630-32.

²⁷¹ *Id.* at 613-15, 634-35

²⁷² 128 S.Ct. 2229 (2008).

²⁷³ *Id.* at 2240.

²⁷⁴ *Id.* at 2260. As with the boards used to try enemy aliens in Nottebohm’s time, the first military commissions convened to try persons in the war on terror had only one legally trained person – a retired army judge – as part of the panel. The other members of the commission had no legal training. There also was a huge imbalance between the legal resources of the government and those allowed the detainee. *See* Andy Worthington, *THE GUANTANAMO FILES* 266 (2007). Post-*Boumediene*, the rules have been revised so that military judges preside over military commission hearings. 2010 MMC, *supra* note 260 at Rule 501.

unlawful enemy combatants with more process than was due *Korematsu*, *Ludecke*, or *Mezei* and the Court was less deferential to the Executive in a time when national security was threatened.²⁷⁵ For example, as discussed in more detail below, detainees at Guantanamo Bay undergo periodic review of their detention and, unlike *Ludecke*, are now entitled to private counsel at government expense in addition to a personal representative. Additionally, detainees are entitled to all information relied upon by the government, except in “exceptional circumstances,” in which case, the detainee is entitled to “a sufficient substitute or summary.”²⁷⁶

Congress responded to the *Boumediene* decision by enacting the Military Commissions Act of 2009. More recently, the Department of Defense (DOD) implemented that Act by amending the MMC in 2010. The 2010 MMC provides extensive and detailed Rules for Military Commissions (RMCs). The MMC has jurisdiction with respect to all crimes covered by Chapter 47A of Title 10 of the United States Code and the laws of war and jurisdiction to try “any alien unprivileged enemy belligerent.”²⁷⁷ In addition, the MMC is given the power to determine whether an alien is a privileged or unprivileged enemy combatant within the meaning of Article V of Geneva Convention IV.²⁷⁸ Trials of persons arrested and detained by the United States in the war on terror are now being conducted pursuant to these rules. The new MMC appears to correct many of the procedural deficiencies noted by the Supreme Court thus far. For example, Rule 505 of the MMC provides that a defendant has a right to see evidence used against him,²⁷⁹. The new MMC also provides for the right to counsel, as explained in more detail below.

²⁷⁵ These decisions are consistent with an expansion of due process rights for noncitizens outside the national security context as well. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21 (1982) (returning lawful permanent resident is entitled to hearing before being excluded).

²⁷⁶ *See e.g.*, Executive Order 13567, *supra* note 245 at para. 4-5. What constitutes a “sufficient substitute” is not clear and will likely be determined on a case-by-case basis.

²⁷⁷ 2010 MMC, *supra*, note 260 at RMC 201 & 202.

²⁷⁸ *See id.* at 202.

²⁷⁹ *See id.* at RMC 505 (“Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge shall be provided to the accused.”)

3. Right to Counsel

The right to counsel was just beginning to be established in U.S. law at the time of World War II. For example, it was not until 1938 that the U.S. Supreme Court held that the right to counsel in criminal cases in federal courts is guaranteed by the Sixth Amendment to the U.S. Constitution.²⁸⁰ The Sixth Amendment was held to apply to the states through the Fourteenth Amendment in *Gideon v. Wainwright*.²⁸¹ Despite the prior lack of recognition of *de jure* protection, it was fairly common practice by 1942 for states to provide counsel on request to indigent defendants who were charged with capital and serious non-capital offenses.²⁸² Later, the Supreme Court held that the Sixth Amendment right to counsel extends to all cases where there is a potential loss of liberty as a result of a criminal prosecution.²⁸³ By contrast, it is widely recognized that no concurrent right to counsel exists for parties to civil actions.²⁸⁴

In the context of immigration law, once an alien is in the United States, the Fourteenth Amendment protects the alien as a “person” against the deprivation of life, liberty, or property without due process of law.²⁸⁵ However, an alien's right to due process in immigration proceedings is only that process which Congress has determined is due.²⁸⁶ Aliens have a statutory right to counsel under the Immigration and Nationality Act (INA), but at their own expense.²⁸⁷ There is no right to counsel paid for by the government because immigration proceedings are considered civil, not criminal. In addition to this statutory right, aliens have a

²⁸⁰ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

²⁸¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁸² *Betts v. Brady*, 316 U.S. 455, 477 and appendix (1942) (Black, J. *dissenting*).

²⁸³ *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972).

²⁸⁴ *Ulmer v. Chancellor*, 691 F.2d 209 (1982).

²⁸⁵ *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973); *Plyer v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”).

²⁸⁶ *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S. Ct. 309, 94 L. Ed. 317 (1950); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), on reh'g on other grounds, 727 F.2d 957 (11th Cir. 1984), judgment aff'd, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985).

²⁸⁷ 8 U.S.C. § 1229a(b)(4).

Fifth Amendment procedural due process right to counsel in some cases.²⁸⁸ This Fifth Amendment right to counsel is derived from the principle that due process requires that proceedings be fundamentally fair and lack of counsel may deprive an immigration proceeding of its fundamental fairness.²⁸⁹

The United States has struggled with the issue of access to counsel by suspected terrorists, and has attempted to restrict the right in some cases. For example, in *Hamdi v. Rumsfeld*,²⁹⁰ an American citizen accused of being an “enemy combatant” was initially forbidden to see a lawyer at all, but was later permitted to see a lawyer only in the presence of U.S. military observers.²⁹¹ After Hamdi’s father filed a lawsuit on his behalf, the U.S. District Court appointed a public defender to represent him.²⁹² The U.S. Supreme Court declined to finally resolve Hamdi’s claims regarding access to counsel because by the time his case reached the Supreme Court, the Court stated that it did not need to consider the issue given that Hamdi had been appointed counsel and had been permitted unmonitored meetings with his lawyer.²⁹³

In *Boumediene v. Bush*, the U.S. Supreme Court noted several procedural deficiencies with respect to the CSRTs, including that detainees are assigned a “personal representative” who is not the detainee’s lawyer or even advocate.²⁹⁴ The Court’s opinion hinted, but did not declare, that a noncitizen has a right to counsel in this context. The Court held that the CSRT procedures, taken together, fell far short of the procedures and mechanisms that would eliminate the need for habeas corpus review.²⁹⁵

²⁸⁸ *Lozada*, 19 I&N Dec. 637, 638 (BIA 1988).

²⁸⁹ *See, e.g., Jacinto v. INS*, 208 F.3d 735 (9th Cir. 2000).

²⁹⁰ 542 U. S. 507 (2004).

²⁹¹ *See id.* at 511.

²⁹² *See id.*

²⁹³ *See id.* at 539.

²⁹⁴ *Boumediene*, 128 S.Ct. at 2260, 2269. The Court further noted that General Yamashita and the German saboteurs in *Quirin*, two other World War II era trials by military commission, got lawyers. *See id.* at 2271.

²⁹⁵ *Id.* at 2260.

As a result of these court decisions, Congress amended the law again with the Military Commissions Act of 2009. As noted above, the DOD implemented the MCA by way of the MMC in April 2010. MMC Rule 506 establishes a right to counsel at government expense.²⁹⁶ Thus, the United States is now providing all detainees being tried before military commissions with free counsel if the detainee so chooses.

B. International Law

Under the Supremacy Clause of the U.S. Constitution, treaties to which the United States is a party are part of the supreme law of the land.²⁹⁷ U.S. law also includes rules of customary international law.²⁹⁸ Both of these sources of international law contain relevant rules regarding the detention and trial of persons during wartime and peacetime.

In 2002, then U.S. President Bush unilaterally determined that the alleged al Qaeda and Taliban detainees at Guantanamo Bay were not prisoners of war (POWs) or civilians within the meaning of Article 4 of Geneva Convention III²⁹⁹ or IV³⁰⁰ respectively.³⁰¹ President Bush made this decision without first convening a competent tribunal to determine the status of the detainees

²⁹⁶ See 2010 MMC, *supra* note 260 at RMC 506.

²⁹⁷ U.S. Const. art. VI.

²⁹⁸ See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”)

²⁹⁹ Geneva Convention Relative to the Treatment of Prisoners of War, art 4, August 12, 1949, 6 U.S.T. 3317 [hereinafter Geneva Convention III].

³⁰⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention IV].

³⁰¹ White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (Feb. 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

as required by Article 5 of Geneva Convention III.³⁰² Such tribunals have since been established by statute and their work is ongoing.³⁰³

Despite initially determining that the detainees did not have a right to protected status under the Geneva Conventions, President Bush determined that the detainees would be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”³⁰⁴ In both *Hamdan* and *Boudemienne*, the U.S. Supreme Court determined that, at a minimum, Common Article 3 of the Geneva Conventions is applicable to the detainees.³⁰⁵ Thus, although the status of these detainees under U.S. and international law is not entirely clear, the Geneva Conventions may be used as guidance in answering the questions posed by the arrest, detention and trial of foreigners brought to the U.S.³⁰⁶ The next section discusses relevant international law principles.

1. Indefinite Detention and Trial

Both Geneva Convention III (POWs)³⁰⁷ and Geneva Convention IV (civilians) permit internment of prisoners of war and civilians, but civilians may be interned “only if the Security of the Detaining Party makes it absolutely necessary.”³⁰⁸ Even if a person is not a POW or a “protected person” within the meaning of Geneva Convention IV, who is entitled to invoke the full protections of the treaty, Article 5 of that Convention still guarantees civilians a certain minimum level of protection, including a right to a fair and regular trial:

³⁰² Geneva Convention III, *supra* note 299 at art. V.

³⁰³ For example, the trial by military commission of Omar Khadr, a Canadian citizen and the youngest detainee at Guantanamo Bay, is described on the Human Rights First website at http://www.humanrightsfirst.org/us_law/detainees/cases/khadr.aspx.

³⁰⁴ White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” ¶ 3 (Feb. 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

³⁰⁵ *Hamdan*, 548 U.S. at 629.

³⁰⁶ Regardless of their legal status, all detainees are entitled to a fair trial under both international humanitarian law and international human rights law. See David Weissbrodt & Andrea Templeton, FAIR TRIALS? THE MANUAL FOR MILITARY COMMISSIONS IN LIGHT OF COMMON ARTICLE 3 AND OTHER INTERNATIONAL LAW, 26 *Law & Ineq.* 353, 358 (2008).

³⁰⁷ Geneva Convention III, *supra* note 299 at art. 21.

³⁰⁸ Geneva Convention IV, *supra* note 300 at art. 42.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, *shall not be deprived of the rights of fair and regular trial prescribed by the present Convention*. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.³⁰⁹

In addition, Geneva Convention IV states: “Protected persons accused of offenses shall be detained in the occupied country, and if convicted, they shall serve their sentences therein.”³¹⁰

This article suggests that a country must first determine whether an accused person is a protected person within the meaning of the Convention. If so, the transfer of the detainee to another country for detention and trial as the United States did with many of the detainees at Guantanamo Bay would not be consistent with the Geneva Convention.

With respect to the length of detention, Geneva Convention III also only permits detention as long as hostilities continue.³¹¹ Likewise, Additional Protocol I to the Geneva Conventions states that, “persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”³¹² Additionally, any internment or imprisonment of civilians must be proportionate to the offense committed.³¹³ Indefinite detention is thus not permitted by international humanitarian

³⁰⁹ Geneva Convention IV, *supra* note 300 at art. 5 (emphasis added). *See also* THOMAS M. MCDONNELL, THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM 106-114 (2010).

³¹⁰ *Id.* at art. 76.

³¹¹ *See, e.g.*, Geneva Convention III, *supra* note 299 art. 118 (“Prisoners of war shall be released and repatriated without delay upon the cessation of hostilities.”).

³¹² Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, art 75, 1125 U.N.T.S. 1979. The United States has signed, but has not ratified the Additional Protocol.

³¹³ Geneva Convention IV, *supra* note 300 at art. 68.

law. However, in the current war on terror, it is difficult to know when, if ever, hostilities will end.

With respect to trials, as stated above, Common Article 3 of the Geneva Conventions requires trial of prisoners of war and detained civilians by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”³¹⁴ And specifically regarding civilians, Article 71 of Geneva Convention IV states that “no sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.”³¹⁵ Even persons suspected of activities hostile to the security of the State or persons accused of being spies or saboteurs have a right to a “fair and regular trial” pursuant to Article 5 of Geneva Convention IV.³¹⁶ Further, accused persons shall be notified of the charges against them and brought to trial promptly.³¹⁷ They also have the right to present evidence, call witnesses, and be represented by counsel.³¹⁸ Article 75 of Additional Protocol I further expands on what constitutes a fair trial and includes, *inter alia*, a presumption of innocence until proven guilty, as well as bans on *ex post facto* laws, double jeopardy, and self-incrimination.³¹⁹

International humanitarian law as reflected in the Geneva Conventions is supplemented by international human rights law.³²⁰ In this regard, the Universal Declaration of Human Rights declares in Article 7 that all persons are equal before the law and are entitled to equal protection

³¹⁴ *Id.* at art. 3.

³¹⁵ *Id.* at art. 71.

³¹⁶ *Id.* at art. 5. *See also* McDonnell, *supra* note 309 at 110-11.

³¹⁷ *See* Geneva Convention IV, *supra* note 300 at art. 71.

³¹⁸ *See id.* at art. 72.

³¹⁹ Additional Protocol I, at art. 75.

³²⁰ *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 2004 I.C.J. Rep. 136, para. 106 (July 9); *Coard v. United States*, Case 10.951 Inter. Am. C.H.R., Report No. 109/99, para. 39-40 (1999). International law scholars have also argued that the MMC should be interpreted in light of U.S. treaty obligations to remain consistent with its legal obligations and to preserve its reputation as a promoter of human rights. *See* Weissbrodt & Templeton, *supra* note 306 at 354.

of the law without discrimination on the basis of race or national origin.³²¹ Article 9 states that no one shall be subject to arbitrary arrest or detention and Article 10 guarantees a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charges.³²²

Articles 2 and 3 of the International Covenant on Civil and Political Rights (ICCPR) likewise guarantee equality before the law without discrimination.³²³ The ICCPR also prohibits arbitrary arrest and detention and states that no one shall be deprived of his liberty except in accordance with such procedures as are established by law.³²⁴ Article 9 requires that a person who is arrested be promptly informed of the reasons for the arrest and the charges against him. In criminal trials, the accused have a right to a fair and public hearing before an independent and impartial tribunal established by law.³²⁵ Article 14 provides the right to examine witnesses. In addition, everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal in accordance with law.³²⁶

The standards set forth in international humanitarian law and international human rights law, taken together, establish the minimum level of due process guaranteed to all persons, regardless of nationality, who are arrested, detained, and tried by any State. As a party to the Geneva Conventions and the ICCPR, the United States is bound to follow those treaties as a matter of law. The United States is also bound by customary international law as set forth in

³²¹ Universal Declaration of Human Rights art. 7, G.A. Res. 217, U.N. GAOR (III 1948). Although not a treaty, the Universal Declaration is considered binding customary international law. Thomas Buergenthal, et al, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 42 (4th ed. 2009).

³²² *Id.* at art. 9, 10.

³²³ ICCPR at art. 2 and 3, 999 U.N.T.S. 171 (1966). The U.S. is a party to the ICCPR.

³²⁴ *Id.* at art. 9.

³²⁵ *Id.* at art. 14. In its interpretive comments to the ICCPR, the United Nations Human Rights Committee has further defined Article 14 as requiring that the tribunal be established by law, that it be independent of the executive and legislative branches of government and that it enjoy judicial independence in deciding legal matters. *See* U.N. Human Rights Comm., Aug. 23, 2007, U.N. Doc. CCPR/C/GC/32 ¶ 18 [hereinafter UNHRC General Comment No. 32]. Article 14's requirements apply to all courts including military tribunals. *See id.* at ¶ 22.

³²⁶ *Id.* at art. 14(5).

documents such as the Universal Declaration on Human Rights.³²⁷ And although national security is a basis for derogations from certain human rights guarantees, there are both temporal and substantive limits on the ability of a state to invoke national security to justify such derogations.³²⁸

These international standards must inform the development of procedures for the military commissions used to try detainees in the war on terror, both to comply with the United States' international legal obligations and to maintain its reputation as a country that promotes and abides by human rights and the rule of law.³²⁹ As of this writing, the United States is conducting proceedings against detainees before military commissions and is using new procedures for those commissions developed in response to decisions of the U.S. Supreme Court as described herein.³³⁰ Whether the new procedures set forth in the 2010 MMC meet the legal requirements for fair trials remains to be seen.

³²⁷ Buergenthal, *supra* note 321 at 42.

³²⁸ *See, e.g.*, Universal Declaration, *supra* note 321 at art. 29; ICCPR, *supra* note 323 art. 4.

³²⁹ *See* Weissbrodt & Templeton, *supra* note 306 at 355, 390-400.

³³⁰ Information regarding pending cases before military commissions at Guantanamo Bay may be found on the U.S. Department of Defense website, *available at* http://www.defense.gov/home/features/detainee_affairs/.

2. Right to Counsel in International law

International humanitarian law also provides a right to counsel, at least for civilians. In this regard, Geneva Convention IV affords civilians “the right to be assisted by a qualified advocate or counsel of their own choice.”³³¹ “Failing a choice by the accused, the Protecting Power *may* provide him with an advocate or counsel.”³³² If the charges are sufficiently serious, the Occupying Power may be required to provide counsel to the accused.³³³

Article 14(3) of the ICCPR specifically addresses the right to counsel in criminal proceedings.³³⁴ Pursuant to Article 14(3), every criminal defendant is able to communicate with counsel of his own choosing and to have that legal counsel assist in his defense.³³⁵ If the defendant cannot pay, the defendant has a right to have legal assistance assigned to him if the interest of justice so requires.³³⁶

The legislative history of the ICCPR suggests that the right to counsel in civil cases was left out because it was seen as less critical because many states had already granted a civil right while many more countries lacked the right in criminal proceedings.³³⁷ The United States unsuccessfully sponsored a proposal that would have granted a right to counsel in cases involving fundamental human rights.³³⁸ Regardless, the Human Rights Committee (HRC), the

³³¹ Geneva Convention IV, *supra* note 300 at art. 72.

³³² *Id.* (emphasis added). A Protecting Power is a state that is not taking active part in the armed conflict, but which agrees to look after the interests of another State that is a party to the conflict.

³³³ *Id.* An Occupying Power is a State that occupies the territory of another State.

³³⁴ ICCPR, *supra* note 323 at art. 14.

³³⁵ See UNHCR General Comment No. 32, *supra* note 325 at ¶¶ 32-34.

³³⁶ *See id.* at ¶ 38.

³³⁷ Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *TOURO L. REV.* 147, 160 (2009).

³³⁸ *Id.* at 159-161.

interpretive body of the ICCPR, has made it clear that Article 14 applies to all courts and tribunals, civilian and military.³³⁹

The Charter of the Organization of American States (OAS), to which the United States also belongs, contains an explicit provision calling for the right to legal aid.³⁴⁰ Adopted at the same time, the American Declaration of the Rights and Duties of Man did not explicitly call for a civil right to counsel, but did call for fair and easy access to courts.³⁴¹

Thus, while there is no universally recognized right to counsel in all proceedings, since WWII there has certainly been an enormous growth in the recognition of the right to counsel in proceedings that may result in a loss of liberty both domestically and internationally. This evolution in our understanding of the importance of counsel may help explain why the United States is now providing lawyers to detainees at Guantanamo Bay.

V. Parallels with the Arrest, Detention and Trial of Suspected Foreign Terrorists Today

A comparison of some of the tactics and procedures used to arrest, detain, and try “alien enemies” during World War II with those that are being used to arrest, detain and try suspected terrorists or “unlawful enemy combatants” today suggests that not all of the ghosts of World War II have been exorcised. There are still some timely lessons that may be learned from the U.S. Latin American Detention program and the treatment of “alien enemies” during times of conflict

³³⁹ *Id.* See UNHCR General Comment No. 32, *supra* note 325 at ¶ 22. In conformity with these comments, states often address the right to civil counsel in their compliance reports and the HRC often seeks information regarding compliance with these comments from countries appearing before it. See Davis, *supra* note 337 at 162. A right to counsel in some civil matters has been found in connection with rights protected by the International Covenant on Economic, Social and Cultural Rights as well as the Convention on the Elimination of Racial Discrimination. See *id.*

³⁴⁰ Charter of the Organization of the American States, art. 45(i), opened for signature Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119 (entered into force Dec. 13, 1951).

³⁴¹ American Declaration of the Rights and Duties of Man, art. XVIII, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). The American Declaration, like the Universal Declaration on Human Rights was not adopted as a treaty, but is considered part of customary international law and is used to interpret the fundamental rights protected by the OAS Charter. See Buergethal, *supra* note 321 at 262.

that have relevance for current U.S. policies regarding suspected “unlawful enemy combatants” today.

The accuracy of the United States’ understanding of the scope of the threat presented by potential subversive German nationals living in Latin America around the time of WWII was negatively influenced by the fact that the United States had inadequate intelligence and only a rudimentary foreign intelligence service in Latin America.³⁴² U.S. military officers shunned posts in Latin America “because such backwater postings were ‘prejudicial to their promotion.’”³⁴³ Thus, the personnel that could not avoid being assigned to Latin America tended to be less competent and less experienced.³⁴⁴

In addition, the United States lacked sufficient field operatives in Latin America who were fluent in Spanish and other foreign languages spoken there. The FBI agents were generally provided with little training and only two weeks of language instruction.³⁴⁵ Historian Max Friedman asserts: “The FBI, directly responsible for identifying suspects for deportation and internment, was home to some of the most poorly informed U.S. officials working in Latin America.”³⁴⁶

Because they had “no reliable sources of their own, the FBI agents established close working relationships with local police forces” with mixed results.³⁴⁷

Asking police or military leaders in countries ruled by dictatorships for the names of dangerous Germans often yielded a list of the dictator’s personal enemies, or the owners of attractive real estate coveted by his friends. And the local police officers did not necessarily display the requisite talent or honesty needed for effective investigation.³⁴⁸

³⁴² Friedman, *supra* note 32 at 59.

³⁴³ *Id.* at 60.

³⁴⁴ *See id.* at 60-62.

³⁴⁵ *See id.* at 62.

³⁴⁶ *Id.* at 64.

³⁴⁷ *Id.* at 66.

³⁴⁸ *Id.*

By 1943, the U.S. Justice Department expressed serious concerns about the “dangerousness” classifications, which were often assigned to detainees by the FBI without prior investigation or evaluation of the credibility of the information upon which the classification was based.³⁴⁹

In addition, because most U.S. officials were unfamiliar with the local society and unable to speak Spanish or German, they had to rely on local police and any other informants who showed up at their door.³⁵⁰ The U.S. often paid informants to denounce local Nazis to the U.S. consulate.³⁵¹ However, paying bounties for information created a problem: “The trouble with paid informants is that they are paid only if they have material to provide – a structural incentive to invent information that contributed greatly to the inflation of the German threat in U.S. assessments.”³⁵² Persons with grudges often turned in one another for reasons unrelated to national security; for example, landlord tenant disputes or disgruntled former lovers.³⁵³

All of these same problems have been identified in Afghanistan and elsewhere in the Middle East in the current “war on terror.” For example, Major General Michael Flynn, the United States’ most senior intelligence officer in Afghanistan, has criticized information gathering there by the United States, calling U.S. intelligence about Afghanistan “clueless.”³⁵⁴ Just as it offered bounties during WWII, the United States has also air-dropped flyers in Afghanistan offering large monetary rewards for information about suspected terrorists or Taliban members.³⁵⁵ Many persons in Afghanistan used this offer as an opportunity to settle

³⁴⁹ Fox, *supra* note 21, at 131.

³⁵⁰ Friedman, *supra* note 32 at 67.

³⁵¹ *Id.* at 68.

³⁵² *Id.*

³⁵³ See Max Paul Friedman, *Trading Civil Liberties for National Security: Warnings from a World War II Internment Program*, 17 J. Pol’y Hist. 294, 296 (2005).

³⁵⁴ Martin Evans, *U.S. military chief brands Afghan intelligence mission ‘clueless’*, TELEGRAPH (Jan. 5, 2010), available at <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/6935138/US-military-chief-brands-Afghan-intelligence-mission-clueless.html>.

³⁵⁵ See Mark Denbeaux et al., Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data 23-25 (Feb. 8, 2006), available at

tribal grudges and get rid of rivals.³⁵⁶ Studies show that 93% of the detainees held at Guantanamo Bay were not captured by U.S. forces.³⁵⁷ The U.S. Commander in charge of Guantanamo Bay detainees was quoted as saying: “Sometimes, we just didn't get the right folks. . . . Commanders now estimate that up to 40% of the 549 current detainees probably pose no threat and possess no significant information.”³⁵⁸ As of 2009, three-quarters of the 774 prisoners sent to Guantanamo have been released.³⁵⁹ The U.S. government also has repeatedly stated that it does not have sufficient personnel with the necessary skills in language, culture, and appropriate intelligence gathering techniques to allow for full and effective communication in Afghanistan and other Middle Eastern countries.³⁶⁰

Another parallel between the U.S. Latin American Detention Program in WWII and the fight against terrorism today is that the United States responded to the threat in each case by creating a registration program for certain aliens. At the Third Meeting of the Ministers of Foreign Affairs of the American Republics in 1942, Resolution XVII was adopted recommending that all aliens be required to register and periodically report in person to the proper authorities and that strict supervision be exercised over the activities of all nationals of member States of the Tripartite Pact.³⁶¹

http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf (One leaflet reads: “Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists.”).

³⁵⁶ See Andy Worthington, *THE GUANTANAMO FILES* 178-79, 183 (2007). See Andy Worthington, *Report on ex-Guantanamo Prisoners Reveals Systematic Abuse and Chronic Failures of Intelligence* (Jun. 18, 2008), http://www.huffingtonpost.com/andy-worthington/report-on-ex-guantanamo-p_b_107728.html; see also Tom Lasseter, *America's prison for terrorists often held wrong men* (Jun. 15, 2008), <http://www.mcclatchydc.com/detainees/story/38773.html>.

³⁵⁷ See Denbeaux, *supra* note 355 at 14.

³⁵⁸ Cooper, Chris, *Detention Plan in Guantanamo*, *WALL ST. J.* (Jan. 26, 2005), available at <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-defense-department/detention-plan-in-guantanamo-prisoners-languish-in-sea-of-red-tape-inmates-waiting-to-be-freed-are-caught-in-uncertainty-improvising-along-the-way>

³⁵⁹ See Andy Worthington, *THE GUANTANAMO FILES* 178 (2007).

³⁶⁰ See, e.g., Andy Worthington, *THE GUANTANAMO FILES* 129-30 (2007).

³⁶¹ Annual Report of the Inter-American Emergency Advisory Comm. for Political Def., Appendix at 55 (1943).

The majority of the American Republics responded positively to this recommendation, adopting or updating laws that required the registration and identification of aliens within their territory. The Inter-American Emergency Advisory Committee for Political Defense later adopted Resolution VI in 1942 on the Registration of Aliens, which encouraged any State that had not already done so to adopt similar laws and set forth recommended minimum standards for any such program.³⁶²

Likewise, shortly after the terrorist attacks on the United States on September 11, 2001, the United States implemented a new registration program for Arabs and Muslims in the United States.³⁶³ The U.S. Justice Department selected more than 50,000 young immigrant men for interviews, virtually all of whom were Arabs or Muslims.³⁶⁴ On September 11, 2002, the Justice Department initiated a new program requiring foreign nationals from selected countries to register at entry and at one-year intervals thereafter.³⁶⁵ It also applied similar requirements to all male nonimmigrants over the age of 16 who were already living in the United States.³⁶⁶ Once again, virtually all of the targeted countries of nationality were Arab or Muslim.³⁶⁷ These programs are essentially a form of racial profiling, which has been criticized as an ineffective law enforcement tool³⁶⁸ and has been limited due to concerns that it may violate the Fourth

³⁶² *Id.* at 56.

³⁶³ Information about the former National Security Entry-Exit Registration System (NSEERS) also known as Special Registration is available at http://www.cbp.gov/xp/cgov/travel/id_visa/nseers/. Although on its face, NSEERS appears to apply to all nonimmigrants arriving in the United States, in practice, it was used to target Arabs and Muslims. See Asian American Legal Defense and Education Fund, *Special Registration: Discrimination and Xenophobia as Government Policy* 4 (Nov. 2003) (and citations therein), available at http://www.citylimits.org/images_pdfs/pdfs/SpecialRegistrationReport.pdf.

³⁶⁴ David Cole, ENEMY ALIENS 49 (2003).

³⁶⁵ *Id.* at 50.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Friedman, *supra* note 353 at 302.

Amendment's prohibition on unreasonable searches and seizures and the Fourteenth Amendment's guarantee of equal protection of the laws.³⁶⁹

During World War II, the Americas justified the Latin American detention program by arguing that the new threat presented by the Axis powers necessitated the adoption of new laws, some of which may be less respectful of civil liberties. For example, one annual report of the Inter-American Emergency Advisory Committee for Political Defense states:

Peace-time legislation could not meet the Axis pattern of total attack, predicated on an intense and world-wide campaign of political aggression, any more than the Panzer division or the Stuka bomber could be checked by the primitive technology of trench warfare. Laws not drafted in contemplation of the widespread subversive organization of totalitarian agents, and which do not take into account their ever-changing tactics and maneuvers, cannot offer the legal, administrative or psychological basis for an effective political defense and a vigorous counter-attack.³⁷⁰

Likewise, the Bush Administration repeatedly responded to its critics with similar reasoning, arguing that international law was developed for relations between States, not for non-state actors like terrorist organizations.³⁷¹ It has been further argued that terrorist organizations present a new kind of threat requiring new kinds of responses, including the development of new laws. For example, in an address to a joint session of Congress shortly after the terrorist attacks of 2001, President Bush stated: "Americans have known surprise attacks, but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack."³⁷² He also states that "we face

³⁶⁹ U.S. CONST. amend IV and XIV. See also Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1278 (2004).

³⁷⁰ Annual Report of the Inter-American Emergency Advisory Comm. for Political Def. 25 (1943).

³⁷¹ For example, President Bush determined that the Geneva Conventions are not applicable to the fight against terrorism because it is not a conflict between High Contracting Parties to the Geneva Conventions. See Memorandum from The White House for the Vice President et al., "Humane Treatment of al Qaeda and Taliban Detainees" (Feb. 7, 1992).

³⁷² Address of President George W. Bush to Joint Session of Congress (Sep. 20, 2001) available at <http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/>

new and sudden national challenges” and that “[w]e will come together to give law enforcement the additional tools it needs to track down terror here at home.”³⁷³ In 2002, Attorney General John Ashcroft stated: “This unprecedented assault brought us face to face with a new enemy, and demanded that we think anew and act anew in order to protect our citizens and our values.”³⁷⁴ This theme continued through 2005, when President Bush stated in a press conference, “we quickly learned that al Qaeda was not a conventional enemy . . . This new threat required us to think and act differently.”³⁷⁵ He then describes the new law enforcement tools created by the Patriot Act,³⁷⁶ many of which have been criticized as improperly infringing on individual liberties.³⁷⁷

In WWII, various U.S. officials sometimes argued that since the enemy violated the law, the enemy should not benefit from legal protections. However, the United States has been somewhat schizophrenic in its adherence to this argument. For example, in the Explanatory Statement to Resolution XX on the Detention and Expulsion of Dangerous Axis Nationals, the CPD Defense stated:

[I]n exercising their powers of detention and expulsion, the American Republics, including those not at war with the Axis, have wisely concluded that the Axis should not be permitted to take advantage of domestic respect for traditional concepts of International Law in order to continue their reprehensible activities in

³⁷³ *Id.* Secretary of Defense Rumsfeld reiterated this point stating, “The problem is that, to a large extent, we are in unexplored territory with this unconventional and complex struggle against extremism. Traditional doctrines covering criminal and military prisoners do not apply well enough.” Bender & Savage, *Guantanamo Must Stay Open*, *Rumsfeld says*, *The Boston Globe* (Jun. 15, 2008).

³⁷⁴ John Ashcroft, Attorney General of the United States, before the Committee on the Judiciary, U.S. Senate, Concerning the Oversight of the Department of Justice (Jul. 25, 2002), *available at* <http://www.justice.gov/ag/testimony/2002/072502agtestimony.htm>.

³⁷⁵ *See* President George W. Bush Press Conference, Dec. 19, 2005, *available at* <http://www.cnn.com/2005/POLITICS/12/19/bush.transcript/index.html>

³⁷⁶ *See id.* Attorney General Ashcroft also pointed to the USA-Patriot Act’s modernization of surveillance tools as part of the new system and laws adopted in the war on terrorism. *See* John Ashcroft, Attorney General of the United States, before the Committee on the Judiciary, U.S. Senate, Concerning the Oversight of the Department of Justice (Jul. 25, 2002), *available at* <http://www.justice.gov/ag/testimony/2002/072502agtestimony.htm>.

³⁷⁷ *See, e.g.*, Larry Abramson, *The Patriot Act: Alleged Abuses of the Law*, NPR (July 20, 2005), *available at* <http://www.npr.org/templates/story/story.php?storyId=4756403>.

this Hemisphere, using as protection for their machinations the guarantees of the very democracy they are seeking to destroy.³⁷⁸

Yet, one paragraph later, the Committee recommends that the American Republics follow the detention guidelines set forth in the Geneva Conventions of July 27, 1929 relative to the treatment of prisoners of war.³⁷⁹ This recommendation was not made for purely humanitarian reasons, however. The Committee wanted to follow the Convention to try to ensure reciprocal treatment for American citizens held in Axis-dominated territory.³⁸⁰

The historical record described above shows that the United States detained German nationals during WWII in part to prevent them from assisting the enemy, whether militarily by returning to the battlefield or economically by supplying the enemy with needed goods. Likewise, several U.S. government officials have recently asserted that it is necessary to detain suspected enemy combatants for the duration of the conflict to prevent their return to the battlefield. For example, in a 2002 Department of Defense briefing, then Secretary of Defense Donald Rumsfeld stated: “As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict.”³⁸¹

In *Hamdi*, the U.S. Supreme Court endorsed this reasoning, stating that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”³⁸² The problem in both cases, however, is that many of the persons arrested and detained were not

³⁷⁸ Explanatory Statement to Resolution XX on Detention and Expulsion of Dangerous Axis Nationals (1943), in Appendix to the Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 77 (1943).

³⁷⁹ *Id.* at 78. The Committee recognized that the Convention was not strictly applicable because it referred only to prisoners of war and not civilians.

³⁸⁰ *Id.*

³⁸¹ Secretary Donald Rumsfeld, Department of Defense Briefing (Mar. 28, 2002), quoted in Mark Denbeaux et al., Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data 4 (Feb. 8, 2006), available at http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf.

³⁸² *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

enemy combatants and had no intention of fighting on the battlefield.³⁸³ The United States is still struggling to create a system that is capable of properly distinguishing between those who do present a threat and those who do not. In addition, in the current war on terror, no end to the hostilities is in sight, leading to the specter of indefinite detention. Lengthy detentions have brought demands for hearings to determine whether the proper persons were being detained.

Just as jurisdiction was established over Germans from Latin America by accusing them of being alien enemies and bringing them to the United States during World War II for detention and trial; likewise, the U.S. asserts jurisdiction over accused alien unlawful enemy combatants captured elsewhere and brought to Guantanamo Bay as part of the current war on terror. In both time periods, many of these persons were to have hearings outside regular U.S. courts in other types of tribunals. As of today, only a handful of trials by military commission are underway, in part because of the multiplicity of legal challenges to the lack of procedural protections afforded the defendants in the proposed military tribunals.³⁸⁴

In reviewing these challenges, the U.S. Supreme Court has acknowledged the importance of deference to the authority of the President in the face of a serious threat to national security, but has also reminded us that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”³⁸⁵ Because the war on terror may be indefinite, the Court has held that detainees are entitled to some measure of due process.³⁸⁶ However, the Court has said that certain evidentiary rules may be relaxed due to the government’s need to maintain focus and secrecy in its war on terror.³⁸⁷

³⁸³ See Fox, *supra* note 21 at 106 (“Secretary of State James Byrnes had admitted in 1945 that deportation mistakes were made in Latin America.”).

³⁸⁴ A list of the persons being tried by military commission may be found at, <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

³⁸⁵ *Id.* at 536. Hamdi was a U.S. citizen.

³⁸⁶ See *id.* at 533.

³⁸⁷ See *id.*

As noted above, the United States' use of military commissions was challenged in *Hamdan v. Rumsfeld*,³⁸⁸ where the Supreme Court held that the government may use military commissions, but must do so in a manner consistent with domestic and international law. According to the Court, military commissions have been used "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede the military effort have violated the law of war."³⁸⁹ However, the Supreme Court found several major procedural deficiencies with the military commission procedures, leading the court to stop their use until those deficiencies were addressed. The Supreme Court again considered challenges to the use of military commissions to determine combatant status in *Boumediene v. Bush*.³⁹⁰ Here, too, the Court noted several deficiencies in the procedures to be used by the CRSTs.³⁹¹ Following these cases, the U.S. government has apparently corrected many of these procedural deficiencies through the new MMC. Therefore, it may be that the military commissions now more fully comply with both U.S. and international law.

VI. Lessons to be Learned

Many criticisms have been leveled at the United States for its internment of persons of Japanese and German nationality or ancestry during World War II. Despite some changes in both domestic and international law, as described above, criticisms continue to be leveled at the United States for its detention and trial of unlawful enemy combatants or suspected terrorists. Thus, while it appears that the United States may have learned some lessons from history, there is clearly more to learn. As the U.S. Supreme Court recently stated in *Hamdi*: "History and common sense teach us that an unchecked system of detention carries with it the potential to

³⁸⁸ 548 U.S. 557 (2006).

³⁸⁹ *Id.*, citing *Quirin*.

³⁹⁰ 128 S.Ct. 2229 (2008).

³⁹¹ *Id.* at 2260.

become a means for oppression and abuse of others who do not present that sort of [immediate national security] threat.”³⁹² The U.S. government must continue to work towards doing a better job of balancing national security and individual liberties.

In his book, *Enemy Aliens*, David Cole describes the United States’ tendency in times of crisis to sacrifice the liberty of non-United States citizens in exchange for a sense of greater security for U.S. citizens.³⁹³ Cole argues that striking the balance between liberty and security in this way is tempting because citizens retain their rights, while the targeted noncitizens have no voice in the political process to protest their treatment.³⁹⁴ However, Cole argues that the United States should resist the temptation to trade the liberty of foreign nationals for the security of United States citizens for four reasons.³⁹⁵

First, the distinction between citizens and noncitizens is illusory in the long run. What we allow our government to do to immigrants today becomes a template for how the government treats citizens tomorrow.³⁹⁶

Second, restricting liberties of noncitizens is likely to prove counterproductive as a security matter because it undermines our legitimacy and hinders law enforcement’s ability to work effectively with local communities.³⁹⁷ Both historically and today, the United States has suffered a loss of reputation in the international community for its failure to abide by the rule of law and to respect human rights.³⁹⁸ This loss of reputation has in turn undermined the United

³⁹² *Hamdi*, 542 U.S. at 530.

³⁹³ Cole, *supra* note 364 at 4.

³⁹⁴ *Id.* at 4-5.

³⁹⁵ *Id.* at 7.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 8-9

³⁹⁸ See Fox, *supra* note 353 at 302; Elaine Sciolino, *Spanish Judge Calls for Closing U.S. Prison at Guantanamo*, N.Y. TIMES, June 4, 2006, available at <http://www.nytimes.com/2006/06/04/world/europe/04terror.html> (“In a speech last month, Britain’s attorney general, Lord Goldsmith, called on the United States to close Guantánamo, saying, ‘The historic tradition of the U.S. as a beacon of freedom, liberty and justice deserves the removal of this symbol.’”)

States' ability to carry out its agenda on an international scale, whether that is fighting terrorism, state building, or combating the drug trade.³⁹⁹ In the international fight against terrorism, where the terrorists operate in multiple countries, such international contributions and cooperation are essential.⁴⁰⁰

Third, treating noncitizens as having fewer rights often is a critical factor in the later regretted pattern of government overreaction in times of crises.⁴⁰¹ And fourth, Cole argues that trading foreigners' rights for citizens' security is constitutionally and morally wrong.⁴⁰²

Both the WWII-era U.S. Latin American Detention Program and the current fight against terrorism exemplify many of Cole's themes. While none of the persons detained in the Latin American Detention Program were U.S. citizens, the restrictions on liberties of noncitizens during WWII led directly to McCarthyism following the war and the corresponding restrictions on the individual freedoms of U.S. citizens.⁴⁰³ By contrast, both citizens and noncitizens have been accused of being enemy combatants in the last ten years and have been subjected to unconstitutional practices, demonstrating again how easily the lines may blur.

As has also been described above, the U.S. Latin American Detention Program was not particularly effective in identifying persons who were true threats to the United States. While the current war on terror may ultimately result in a better success rate, the U.S. government has admitted that large numbers of those initially detained are not connected to the Taliban or Al

³⁹⁹ See Cole, *supra* note 364 at 10 (and sources cited in fn 16). See also *Release and Review of the Subcommittee Report: "The Decline in America's Reputation: Why?" Before the Subcomm. on International Organizations, Human Rights, and Oversight*, 110th Cong. 20-21 (2008) (statement of Esther Brimmer, PhD., Deputy Director and Director of Research for the Center for Transatlantic Relations, The Paul H. Nitze School of Advanced International Studies, Johns Hopkins University).

⁴⁰⁰ McDonnell, *supra* note 309 at 178 ("Al Qaeda reportedly has cells in over 100 countries. To gather intelligence on such a diffused enemy requires cooperation from many countries.")

⁴⁰¹ Cole, *supra* note 364 at 7, 10. In his book, *JUSTICE AT WAR*, Peter Irons documented the government's zeal in rounding up and locking up Japanese Americans during WWII, which included the use of tainted evidence to secure convictions. Peter Irons, *JUSTICE AT WAR* (1993). The court relied in part on evidence of government misrepresentations in overturning the conviction of Fred Korematsu.

⁴⁰² *Id.* at 7.

⁴⁰³ See *id.* at chapters 7 & 8; see also Krammer, *supra* note 87 at 173.

Qaeda. These numbers point to government overreaction to a threat in both time periods. These programs also wasted precious government resources during times of crisis on many persons who were ultimately determined to be not particularly dangerous.⁴⁰⁴

If the United States is going to continue to rely on unknown informants and use bounties to identify suspected enemy aliens, it needs to do more investigation before deciding to remove the suspect from his or her country of nationality for detention and trial elsewhere. One option would be to conduct hearings in the country where the person is apprehended, as contemplated under Article 5 of Geneva Convention III, to make an initial determination as to whether the person actually is a threat to the United States.⁴⁰⁵ International law creates a presumption in favor of detention in occupied territory or a location closer to that person's home to prevent return to the battlefield if that person is determined to be a threat.

And while the Supreme Court upheld the government's program of detaining persons of Japanese or German descent during WWII, most people now regard those decisions as wrong. In the current war on terror, the Supreme Court has been somewhat more willing to review the executive branch's actions and measure them against the requirements of individual rights such as due process. And the executive branch of government has responded to these court decisions by increasing procedural protections for persons being tried by military commissions, as is demonstrated by the most recent version of the Rules for Military Commissions.

In his book, Cole's primary purpose is to show that the phenomenon of government overreaction is inextricably tied to the double standards the United States employs with respect to citizens and noncitizens in times of crisis.⁴⁰⁶ He suggests that to correct the problem, we treat citizens and noncitizens equally with respect to basic constitutional rights such as due

⁴⁰⁴ See Fox, *supra* note 353 at 303.

⁴⁰⁵ Geneva Convention III, *supra* note 299 at art. 5.

⁴⁰⁶ Cole, *supra* note 364 at 229.

process, equal protection, and the First Amendment freedoms of religion, speech and association.⁴⁰⁷ As another scholar has stated: “It is . . . precisely during times of war or other perceived crises – times that our civil liberties are most easily lost – that we must most diligently guard our rights and insist on lawful conduct by the government.”⁴⁰⁸ As the comparison between the U.S. Latin American Detention Program and the current war on terror shows, we have made strides in that direction. However, there is still more work to be done to find the proper balance between individual liberties and national security.

VII. Conclusion

Many actions were taken against persons believed to be enemy aliens during WWII over which the United States now expresses serious regret. While perhaps technically legal at the time, the mass arrests, deportations, and lengthy detentions of accused alien enemies on the basis of often specious evidence was unjust, a waste of resources, and damaging to the U.S. reputation abroad. The United States appears to have learned some lessons from that experience. In the current fight against terrorism, U.S. courts are providing more stringent review of government action to protect individual rights and the U.S. government is responding to those court directives by providing greater protections. However, the U.S. government still initially went too far in favoring national security over individual liberties when faced with terrorist threats. As in WWII, it arrested and detained many persons on flimsy allegations, transported them far from home, locked them up indefinitely, and limited their procedural rights when they demanded hearings to prove their innocence. Thus, while the United States has exorcised many of the ghosts from the World War II Latin American Detention Program, some of those ghosts still haunt Guantanamo.

⁴⁰⁷ *Id.* at 233.

⁴⁰⁸ Saito, *supra* note 88 at 297.