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

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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 textbook published in the United States. 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. 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, U.S. and international law at the time allowed these arrests and detentions of persons with German connections without requiring any further proof of Nazi sympathies, much less subversive activities.

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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.

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 like the Nottebohms who had been deemed to present little or no security risks because it was beneficial for the United States and Latin American governments to do so for economic reasons. Thus, what started as a national security measure evolved into a program aimed at increasing U.S. economic influence in Latin America.

This article begins by telling 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. It 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 then 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 that have relevance for current U.S. policies regarding the arrest, detention and trial of suspected foreign terrorists.

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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. **Frederich Nottebohm’s Story**

Frederich Nottebohm was born in Hamburg, Germany on September 16, 1881 into a family of eight children. After spending two years in South Africa as a young man, he emigrated to Guatemala in 1905 at the age of 24. He joined his brothers, Arturo and Juan, in business in Guatemala City in a firm called Nottebohm Hermanos. Nottebohm Hermanos was a very successful firm engaged in commerce and banking and the ownership of several coffee plantations in Guatemala. In fact, by the 1930s, Nottebohm Hermanos was the second largest coffee producer in Guatemala. 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. Frederich became a partner in the firm in 1912 and later became head of the firm in 1937, upon the death of his brother, Arturo.

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) and seized all property of Nottebohm Hermanos.

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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 Frederich.

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

8 Nottebohm, 1955 I.C.J. at 13. Juan Nottebohm is also known as Johannes Nottebohm.

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


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, 1955 I.C.J. at 13. 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). 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) (1917).
in the United States. The United States government took this action because it believed that Nottebohm Hermanos was owned at least in part by German nationals, who were deemed to be enemy aliens. 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. Accordingly, the U.S. government released and returned the property to Nottebohm Hermanos pursuant to the settlement of the lawsuit brought following the war.

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. One of the other countries he visited during this time was Liechtenstein, where another brother, Dr. Hermann Nottebohm, had resided since 1931.

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

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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. 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.
19 See id.; see also Nottebohm, 1955 I.C.J. at 4, 8; Dr. Erwin Loewenfeld, Nationality and the Right of Protection in International Law, 42 TRANSACTIONS OF A GROTIIUS 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, CHICAGO DAILY TRIBUNE 3 (Dec. 27, 1945).
advantage of this law to become Guatemalan citizens, but because Frederich had been born in Germany, he remained ineligible for Guatemalan citizenship.

Perhaps sensing the coming of the war, in March of 1939, Frederich Nottebohm gave a power of attorney to the firm of Nottebohm Hermanos and left Guatemala for Hamburg, Germany. On September 1, 1939, while Frederich was traveling in Europe, World War II officially began with Germany’s invasion of Poland. The following month, Frederich traveled to Vaduz, Liechtenstein to visit his brother, Dr. Hermann Nottebohm, and to apply for Liechtenstein citizenship. Nottebohm’s citizenship application was quickly approved and on October 20, 1939, he received a certificate of naturalization as a Liechtenstein citizen. Under both German and Liechtenstein law, Nottebohm lost his German citizenship by virtue of becoming a citizen of Liechtenstein.

Nottebohm then made preparations to return to Guatemala, including having the Guatemalan Consul General in Switzerland enter a visa in his new Liechtenstein

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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); Dr. Erwin Loewenfeld, Nationality and the Right of Protection in International Public Law, 42 TRANSACTIONS OF THE GROTIUS SOCIETY, PROBLEMS OF PUBLIC & PRIVATE INT’L L.: TRANSACTIONS FOR YEAR 1956 5, 7 (1956).


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


27 See Loewenfeld, Nationality and the Right of Protection in International Law, supra note ___ at 12; Goldie, The Critical Date, supra note ___ at 1269.
passport. Upon his return to Guatemala in early 1939, Nottebohm informed the Guatemalan authorities there of his acquisition of Liechtenstein citizenship and asked that the Guatemalan register of foreign nationals be changed to reflect this fact. The Guatemalan authorities complied with this request on February 5, 1940. Frederich Nottebohm then resumed his business activities in Guatemala.

Meanwhile, the Allied powers were becoming concerned about the opening of a “fifth column” for Nazi Germany in Latin America fueled by Germans living in Latin America, but remaining sympathetic to Germany. The United States was particularly concerned 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 who did business with Germany. 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. 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.” On July 17, 1941, U.S. President Roosevelt issued a

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29 See Jones, The Nottebohm Case, supra, note __ at 232.
30 Nottebohm, 1955 I.C.J. at Annex No. 1 of Application to ICJ, p. 12; see also Jones, supra note __ at 232.
31 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, AMERICA’S INVISIBLE GULAG, supra note __ at 7-8.
33 82 Concerns Added to Trade Blacklist, NEW YORK TIMES 24 (Nov. 18, 1939).
34 Questions Nazi Purchase, NEW YORK TIMES 31 (May 11, 1941).
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 direction of, . . . or in collaboration with Germany or Italy or a national thereof.”

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.”

Following the Japanese attack on Pearl Harbor, the United States officially entered World War II in December 1941. Guatemala also entered the war against Germany on December 11, 1941. On December 8, 1941, President Roosevelt issued Executive Orders pursuant to the Alien Enemy Act (AEA), 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.

In 1942, the U.S. government added Frederich and his nephews and business partners, Karl-Heinz and Kurt Nottebohm, to the U.S. blacklist, along with several more Nottebohm family businesses, including the Nottebohm Banking Corporation. Much of the Nottebohms’ collective property located in the United States was later deemed to be

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37 Annex No. 1 of Application to ICJ, Annexes to Application (No. I) p. 13.
38 See id.; see also Dr. Erwin Loewenfeld, Nationality and the Right of Protection in International Law, 42 TRANSACTIONS OF A GROTIIUS SOCIETY, Problems of Public and Private Int’l L.: Transactions for the Year 1956 5, 7 (1956) (Guatemala entered war at end of 1941).
40 Presidential Proclamation No. 2526 (Dec. 8, 1941).
vested in the U.S. government, meaning that it could be held, used, administered, liquidated or sold for the benefit of the United States.\textsuperscript{43}

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 citizens.\textsuperscript{44} In January 1943, U.S. military police in Guatemala City took them into custody and removed them to the United States.\textsuperscript{45} 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.\textsuperscript{46}

Some months later, on October 19, 1943, the Guatemalan police requested that Frederich Nottebohm appear before the Director of Police.\textsuperscript{47} 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.\textsuperscript{48} Frederich protested that he was no longer a German citizen and showed the Guatemalan police his Liechtenstein passport.\textsuperscript{49} He was told that he would be deported regardless of his Liechtenstein nationality.\textsuperscript{50} The Swiss embassy, on

\textsuperscript{43} 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.

\textsuperscript{44} 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, CHICAGO DAILY TRIBUNE 3 (Dec. 27, 1945).

\textsuperscript{45} Carl Wiegman, A Citizen Seeks to Free His Son Interned by U.S., CHICAGO DAILY TRIBUNE 4 (Jan. 11, 1946).

\textsuperscript{46} See id.

\textsuperscript{47} See Jones, The Nottebohm Case, supra note __ at 232. Although this author uses 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, THE CRITICAL DATE, supra note __, at 1269; Loewenfeld, Nationality and the Right of Protection in International Law, supra note __ at 7.

\textsuperscript{48} See Jones, The Nottebohm Case, supra note __ at 232.

\textsuperscript{49} See id.

\textsuperscript{50} See id.
behalf of Liechtenstein, also protested his deportation to and detention in the United States, but to no avail.\textsuperscript{51}

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.\textsuperscript{52} He was interned at Camp Kenedy in Texas for approximately one year along with his nephews.\textsuperscript{53} In December 1943, all three of the Nottebohms at Camp Kenedy were given the opportunity to be repatriated to Germany, but refused repatriation because they preferred to return to Guatemala.\textsuperscript{54} 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

\textsuperscript{51} 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 Frederich 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 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.

\textsuperscript{52} See Jones, The Nottebohm Case, supra note ___ at 232.

\textsuperscript{53} See id. Interestingly, the Warrant from the U.S. Attorney General authorizing Frederich 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 November 13, 1943, Box 758, DOJ, RG 60, National Archives, College Park, MD (NA).

\textsuperscript{54} 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.
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.\textsuperscript{55}

Despite the board’s recommendations, Karl Nottebohm was not immediately released. In September 1944, the U.S. government closed Camp Kenedy.\textsuperscript{56} As a result, the Nottebohms were transferred to Fort Lincoln in North Dakota, where the Nottebohms remained until their release following the end of the war.\textsuperscript{57}

In 1944, while the Nottebohms were being detained in the United States, the government of Guatemala brought 57 sequestration hearings against Frederich Nottebohm as an enemy alien.\textsuperscript{58} On December 20, 1944, the Guatemalan Foreign Ministry cancelled his registration as a national of Liechtenstein.\textsuperscript{59}

World War II came to an end in May 1945.\textsuperscript{60} Karl-Heinz Nottebohm was released in December 1945 and allowed to return to Guatemala.\textsuperscript{61} The government of Guatemala also requested that the United States release Kurt Nottebohm.\textsuperscript{62} On January 10, 1946, U.S. District Court Judge Vogel ordered the U.S. government to release Kurt Nottebohm.\textsuperscript{63} The U.S. government complied, only to immediately charge Kurt

\begin{enumerate}
  \item 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).
  \item See German American Internee Coalition website: USDOJ Internment Facilities (stating that Camp Kenedy closed in September 1944).
  \item See Jones, The Nottebohm Case, supra note ___ at 233.
  \item Loewenfeld, Nationality and the Right of Protection in International Law, supra note ___ 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).
  \item Nottebohm, 1955 I.C.J. Rep. 4, 19
  \item 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).
  \item Banker Tells of U.S. Seizure in Guatemala, CHICAGO DAILY TRIBUNE 3 (Dec. 27, 1945).
  \item Carl Wiegman, A Citizen Seeks to Free His Son Interned by U.S., CHICAGO DAILY TRIBUNE 4 (Jan. 11, 1946).
  \item See id.
\end{enumerate}
Nottebohm with unlawful presence in the United States in violation of the immigration laws.\(^{64}\) 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.\(^{65}\) The government concluded that it had no credible evidence of Nazi sympathies or activities by Frederich 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 indicated that he was a member of the party or even a sympathizer of Hitler.”\(^{66}\) The 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.”\(^{67}\) For a variety of reasons, the U.S. government expressed “grave doubt” as to the authenticity of the letter.\(^{68}\) Accordingly, the U.S. government ultimately recommended and arranged for his release.

Frederich traveled to New Orleans and applied for permission to return to Guatemala. Guatemala refused to readmit him.\(^{69}\) Frederich appealed the Guatemalan Foreign Ministry’s decision to cancel his registration as a citizen of Liechtenstein, but

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\(^{64}\) 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.

\(^{65}\) 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.

\(^{66}\) 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.


\(^{68}\) See id. It was surmised that the fake letter was prepared to support the Guatemalan government’s decision to expropriate Frederich Nottebohm’s property.

\(^{69}\) Jones, *The Nottebohm Case*, supra note ___ at 233.
was unsuccessful.\textsuperscript{70} 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.\textsuperscript{71} 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 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.\textsuperscript{72}

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.\textsuperscript{73} In that lawsuit, the U.S. government asserted that Frederich and Arturo Nottebohm were not the only partners in Nottebohm Hermanos during WWI as claimed by the Nottebohm family. 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 U.S. government following World War I in an attempt to persuade the government to unblock

\begin{footnotes}
\item[70]See id.
\item[71]Goldie, \textit{The Critical Date, supra} note \_ 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.
\item[72]See Loewenfeld, \textit{supra} note \_ at 7.
\item[73]Nottebohm Hermanos v. McGrath, Complaint dated Apr. 4, 1950, Civ. Action No. 1509-50 (D.D.C.)
\end{footnotes}
property seized during that war. 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 which resulted in an agreement for the unblocking of 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. The Nottebohms were to receive an amount of money that represented approximately half the value of Nottebohm Hermanos’ property that had been seized. However, much of the property was not actually released until 1958.

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. 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. This decision was highly criticized by

74 Answer and Counterclaim in Civil Action No. 1509-50, Thomas Corcoran Papers, Box 505, Manuscript Division, Library of Congress, Washington, D.C.
75 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.
76 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 (Vaduz, 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).
77 Nottebohm, 1955 I.C.J. at 4, 12.
78 Nottebohm, 1955 I.C.J. at __. 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.
international scholars\textsuperscript{79} and its reasoning was later rejected by the International Law Commission in its Draft Articles on Diplomatic Protection.\textsuperscript{80}

Following the ICJ’s decision, the Guatemalan Congress voted on November 23, 1956 to expropriate all German property without compensation.\textsuperscript{81} 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.”\textsuperscript{82} As a result, Frederich Nottebohm was stripped of all of his property in Guatemala and received no compensation for his loss.\textsuperscript{83}

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 ever having a hearing at which he 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.\textsuperscript{84} The law did not...

\textsuperscript{79} See Goldie, The Critical Date, supra note __ at 1272; Jones, The Nottebohm Case, supra note __ at 231; Loewenfeld, Nationality and the Right of Protection in International Public Law, supra note __ at 5.


\textsuperscript{81} 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.

\textsuperscript{82} ‘End of War’ Act Aids Guatemala, NEW YORK TIMES (Nov. 25, 1956).

\textsuperscript{83} 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, NAZIS & GOOD NEIGHBORS, supra note __ at 187.

\textsuperscript{84} 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...
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 INS official involved in the program stated, “the war thrust us into the shameful position of locking people up for their beliefs.”

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. 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 danger of the particular alien’.

According to historian Max Friedman, “only a minority of the deportees conceivably warranted the label of “dangerous enemy alien”.” “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.” 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.

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85 Krammer, UNDUE PROCESS, supra note __ at 129 (quoting Jerre Mangione, INS camp inspector).
86 Friedman, NAZIS AND GOOD NEIGHBORS, supra note __, at 2; Fox, AMERICA’S INVISIBLE GULAG, supra note __ at 89. “The United States interned more persons from Guatemala than from any other republic except Peru.” Fox, The Deportation of Latin American Germans, supra note __ at 123. 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).
87 Friedman, NAZIS AND GOOD NEIGHBORS, supra note __ at 111.
88 Id. at 6.
89 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.
First 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. \textsuperscript{90} Second was the desire to build up a reserve of German internees who could be traded for American prisoners of war. \textsuperscript{91} And third was the desire to eliminate German commercial interests in Latin America to make room for U.S. business interests to move in after the war. \textsuperscript{92} 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] are helpless and foreigners are the real actors.”\textsuperscript{93} 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.\textsuperscript{94} 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. . . .

\textsuperscript{90} Stephen Fox, \textit{The Deportation of Latin American Germans, 1941-47: Fresh Legs for Mr. Monroe’s Doctrine}, 32 Y.B. GER.-AM. STUD. 17, 119 (1997) (“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.”).
\textsuperscript{91} Krammer, \textit{UNDUE PROCESS}, \textit{supra} note _ at 91.
\textsuperscript{92} \textit{Id.} at 92; \textit{see also} Fox, \textit{AMERICA’S INVISIBLE GULAG}, \textit{supra} note _ 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.”); \textit{see also} Fox, \textit{The Deportation of Latin American Germans}, \textit{supra} note __ 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.’”).
\textsuperscript{93} Friedman, \textit{NAZIS AND GOOD NEIGHBORS}, \textit{supra} note __ at 4.
\textsuperscript{94} \textit{See id.}
German competition was a security issue." 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. 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. Accordingly, the United States requested that Panama detain and intern enemy aliens within Panama. Roundups also took place in several other Latin American countries that week, including in Guatemala. 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.

The Roosevelt Administration perceived a possibility of Germans living in Latin America becoming a destabilizing force and presenting a “fifth column” for Nazi

\[\text{95 See id. at 4.}\]
\[\text{96 Id. at 105.}\]
\[\text{97 See id. at 108.}\]
\[\text{98 See id.}\]
\[\text{99 See id.}\]
\[\text{100 See id. Approximately 10% of Germans in Guatemala belonged to the Nazi party. See id. at 27.}\]
Germany.\footnote{See id. at 2, 52-55. See also Fox, AMERICA’S INVISIBLE GULAG, supra note __ at 8.} “[T]he Roosevelt administration assumed Hitler might use the Auslandsdeutsche (Germans living abroad) to pave the way for a German invasion of the Americas.”\footnote{Friedman, NAZIS AND GOOD NEIGHBORS, supra note __ at 45.}

U.S. Assistant Secretary of State Adolf Berle “was the main force behind the [Latin American] deportation program.”\footnote{See id. at 81.} He supported the program primarily because he viewed Germans in Latin America as an external threat to the United States.\footnote{See id.} 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.\footnote{“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, NAZIS AND GOOD NEIGHBORS, supra note __ at 119.}

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. . . Germans living in Latin America seemed to be the key to Nazi aspirations for dominating the region by military, political, or economic means. . . This view was the conventional wisdom in 1941.”\footnote{Friedman, NAZIS AND GOOD NEIGHBORS, supra note __ at 5; Krammer, UNDUE PROCESS, supra note __ at 36 (the FBI is “now considered by historians to have been notoriously irresponsible and biased at the time of WWII.”).} 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.”

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. The media depicted Latin Americans as “inferior and childlike, feminized and vulnerable.” Yellow journalism “contributed directly to the impressions held by policymakers in Washington.” 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 and to try to bring the United States into the war.

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

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 intern less than 1% of them. If Germans were dangerous by virtue of

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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.
108 Friedman, NAZIS AND GOOD NEIGHBORS, supra note __ at 48-49; Krammer, UNDUE PROCESS, supra note __ at 36.
109 Id. at 49.
110 Id. at 58; Krammer, UNDUE PROCESS, supra note __ at 89.
111 See id. at 3, 111, 120.  Krammer, UNDUE PROCESS, supra note __ at 173.
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. 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.”

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116 Krammer, UNDUE PROCESS, supra note __ at 91. Some obstacles to this plan, including a lack of ships for transportation, are described in Fox, The Deportation of Latin American Germans, supra note __ at 126-9.

117 Friedman, NAZIS AND GOOD NEIGHBORS, supra note __ 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.”\textsuperscript{118} 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.\textsuperscript{119}

This idea is supported by the fact that following the war, the United States was reluctant to return the German detainees to Latin America.\textsuperscript{120} Instead, some U.S. officials advocated for repatriation to Germany for the sake of ‘our long-range economic and political interests.’\textsuperscript{121}

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.\textsuperscript{122} 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.\textsuperscript{123}

The targeting of the Nottebohms for economic rather than political activities “vividly illustrates the way the deportation program had evolved during the war from an

\textsuperscript{118} Friedman, NAZIS AND GOOD NEIGHBORS, supra note __ at 4-5.
\textsuperscript{119} See id. at 4-5; See also Krammer, UNDUE PROCESS, supra note __ at 92, 152.
\textsuperscript{120} Fox, The Deportation of Latin American Germans, supra note __ at 130-4.
\textsuperscript{121} Id. at 131. See also Saito, Justice Held Hostage, supra note __ at 298 (discussing same phenomenon with respect to Japanese from Peru).
\textsuperscript{122} See id. at 132-3.
\textsuperscript{123} Friedman, NAZIS AND GOOD NEIGHBORS, supra note __, at 6.
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 backyard.’”¹²⁴ 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.”¹²⁵ He then concludes, 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.¹²⁶

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.”¹²⁷ The memorandum’s author, James Bell, further wrote that he did not

¹²⁴ Id. at 168.
¹²⁵ Id. at 221.
¹²⁶ See id.
¹²⁷ 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.
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.”\textsuperscript{128} Likewise, Kurt Nottebohm alleged in a petition for habeas corpus for release from 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.”\textsuperscript{129} 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.\textsuperscript{130} “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.\textsuperscript{131} The State Department was not in charge of the camps, however. That duty fell to the Department of Justice (DOJ).\textsuperscript{132}

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

\begin{itemize}
\item \textsuperscript{128} Id.
\item \textsuperscript{129} 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.
\item \textsuperscript{130} Friedman, NAZIS AND GOOD NEIGHBORS, supra note ___ at 156.
\item \textsuperscript{131} See id. at 157.
\item \textsuperscript{132} See id. at 158. See also Fox, AMERICA’S INVISIBLE GULAG, supra note ___ at 9.
\end{itemize}
(AECU). He opposed mass internment in principle, and with U.S. Attorney General Francis Biddle’s support, he tried to moderate the excesses of the program. “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 hearings, but those the State Department brought up from Latin America did not.”

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, somehow. . . 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.

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

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133 See Friedman, NAZIS AND GOOD NEIGHBORS, supra note _ 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).

134 See Friedman, NAZIS AND GOOD NEIGHBORS, supra note _ at 159; see also Fox, AMERICA’S INVISIBLE GULAG, supra note _ at 91, 131.

135 Friedman, NAZIS & GOOD NEIGHBORS, supra note _ at 160.

136 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).

137 Friedman, NAZIS & GOOD NEIGHBORS, supra note _ at 160.
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. 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 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.

The Alien Enemy Act was originally passed in 1798 and has changed little since then. 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. The purpose of the Act is to subject to Executive control all aliens, who, because of their nativity or feeling of allegiance, might

\footnotesize{139} Id.
\footnotesize{140} Ludecke v. Watkins, 335 U.S. 160, 162 (1948).
\footnotesize{141} 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.
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 Alien Enemy Control Unit (AECU), which was placed in the Department of Justice (DOJ). 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. To that end, civilian alien enemy review boards were created to examine the evidence against an alien enemy and determine his or her fate.

Accused alien enemies had no right to a hearing before the Board, 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. 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.

Accused persons had no right to counsel, but could bring a friend along as an advisor. By contrast, the government was represented by the United States Attorney

142 Fox, *The Deportation of Latin American Germans, supra note __ at 133.
144 Krammer, *UNDUE PROCESS, supra note __ at 45. See also Francis Biddle, IN BRIEF AUTHORITY 208 (1962).
145 Harris, *The Alien Enemy Hearing Board as a Judicial Device in the United States during World War II, supra note __ at 1362.
146 *Id.; Krammer, *UNDUE PROCESS, supra note __ at 45.
147 Harris, *The Alien Enemy Hearing Board as a Judicial Device in the United States during World War II, supra note __ at 1363.
148 *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, *UNDUE PROCESS, supra note __ at 47. See also Biddle, IN BRIEF AUTHORITY, supra note __ at 208. (“the alien could be represented by a
for that particular judicial district (or his designee), along with a special agent from the Federal Bureau of Investigation (FBI), and a representative from Immigration and Naturalization (INS).\textsuperscript{149}

The FBI conducted the investigation of the alien and presented its evidence to the Board.\textsuperscript{150} The alien would be questioned about the evidence and could submit affidavits in his or her behalf.\textsuperscript{151} 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.\textsuperscript{152}

The Board was empowered to recommend one of three outcomes: internment, parole, or release.\textsuperscript{153} 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.\textsuperscript{154} The U.S. District Attorney would also make his own independent recommendation.\textsuperscript{155} If the three recommendations were in agreement, the Attorney Generally normally concurred in their recommendations.\textsuperscript{156} If there was

\begin{flushright}
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} \textit{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); \textit{Ludecke}, 335 U.S. at 171, n. 17 (willingness to review whether a person is 14 years of age).
\textsuperscript{153} Harris, \textit{The Alien Enemy Hearing Board as a Judicial Device in the United States during World War II}, supra note __ at 1363; Krammer, \textit{UNDUE PROCESS}, supra note __ at 47.
\textsuperscript{154} Harris, \textit{The Alien Enemy Hearing Board as a Judicial Device in the United States during World War II}, supra note __ at 1363; \textit{see also} Krammer, \textit{UNDUE PROCESS}, supra note __ at 46.
\textsuperscript{155} Harris, \textit{The Alien Enemy Hearing Board as a Judicial Device in the United States during World War II}, supra note __ at 1363.
\textsuperscript{156} Id. at 1368.
\end{flushright}
disagreement, the Attorney General tended to side with the Board, which had actually observed the demeanor of the accused alien enemy.\textsuperscript{157}

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.\textsuperscript{158}

However, this scholar went on to describe the United States’ use of these review boards as a “feeble gesture.”\textsuperscript{159} 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.\textsuperscript{160} Accordingly, the boards were forced to create and apply their own rules, acting as both judge and jury.\textsuperscript{161}

The constitutionality of the Alien Enemy Act was challenged in a number of lawsuits, including a post-World War II suit that reached the U.S. Supreme Court.\textsuperscript{162} The plaintiff, Mr. Ludecke, had been born in Germany and had once been a member of the Nazi party.\textsuperscript{163} However, he later disagreed with the Nazis and was imprisoned in a German concentration camp.\textsuperscript{164} He escaped in 1934 and traveled to the United States, where he became a lawful permanent resident.\textsuperscript{165} His petition to become a U.S. citizen

\textsuperscript{157} Id.
\textsuperscript{158} Id. at 1369.
\textsuperscript{159} Id. at 1370.
\textsuperscript{160} Krammer, UNDUE PROCESS, supra note __ at 47.
\textsuperscript{161} Harris, The Alien Enemy Hearing Board as a Judicial Device in the United States during World War II, supra note __ at 1370.
\textsuperscript{162} Ludecke, 335 U.S. at 160.
\textsuperscript{163} Id. at 163.
\textsuperscript{164} Id.
\textsuperscript{165} Ludecke, 335 U.S. at 163, 173.
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. 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. 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.” Thus, the Court accepted a very narrow role for judicial review.

166 Id. at 163.
167 Id. at 163-64.
168 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.

169 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.
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.”\textsuperscript{170} The Court further noted that it is often impracticable to deport an alien enemy during active hostilities.\textsuperscript{171} 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.\textsuperscript{172} Interestingly, in \textit{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.\textsuperscript{173} 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.\textsuperscript{174} 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.\textsuperscript{175}

\textsuperscript{170} \textit{Ludecke}, 335 U.S. at 167.
\textsuperscript{171} Id. at 166.
\textsuperscript{172} 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.”)
\textsuperscript{173} Id. at 165.
\textsuperscript{174} 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.
\textsuperscript{175} Other attempts to challenge this assumption of disloyalty also were largely unsuccessful. \textit{See e.g.}, Minotto v. Bradley, 252 F. 600 (N.D. Ill. 1918).
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 declaring that the Act is not “offensive to some emanation of the Bill of Rights” including the due process clause. The Court stated that if war powers are abused, recourse should be sought in the political branches, not in court.

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. 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.” 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. As a general rule, U.S. courts have declared that the federal government has plenary power over immigration, in

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177 *Id.* at 172-73. *See also* U.S. v. Hack, 159 F.2d 552,554 (7th Cir. 1947) (affirming application of political question doctrine).
178 *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.).
179 *Id.* at 186-87 (Douglas, J., dissenting).
180 *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”).
part because of its connection to foreign affairs and national security issues. As a result, courts have given the political branches significant discretion when it comes to defining the due process rights of non-citizens.

In a case arising shortly after World War II, on the basis of undisclosed national security concerns, the United States denied admission to Ignatz Mezei, a former long-term lawful permanent resident of the United States who was returning from a trip abroad. Having been deemed a security risk by the United States, no other country would accept Mezei, 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.” 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.

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

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181 See, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889).
182 See, e.g., Ekiu v. United States, 142 U.S. 651 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893).
184 Mezei, 345 U.S. at 210.
185 See id. at 215.
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 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. 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. 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.

186 See Banker Tells of U.S. Seizure in Guatemala, CHICAGO DAILY TRIBUNE 3 (Dec. 27, 1945).
187 The Kiyemba case that is currently pending in U.S. federal courts 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. See Kiyemba v. Obama, Case No. 08-5424 (D.C. Cir. May 28, 2010). It remains to be seen whether the U.S. Supreme Court will take up the case once again.
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 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 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.  

This next section will describe the creation and execution of the program in light of 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.

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189See Saito, Justice Held Hostage, supra note ___ at 304-05.
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.\textsuperscript{190} 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 efforts with respect to police and judicial measures for the defense of society and the American States.\textsuperscript{191} 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.”\textsuperscript{192} 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.\textsuperscript{193}

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.\textsuperscript{194} 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.”\textsuperscript{195}

\textsuperscript{190} Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 7 (July 1943).
\textsuperscript{191} Second Meeting of the Ministers of Foreign Affairs of the American Republics, 35 Am. J. Int’l L. 1, 7 (Jan. 1941).
\textsuperscript{192} Id. at 11.
\textsuperscript{193} Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 7-8 (July 1943).
\textsuperscript{194} Id. at 8.
\textsuperscript{195} Id. at 8-9.
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.\footnote{Id. at 9. A summary description of the cooperation between the American Republics can be found in Fox, The Deportation of Latin American Germans, supra note \( \text{at} \) 124-6.} 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 and to appropriate recommend measures.\footnote{Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 9 (July 1943).} 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.\footnote{Id. at 10-11.} 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.”\footnote{Id. at 10.}

The CPD held its first meeting on April 15, 1942.\footnote{Id. at 24.} During the course of its work, it submitted twenty-one programs of action to the governments of the American

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  \item \footnote{Id. at 9. A summary description of the cooperation between the American Republics can be found in Fox, The Deportation of Latin American Germans, supra note \( \text{at} \) 124-6.}
  \item \footnote{Annual Report of the Inter-American Emergency Advisory Committee for Political Defense 9 (July 1943).}
  \item \footnote{Id. at 10-11.}
  \item \footnote{Id. at 10.}
  \item \footnote{Id. at 24.}
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Republics. 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. 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.” 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.

The CPD first recommended a system of registration and periodic reporting for all aliens as a method to help identify and control dangerous individuals. Violations of the program would be punishable by internment. 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.” Accordingly, the CPD adopted Resolution XX, which recommends internment of dangerous Axis nationals within the Hemisphere for the duration of the emergency. Pursuant to Resolution XX, internment could occur in well-guarded

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201 Id.
202 Id.
203 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.
204 Id. at 24.
205 Id. at 25. Shortly after 9/11/01, the U.S. government similarly implemented a new registration program for Muslims living in the United States. See Part V infra.
206 Id. at 26.
207 Id. at 28.
208 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.
detention camps in non-vital areas of the country where the arrest occurred.\footnote{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).}

Alternatively, some American Republics concluded bilateral agreements for the expulsion and transfers of dangerous Axis agents and nationals to other Republics for interment for the duration of the war.\footnote{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).}

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.\footnote{Resolution XX, supra note __, at ¶ 4.} 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 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.\footnote{212}

Interestingly, the CPD acknowledged in its Explanatory Statement about Resolution XX that these practices had already been followed by the American
Republics.\footnote{213} 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.”\footnote{214} 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 the detention of dangerous Axis agents to forestall any threats of mistreatment of Americans in Axis territory.\footnote{215}

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

\footnote{212} Id.
\footnote{214} Id.
\footnote{215} 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. See also Krammer, UNDUE PROCESS, supra note __ at 49.
German nationals and expropriation of the property of such persons. 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. Thus, they recommended measures limiting the ability to acquire citizenship and providing for the loss of citizenship.

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.

2. International Human Rights and Humanitarian Law Treaties

Most modern international human rights norms have developed in the period since 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

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217 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” at 4 (Nov. 3, 1942) Subject Files 1939–54, Box 180, Special War Problems Division, RG59, National Archives, College Park, MD.
218 See id. at 135.
all written after the war. Thus, there was little international human rights law that could be relied upon by the detainees during WWII.

The one possible exception was in the area of the laws of war, also known as international humanitarian law. While the modern-day Geneva Conventions III and IV of 1949 governing treatment of prisoners of war (POWs) and civilians respectively during armed hostilities did not yet exist, the Geneva Convention of 1929 relative to the treatment of prisoners of war did set forth some basic rules with respect to the treatment of POWs. And while there were no comparable treaties dealing with the alien enemy civilians interned in the territory of a belligerent nation, 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 force in the armed forces of the detaining Power. Article 61 provides for basic due process rights such as notice and opportunity to be heard. 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. Also of relevance here, article 75 of the 1929 Geneva Convention provides

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that POWs shall be repatriated as soon as possible after the conclusion of peace.\textsuperscript{224} 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, there were some customary rules of international humanitarian law that may have been applicable to this program during WWII. For example, at least one scholar 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.\textsuperscript{225} He further argues that these prohibitions were applicable to the arrests, detentions and deportations of Germans and Japanese from Latin America.\textsuperscript{226}

One problem with this 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 international humanitarian law tend to be concerned with persons in Occupied Territory, and neither Latin America nor the United States was Occupied Territory. Accordingly, some of the customary international humanitarian law rules may

\begin{itemize}
\item \textsuperscript{224} \textit{Id.} at art. 75.
\item \textsuperscript{225} \textit{See} Saito, \textit{Justice Held Hostage, supra} note \_ at 305-08.
\item \textsuperscript{226} 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. \textit{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.
\end{itemize}
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, it is certain that 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, however, 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 terrorism 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 were in the 1940s. As the Supreme Court stated in Hamdi v. Rumsfeld, the Executive Branch does not have a “blank check” even in wartime.227

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.228 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.229 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.230 That decision has since been highly criticized as being contrary to equal protection, including by the Supreme Court itself,231 and Korematsu’s conviction was ultimately vacated, along

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228 323 U.S. 214 (1944).
229 Id. at 217-18.
230 Id. at 218.
with the two other men convicted with him.\textsuperscript{232} 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\textsuperscript{233} and 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.”\textsuperscript{234} No such apology has been offered to any other ethnic groups detained during the war, such as the Germans from Latin America.\textsuperscript{235} This history indicates that the government would likely need a more compelling reason than nationality or ancestry to justify removing persons from their homes, families, communities and jobs and placing them in indefinite detention today.

\section*{2. Challenges to Arrest, Detention and Trial of Unlawful Enemy Combatants}

In the current war on terrorism, the government has relied on various statutory and presidential authority, such as the Authorization for Use of Military Force (AUMF),\textsuperscript{236} coupled with the President’s 2001 military order on the “Detention,

\begin{footnotesize}
\textsuperscript{235} 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”).
\end{footnotesize}
Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,\textsuperscript{237} the Military Commissions Act (MCA),\textsuperscript{238} the Detainee Treatment Act of 2005 (DTA),\textsuperscript{239} and, most recently, the Military Commissions Act of 2009,\textsuperscript{240} as the basis for its arrest, detention, and trial of suspected unlawful enemy combatants and other suspected terrorists. 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.

\textbf{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.\textsuperscript{241} 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 terrorism.\textsuperscript{242}

In \textit{Hamdi v. Rumsfeld},\textsuperscript{243} the U.S. Supreme Court rejected a challenge to the President’s authority to detain persons who fought against the United States in Afghanistan for the duration of the conflict in which they were captured as a

\textsuperscript{237} 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. \textit{See id.; see also Hamdan v. Rumsfeld}, 548 U.S. 557 (2006).
\textsuperscript{240} 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.
\textsuperscript{241} AUMF, \textit{supra} note \__.
\textsuperscript{242} 66 Fed. Reg. at 57833.
\textsuperscript{243} 542 U. S. 507 (2004).
“fundamental and accepted incident of war.” 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. U.S. authorities initially 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. 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, the Court stated that the detention may only last as long as hostilities. 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.

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. In Zadvydas, the Court invalidated a portion of the Immigration and Nationality Act that permitted the government to continue to

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244 Id. at 518.
245 See id. at 510.
246 See id.
248 After the court’s decision, the U.S. released Hamdi and allowed him to travel to Saudi Arabia in exchange for his renunciation of his U.S. citizenship.
detain an alien beyond the statutory 90-day removal period.\textsuperscript{250} The Court stated that such detention without any ending date would raise “serious constitutional problems” under 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.\textsuperscript{251} Thus, while the executive may detain persons deemed to be dangerous,\textsuperscript{252} 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 may be conducted by way of military commission or in federal court.\textsuperscript{253} 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.\textsuperscript{254} This section will first describe some of the legal issues that arose under the DTA of 2005 and then how the new MCA and 2010 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.\textsuperscript{255} The U.S. Secretary of Defense is charged with creating the procedures for the CSRTs. However, the DTA also provides

\textsuperscript{250} INA, § 241(a)(6).
\textsuperscript{251} Zadvydas, 533 U.S. at 682.
\textsuperscript{252} 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).
\textsuperscript{255} DTA, supra note __ at § 1005.
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 for the consideration of the probative value of any detainee’s statement that may have been obtained by coercion. The DTA further provides that no court shall have jurisdiction to hear an application 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.

The constitutionality of this statutory scheme was challenged in *Hamdan v. Rumsfeld*.

In that case, a Yemeni national who was alleged to be Osama Bin Laden’s chauffer 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 charged with one count of conspiracy to commit offenses triable by military commission a year after that in mid-2004.

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. The Court upheld the President’s power to establish military commissions under both U.S. law and the laws of war. However, the Court held that

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256 *Id.*
257 *Id.*
259 *See id.* at 566.
260 *See id.* at 567.
261 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.
the President’s power to convene such commissions is limited by the U.S. Constitution, U.S. statutes such as the UCMJ, and the international law of war.  

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. More specifically, the Court held that common Article 3 of the Geneva Conventions was applicable and that the military commission was not a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” as required by that article. 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 2/3 vote will suffice both for a guilty verdict and a sentence (other than the death sentence).  

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.  

There, the U.S. Supreme Court struck down portions of the Act because it unconstitutionally suspended the writ of habeas corpus. In addition, the Court noted several procedural deficiencies with CRSTs in that case, including that: (1) detainees are assigned a “personal representative” who is not the detainee’s lawyer or

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262 See id. at 597-612.
263 See id. at 567.
264 See id. at 630-32.
265 Id. at 613-15, 634-35
267 Id. at 2240.
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.\footnote{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 at 266.}

These recent detainee cases are remarkable in that the Supreme Court was willing to provide accused alien 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 is threatened.\footnote{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).}

Congress responded to the Boumediene decision by enacting the Military Commissions Act of 2009, and 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 combatant.”\footnote{MMC, supra, note __ at RMC 201 & 202.} It also is deemed to be a tribunal competent to determine whether a person is an alien privileged or unprivileged enemy combatant within the meaning of.
Article V of Geneva Convention IV.\textsuperscript{271} Thus, it is likely that several trials of persons arrested and detained by the United States in the war on terrorism will now be conducted pursuant to these rules. The new MMC appears to correct many, if not all, of the procedural deficiencies noted by the Supreme Court thus far.\textsuperscript{272} For example, Rule 505 of the MMC provides that a defendant has a right to see evidence used against him,\textsuperscript{273} correcting one such procedural deficiency. The new MMC also provides for the right to counsel, as explained in more detail below.

\textsuperscript{271} See id. at 202.

\textsuperscript{272} Of course, the Court can only act with respect to detainees who come before it. Recent press reports reveal that the U.S. government surreptitiously removed persons from Guantanamo Bay to avoid the jurisdiction of the courts. See Adam Goldman and Matt Apuzzo, \textit{Guantanamo prisoners moved earlier than disclosed}, \textsc{The Washington Post} (Aug. 7, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/08/06/AR2010080605828.html?wpisrc=nl_cuzhead.

\textsuperscript{273} 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. The Sixth Amendment was held to apply to the states through the Fourteenth Amendment in *Gideon v. Wainwright*. Despite the prior lack of recognition of *de jure* protection, it was fairly common practice for states to provide counsel on request to indigent defendants who were charged with capital and serious non-capital offenses by 1942. Later, the Supreme Court held 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. By contrast, it is widely recognized that no concurrent right to counsel exists for parties to civil actions.

In the context of immigration law, once an alien is in the United States, the Fourteenth Amendment protects the alien as a “person” against deprivation of life, liberty, or property without due process of law. However, an alien's right to due process in immigration proceedings is only that process which Congress has determined is due. Aliens have a statutory right to counsel under the Immigration and Nationality

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279 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.”).
Act (INA), but at their own expense. 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 Fifth Amendment procedural due process
right to counsel. 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.

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*, an American citizen accused of being an “enemy combatant” was initially
not allowed to see a lawyer at all, but was later permitted to see a lawyer only in the
presence of U.S. military observers. After Hamdi’s father filed a lawsuit on his behalf,
the U.S. District Court appointed a public defender to represent him. 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.

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. 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.\textsuperscript{289}

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 for a right to counsel at government expense.\textsuperscript{290} Thus, the United States is now providing all detainees with free counsel if the detainee so chooses.

\textbf{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.\textsuperscript{291} U.S. law also includes rules of customary international law.\textsuperscript{292} 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 III\textsuperscript{293} or IV\textsuperscript{294} respectively.\textsuperscript{295} President Bush made this decision without first convening a competent

\textsuperscript{289} \textit{Id.} at 2260.
\textsuperscript{290} \textit{See} MMC, \textit{supra} note \_ at RMC 506.
\textsuperscript{291} U.S. Const. art. VI.
\textsuperscript{292} \textit{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. ”)
\textsuperscript{293} Geneva Convention Relative to the Treatment of Prisoners of War, art 4, August 12, 1949, 6 U.S.T. 3317 [hereinafter Geneva Convention III].
\textsuperscript{294} 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].
tribunal to determine the status of the detainees as required by Article 5 of Geneva
Convention III. Such tribunals have since been established by statute and their work is
ongoing.

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.” In both Hamdan and
Boudemiene, the U.S. Supreme Court determined that, at a minimum, common article 3
of the Geneva Conventions is applicable to the detainees. 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. The next section discusses relevant
international law principles.

1. Indefinite Detention and Trial

Both the Geneva Convention III (POWs) 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.” Even if a person is
not a POW or a “protected person” within the meaning of Geneva Convention IV entitled
to invoke the full protections of the treaty, Article 5 of that Convention still guarantees

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296 Geneva Convention III, supra note __, at art. V.
297 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
298 White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” ¶ 3 (Feb. 7,
299 Hamdan, 548 U.S. at 629.
300 Geneva Convention III, at art. 21.
301 Geneva Convention IV, at art. 42.
civilians a certain minimum level of protection, including a right to a fair and regular trial:

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.302

In addition, Geneva Convention IV states that: “Protected persons accused of offenses shall be detained in the occupied country, and if convicted, they shall serve their sentences therein.”303 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 3 also only permits detention as long as hostilities continue.304 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

303 Id. at art. 76.
304 See, e.g., Geneva Convention III, art. 118 (“Prisoners of war shall be released and repatriated without delay upon the cessation of hostilities.”).
have ceased to exist.” 305 Additionally, any internment or imprisonment of civilians must be proportionate to the offense committed. 306 Indefinite detention is thus not permitted by international humanitarian law. However, in the current war on terrorism, 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.” 307 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.” 308 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. 309 Further, accused persons shall be notified of the charges against them and brought to trial promptly. 310 They also have the right to present evidence, call witnesses, and be represented by counsel. 311 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. 312
International humanitarian law as reflected in the Geneva Conventions is supplemented by international human rights law.\textsuperscript{313} 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 of the law without discrimination on the basis of race or national origin.\textsuperscript{314} 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.\textsuperscript{315}

Articles 2 and 3 of the International Covenant on Civil and Political Rights (ICCPR) likewise guarantee equality before the law without discrimination.\textsuperscript{316} 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.\textsuperscript{317} 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.\textsuperscript{318} 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.\textsuperscript{319}

\textsuperscript{315} Id. at art. 9, 10.
\textsuperscript{316} ICCPR at art. 2 and 3, 999 U.N.T.S. 171 (1966). The U.S. is a party to the ICCPR.
\textsuperscript{317} Id. at art. 9.
\textsuperscript{318} Id. at art. 14.
\textsuperscript{319} Id. at art. 14(5).
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 documents such as the Universal Declaration on Human Rights. 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.320

If the United States decides to continue to use some form of tribunals rather than U.S. courts to try detainees in the war on terrorism, these international standards must inform the development of procedures for those tribunals. As of this writing, the United States has initiated proceedings against a handful of the 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. As an alternative, the Obama Administration is reportedly considering transferring some of the detainees from Guantanamo to the continental United States to be prosecuted in federal criminal courts, but no final decisions have been made as yet.321 Assuming normal evidentiary rules are followed, such criminal trials should be fully compliant with the due process requirements of international human rights law.

320 See, e.g., Universal Declaration, supra note __ at art. 29; ICCPR, supra note __, art. 4.
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.”322 “Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel.”323 If the charges are sufficiently serious, the Occupying Power may be required to provide counsel to the accused.324

Article 14(3) of the ICCPR specifically addresses the right to counsel in criminal proceedings.325 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. If the defendant cannot pay, the defendant has a right to have legal assistance assigned to him if the interest of justice so requires.

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.326 The United States unsuccessfully sponsored a proposal that would have granted a right to counsel in cases involving fundamental human rights.327 Regardless, in 1984, the Human Rights Committee (HRC), the interpretive body of the ICCPR, issued

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322 Geneva Convention IV, supra note __, at art. 72.
323 Id. (emphasis added).
324 Id.
325 ICCPR, supra note __ at art. 14.
327 Id.
General Comment No. 13 stating that Article 14 applies to civil as well as criminal proceedings.\textsuperscript{328}

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.\textsuperscript{329} 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.\textsuperscript{330}

Thus, while there is no universally recognized right to counsel in all proceedings, 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 since WWII. 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. \textbf{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

\textsuperscript{328} \textit{Id.; see also} Human Rights Committee, General Comment No. 13 (1984), available at http://www.unhchr.ch/tbs/doc.nsl/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument. 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. \textit{See} Davis, \textit{In the Interests of Justice, supra} note __, at __. 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. \textit{See id.}


\textsuperscript{330} 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), \textit{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. \textit{See} Buergenthal, \textit{supra} note __ at 262.
ghosts of World War II have been exorcised. Some of these parallels include problems caused by a lack of good intelligence, the creation of special alien registration programs, claims that new threats necessitated the adoption of new laws and that alien enemies should not benefit from the protection of the law, indefinite detentions, and hearings outside regular Article III courts with limited due process rights. These recurrent themes demonstrate that 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 that have relevance for current U.S. policies regarding suspected “unlawful enemy combatants” today.

A. Problems With Lack of Good Intelligence

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.331 U.S. military officers shunned posts in Latin America “because such backwater postings were ‘prejudicial to their promotion’.”332 Thus, the persons who could not avoid being assigned there tended to be less competent and less experienced.333

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.334 Historian Max Friedman asserts: “The FBI, directly responsible for

331 Friedman, NAZIS AND GOOD NEIGHBORS, supra note __, at 59.
332 Id. at 60.
333 See id. at 60-62.
334 See id. at 62.
identifying suspects for deportation and internment, was home to some of the most poorly informed U.S. officials working in Latin America.”

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

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.

By 1943, the U.S. Justice Department was expressing 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.

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. The U.S. often paid informants to denounce local Nazis to the U.S. consulate. 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.” Persons with grudges often

335 Id. at 64.
336 Id. at 66.
337 Id.
338 Fox, AMERICA’S INVISIBLE GULAG, supra note __, at 131.
339 Friedman, NAZIS AND GOOD NEIGHBORS, supra note __, at 67.
340 Id. at 68.
341 Id.
turned in one another for reasons unrelated to national security; for example, landlord
tenant disputes or disgruntled former lovers.\textsuperscript{342}

All of these same problems have been identified in Afghanistan and elsewhere in
the Middle East in the current war on terrorism. 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.”\textsuperscript{343} 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.\textsuperscript{344} Many persons in Afghanistan used this
offer as an opportunity to settle tribal grudges and get rid of rivals.\textsuperscript{345} Studies show that
93\% of the detainees held at Guantanamo Bay were not captured by U.S. forces.\textsuperscript{346} 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.”\textsuperscript{347} As of 2009, three-quarters of the 774 prisoners sent to Guantanamo

\textsuperscript{342} See Max Paul Friedman, \textit{Trading Civil Liberties for National Security: Warnings from a World War II

\textsuperscript{343} Martin Evans, \textit{U.S. military chief brands Afghan intelligence mission ‘clueless’}, TELEGRAPH (Jan. 5,

\textsuperscript{344} 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
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
murders and terrorists.”).

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),

\textsuperscript{346} See Denbeaux, \textit{supra} note ___ at 14.

\textsuperscript{347} Cooper, Chris, \textit{Detention Plan in Guantamano}, The Wall Street Journal (Jan. 26, 2005), available at
http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-
have been released.\textsuperscript{348} The U.S. government also has repeatedly stated that it does not have sufficient persons 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.\textsuperscript{349}

\section*{B. Creation of Alien Registration Programs}

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.\textsuperscript{350} 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 which set forth recommended minimum standards for any such program.\textsuperscript{351}

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

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\item[\textsuperscript{348}] See Andy Worthington, \textit{THE GUANTANAMO FILES} 178 (2007).
\item[\textsuperscript{349}] See, e.g., Andy Worthington, \textit{THE GUANTANAMO FILES} 129-30 (2007).
\item[\textsuperscript{350}] Annual Report of the Inter-American Emergency Advisory Committee for Political Defense, Appendix at 55 (1943).
\item[\textsuperscript{351}] \textit{Id.} at 56.
\end{itemize}
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in the United States. The U.S. Justice Department selected more than 50,000 young immigrant men for interviews, virtually all of whom were Arabs or Muslims.\textsuperscript{352} 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.\textsuperscript{353} It also applied similar requirements to all male nonimmigrants over the age of 16 who were already living in the United States.\textsuperscript{354} Once again, virtually all of the targeted countries of nationality were Arab or Muslim.\textsuperscript{355} These programs are essentially a form of racial profiling which has been criticized as an ineffective law enforcement tool\textsuperscript{356} and has been limited due to concerns that it may violate the Fourth Amendment’s prohibition on unreasonable searches and seizures and the Fourteenth Amendment’s guarantee of equal protection of the laws.\textsuperscript{357}

C. Claims of Inadequacy or Inapplicability of Laws

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

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\item[352] David Cole, ENEMY ALIENS 49 (2003).
\item[353] Id. at 50.
\item[354] Id.
\item[355] Id.
\item[356] Friedman, Trading Civil Liberties for National Security, supra note __, at 302.
\end{footnotes
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.\textsuperscript{358}

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. It has 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."\textsuperscript{359} He also states that "we face 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."\textsuperscript{360} 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.”\textsuperscript{361} 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

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\item 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).
\end{itemize}
}
us to think and act differently.”  He then describes the new law enforcement tools created by the Patriot Act, many of which have been criticized as improperly infringing on individual liberties.

In addition, the United States argued both then and now that since its enemies 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:

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

Yet, one paragraph later, the Committee recommended 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. This recommendation was not made for purely humanitarian reasons, however. The Committee wanted to follow the Convention

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366 Id. at 78. The Committee recognized that the Convention was not strictly applicable because it referred only to prisoners of war and not civilians.
to try to ensure reciprocal treatment for American citizens held in Axis-dominated territory.367

D. Indefinite Detention

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.”368 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.”369 The problem in both cases, however, is that many of the persons arrested and detained were not enemy combatants and had no intention of fighting on the battlefield.370 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 terrorism, no end to the hostilities is in

367 Id.
370 See Fox, AMERICA’S INVISIBLE GULAG, supra note __ at 106 (“Secretary of State James Byrnes had admitted in 1945 that deportation mistakes were made in Latin America.”).
sight, leading to the specter of indefinite detention. Lengthy detentions have brought demands for hearings to determine whether the proper persons were being detained.

E. Hearings By Non-Article III Courts With Limited Due Process Rights

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 terrorism. 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, however, only a few such trials have actually begun because of the multiplicity of legal challenges to the lack of procedural protections afforded the defendants in the proposed military tribunals.

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.”371 Because the fight against terrorism may be indefinite, the Court has held that detainees are entitled to some measure of due process.372 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 terrorism.373

371 Id. at 536. Hamdi was a U.S. citizen.
372 See id. at 533.
373 See id.
As noted above, the United States’ use of military commissions was challenged in *Hamdan v. Rumsfeld*,\(^{374}\) 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.”\(^{375}\) However, the Supreme Court found several major procedural deficiencies with the military commission procedures, leading the court to stop their use until those deficiencies are addressed. The Supreme Court again considered challenges to the use of military commissions to determine combatant status in *Boumediene v. Bush*.\(^{376}\) Here, too, the Court noted several deficiencies in the procedures to be used by the CRSTs.\(^{377}\) It appears that following these cases, the U.S. government has corrected many, if not all, of these procedural deficiencies through the new MMC, so it may be that the military commissions now 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 described above, criticisms continue to be leveled at the United States for its detention of unlawful enemy combatants or suspected terrorists today. 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


\(^{375}\) *Id.*, citing Quirin.

\(^{376}\) 128 S.Ct. 2229 (2008).

\(^{377}\) *Id.* at 2260.
recently stated in *Hamdi*: “History and common sense teach us that an unchecked system of detention carries with it the potential to become a means for oppression and abuse of others who do not present that sort of [immediate national security] threat.” The U.S. government must do 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. 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. 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.

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.

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

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376 *Hamdi*, 542 U.S. at 530.  
380 *Id.* at 4-5.  
381 *Id.* at 7.  
382 *Id.*  
383 *Id.* at 8-9
failure to abide by the rule of law and respect human rights.\textsuperscript{384} This loss of reputation has in turn undermined the United States’ ability to carry out its agenda on an international scale, whether that is fighting terrorism, state building or combating the drug trade.\textsuperscript{385} In the international fight against terrorism, where the terrorists operate in multiple countries, such international contributions and cooperation are essential.\textsuperscript{386} 

Third, treating noncitizens as having fewer rights often is a critical factor in the later regretted pattern of government overreaction in times of crises.\textsuperscript{387} And fourth, Cole argues that trading foreigners’ rights for citizens’ security is constitutionally and morally wrong.\textsuperscript{388} 

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.\textsuperscript{389} By contrast, both citizens and noncitizens have been accused of being enemy combatants in the last

\textsuperscript{384} See Fox, Trading Civil Liberties for National Security, supra note \_\_ 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.”")


\textsuperscript{386} McDonnell, THE UNITED STATES, INTERNATIONAL LAW AND THE STRUGGLE AGAINST TERRORISM, supra note \_\_ at 178 (“Al Qaeda reportedly has cells in over 100 countries. To gather intelligence on such a diffused enemy requires cooperation from many countries.”)

\textsuperscript{387} Cole, ENEMY ALIENS, supra note \_\_ 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.

\textsuperscript{388} Id. at 7.

\textsuperscript{389} See id. at chapters 7 & 8; see also Krammer, UNDUE PROCESS, supra note \_\_ at 173.
five 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 terrorism 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 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 not to be particularly dangerous.\textsuperscript{390}

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.\textsuperscript{391} If determined to be a threat, or if necessary to hold the person to prevent return to the battlefield, international law creates a presumption in favor of detention in occupied territory or a location closer to the person’s home.

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 terrorism, the Supreme Court has been

\textsuperscript{390} See Fox, \textit{Trading Civil Liberties for National Security}, \textit{supra} note ___ at 303.

\textsuperscript{391} Geneva Convention III, \textit{supra} note ___, at art. 5.
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.  He suggests that to correct the problem, we treat citizens and noncitizens equally with respect to basic constitutional rights such as due process, equal protection, and the First Amendment freedoms of religion, speech and association. 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.” As the comparison between the U.S.-Latin American Detention Program and the current war on terrorism 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.

**Conclusion**

Frederich Nottebohm was the victim of government overreaction during a time of threats to national security and of economic greed. Many actions were taken against persons such as Nottebohm believed to be enemy aliens during WWII over which the United States now expresses serious regret. While perhaps technically legal at the time,  

392 Cole, ENEMY ALIENS, supra note __ at 229.  
393 Id. at 233.  
394 Saito, Justice Held Hostage, supra note __ at 297.
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.