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Hon. Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy:

Thank you for allowing me to testify before the Committee at its February 29, 2012, hearing on "The Due Process Guarantee Act: Banning Indefinite Detention of Americans." Below, please find my answers to the Questions for the Record submitted by Senators Klobuchar and Coons.

I hope you will let me know if there is anything else I can do to assist the Committee with its work.

Sincerely,

Lorraine K. Bannai
Professor of Legal Skills and
Director, Fred T. Korematsu Center
for Law and Equality

Due Process Guarantee Act: Banning Indefinite Detention of Americans
Senate Judiciary Committee

February 29, 2012

QUESTIONS FOR THE RECORD FOR LORRAINE K. BANNAI

From Senator Amy Klobuchar

In your testimony, you discuss the importance of Congressional oversight of the Executive branch, citing the internment of Japanese Americans during World War Two as an example in which appropriate actions by Congress were absent. In the context of military detentions and related policies, do you have recommendations as to the nature and parameters of Congressional oversight that should be implemented?

Answer:

After President Franklin Delano Roosevelt issued Executive Order 9066, authorizing the War Department to issue orders controlling the Japanese population on the West Coast, Congress passed Public Law 503, which made violation of any military order issued pursuant to Executive Order 9066 a federal crime.¹ In enacting this statute, however, Congress failed in two important respects:

First, it failed to scrutinize the justification for the Executive Order. As has been established by both the Congressional Commission on Wartime Internment of Civilians² and the *coram nobis* cases of Fred Korematsu and Gordon Hirabayashi³, there was no military necessity for the wartime incarceration of Japanese Americans. While some would doubt whether Congress during World War II would have been inclined to question Executive Order 9066 and the military orders issued pursuant to it, one should hope that Congress would serve as a check on exercises of Executive and military power that are excessive. There was no opposition or debate in Congress regarding Public Law 503. At the very least, Congress should inquire into whether there is a sufficient basis to justify Executive action.

Second, in authorizing the military to take adverse action against civilians during World War II, both Congress and the Executive failed to specify the type of conduct that would be criminalized. Congress did not identify acts subject to punishment; it left that determination up to the discretion of military authorities.⁴ In fact, the conduct criminalized was to be

¹ Pub. L. No. 77-503, 56 Stat. 173 (1942).

² U.S. Comm'n on Wartime Relocation and Internment of Civilians, Congress of 1980, Report: *Personal Justice Denied*, at 18 (The Civil Liberties Public Education Fund & University of Washington Press, 1997) (1982).

³ *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

⁴ Public Law 503 simply stated that "whoever shall enter, remain in, leave, or commit any act in any military area . . . contrary to the restrictions applicable to any such area . . . shall . . . be guilty . . . "

specified in not-yet-issued military orders. On March 14, 1942, during Congressional discussion of Public Law 503, Senator Robert Taft of Ohio criticized the bill for its vagueness:

I think this is probably the "sloppiest" criminal law I have ever read or seen anywhere. . . I do not want to object, because the purpose of it is understood. . . . I have no doubt [this] act . . . would be enforced in war time. I have no doubt that in peacetime no man could ever be convicted under it, because the court would find that it is so indefinite and so uncertain that it could not be enforced under the Constitution.⁵

Thus, Congress should ensure that there be no detention of any individual without a clear, constitutionally sufficient statement as to the proscribed conduct that would justify such detention.

From Senator Christopher A. Coons

1. Thank you for your testimony and important historical perspective on this critical issue. Given your experience in the *Korematsu* case, I am interested in your thoughts on Attorney General Holder's recent statement, which defended the view that the administration has the legal authority to conduct targeted killings of Americans abroad, under certain circumstances:

"Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The Fifth Amendment guarantees all United States citizens against loss of life or liberty without "due process *of law*" (emphasis added). Do you agree that the Fifth Amendment permits the targeted killing of Americans abroad without any judicial process?

Answer:

No. Though I am not an authority on Constitutional Law, the United States Supreme Court has made clear that Americans detained abroad are possessed of fundamental due process rights. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

Given that an American citizen detained abroad is entitled to due process in challenging the validity of his or her detention, it only stands to reason that the same process, or greater process, should be ensured prior to the taking of his or her life.

⁵ Congressional Record, March 19, 1942, p. 2726.

I would say that due process is the same as judicial process. The issue of whether an American abroad can be killed would seem to turn on a few key questions: first, whether the American poses a direct threat and what a direct threat is, and, second, who makes that determination. In his remarks, Attorney General Holder spoke to the authority of the United States to use lethal force to "target" U.S. citizens "at least" in circumstances in which (1) the citizen is a senior operational leader of Al-Qaeda or associated forces; (2) he or she is actively engaged in planning to kill Americans and poses an imminent threat of violent attack on the United States; (3) capture is not feasible; and (4) the operation is conducted in a manner consistent with the law of war. The question is not solely whether these are good criteria; the question is who decides whether the criteria is satisfied. I find it a frightening proposition that military authorities or the Executive would themselves, without judicial intervention, determine, for example, who is a "leader" of a force associated with an enemy; whether the citizen was involved in "active planning" or posed an "imminent threat"; and whether capture is "feasible" or not.

During World War II, the President issued a blank check to the military to decide who should be subject to removal and detention to protect the national security, and, pursuant to that authority, the military removed over 110,000 persons of Japanese ancestry from the West Coast and incarcerated them. We now know that the Executive and military judgments were wrong. The courts are the guardians of our constitutional rights, and they, not the Executive or military, decide when an immediate, real, and lethal threat can only be averted by a curtailment of those rights.⁶

2. What do you see as the problem, if any, with relying upon regulation, military discretion, or civilian executive discretion in determining the proper scope of fundamental rights as United States citizens?

Answer:

The courts decide the scope of the rights guaranteed United States citizens under the Constitution. Neither the military, the Executive, nor Congress can define or determine the scope of those rights, although the Executive and Congress can take action to ensure that those rights are protected (as the current bill introduced by Senator Feinstein seeks to do).

To allow the military or the Executive to define the scope of constitutional rights invites them to trammel on those rights. Their actions must always be subject to judicial review to ensure that constitutional guarantees are adequately protected.

⁶ It should be noted that Mitsuye Endo did file a petition for writ of habeas corpus to challenge her incarceration during World War II; thus, she had access to the courts to seek review of her detention. However, her petition was not granted until 2-1/2 years after the initial orders removing Japanese Americans from the West Coast. *Ex Parte Endo*, 323 U.S. 283 (1944). Thus, it cannot be said that the writ provided her or other Japanese Americans an effective, speedy means of seeking judicial review of their unjust detention.