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**HEARING ON
“PAST AND PRESENT: SAFEGUARDING AMERICAN CIVIL LIBERTIES “**

**BEFORE THE HONORABLE MICHAEL M. HONDA
MEMBER OF CONGRESS**

MAY 21, 2003

Introduction

Congressman Honda, thank you for convening this important hearing and for inviting us to testify today. My name is Cory Smith and I am the Legislative Counsel for the Lawyers Committee for Human Rights. The Lawyers Committee for Human Rights has worked in the U.S. and abroad for a quarter century to create a secure and humane world by advancing justice, human dignity, and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; promote fair economic practices by creating safeguards for workers' rights; and help build a strong international system of justice and accountability for the worst human rights crimes. In the aftermath of the horrific attacks of September 11th the Lawyers Committee has sought to ensure that human rights are protected in U.S. laws and policies relating to counter-terrorism and national security. As part of this work, we have published two reports, *A Year of Loss* and *Imbalance of Powers*, which detail a range of measures taken by the government since September 11th, that have had the effect of eroding human rights, civil rights, and civil liberties including: the treatment of immigrants, refugees, and minorities; the adjudication of national security cases under military law or the criminal justice system; the erosion of the right to privacy; and restrictions on openness in government. History can be a powerful teacher, but the lessons of history are too often forgotten. That is why we support your resolution, Congressman Honda, to recognize February 19th as a “Day of Remembrance” for the signing of Executive Order 9066. We also support Senator Durbin’s resolution condemning bigotry and violence against Arab and Muslim Americans, South-Asian Americans and Sikh Americans. We are grateful for the opportunity to share with you our concerns regarding safeguarding human rights and civil liberties in America today, as they relate to the shameful policy of internment and exclusion of Japanese-Americans during World War II.

The infamous internment is one of a number of actions taken in times of crisis that we as a country have later looked back on with deep regret and which include: the Alien & Sedition Acts, the Civil War suspension of Habeas Corpus, the Chinese Exclusion Act, the Alien Land Laws, the McCarthy Era Blacklist, and FBI and local law enforcement

harassment and surveillance of anti-war and civil rights activists. Today as we face the challenge of confronting terrorism, we are again pursuing policies that violate fundamental rights, subjecting certain citizens and non-citizens to persecution, harassment, and discrimination because of their religion, nationality, and race. While we recognize that the government has the responsibility to protect the public from attack, we fear that a number of the policies being pursued today violate fundamental rights, while doing little to make us safer. Currently, an array of policies and decisions by the Executive branch, the courts, and Congress are resulting in both intentional and unintentional harassment, persecution, and discrimination of citizens and noncitizens in communities of Arab and Muslim Americans, South Asian-Americans, and Sikh-Americans. We may be at the start of another sad chapter in the history of discrimination in this country, opening old wounds and creating new scars by fostering a climate that enables the targeting of entire communities.

In addition, new initiatives unrelated to increasing our safety have been introduced under the guise of national security. These new policies, such as the discriminatory detention of Haitian asylum-seekers, have no apparent connection to security.

In addition to attacks on the rights of non-citizens, the Administration has asserted for the first time in the history of our country the authority to jail indefinitely, without access to counsel, American citizens it believes are dangerous. In two cases of so-called "enemy combatants," the Administration is arguing in court that the President can hold indefinitely in military custody American-born US citizens without ever charging them with a crime. Further erosions of fundamental liberties may be in the offing. Earlier this year, a draft Justice Department proposal, the Domestic Security Enhancement Act of 2003 (hereinafter PATRIOT II), became public, which showed Administration plans to further expand Executive branch power by authorizing secret arrests and making it easier to strip Americans of their citizenship altogether. So now is a particularly important moment to focus our attention on the lessons of history. Failure to learn those lessons risks squandering the fundamental freedoms that are the source of our democracy's strength.

The Blanket Detention of Haitian Asylum-Seekers

Since the arrival of a boat of Haitian asylum seekers off the coast of Florida in December 2001, and the arrival of a second boat in October 2002, the Justice Department has initiated a series of steps that have singled out Haitians for blanket detention, have attempted to deprive them of any meaningful individualized determination of their eligibility for release, and subjected them to unfair expedited procedures.

This new policy includes several steps:

- A blanket detention policy directed at only Haitian asylum seekers.
- The invocation of expanded post 9/11 detention authority in an attempt to prevent the release of Haitian asylum seekers who were found to be eligible for release by immigration judges.

- The expansion of expedited removal to sea arrivals - which had the effect of subjecting future Haitian asylum seekers to unfair summary procedures as well as depriving them of the right to have an immigration judge assess their eligibility for release.
- The expedited scheduling of Haitian asylum cases - so quickly that many were not able to find legal representation.
- A sweeping decision by the Attorney General which will have the effect of depriving Haitian asylum seekers of an individualized assessment of the need for their continued detention.

While the INS initially denied that a special detention policy existed, it eventually had to concede the existence of this policy after a federal lawsuit was filed by the Florida Immigrant Advocacy Center on behalf of the Haitians. The Lawyers Committee has filed two amicus briefs in this case, arguing that the discriminatory Haitian policy violates international law. Various justifications have been proffered by the Administration for this unjust policy. These justifications have ranged from claims that the policy is necessary to deter Haitian asylum seekers from risking their lives by taking a dangerous sea journey, to more recent arguments that the use of any government resources, for example Coast Guard cutters, to interdict and adjudicate the claims of Haitian refugees diverts attention away from fighting terrorism, and that, therefore, continued boat arrivals by Haitians pose a threat to national security.

The invocation of "national security" concerns to justify the escalating discrimination against Haitian asylum seekers is extremely troubling. One implication of this argument is that the U.S. government does not have the capacity to adequately screen 200 Haitian asylum seekers. The Attorney General has in fact stated that: "Under the current National Emergency, the Government's capacity to promptly undertake an exhaustive factual investigation concerning the individual status of hundreds of undocumented aliens is sharply limited and strained to the limit." Yet the government is conducting security checks on many other non-citizens. There is no explanation why the arrival of 200 Haitian men, women, and children poses such an insurmountable hurdle. Nowhere does the Attorney General address the substantial cost of detaining these Haitians for prolonged periods – money which, under the Attorney General's own argument, might be better spent on higher priority security threats than desperate Haitians fleeing persecution.

The discriminatory treatment of Haitian asylum-seekers is wrong. No other group of asylum seekers is subject to the same restrictions. This arbitrary deprivation of liberty, based solely on national origin and overly-broad national security grounds, has painful similarities to the internment of Japanese-Americans.

The Detention of U.S. Citizens: Enemy Combatants Jose Padilla and Yasir Hamdi

The Administration is holding without charge and without access to counsel two U.S. citizens, Jose Padilla and Yaser Hamdi, as so-called "enemy combatants," meanwhile rejecting debate on the scope and meaning of that term. The Executive branch has imposed the "enemy combatant" label by fiat and argues that, since it has not charged

these two men with committing a crime, they are not entitled to the due process protections of criminal defendants.

These cases are unprecedented in U.S. legal history. The Administration, in effect, has reserved for itself the authority to label U.S. citizens enemy combatants and deny those so labeled all legal rights and remedies, whether under international human rights or humanitarian law, U.S. criminal law, the Uniform Code of Military Justice, or the U.S. Constitution. At a minimum, Padilla and Hamdi should be provided with access to counsel. The indefinite detention of two U.S. citizens in a military brig without charge, without trial, and without access to counsel should give pause to anyone concerned with safeguarding civil liberties and fundamental freedoms.

The Domestic Security Enhancement Act of 2003 (PATRIOT II)

In February the Center for Public Integrity, a non-profit government watchdog posted draft anti-terrorism legislation on its web site. The draft proposal, dubbed PATRIOT II, builds on the USA PATRIOT Act. This draft legislation was leaked from the Justice Department and includes many provisions that would endanger core civil liberties and fundamentally alter the relationship between the Executive branch, the courts, and Congress. As we remember the internment and examine restrictions of civil liberties since September 11th two provisions of PATRIOT II evoke particular concern: one would make it easier to strip Americans of their citizenship and the other would authorize secret arrests.

Authorizes Stripping Americans of their Citizenship for Engaging in Constitutionally Protected Conduct

Current law reflects the sacrosanct nature of American citizenship by making it very difficult for the government to take it away from people. Only in rare cases, for example when a person serves in the armed forces of a state at war with our country, can the government deprive an American of his or her citizenship. And even in those cases, the government must prove that there was a specific intention to relinquish American citizenship by engaging in that conduct.

The Justice Department's draft bill takes a different approach to citizenship. It would create a system where the government can strip an American of his citizenship as a form of punishment if, for example, the person gave "material support" to a group designated by the government as "terrorist." The question of what constitutes "material support" has been challenged in the courts, because it is vague and appears to include political association and speech that is protected by the Constitution.

Authorizes Secret Arrests

PATRIOT II contains a provision that overturns a federal court decision requiring the Justice Department to turn over the names of the people it detained in post-9/11 sweeps, a

ruling that the government has appealed.¹ Although the Justice Department has argued on appeal that current law does not require that it disclose these names, the draft bill hedges those bets by explicitly authorizing the government to keep secret the names of those it arrests and jails without charge.

Secret arrests and secret detentions are practices that the Lawyers Committee encounters frequently in its human rights work abroad. They are the hallmarks of repressive and dictatorial regimes. As we remember the internment of Japanese-Americans, we should be scrupulous in defending core principles of open government and transparency and reject measures that would permit the government to deprive people of their liberty under a cloak of secrecy.

Conclusion

Congressman Honda, as we look back today on the lessons of the past, it is helpful to remember that often, in times of crisis or great anxiety, we have yielded to the impulse to discriminate against minorities and to curtail fundamental principles of our democracy. We are living again in one of those times, and if we fail to learn from the mistakes of the past, we are bound to repeat them. We have many lessons to learn.

The USA PATRIOT Act of 2001 will likely be viewed one day as are many other laws enacted in the name of national security during times of national anxiety: the Alien & Sedition Acts, the Chinese Exclusion Act of 1882, the Alien Registration Act of 1940, Executive Order 9066 of 1942, the McCarran Internal Security Act of 1950, and the Antiterrorism and Effective Death Penalty Act of 1996. These laws in many ways eroded the rights of immigrants and minorities and upset our system of checks and balances. Like the Japanese internment, many of these laws were the culmination of an incremental escalation in restrictive, anti-immigrant practices over decades. According to our political leaders, the war on terrorism will be lengthy. Now is the time to exercise vigilance so that we can avoid a situation where the country tolerates widespread and systematic discrimination and abuse of Muslim and Arab-Americans, South-Asian Americans, and Sikh-Americans, as it did of Japanese-Americans during the WWII period.

The potent mixture of wartime, racism, nativism, and intolerance provided the environment in which the country accepted widespread violation of the rights of Japanese-Americans and foreigners during WWII. Many of these elements are present again today, and as a consequence we are again seeing detention policies and the harassment of minority groups who are presumed, based on race or religion, to be disloyal. In the 1940's these policies fostered an atmosphere that allowed the internment of Japanese-Americans. Similarly, government policies which single out Arab and Muslim men for detention and interrogation feed a climate of fear and suspicion that has led to a significant increase in hate crimes against people in these communities across the country.

¹ *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002).

Unfortunately, the courts in times of national crisis have not always been willing to challenge the President and have been largely willing to defer to the Executive branch. In fact, Chief Justice Rehnquist in his 1998 book, *All the Laws But One: Civil Liberties in Wartime* emphasized that the courts should defer to the Executive branch in wartime.² In the 1940's the Court in *Korematsu*³ abdicated its role in safeguarding liberty. Just last month, the Supreme Court in *Demore v. Kim*⁴ upheld a statutory provision denying individualized bail determinations for non-citizens in detention. Recently, Justice Scalia stated, "Most of the rights that you enjoy go way beyond what the Constitution requires."⁵ Congress has a crucial role to play in ensuring that the balance of powers on which our democracy rests is not disturbed.

Thank you, Congressman Honda, for convening this hearing and for giving us all the opportunity to reflect on the tragic lessons of the internment of Japanese-Americans. During these challenging times, it is critically important for Congress to assert its oversight role and keep watch over Executive branch policies. Prevailing against terrorism is not only consistent with but requires keeping America's democratic ideals and principles intact.

² Rehnquist, William H., *All the Laws but One: Civil Liberties in Wartime*, New York, Alfred A. Knopf, 1998.

³ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴ *Demore v. Kim*, No. 01-1491, slip op. (U.S. Apr. 29, 2003).

⁵ Clarence Page, "Giving Up Privacy Doesn't Make Us Safer From Terrorism," *The Salt Lake Tribune*, Apr. 26, 2003, available at <http://www.sltrib.com/2003/Apr/04262003/commenta/51405.asp> (accessed May 20, 2003).