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# CIVIL RIGHTS

## “KEEP YOUR FRIENDS CLOSE, BUT YOUR ENEMIES CLOSER”: INTERNMENT OF ENEMY ALIENS IN THE PRESENT CONFLICT

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United States law, in accordance with customary international law, has since 1798 permitted the internment or restriction of enemy aliens found within the United States during time of international conflict or war. The United States has applied this law in every declared war since the law's enactment. Application of this law and related precedent to the present conflict (sometimes known as the Global War on Terror) permits the detention or restriction of aliens known or suspected of links to foreign terrorist organizations. In light of the United States' ongoing debates over the detention of combatants in Guantanamo Bay—as well as the question whether to try them in military or civilian settings, if at all—this statute presents a secure alternative to the outright release of the detainees, or to their introduction into the civilian criminal justice system. Established law and precedent thereby affords a further option to address this thorny problem.

### I. Internment of Aliens in United States Law

The sovereign government has the unqualified right to exclude aliens at the border.<sup>1</sup> The general rule governs, that the sufferance of peaceful alien visitors entails their fair and reasonable treatment, according to minimum standards of civilized nations. They are to be treated fairly and, under the prevailing western liberal consensus, afforded such legal process as may be due to protect their interests and property. In political science terms, both a Social Contract theory (postulating a bargain of admission in return for civil obedience) and the Hobbesian-realist state of nature theory (security dependent on individual submission to, or protection by, the greater municipal power), lead to this same result.<sup>2</sup>

Customary international law dictates, upon outbreak of war, private communication with the enemy state and its citizens ceases. Diplomats may have safe passage home; but their countrymen can be detained to prevent their contribution to enemy war efforts.<sup>3</sup> As one treatise notes, “Subjects of the enemy who are permitted to remain in a belligerent state may be subjected to such special police regulation and supervision as may be deemed necessary by the government for its security.”<sup>4</sup>

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### II. English Common Law Precedents

The Common Law distinguished aliens for their allegiance owed to a different sovereign. The law presumed every subject from birth owed a superior, “natural allegiance” to the ruler of his place of birth. When an alien entered into England and received the benefit and protection of the law, he owed a “local allegiance” to the King for so long as he enjoyed the King’s “dominion and protection.”<sup>5</sup> Natural allegiance was perpetual, and local allegiance temporary; for this reason, aliens might own movable property and personal goods, but could not own or inherit real property: The entitled owner of English land owed allegiance to the British crown, and this contradicts the alien’s allegiance to a foreign sovereign. No man could serve two masters.

Such rights as aliens had, moreover, adhered only to the “alien-friend,” whose country was at peace with Britain. The common law jurist William Blackstone famously declared, “alien-enemies have no rights, no privileges, unless by the king’s special favour, during the time of war.”<sup>6</sup> In the early years of the United States, Framers of the Constitution such as James Madison “viewed as fundamental the distinction between alien enemies and alien friends.”<sup>7</sup>

#### A. Alien Enemy Act of 1798

Congress in 1798 passed the Alien Enemy Act. Congress specified that in the event of a declared war, or “any invasion or predatory incursion perpetrated, attempted or threatened against the territory of the United States,” when the President shall make a proclamation of the event, all “natives, citizens, denizens, or subjects of the hostile nation or government” over the age of fourteen “shall be liable to be apprehended, restrained, secured, and removed as alien enemies.” The Act authorizes the President and his agents to determine as to enemy aliens, 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,” and “to establish any other regulations which are found necessary in the premises and for the public safety.”<sup>8</sup>

When the President or his officers determine that an enemy alien should be removed or deported, the statute appoints that duty to the United States Marshals Service.<sup>9</sup> The Act also grants judicial process to enemy aliens who challenge their designation: On complaint to a United States court having jurisdiction, in accordance with presidential regulations, an enemy alien can “be duly apprehended and conveyed before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing,” the court may order the alien’s removal from United States territory, posting of surety bond, or other restriction or imprisonment.<sup>10</sup>

As will be shown, however, the detention of enemy aliens need not follow a prior judicial order.

### *B. Past Practices of Alien Internment*

Although Congress passed the Act in response to the threat of undeclared war with France in 1798, the first use of the Act came during the War of 1812. On behalf of President James Madison, in October 1812, Secretary of State James Monroe issued regulations directing United States Marshals to detain British subjects within the United States.<sup>11</sup> Secretary Monroe instructed the Marshals that if enemy aliens arrived or were found in their districts, the Marshals should “designate for them particular places of residence, at least thirty miles from the tide-water, to the limits of which designations they are to be confined.”<sup>12</sup> Monroe’s intent was to prevent aid to British forces near the seacoast. On February 23, 1813, Secretary Monroe further restricted enemy aliens within forty miles of the tidewater, requiring those engaged in commerce to “apply to the marshals of the states or territories in which they respectively are, for passports to retire to such places, beyond that distance from tide water, as may be designated by the marshals.”<sup>13</sup> Enemy aliens not engaged in commerce could apply to the Marshal for permission to remain where they were, subject to monthly renewal. Failure to comply meant enemy aliens were “to be taken into custody, and conveyed to the place assigned to them, unless special circumstances require indulgence.”<sup>14</sup> In November 1813, Monroe directed the Marshals to confine every enemy alien who refused to sign a “parole of honour” binding him to good conduct, and to not release any alien so imprisoned without permission from the Commissary General, a newly created administrative official in charge of prisoners of war and aliens.<sup>15</sup>

One British merchant named Lockington resided in Philadelphia at war’s outbreak, and he received a passport to Reading, Pennsylvania, more than forty miles from the tidewater. He removed to Reading, but shortly thereafter returned to Philadelphia. When he refused the order to return to Reading, declined to execute a parole, and otherwise gave cause to suspect his hostility to the United States, the Marshal for the District of Pennsylvania jailed him. Pennsylvania state courts twice heard Lockington’s petition for a writ of habeas corpus; each time, they admitted jurisdiction to hear his complaint, but denied Lockington relief on the merits and left him in jail.<sup>16</sup> Jailed one month, Lockington changed his mind, and, after signing a parole in April 1813, he went free. After the war, he sued the U.S. Marshal for unlawful arrest and imprisonment.

Associate Justice of the Supreme Court Bushrod Washington, sitting as Circuit Justice for the United States Circuit Court for the District of Pennsylvania, upheld the Marshal’s authority and actions under the Alien Enemy Act. Lockington contested the validity of the Act on three grounds: First, he argued the President had exceeded his authority under the Act; second, he challenged the authority of the Marshal to act for the President; and third, he argued that the Marshal could not detain him without a court order.

Justice Washington rejected the three arguments in turn. The “power of the president” under the law, he wrote, “appears to me to be as unlimited as the legislature could make it.” The

Department of State and the Marshals Service acted under delegation of authority and official power of the President. And finally, Justice Washington held that it would defeat the law’s purpose, “the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge,” if the Marshal in every case first must await judicial approval. Instead, “congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law,” and the judiciary was to base its decisions on the ordinances and rules the President would issue pursuant to the Act.<sup>17</sup>

Chief Justice John Marshall, sitting as Circuit Justice for the United States Circuit Court for the District of Virginia, ruled on the other recorded case, in December 1813. Thomas Williams challenged his confinement by the U.S. Marshal in Richmond, Virginia. Chief Justice Marshall reviewed the alien’s detention on a writ of habeas corpus, and the Court released Williams—because the U.S. Marshal for the District of Virginia had failed to specify where Williams was to remove to, and therefore gave Williams no chance to comply with the regulation and preserve his liberty, before putting Williams in jail.<sup>18</sup> Both Justices’ opinions confirmed the President’s power under the Act, its constitutionality, and the President’s freedom to act without prior court order.

### **III. World War I**

During the First World War, the United States detained about 6300 civilians of German, Austrian, Greek, Dutch, French, Belgian, and other nationalities, deporting almost one-third of them to Europe.<sup>19</sup> Aliens not detained were to register at the nearest post office. Regulations forbade them ownership of guns, radios, explosives, or residence within a half mile of military installations.<sup>20</sup>

President Woodrow Wilson invoked the Act to detain enemy aliens,<sup>21</sup> and Congress also passed new laws governing espionage and enemy property. In 1917, the Trading with the Enemy Act created a Custodian of Alien Property, who took custody of all property and valuable rights belonging to enemy aliens interned or disqualified for the duration of a war.<sup>22</sup> Through the years, this agency has become the Office of Foreign Assets Control (OFAC), in the Department of the Treasury.

Courts continued to enforce the Alien Enemy Act and to uphold the detention of enemy aliens during the First World War. They did so upon the same reasoning and precedents as the opinions of Chief Justice Marshall and his contemporaries.

### **IV. World War II and After**

President Franklin Roosevelt issued proclamations pursuant to the Alien Enemy Act for the restriction and detention of enemy aliens of the Axis powers. Federal regulations barred enemy aliens from areas of military value, and also denied aliens weapons, and surveillance or communications equipment. Alien enemies were not allowed to “undertake any air flight or ascend in to the air in any airplane, aircraft or balloon of any sort.” No enemy alien was permitted “to land in, enter, or leave the United States,” except as prescribed by regulation.<sup>23</sup>





- Are determined to assist in, or sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities designated in or under the Executive Order; or
- Are determined to be otherwise associated with certain individuals or entities designated in or under the Executive Order.<sup>39</sup>

The Alien Enemy Act empowers the President to restrict and detain aliens upon the President's proclamation of the triggering event.<sup>40</sup> After the September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks<sup>41</sup> declared a national emergency under the aforementioned statutes, the President in Executive Order 13224 also declared his finding that

grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR [United Nations Security Council Resolution] 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. . . .

These proclamations meet the requirement of the Alien Enemy Act that the President publicly proclaim the "invasion or predatory incursion perpetrated, attempted or threatened against the territory of the United States."<sup>42</sup> It remains for the President and his administration to promulgate and enforce rules or regulations implementing the Alien Enemy Act.

Invocation of the Alien Enemy Act enables the United States to defend against a particular class or subset of foreign terrorist, adherent, or sympathizer: Aliens who have entered the United States, and may not have been determined to be combatants (lawful or unlawful) in the present conflict, but who nonetheless may act or threaten to further the goals or operations of Al Qaeda and foreign terrorist organizations against the United States. The President, through his agencies and officers, may detain or otherwise restrict such aliens as enemies in this war.

In at least one instance, an alien in the United States was determined to be an Al Qaeda sympathizer or operative presenting a threat to the United States.<sup>43</sup> The United States detained him under invocation of general war powers rather than the Alien Enemy Act, and persisted on that basis through grant of Supreme Court review on certiorari to the Court of Appeals. The case became moot upon the alien's transfer to federal criminal prosecution and his guilty plea to charges of material support to terrorism.

Problems arise in this intermediate category of alien, when he has not been captured on a foreign battlefield, and some may not believe that he can be an outright combatant.<sup>44</sup> Similar problems arise when the determination of his belligerent status might depend on intelligence information or evidence neither advisable to disclose, nor sufficient to meet a criminal

trial standard of proof beyond a reasonable doubt.<sup>45</sup> Other questions of legal procedure concern whether there should be judicial versus administrative proceedings, and civilian versus military custody or trial of the alien's status.<sup>46</sup> Where a detainee is put to civilian trial in federal court, and were to be acquitted thereby, the government would still wish to prevent the detainee's return to the battle or, worse, his release into the general public.

Proper invocation and implementation of the Alien Enemy Act can provide a measured and appropriate response to these problems, short of military detention, federal criminal prosecution, or outright release. The Act gives the President full authority to set criteria for restricting or detaining the enemy alien. It also provides for civil judicial review, and the courts have long recognized the availability of habeas corpus to test the legality of an enemy alien's detention. In all cases, a suspected or threatening adherent to the enemy FTO need not automatically go free.

Secondarily, the Alien Enemy Act also provides an alternative approach for those detainees currently held in Guantanamo Bay after capture overseas. Should the Executive, the Congress, or the two political branches in combination, reach a policy decision, that particular detainees should not be treated as military combatants but as civilians, there would, under this Act, remain an alternative to the stark choices of prosecution in the federal justice system, or release. Transferred detainees brought within the United States would remain aliens. They would qualify as enemy aliens—no less than the Axis aliens detained in Latin America during World War Two—by their designation as adherents or agents of Al Qaeda or other designated terrorist organizations. Their presence in the United States, by whatever means they arrived here, merits their detention and security under the Alien Enemy Act.

Accordingly, there is utility and timeliness to the Alien Enemy Act of 1798, and the United States should not overlook this applicable law as it prosecutes the present war.

## Endnotes

1 *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946) ("Under no concept of government could a nation be held powerless to rid itself of enemies within its borders in time of war, whether the individuals concerned be actually hostile or merely potentially so because of their allegiance"). See also REST. 3D, FOREIGN RELATIONS LAW OF THE UNITED STATES (hereinafter REST. 3D) § 206 (1997 & Supp.).

2 GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 9-13 (1996); cf. REST. 3D §§ 432, 722(2).

3 GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 283 (4th ed. 1915) ("[C]itizens of one belligerent power in the territory of the other at the declaration of war may be required to depart, or may be permitted to remain, at the discretion of the state in whose territory they are resident").

4 *Id.* "If they give aid or information to the enemy, or to their own government, they become subject to the laws of war, and may be treated, according to the nature of their offence, as prisoners of war, or as traitors or spies, and may be punished accordingly." *Id.*

5 WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND \*358.

6 *Id.* at \*360-361; *De Lacey v. United States*, 249 F. 625, 626 (9th Cir. 1918) ("[T]here is nothing in the Constitution or laws of the United States which

in any way has changed the common law rule, or restricted the power of Congress to enact the alien enemy law.”) (quoting BLACKSTONE).

7 NEUMAN, *supra* note 2, at 58.

8 Alien Enemy Act of 1798, 1 Stat. 577 (July 6, 1798), *codified at* 50 U.S.C. §§ 21-24 (2006).

9 50 U.S.C. § 24.

10 *Id.* § 23.

11 Gerald L. Neuman & Charles F. Hobson, *Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 38, 39 (2005). Chief Justice Marshall’s opinion was apparently never reported officially, and we have Profs. Neuman and Hobson to thank for bringing it to light in this article.

12 *Id.*

13 Lockington v. Smith, 15 F. Cas. 758, 759 (C.C. Pa. 1817) (No. 8448); Neuman & Hobson, *supra* note 11, at 40.

14 Neuman & Hobson, *supra* note 11, at 40.

15 Lockington, 15 F. Cas. 758, 759.

16 Neuman & Hobson, *supra* note 11, at 40 & n.10.

17 Lockington, 15 F. Cas. 758, 760-761.

18 Neuman & Hobson, *supra* note 11, at 41-43.

19 Mitchel Yockelson, “The War Department: Keeper of Our Nation’s Enemy Aliens During World War I,” Presented to the Society for Military History Annual Meeting, April 1998, <http://net.lib.byu.edu/~rdh7/wwi/comment/yockel.htm> (accessed Apr. 25, 2008).

20 MICHELLE MALKIN, IN DEFENSE OF INTERNMENT 55 (2004).

21 See 40 Stat. 1651, 1716, 1730, and 1772 (presidential proclamations regarding enemy aliens).

22 Trading with the Enemy Act of 1917, 40 Stat. 411 (1917), *amended by* 50 App. U.S.C. §§ 1-44 (2006).

23 6 Fed. Reg. 6321 (Dec. 7, 1941) (Japan); *id.* at 6323 (Dec. 8, 1941) (Germany); *id.* at 6324 (Dec. 8, 1941) (Italy); 7 Fed. Reg. 5535 (July 17, 1942) (Hungary, Bulgaria & Romania).

President Roosevelt’s detention orders in World War II have been infamous for their overbreadth, reaching American citizens of Japanese descent in addition to actual aliens. This treatment of Japanese-Americans has been uniformly denounced. See, e.g., Adarand v. Peña, 515 U.S. 200, 214-16, 236 (1995); Pub. L. 100-383, § 2(a), 102 Stat. 903-904 (congressional apology and reparation payments). This essay in no way seeks to support or defend that act, rather this essay addresses solely the limited focus of actual aliens who are not citizens of the United States.

24 7 Fed. Reg. 55 (Jan. 3, 1942) (transferring Territory of Alaska from Attorney General’s to Secretary of War’s responsibility).

25 MALKIN, *supra* note 20, Appendix F and sources cited therein.

26 MALKIN, *supra* note 20, at 60-61. “Those deported included approximately 4,100 ethnic Germans, 2,300 ethnic Japanese, and 300 ethnic Italians.” *Id.*

27 E.g., United States *ex rel.* von Heymann v. Watkins, 159 F.2d 650, 652-53 (2d Cir. 1947) (upholding detention of German detained and handed over by Costa Rica, yet allowing alien “reasonable time” to depart U.S. on his own); United States *ex rel.* Steinvorth v. Watkins, 159 F.2d 50 (2d Cir. 1947) (reviewing transport of detainee from Costa Rica; releasing detainee when determined he was not a German citizen).

28 11 Fed. Reg. 4079 (Apr. 10, 1946) (Aliens transported to U.S. from W. Hemisphere states subject to detention and deportation).

29 50 U.S.C. §§ 1701-1706 (2006).

30 50 U.S.C. § 21 (2006) (emphasis added).

31 Public Law 107-40, 115 Stat. 224, *codified at* 50 U.S.C. § 1541 note (2006).

32 Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004); see also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 102 (2006) (“We are officially at war with Al-Qaeda by virtue of

the [AUMF].”).

33 Judge Posner agrees, that the AUMF “is tantamount to a declaration of war, though not against all terrorist groups, just against Al-Qaeda and its affiliates.” POSNER, *supra* note 32, at 72.

34 Little v. Barreme, 6 U.S. 170 (1804).

35 50 U.S.C. § 1801 (a)(4) (2006).

36 *Id.* § 1801(b)(1)(C), (b)(2).

37 United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (In a non-FISA case, court applied FISA definitions to find the defendant was an agent of Al Qaeda and Al Qaeda is a foreign power.); United States v. Rahman, 861 F. Supp. 247 (S.D.N.Y. 1994) (Al Qaeda defendants in 1993 World Trade Center bombing were agents of a foreign power under FISA), *aff’d*, 189 F.3d 88 (2d Cir. 1999).

38 U.S. Department of State, Office of the Coordinator for Counterterrorism, Fact Sheet (Washington, D.C. Dec. 20, 2002) (citing International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*; National Emergencies Act, 50 U.S.C. § 1622(d); Section 5 of the United Nations Participation Act (UNPA), *as amended*, 22 U.S.C. § 287c (2006); and 3 U.S.C. § 301 (2006)), *available at* <http://www.state.gov/s/ct/rls/other/des/122570.htm>.

39 Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

40 50 U.S.C. § 21.

41 Presidential Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001), *renewed on* Sept. 12, 2007. <http://frwebgate5.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=633678167263+0+2+0&WAISaction=retrieve>.

42 50 U.S.C. § 21.

43 Al Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *rev’d en banc on other grounds sub nom.* Al Marri v. Pucciarelli, 534 F.3d 214 (2008), *vacated and remanded with instructions to dismiss as moot sub nom.* Al Marri v. Spagone, 129 S. Ct. 1545 (2009). In its initial panel opinion, the Fourth Circuit Court of Appeals specifically excluded from its consideration the Alien Enemy Act, and noted that no parties to the case had argued for or against its application. 487 F.3d at 175 n.5. The en banc opinion left undisturbed this exclusion of the Alien Enemy Act from its analysis, and instead proceeded, on the basis of the case’s appellate posture, to assume the facts in the light most favorable to the Government’s determination that al-Marri was an unlawful enemy combatant. The en banc court remanded the case for consideration of procedural due process issues. The Supreme Court granted certiorari, 129 S. Ct. 680 (2008), then vacated the case upon al-Marri’s transfer from military custody and indictment in the U.S. District Court for the Northern District of Illinois. 129 S. Ct. 1545 (2009).

44 David B. Rivkin, Jr. & Lee A. Casey, *The War on Terror is Not a Crime*, WALL ST. J., April 25, 2008, *available at* [http://online.wsj.com/public/article\\_print/SB120908451409543573.html](http://online.wsj.com/public/article_print/SB120908451409543573.html); David B. Rivkin & Lee A. Casey, *The Gitmo Distraction*, WALL ST. J., July 9, 2007; see also POSNER, *supra* note 32, at 72-75 (discussing “crime” versus “war” dichotomy).

45 E.g., Patrick Radden Keefe, *Annals of Surveillance: State Secrets: A Government Misstep in a Wiretapping Case*, NEW YORKER, Apr. 28, 2008, *available at* [http://www.newyorker.com/reporting/2008/04/28/080428fa\\_fact\\_keefe?printable=true](http://www.newyorker.com/reporting/2008/04/28/080428fa_fact_keefe?printable=true); Julian E. Barnes, *Guantanamo Closure No Simple Prospect*, L.A. TIMES, Apr. 14, 2008, <http://articles.latimes.com/2008/apr/14/nation/na-gitmo14>.

46 Carrie Johnson & Walter Pincus, *Few Clear Wins in U.S. Anti-Terror Cases: Moving Early on Domestic Suspects Often Does Not Bring Convictions*, WASH. POST, Apr. 21, 2008, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/20/AR2008042002227.html>; Michael B. Mukasey, *Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions*, WALL ST. J., Aug. 22, 2007.

