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To Have and To Hold

Those in U.S. custody deserve reliable evidence.

BY LOUIS FISHER

After the 9/11 terrorist attacks, the Bush administration indefinitely detained U.S. citizens and aliens without recognizing any procedural rights. They were not charged with crimes, provided access to counsel, or granted a hearing. The government said it could rely on confidential sources without sharing that information with the detainee.

Ali al-Marri, a Qatari student in Peoria, Ill., was arrested by the FBI in 2002 for credit card fraud and prosecuted in civil court. A year later he was designated an "enemy combatant" and placed in a naval brig in Charleston, S.C. For more than five years he was held and never charged.

The Supreme Court accepted his case in December 2008 to decide whether the administration may seize and indefinitely hold in military detention, without criminal charge or trial, someone lawfully residing in the United States. On Feb. 26, facing possible defeat in the Court, the government removed him from military detention and indicted him in civilian court. On March 6 the Court held that the transfer to civil court made the case moot.

The overall issue of detainee rights, however, will not become moot—the Obama administration filed a brief on Friday with a new legal standard for detentions—and neither is it historically novel. Take the story of Ellen Knauff, held on Ellis Island from 1948 to 1951. The government justified its action on the basis of "confidential information" and argued it need not share the information with her, her attorney, or the courts. Her story reminds us why we should not take at face value executive branch claims about secret evidence and national security threats.

A WAR BRIDE ARRIVES

Ellen Knauff was born in Germany and lived in Prague. Her mother, father, and other Jewish relatives perished in the Nazi camps. To escape the incoming German army, she obtained a permit to work in England. She served as a Red Cross nurse and joined the Women's Voluntary Air Force, an arm of the Royal Air Force. After the war, she worked for the American military government in Germany, receiving commendations.

On Feb. 28, 1948, she married Kurt Knauff, a U.S. citizen and veteran of World War II. Intent on becoming a U.S. citizen, Ellen Knauff booked a ship to America and arrived in New York Harbor on Aug. 14, 1948. After questioning by an immigration official, she was taken to Ellis Island. There she was questioned over a period of weeks and months, without visitors or legal assistance.

On Oct. 6, 1948, an immigration official recommended that she be permanently excluded without a hearing on the ground that her admission would be "prejudicial" to the United States. On that same day, Attorney General Tom Clark entered a final order of exclusion. A federal district court dismissed a habeas petition, and the U.S. Court of Appeals for the 2nd Circuit affirmed.

On Jan. 16, 1950, the Supreme Court decided 4-3 in favor of the administration. Justice Sherman Minton held that her exclusion was authorized by law and various proclamations and regulations issued by executive officials.

Justice Felix Frankfurter penned one dissent. Justice Robert Jackson, joined by Frankfurter and Justice Hugo Black, wrote another. They found no evidence that Congress had authorized "an abrupt and brutal exclusion of the wife of an American citizen without a hearing." In Jackson's words, the administration told the judiciary "that not even a

court can find out why the girl is excluded." The claim that evidence of guilt "must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."

Returned to Ellis Island, Knauff was threatened several times with deportation. On one occasion, immigration officials invited her attorney to travel to Washington to block deportation even though the agency had already decided to immediately deport her on the morning of May 17, 1950. She was driven to Idlewild airport. In his capacity as circuit justice, Jackson learned of the decision and issued an emergency stay. Jackson's order reached the airport about 20 minutes before her departure.

PUBLIC SCRUTINY

Fortunately, constitutional rights are not left solely to the judiciary. A number of newspapers came to Knauff's defense. An editorial in *The New York Times* protested the "remarkably un-American aspect of our immigration procedures," insisting that individuals are entitled to be informed of charges against them and have an opportunity to answer them.

In response to the effort to fly Knauff out of Idlewild, an editorial in the *St. Louis Post-Dispatch* condemned the administration for acting contemptuously toward Congress and the courts. Whatever security charges might be mounted against Knauff, "it cannot possibly justify the star-chamber record of the Department of Justice. It cannot justify vindictiveness. It cannot justify stealth."

Rep. Francis Walter introduced a private bill in January 1950 to permit her entrance. The House Judiciary Committee unanimously supported Walter's bill. The committee report included a letter from a Justice Department official, stating that the president and the attorney general had sole authority to deny entry "for security reasons." She had "to stand the test of security" and "she failed to meet" that test. Since confidentiality prevented anyone from knowing on what ground she was excluded, no one knew what the test was. The bill reached the House floor on May 2 and passed unanimously. Legislation was introduced in the Senate but no action was taken.

On March 26, 1951, the Immigration Service held a hearing. Three witnesses testified that Ellen Knauff was a security risk. Although their statements relied entirely on hearsay, the immigration board found the information sufficient. Knauff's attorney objected to the hearsay testimony but the board said it would make its own determination as to what facts are permissible: "You must know that the Board is not bound by the rules of evidence."

The dispute placed two questions before an immigration appeals board: (1) was there evidence before the Immigration Service to justify its findings? and (2) was she accorded a fair and impartial hearing? On Aug. 29, 1951, the appeals board held there was not adequate evidence to justify her exclusion. With the first question answered, it was unnecessary to consider the second. The appeals board ordered Ellen Knauff admitted for permanent residence.

HEARSAY VS. EVIDENCE

Much of the debate after 9/11 has centered on the reliability and admissibility of information against detainees. The careful reasoning of the Board of Immigration Appeals merits close reading. It referred to "several kinds of hearsay." One consisted of statements "purporting to be based on the declarant's own knowledge, but is unsworn." The second is a sworn statement regarding matters known to the declarant through hearsay. To the appeals board, the statements of the three witnesses fell in the second category. As to anything dealing with espionage or subversive activities by Ellen Knauff, they had no personal knowledge. "The sum total then of all of the testimony is hearsay." Hearsay in an administrative hearing might be admissible if corroborated by direct evidence, but "all we have in this case is hearsay."

The immigration board claimed it was not bound by the rules of evidence, a position the appeals board rejected. Whatever discretion an administrative agency possesses does not eliminate the need for evidence: "hearsay is still hearsay whether it is introduced into a court or before an administrative agency." (Here one could change "administrative agency" to military commission or Combatant Status Review Tribunal.)

On Nov. 2, 1951, Attorney General J. Howard McGrath approved the decision of the appeals board, and Ellen Knauff left Ellis Island to begin her life in America.

She prevailed not simply because of judicial proceedings but because the matter left the world of shadows and secrets and entered the public arena. Statements by the three witnesses could be examined by those who knew them, including those following the case in Europe. Institutions outside the judiciary, including a free press and Congress, intervened to make the difference. Citizens and aliens should not be condemned by speculation and second-hand conjectures.

As with Ellen Knauff, executive officials have an obligation in the al-Marri case to disclose to the judiciary the evidence used to justify his detention. Hearsay by executive officials and informers who have no direct knowledge is not evidence.

Louis Fisher works for the Law Library of Congress on constitutional issues. His most recent book is The Constitution and 9/11: Recurring Threats to America's Freedoms *(2008). The views expressed here are personal, not institutional.*