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Lecture

STRANGERS TO THE CONSTITUTION?: RESIDENT ALIENS, MILITARY TRIBUNALS, AND THE LAWS OF WAR

Adeno Addis*

I.

In 1996, Gerald Neuman of Columbia Law School wrote a book entitled *Strangers to the Constitution*, from which I gratefully borrow the title of my talk today. Neuman began the book with this question: "The Constitution begins with 'We the People.' Where does it end?"¹ It is obvious how the Constitution ends literally, with the Twenty-Seventh Amendment or, if one were to be more proper, with Article VII.

Of course, we know that the question was not meant to elicit a literal answer. Neuman was not asking about what the last words of the Constitution were. Rather, his was a fundamental question: who is included in the phrase "We the People"? To whom does the Constitution speak? One could say that a great deal of constitutional jurisprudence is an attempt to supply answers to this simple question. Different answers have been given at different times. There was a time when people of certain ethnic and racial origin were deemed not to be part of "We the People."² And for a long while women were not to be

* W. Ray Forrester Professor of Public and Constitutional Law, Tulane Law School. This lecture was given as the Third Annual Indiana Supreme Court Lecture at Valparaiso University School of Law on October 24, 2002. I thank the Dean and members of the law school community for their generous hospitality during my visit and for the many wonderful conversations that I had with them.

¹ GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* 3 (1996).

² See U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3; see also *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857). Chief Justice Roger Taney, the author of that infamous decision, concluded in that case that the phrase "We the People of the United States" and the various references to "persons" were to be understood as synonymous with "citizens." *Dred Scott*, 60 U.S. at 404. For Taney, this implied that even a free black could never be a citizen of the United States, for blacks were not viewed as part of "We the People" when the Constitution was framed. *Id.* at 404-05. It took three-quarters of a century and a destructive civil war before the phrase "We the People" was thought to include people of African descent, at least formally. See, e.g., U.S. CONST. amends. XIII, XIV, XV.

qualified members of "We the People."³ We no longer think that way, at least not formally. But these two examples indicate three important general propositions. First, the history of "We the People" has been one of tension: the tension between America's commitment to a community of equals, on the one hand, and a deep-seated desire to exclude certain groups from the privilege of full membership on the other. It is this tension that has defined the development of "We the People." Second, the development of "We the People" has generally been in the direction of more inclusiveness, although with some zigzags. Third, it is the mobilized efforts of successive generations that have enabled or forced us to reconceive the nature of the community that is embodied in the phrase "We the People."

There is something else that we might note about the phrase "We the People." As Alexander Bickel observed long ago, the Constitution starts with the phrase "We the People," not "We the Citizens," as it could have.⁴ This suggests that the community that is the primary focus of the Constitution is the people—citizens and noncitizens alike within the geographic limit of what we call the United States or territories that are subject to the authority of the United States. Justice John Marshall Harlan expressed this position in a powerful dissent at the turn of the twentieth century when he said, "The Constitution speaks . . . to all peoples, whether of States or territories, who are subject to the authority of the United States."⁵

To be sure, the Constitution conceives of many subcommunities for specific purposes and roles within the larger community of "We the People." But when that is the case, the Constitution specifically says so. Thus, only citizens are to be members of Congress,⁶ and only the rights

³ It took a century and a half before women were constitutionally guaranteed the right to vote. See U.S. CONST. amend. XIV, § 2. For the evolution of the formal full inclusion of women in the community of "We the People," see JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991). See also ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 311-17 (1997).

⁴ ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 36 (1975). Indeed, Bickel makes the claim that "the concept of citizenship plays only the most minimal role in American constitutional scheme." *Id.* at 33.

⁵ *Downes v. Bidwell*, 182 U.S. 244, 378 (1901) (Harlan, J., dissenting).

⁶ U.S. CONST. art. I, § 2, cl. 2 (requiring members of the House of Representative to have been U.S. citizens for seven years); *id.* art. I, § 3, cl. 3 (requiring senators to be U.S. citizens for nine years).

of citizens to vote are protected,⁷ though there is no prohibition on enfranchising noncitizens. In fact, “[d]uring the eighteenth and nineteenth centuries [many] states and territories enfranchised immigrants in both state and federal elections.”⁸ The Constitution creates an even smaller category of “We the People” for certain roles. For example, only a natural born citizen can be President of the United States.⁹ From these specific constitutional limitations, one could reasonably infer that formal participation in the political realm assumes a community of citizens. But that has to be viewed as a special case, as an exception to the general community of “the People,” to which the Constitution refers numerous times,¹⁰ and which seems to be its primary concern.

II.

In this lecture, I want to consider an answer President George W. Bush gave on November 13, 2001, albeit indirectly, to the question of who is included in the community of “We the People.” On that day, the President issued a military order authorizing the establishment of military commissions (tribunals)¹¹ for the purpose of trying people accused of terrorism, of harboring terrorists, or of being members of a terrorist organization such as al Qaida.¹² Such individuals were to be tried for “violations of the law of war and other applicable laws.”¹³ The

⁷ U.S. CONST. amend. XIV, § 2; *id.* amends. XV, XIX, XXVI. Of course, this means that enfranchisement of permanent residents is a permissible option. Some have argued that the Constitution actually requires enfranchisement. See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977). However, I believe this is a harder position to defend.

⁸ Jennifer Gordon, *Let Them Vote*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* 43 (Joshua Cohen & Joel Rogers eds., 1999). Not only is enfranchising immigrants not prohibited by the Constitution, but doing so will, in my view, be normatively desirable. To the extent that permanent residents are required to shoulder most, if not all, of the social responsibilities that citizens are required to shoulder (such as pay taxes and defend the United States), it would be inconsistent with any reasonable understanding of democracy to exclude them from having a say in how the government that requires them to shoulder those burdens is constituted.

⁹ U.S. CONST. art. II, § 1, cl. 4 (requiring that the President be a natural born citizen).

¹⁰ See U.S. CONST. amends. I, II, IV (referring to the “right of the people”); *id.* art. I, § 9, cl. 8; *id.* art. III, § 3, cl. 1; *id.* art. IV, § 2; *id.* art. IV, § 2, cl. 3; see also *id.* amend. V; *id.* amend. XIV, §§ 1, 3 (referring to right of “persons”).

¹¹ I shall use “commissions” and “tribunals” interchangeably.

¹² Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 2 (Nov. 13, 2001) [hereinafter *Military Order*].

¹³ *Id.* § 1(e).

Order was adopted in the wake of the terrorist attacks on the United States two months earlier, on September 11, 2001.

The Military Order was sweeping in its reach and was immediately subjected to fierce criticism that came from across the political spectrum.¹⁴ It is a rare day in Washington when Democratic Senator Edward Kennedy of Massachusetts and William Safire, the conservative *New York Times* columnist, agree on matters of politics.¹⁵ Or when the Democratic Chairman of the Senate Judiciary Committee, Senator Patrick Leahy of Vermont, and Republican Representative Robert Barr of Georgia see eye-to-eye politically. Yet, the Military Order brought that about. Each opposed the Military Order to one degree or another.

The critics of the Order could be grouped into three categories: the institutionalists, the proceduralists, and the internationalists. The first group of critics, the group advocating the institutionalist critique, faults the Order because it undermines an important aspect of American legal culture—checks and balances. The President and his advisors make the law and the regulations under which the accused are to be tried. They determine who is to be subject to tribunal jurisdiction. They decide whether or not to prosecute and what procedural and evidentiary safeguards are to be afforded the accused. The President, not an independent judicial tribunal, will review the decisions of the military tribunals and appeal panels. Put simply, the complaint is that everyone and everything in the tribunal process is subordinate to the President. As William Safire observed: “No longer does the judicial branch and an independent jury stand between the government and the accused. In lieu of those checks and balances central to our legal system, the [accused] face an executive that is now investigator, prosecutor, judge, jury and jailer or executioner.”¹⁶ To this group of critics, the President,

¹⁴ This is not to say that the Order does not have its supporters. There were some that defended the Order both on constitutional and normative grounds. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*; Agora: *Military Commissions*, 96 AM. J. INT’L L. 328 (2002).

¹⁵ William Safire called the adoption of the Order as something amounting “to dictatorial power.” See William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31.

¹⁶ *Id.*

through this Order, has simply created his own justice and prison systems.¹⁷

The checks and balances argument is said to have its basis either in the constitutional doctrine of separation of powers or in the general legal principle that, in a democratic culture, one person or group should not be the legislator, the prosecutor, and the judge at the same time,¹⁸ except, of course, in an extreme emergency when other loci of legitimate power are in no position to function properly.¹⁹ The Constitution and our legal culture generally distrust aggregations of power.²⁰ As Justice Hugo Black once put it, "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the

¹⁷ Defenders of the tribunals argue that the President has authorization from Congress. See Bradley & Goldsmith, *supra* note 14. They cite both the Joint Resolution authorizing him to use all means to pursue terrorists and some statutory provisions. *Id.* at 252-54. I believe that it is a stretch to view the Joint Resolution as authorizing the establishment of military tribunals, and there is a reasonable argument to be made that the statutory provisions relied upon do not contemplate such authorizations.

¹⁸ It has been an accepted principle in Anglo-American law for centuries that a "person cannot be judge in his own cause." Dr. Bonham's Case, Rep. 107a, 114a (C.P. 1610). This principle has been said to apply to appellate as well as trial judges. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986).

¹⁹ See *Ex parte Milligan*, 71 U.S. 2, 121 (1866) (stating that trials before military commissions "can never be applied to citizens . . . where the courts are open and their process unobstructed"). It is true that the court referred to "citizens" here, but that is precisely because the facts involved citizens, nothing more. *Id.* at 107, 121. To the extent that President Bush is relying on that statement for distinguishing between citizens and noncitizens, he is misreading the case. First, the issue in that case was simply whether military tribunals ought to be used when the courts are functioning properly, not whether there ought to be distinction between citizens and noncitizens. *Id.* at 118-27. The outcome did not turn on the status of the individuals but rather on the state of the federal courts. *Id.* at 127-31. Second, to the extent that the Court did take into account the status of the individuals, then it could be argued that the reference to citizens is not so much to citizens in the technical sense but to all those that are members of "We the People" who were potential targets of a military tribunal.

²⁰ *Wyman v. James*, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting). Justice Douglas quoted Lord Acton to make the point:

I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority.

Id.

Constitution endeavored to prevent by providing for the separation of governmental powers.”²¹

The second group makes a proceduralist argument. Even if the establishment of tribunals could be institutionally justified, the way they are organized will likely result in the miscarriage of justice. Most of the trials are likely to be conducted in secret.²² Secret trials often breed injustice.²³ Hearsay evidence, perhaps even double and triple hearsay, is admitted. There is no requirement that there be unanimity to convict.²⁴ For this group of critics, it is not the establishment of tribunals per se that is worrisome but rather the rules under which they are meant to function and the consequences that are likely to follow from this.

The third group, one that I shall refer to as the internationalists, worries that a decision rendered by a military tribunal would not enjoy legitimacy in the wider international community, the cooperation of which the United States needs if it were to defeat terrorism. The internationalists argue that the legitimacy gap could have two consequences. First, other countries may be reluctant to extradite to the United States those who are suspected of involvement in the September 11th or other terrorist attacks. Indeed, some countries have already expressed their reluctance to send suspected terrorists to the United States to stand trial if the only avenue is to be a military tribunal.²⁵ Second, the legitimacy deficit could also affect the capacity of the United States to lead worldwide in the defense of human rights. It will be harder to complain with any degree of persuasiveness to countries such as Egypt and Peru, countries that the United States has at one time or another criticized for using military tribunals to try civilians, that those

²¹ Reid v. Covert, 354 U.S. 1, 39 (1957) (plurality opinion).

²² The regulations say they will, however, be open as much as practicable.

²³ CBC News Online, *U.S. Senate Debates Use of Military Tribunals* (Nov. 28, 2001), at http://www.cbc.ca/storyview/CBC/2001/11/28/tribunals_011128 (last visited Mar. 30, 2003). The Chairman of the Senate Foreign Relations Committee, Senator Patrick Leahy of Vermont, made this point at a Senate Judiciary Committee hearing where Assistant Attorney General Mike Chertoff defended the appropriateness of secret military tribunals. *Id.* Senator Leahy observed: “It’s clear that secret trials [which such tribunals would entail] can breed injustice and taint the legitimacy of the verdicts.” *Id.*

²⁴ The regulations now require unanimity for the death penalty.

²⁵ The European Parliament representing the fifteen members of the European Union adopted a resolution “emphatically declar[ing] that extradition from the EU to the United States cannot be allowed for people who could be sentenced to death or who are to be tried by military tribunals.” Charles V. Pena, *Blowback: The Unintended Consequences of Military Tribunals*, 16 NOTRE DAME J. L. ETHICS & POL’Y 119, 122 (2002) (citation omitted).

accused of supporting terrorist groups should be tried in an open court rather than before military tribunals.²⁶

Like any attempt to group people into distinct and neat categories, putting the critics of the Military Order and of the proposed tribunals into three categories has its reductive dimension. It underplays the possibility that there may be an overlap among the position of the three groups, the possibility that an individual critic may be committed to all three positions, or the fact that the category may be under or over inclusive and the like.

In whatever way one categorizes the critics of President Bush's Order, because of their preoccupation with the general issue of military tribunals, not many have started to focus on specific issues raised by the Military Order. The focus of the critics has been, by and large, on what shall be referred to as the pitfall of dual unilateralism. The institutionalists and proceduralists worry about presidential unilateralism in the context of the constitutional scheme of government, and the internationalists question whether the unilateralism that the tribunals represent, vis-à-vis the rest of the world, is desirable at all.

²⁶ In its annual *Country Reports on Human Rights Practices*, the State Department criticized the use of military tribunals to try civilians for acts of terrorism. The 2000 *Country Reports on Egypt* faulted the country because the "use of military ... courts ... has deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge." U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2000 (Feb. 23, 2001), <http://www.state.gov/drl/rls/hrrpt/2000/nea/784.htm> (last visited Mar. 27, 2003). "Military courts," the report continued, "do not ensure civilian defendants due process before an independent tribunal." *Id.* The State Department has also often criticized Peru for its use of military tribunals to try civilians accused of treason and terrorism. *See, e.g.*, U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2000 (Feb. 23, 2001), <http://www.state.gov/gdrl/rls/hrrpt/2000/wha/827.htm> (last visited Mar. 27, 2003). The 2000 *Country Reports* observes that the use of military courts by Peru for terrorism "do[es] not meet internationally accepted standards of openness, fairness, and due process." *Id.* When Lori Berenson, a U.S. citizen, was tried and convicted in Peru of terrorism-related crimes by a military tribunal, State Department spokespersons repeatedly criticized Peru for not trying Ms. Berenson in an open civilian court in accordance with international juridical norms. *See id.* Similar observations were made about Turkey, Sudan, and others. *See Pena, supra* note 25. Interestingly, the 2001 *Country Reports on Egypt*, which was the first update to the *Reports* after the Military Order, does not include the criticism of Egyptian tribunals, and there is no indication for the removal. *See* U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2001 (Mar. 4, 2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8248.htm> (last visited Mar. 27, 2003).

Rather than joining the general debate on dual unilateralism or the constitutionality or desirability of establishing military tribunals, I shall focus on an issue of a narrower scope, though quite central to the President's Order. The Military Order makes a distinction between citizens and noncitizens for purposes of tribunal jurisdiction. The question is this: even if one were to assume that the President is within his constitutional authority to establish military tribunals and even if one could be persuaded that under the circumstances the establishment of such tribunals is consistent with the best understandings of political morality, is the Order nevertheless defective on either of those grounds because it makes a distinction between citizens and noncitizens, making only the latter subject to the jurisdiction of the tribunals? Put differently, does the phrase "We the People" in both its constitutional and political²⁷ dimensions make it impermissible for the President to make such distinctions?

III.

As indicated earlier, according to the Order, the military tribunals are to have jurisdiction over noncitizens only.²⁸ The universe of noncitizens that are potential targets is made up of three different groups. One group includes all noncitizens who are arrested outside the United States and who have no residence or any other status that links them to the United States (Nonresident Aliens or "NRAs"). The second group includes noncitizens who are arrested within the United States while in the country on temporary visas (Lawful Temporary Residents or "LTRs"), such as visitors and students. The third group includes resident aliens (Lawful Permanent Residents or "LPRs") who may be arrested within or outside the country.

The main focus of this lecture is the third group, LPRs, although I shall have something to say about LTRs as well. And to a great extent, what I say about LPRs may apply equally to LTRs. The case of NRAs is

²⁷ By "political" I mean to refer to the role of political morality to define what the community "We the People" can or cannot do to a segment or segments of its population.

²⁸ Section 2(a) of the Military Order provides: "The term 'individual subject to this order' shall mean any individual who is not a United States citizen . . ." Military Order, *supra* note 12. According to congressional testimony, that would cover about twenty million individuals in the United States. See *Military Tribunals*, 147 CONG. REC. S13275-01 (daily ed. Oct. 13, 2001).

far more complicated, and it is arguable that the Constitution does not speak to them, at least not as loudly as it does to the other two groups.²⁹

The Order makes no distinction among noncitizens. A permanent resident who has adopted this country as his permanent home, but has not yet taken up American citizenship, and who is arrested within the United States will be subject to tribunal jurisdiction in the same way as a nonresident alien who was arrested outside the country. It matters not how many years an individual may have lived in the United States or how deep or extensive his connections. It matters not that historically admission as an LPR has constituted invitation to full membership to the community of "We the People." And it seems to make no difference that to be invited as an LPR is to have gone through the most rigorous selection process. The fact that an LPR could be drafted to the armed forces of the United States or that he is required to shoulder and discharge almost all social responsibilities that are required of citizens, such as paying taxes, will count for naught.³⁰

A permanent resident is treated by the Military Order as outside the community of "We the People" as would persons who have never set foot in this country or never have any inclination to make this country their home.³¹ Indeed, for purposes of tribunal jurisdiction, the relevant defining feature of "We the People" becomes whether one has taken the formal act of acquiring citizenship rather than the quality or strength of one's affiliation to the community.

To make the point more clearly, imagine the following. Two individuals who happened to be friends emigrated from Canada to the United States six years ago. One of them has just become a citizen after

²⁹ "[C]onstitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *But see* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 983-84 (2002).

³⁰ "Aliens like citizens pay taxes and may be called into the armed forces." *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (Blackmun, J.). Justice Blackmun clearly thought that immigrants were part of "We the People." *Id.* The United States Code states that "no local board shall order for induction for training and service in the Armed Forces of the United States an alien unless such alien shall have resided in the United States for one year." 50 U.S.C. app. § 455(a)(3) (2000). A permanent resident alien may request exemption from military service but will lose eligibility for citizenship if the exemption is granted. 8 U.S.C. § 1426(a) (2000).

³¹ The distinction between those who have entered the country and those who have not effected such entry is of course a constant theme of constitutional jurisprudence in this area. As Justice Breyer wrote for the majority in *Zadvydas*, "once an alien enters the country, the legal circumstance changes." *Zadvydas*, 533 U.S. at 693.

waiting for the required five-year period. The other has not yet taken up U.S. citizenship and remains a Canadian citizen, although he is eligible to apply for American citizenship. The two are accused of harboring terrorists. According to President Bush's Military Order, one of them, the citizen, will be tried before regular federal courts with all the protections afforded to a defendant in such a trial. The permanent resident may be subject to the jurisdiction of military tribunals where constitutional protections are minimal to nonexistent.

By now some of you may be saying to yourselves:

Adeno Addis, you have too much time on your hands! Why worry about people who are determined to destroy or at least to seriously damage us? A person whose purpose in life is to destroy us as a people has by definition cast himself or herself outside the community. Indeed, such a person is the very negation of "We the People."

This is a reasonable and understandable concern. But let me make three observations in regard to this concern. First, if the criterion for the loss of membership is one's desire or attempt to destroy "We the People," then the distinction between citizen and noncitizens makes very little sense. Surely a citizen who is accused of conspiring to injure us, or belongs to a group that desires to destroy us, is no less a threat to "We the People" than is the permanent resident who may be accused of similar acts. Nor is this citizen less a negation of who we are as a people and what we stand for than the permanent resident who is accused of similar acts.

Second, and perhaps more importantly, under the Military Order, an individual becomes subject to the jurisdiction of the Commission simply on the basis of allegation by the President. The point is that it is the mere allegation by the President, more correctly by the Secretary of Defense (and perhaps with the assistance of the Attorney General), that lands one under the jurisdiction of the tribunal. The President, with the assistance of the Secretary of Defense, determines who is a terrorist suspect.³² And in these times, I am afraid there is going to be a tendency for government officials to err on the side of wider inclusion. History teaches us that in times of great fear and vulnerability, the exercise of unchecked power by the Executive often tends to be grossly overinclusive, for the Executive

³² Military Order, *supra* note 12.

sees its function primarily as one of ensuring the security of the nation and, hence, to subordinate other important constitutional and civic values to that primary concern. Indeed, courts are now finding, in relation to people that are detained and over whom courts have jurisdiction, that important constitutional and civic values are subordinate to the notion of security.

Put simply, my second argument is that defending the President's authority to subject resident aliens to a military tribunal on the account that those individuals mean to destroy us, or to adversely affect "We the People," simply assumes the very thing that is meant to be proven. I find it to be extraordinary that one's constitutional protection will diminish with the perceived likelihood of one's guilt prior to trial. This seems utterly inconsistent with our constitutional tradition. But, that is precisely what the Military Order does by authorizing the President to subject an individual to the jurisdiction of a military tribunal if he has reason to believe—and no more than that—that the accused is guilty of the crime charged.

Third, if constitutional democracy is to live up to its promise of treating all its members with "equal concern and respect," to borrow a phrase from Ronald Dworkin,³³ and to have a community of equals, it must be especially vigilant about the fate of its minorities in times of crises and strain, for it is those members that are most vulnerable in such times. Alien residents, including permanent residents, are, in this circumstance, the most vulnerable minority within the community. I shall have more to say about this later.

IV.

This, of course, is not the first time that the President of the United States has sought to establish military tribunals by an executive order for the purpose of trying those accused of violations of the laws of war. The last executive order, after which President Bush modeled his, was adopted in 1942 by President Franklin Delano Roosevelt to establish a military commission to try Nazi saboteurs who were sent to the United States to engage in terrorist acts within the United States.³⁴ But, there are a number of significant differences between the two orders. Perhaps the

³³ RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 272-73 (1977) (stating that "[g]overnment must not only treat people with concern and respect, but with equal concern and respect").

³⁴ See generally *Ex parte Quirin*, 317 U.S. 1 (1942).

most important difference is that Roosevelt's Order made no distinction between citizens and noncitizens, while that distinction is central to Bush's Military Order. As a matter of fact, in 1942, one of the accused saboteurs claimed, without any success, that he was a U.S. citizen and, therefore, was entitled, under the Constitution, to a trial before an Article III court rather than a military tribunal.³⁵

Why was President Bush moved to make the distinction between citizens and noncitizens while President Roosevelt was not? One response might be that the distinction was simply a calculated political act. President Bush wanted to minimize political resistance to the establishment of military tribunals, though there was no belief that permanent residents could be any more likely to have been part of the terrorist network that attacked the United States than citizens. It is perhaps true that there would have been a great deal more resistance to the idea of military tribunals had citizens been subject to their jurisdiction. Citizens vote and have relatives that vote, and the political cost may have been calculated to be much greater than whatever security was to be gained by subjecting citizens to the jurisdiction of military commissions.

In an interesting article, Jack Goldsmith and Cass Sunstein of the University of Chicago Law School explore the issue of why there has been strong criticism of President Bush's Military Order while there was virtually no criticism of President Roosevelt's similar Order in 1942.³⁶

³⁵ *Id.* Although the Court declined to address the claimant's status as a U.S. citizen—the issue was whether the claimant lost his U.S. citizenship because he elected to maintain German allegiance and citizenship—it made it clear that U.S. citizenship “does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.” *Id.* at 37.

³⁶ Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 153, 2D SERIES (2002), http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/153.jg-cs.tribunals.pdf (last visited Mar. 30, 2003); see also LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 34-41 (Mar. 26, 2002). The editorials of almost all of the major newspapers and magazines, including *The New York Times*, *The Washington Post* and *The New Republic* were quite supportive of the establishment of military tribunals. *The Washington Post* editorialized: “Americans can have the satisfaction of knowing that even in a time of great national peril we did not stoop to the practices of our enemies.” *Justice Is Done*, WASH. POST, Aug. 9, 1942, at 6. *The New York Times* opined that a “fair trial for any person accused of crime . . . is one of the things we defend in this war” and did not criticize the trial by military tribunals as being inconsistent with that commitment. *They That Take the Sword*, N.Y. TIMES, Aug. 9, 1942, at 8. The base line for *The New York Times* was what the enemy would do if it caught American citizens doing what the Germans were accused of doing. *Id.* *The New Republic* thought it

After examining all the differences between the two orders that may account for the different reactions that each received, including the fact that the nation in 2001 may not have perceived a threat to its survival as it did in 1942, the authors conclude that a major reason is the shift in legal culture in the intervening sixty years. The shift, as they see it, is that of the strengthening of civil liberties, especially in the post-Sixties era, and increasing distrust of the power of government. If Goldsmith and Sunstein are right in their observation, then it clearly explains why President Bush's Order may have exempted citizens from tribunal jurisdiction. But how does one explain the singling out of noncitizens, including LPRs? I think the answer may be the development of another parallel culture. Although the legal culture may have changed in favor of more civil liberties and more suspicion of government, that culture is also accompanied by an increase in anxiety about, and at times even hostility towards, immigration and immigrants. Globalization and the dislocation that it often entails have intensified that anxiety about the foreign "Other," both in this and other countries. So, perhaps one explanation for the President's desire to distinguish between citizens and noncitizens is the recognition of the two sides of the cultural shift. A more robust culture of rights is accompanied by a more heightened sense of fear or anxiety about the foreign "Other."

However, this seems to me precisely the sort of political calculation that the Constitution and political morality would view unfavorably. Singling out a group for a special disability precisely because it lacks the political clout will surely offend the equal protection dimension of the Fifth Amendment and will be in violation of a reasonable understanding of political morality. Put simply, the distinction will violate both the constitutional and political aspects of "We the People."

It will offend the equal protection component of the Due Process Clause of the Fifth Amendment³⁷ because, even though the federal government is said to have plenary power on matters of immigration,³⁸

"good to know that even in wartime and even toward the enemy we do not abandon our basic protection of individual rights." *The Saboteurs and the Court*, NEW REPUBLIC, Aug. 10, 1942, at 159.

³⁷ The Supreme Court has insisted that there is a presumption of "congruence" under which "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

³⁸ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). The plenary power argument was first announced in

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that power is, to quote Justice Breyer in *Zadvydas v. Davis*,³⁹ “subject to important constitutional limitation[.]”⁴⁰ There are two dimensions to this constitutional limitation. First, the power cannot be exercised unrelated to an immigration or naturalization issue. To have plenary power over immigration and naturalization does not mean to have plenary power over the lives of noncitizens across a whole range of activities. Subjecting LPRs to military commissions is not an exercise of immigration or naturalization power. The issues for which LPRs are sent to military tribunals have very little to do with the admission or naturalization process.

The force of the argument becomes even stronger given the fact that the issue of whether the Congress, the branch that has been given the primary authority over immigration and naturalization,⁴¹ has endorsed the distinction is unclear at best. There is no presidential plenary power that allows the President to distinguish among members of “We the People” and to impose disability on one section of the community.

Even if one were to agree with the Supreme Court’s decision in *Mathews v. Diaz*,⁴² a case where the Supreme Court sustained a federal regulation disqualifying permanent resident aliens from participating in the Medicare program unless they had been in the country for five years as permanent residents (and one could reasonably disagree with the outcome in that case), I believe that decision cannot serve as a precedent for the distinction that is made in the Military Order. In *Mathews*, it was at least plausible that Congress was regulating “the conditions of entry . . . of aliens”⁴³ and that it is within Congress’s power to ensure that admitees are not “likely . . . to become a public charge.”⁴⁴ But, it would be hard to argue that the citizen–noncitizen distinction in the Military Order is in pursuance of any conceivable immigration or naturalization purpose. It is, to borrow a metaphor from dormant commerce jurisprudence, “downstream regulation.”⁴⁵ Or, is it upstream?

Ping v. United States, commonly called the *Chinese Exclusion Case*. 130 U.S. 581 (1889). The plenary power argument will work only if one assumes that the President has the authorization of Congress to establish the tribunals, an assumption that could be reasonably challenged.

³⁹ 533 U.S. 678 (2001).

⁴⁰ *Id.* at 695.

⁴¹ See U.S. CONST. art. 1, § 8, cl. 4.

⁴² 426 U.S. 67.

⁴³ *Id.* at 84.

⁴⁴ 8 U.S.C. § 1182(a)(4)(A) (2000).

⁴⁵ See *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

Alternatively, to use a description that the noted political theorist Michael Walzer utilized in the course of developing his theory of justice, the regulatory schemes embodied in the Order do not respect the distributive autonomy of spheres.⁴⁶

When an issue is not one of admission or naturalization, the Constitution conceives of “We the People” as a community of persons rather than as a community of citizens. That is evident in the fact that equal protection and the Bill of Rights speak to us as “the people” or as “persons.” The First, Second, and Fourth Amendments refer to the “right of the People.” Articles I(9), III(3), and IV(2), as well as the Fifth and Fourteenth Amendments, refer to “persons.”

During the congressional debate, the principal author of the Fourteenth Amendment, Representative John Bingham, a Republican from Ohio, asked, “Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection?”⁴⁷ One may ask, essential for what? Essential certainly for the security of those noncitizens in our land. But, more importantly in my view, it is essential for the integrity and character of “We the People,” for as Justice Jackson once observed, equal protection is the most practical guarantee that arbitrary and unreasonable government would not turn “We the People” into a community of unequals by imposing burdens on a minority or minorities that the government is not willing to impose, or is fearful of imposing, on the rest of us.⁴⁸ “We the People” are a unit. We are like a drum, you hit us on one end, our whole being vibrates. We feel the tremor. I shall have more to say on that later.

For non-immigration and non-naturalization issues, therefore, the Constitution starts with “We the People” and ends with “persons.” As I

⁴⁶ MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61-63, 303-11 (1983).

⁴⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

⁴⁸ This is how Justice Jackson put it:

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally [and that] nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring); see also Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

noted earlier, there are exceptions to this, but those exceptions do not undermine this general proposition.

Even if the citizen-noncitizen distinction is to be considered within the purview of the immigration power, that power will still have to be exercised with some degree of reasonableness.⁴⁹ There does not seem to be any plausible reason that would justify the distinction between citizens and LPRs for purposes of tribunal jurisdiction other than the fact that the latter are less able to exact political cost on politicians. Clearly, if there was any evidence that indicated that LPRs were more likely to engage in the prohibited acts than citizens, then the distinction may be considered reasonable. But, in this instance, there was no such evidence—at least none that was publicly offered. In fact, from what is publicly available, there were some citizens, but no permanent residents, that have been charged in connection with the September 11th terrorist attacks.⁵⁰

Perhaps one could argue that even though there is no empirical evidence to show that LPRs are more likely to engage in activities that are injurious to the United States, it is not illogical to think that those who have chosen to take an oath of loyalty to the United States and its flag have a deeper commitment to the country and, consequently, may be more reluctant to engage in activities that will injure it and its people. This argument seems to me unpersuasive. First, this Order applies not only to people who have opted not to take up citizenship though eligible to do so, but also to those who might well have taken up citizenship if they were eligible if the five-year waiting period was over, and perhaps even those who have applied but have not yet gotten the approval. In such a case, LPRs are not what Annette Baier has called “voluntary resident aliens.”⁵¹ Second, there are many reasons why people do not take up citizenship, and it is not necessarily the case that it is for lack of commitment or loyalty to the country. In the era of increased globalization, the very idea of citizenship may have to be recast.

Third, if oath of allegiance defines commitment, then we should be wary of people born in this country, for they are not required to “swear

⁴⁹ See *Mathews v. Diaz*, 426 U.S. 67, 83 (1976)

⁵⁰ See, e.g., Peter Finn, *Suspect's Slip Helped Police in Germany Foil Alleged Plot*, WASH. POST, Sept. 8, 2002, at A25.

⁵¹ Annette C. Baier, *Some Virtues of Resident Alienage*, in VIRTUE 291, 292 (John W. Chapman & William A. Galston eds., 1992); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 585 (1952).

allegiance to the Constitution."⁵² Perhaps "[w]e assume that by virtue of their birth" in the country they will remain loyal to the United States.⁵³ As the cases of John Walker Lindh and others show, this may not necessarily be the case.⁵⁴ Even more importantly, why is it logical to assume that people that happen to be in this country by accident of birth will be more committed, and more loyal, to the country than those LPRs who have made the affirmative decision to abandon their roots and to move to this country?⁵⁵

In fact, it may be argued that even in the immigration area, where the courts have normally deferred to the political branches of the federal government, treating aliens, including LPRs, less favorably than citizens on matters as fundamental as the protection of civilian justice requires that there be a showing of more than reasonableness.

I said earlier that the distinction also offended political morality. How does it do that? Let me first start with what I believe to be a reasonable assumption from the point of view of political morality, though it will be increasingly contested in the information age where national borders are becoming speedbumps on the information superhighway. That is, "We the People," through our elected officials, have the right to determine who shall be a member of the community and under what condition membership shall be granted. To be a community is to have the power to determine the rules under which membership to the community shall be granted. Otherwise, the very existence of the community itself is at risk. As Michael Walzer put it, "Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*."⁵⁶ I agree. But the character and integrity of the community will also be affected if the power over admission is transformed into a means of imposing social disabilities on the newcomers, turning the newcomers "into pariahs," to use Owen Fiss's description.⁵⁷ The Military Order, just like the welfare reform act of the mid-1990s (which denied welfare benefits to permanent residents

⁵² Gordon, *supra* note 8, at 46.

⁵³ *Id.*

⁵⁴ Eric Lichtblau, *Threats and Responses: The Terrorism Suspects; 4 in U.S. Charged in Post-9/11 Plan to Join Al Qaeda*, N.Y. TIMES, Oct. 5, 2002, at A1.

⁵⁵ Gordon, *supra* note 8, at 46.

⁵⁶ WALZER, *supra* note 46, at 62.

⁵⁷ See Owen Fiss, *The Immigrant as Pariah, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS*, *supra* note 8, at 16.

when they fell on hard times even though they pay taxes just like citizens), imposes a social disability threatening the claim of "We the People" to be a community of equals. The disability that the Military Order imposes on LPRs, just like the welfare disability,⁵⁸ is not just a disability on permanent residents, but, more significantly, it threatens to undermine the nature of the community, the character of "We the People."

In the current context, the distinction between citizens and LPRs may also be overdetermined by other traditional markers of subordination such as race, religion, and ethnicity. To the extent that the fight against terrorism is generally viewed as a fight against Islamic fundamentalists, many of whom are thought to be from the Middle East or South and South East Asia, people who come from those parts of the world and are Muslims are going to be especially vulnerable to being subject to tribunal jurisdiction.

Indeed, one of the most worrying developments in the post-September 11th period has been the degree to which ethnic profiling has become an almost routine measure for law enforcement authorities.⁵⁹ In making a distinction between citizens and noncitizens, the Military Order both codifies and gives legitimacy to this process of ethnic profiling. The impact of this on the character of "We the People" is of two kinds. As I have argued earlier, the immediate impact is, of course, the turning of some members of "We the People," who are permanent residents, into pariahs. But, there is a second and unintended impact on the character of the community. Despite the explicit exemption of citizens from the jurisdiction of the military tribunals, the ethnic profiling that is inherent in, and is endorsed by, the Order will have some impact on the citizens as well. Citizens that "look foreign" and from a certain area of the world will be treated as suspects by both the public and law enforcement officials.⁶⁰ The signal that the Order sends is much larger than the immediate impact that appears clear from the text. As I noted earlier, "We the People" are a unit, and a strike on one corner or segment of the unit, however localized it might have been intended to be, will often have an impact on the entire unit. Perhaps that is why the

⁵⁸ 8 U.S.C. § 1611 (2000).

⁵⁹ See Cole, *supra* note 29, at 974-77; see also David M. Halbfinger, *Terror Scare in Florida: False Alarm, But Televised*, N.Y. TIMES, Sept. 14, 2002, at A10.

⁶⁰ See Halbfinger, *supra* note 59.

Constitution is careful not to make a distinction between citizens and noncitizens except for limited and specific purposes.

It is not just domestically that the distinction between citizens and noncitizens will have adverse consequences. It will have an undesirable global impact as well. First, this Order and its consequences will be viewed as precedent by many regimes around the world to try civilians suspected of terrorism by military commissions and tribunals, especially citizens of other countries. I say especially citizens of other countries because it is precisely trials of such individuals, especially if they were from the United States, which will attract international attention. And, it is such attention and scrutiny that secret military trials will allow regimes to avoid. Second, the United States will not have the high moral ground to criticize and challenge such trials. When in the mid-1990s Peru used a military tribunal to try U.S. citizen Lori Berenson for the terrorism-related crime of treason, the State Department characterized her trial, quite correctly in my view, as lacking in due process and having egregious flaws. Indeed, the State Department is on record as having denounced the use of military tribunals to try civilians, not once, not twice, but dozens of times.⁶¹ After November 13, 2001, that will be increasingly difficult to do without sounding hypocritical. To be sure, there is no guarantee that other nations will follow the United States and not try citizens of other countries, or their own, before military tribunals if the United States were to drop the idea of military tribunals. But, given the unparalleled power and influence of the United States, it is almost certain that the use of military tribunals by the United States will be viewed as legitimizing military proceedings against foreigners, including U.S. citizens abroad.⁶²

Recently, the Bush Administration reversed the commitment of the Clinton Administration that the United States will be a signatory member of the newly established International Criminal Court to the dismay of many in the international community, including European allies. One of the reasons the Administration offered was that U.S. citizens and servicepersons around the world will be vulnerable to politically motivated trials before the International Criminal Court. Whatever the merit of that argument, the Military Order, and the

⁶¹ See *supra* note 26.

⁶² For a report that argues that governments worldwide are using September 11th as an opportunity to restrict the freedom of their citizens as well as the freedom of others, see *For Whom the Liberty Bell Tolls*, *ECONOMIST*, Aug. 31, 2002, at 18-20.

tribunals it seeks to establish, will make U.S. citizens more vulnerable to trials not by a court, such as the International Criminal Court, which will have to function in the open, but by shadowy and secretive military tribunals.

Third, the trial of noncitizens, including LPRs, by military tribunals is utterly inconsistent with international norms to which the United States has obligated itself. Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), for example, requires states to ensure that all persons are equal before the courts and tribunals.⁶³ Discrimination on the basis of citizenship or any other basis is prohibited.⁶⁴ It is true that these international guarantees are subject to suspension or derogation in time of emergency,⁶⁵ but the United States has not taken any steps to invoke that right of derogation. Furthermore, it is not even clear that under the ICCPR a derogation of this sort will be allowed.⁶⁶ The actions of the United States in relation to military tribunals are, therefore, inconsistent with the treaty commitment that it has given to the international community.

Violations of international norms by the United States will not only deprive the accused of their internationally guaranteed protections, but they will, more importantly, undermine the capacity of the United States to shape the post-Cold War world in the direction of more respect for human rights. It is not accidental that the organic document (the constitution) of the international community, the United Nations

⁶³ See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(1), 6 I.L.M. 360, 372 [hereinafter ICCPR]. The ICCPR also provides that, at the minimum, there shall be a public hearing before an "independent and impartial tribunal established by law" and the possibility of appealing to an independent tribunal. See *id.* art. 14(2)-(3), (5).

⁶⁴ The action of the U.S. government is also clearly a violation of the Third Geneva Convention of 1949, which prescribes as to how prisoners of war as well as civilians in times of war are to be treated. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁶⁵ Article 4(1) of the ICCPR provides for the rights of derogation as follows: Rights may be suspended only "[i]n time of public emergency which threatens the life of the nation." ICCPR, *supra* note 63, art. 4(1). Although, it could be argued that what happened on September 11th created an emergency, especially at the earlier moments when the nature of the extent of the threat and the identity of the attackers were unknown, it would be hard to argue that a permanent risk of international terrorism which the United States will fight will meet the threshold of "an emergency which threatens the life of the nation." *Id.* art. 4(1).

⁶⁶ Article 4(1) provides that derogation may not be applied in a manner that discriminates on the basis of, among other things, race, color, and religion. ICCPR, *supra* note 63, art. 4(1); see also *id.* art. 4(2).

Charter, opens with the same phrase as that of the United States Constitution: "We the People of the United Nations."⁶⁷ The influence of the United States on the international community has been evident from the very beginning, from the very framing of the United Nations Charter. Given the fact that currently the United States is the unchallenged global power, the capacity of "We the People of the United States" to help shape the community of "We the People of the United Nations" in the direction of more respect for human rights is very significant. However, the proposed military tribunals and the distinction they make between citizens and noncitizens undercut that capacity.

V.

As authorized by the Military Order, in March of this year, the Secretary of Defense promulgated the rules to govern the conduct of the trials before the military commissions. The rules appear to minimize some of the harshest aspects of the initial Military Order. The presumption of innocence will apply, as well as the usual criminal standard of proof beyond a reasonable doubt. Now there is a requirement that there be unanimity among the members of the tribunal to impose the death penalty, rather than the two-thirds majority that the initial Military Order provided. Some aspects of the evidentiary rules are modified, but these modifications do not deal with the central issue of this lecture. Noncitizens who are accused of terrorism will be subject to the exclusive jurisdiction of military tribunals.

The Military Order affects "We the People" negatively in two ways. It undermines our commitment to constitute a community of equals internally, and it undercuts our moral authority to help shape an international community that is defined by its respect for human rights. It is how we act in times of anxiety and tension and in relation to the most vulnerable group within the body of "We the People" that will define the character of our community and the extent of our influence abroad. As the *New York Times* columnist Thomas Friedman aptly put it: American leadership may at times require American valor, "but it is ultimately based on American values."⁶⁸ We should not allow these times of anxiety and vulnerability to shake our commitment to those values.

⁶⁷ U.N. CHARTER pmb1.

⁶⁸ Thomas L. Friedman, *Why the World Listens When We Speak*, TIMES-PICAYUNE, Sept. 17, 2002, at B5.

There have been times in the history of this country when anxieties and tensions have led to hostilities towards aliens (or citizens that are considered aliens) within the country. In some circumstances, those hostilities led to political and legal actions that we have regretted. By making a distinction between noncitizens and citizens in the Military Order, for the purpose of establishing the jurisdiction of military tribunals, President Bush unfortunately lends support to, or associates himself with, that part of our tradition.⁶⁹ The cost of the Military Order's distinction between citizens and noncitizens is not only unfair to those who are subjected to harsher treatment by virtue of belonging to a vulnerable group, but it is also unfair to the character and identity of the community we seek to build, a community of equals. It is far from certain that we will purchase any degree of security with the high cost that we will be paying by turning some members of "We the People" into pariahs and by setting a precedent that will negatively affect our capacity to influence the constitution of a decent international community.

Responding to critics of some aspects of the Administration's policy in relation to civil liberties, Attorney General John Ashcroft accused the critics of aiding and abetting our enemies by eroding our national unity and diminishing our resolve in the war against terrorism. Ashcroft stated:

To those who pit Americans against immigrants and citizens against non-citizens, those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends.⁷⁰

I think the Attorney General gets it wrong. It is in fact some aspects of the Administration's policy of the war against terrorism that threaten to erode our national unity and the cohesiveness of "We the People," by making an unconstitutional and, in my view, ill-advised distinction between citizens and noncitizens, a distinction that is of dubious utility to the security of the nation. It is not the critics that give aid and comfort

⁶⁹ See Aryeh Neier, *The Military Tribunals on Trial*, N.Y. REV. BOOKS, Feb. 14, 2002, at 12.

⁷⁰ *Senate Judiciary Committee Hearing on Anti-Terrorism Policy*, 107th Cong. 313 (2001) (testimony of Attorney General John Ashcroft).

to our enemies, but rather it is those who would discard or otherwise compromise the principles that define “We the People” who will play into the hands of our enemies and give pose to our friends.

The President would honor and reaffirm the central commitment of this nation to constitute a community of equals by withdrawing jurisdiction of the military tribunals over LPRs and, even better, by abandoning the idea of military tribunals altogether. The federal courts will try these cases as efficiently and as fairly as they have done in the past when terrorist suspects came before them.

There are hopeful signs that perhaps the military tribunals will not come into being if the trials of Zaccarias Moussaoui, the French citizen who is accused of being one of the September 11th plotters, and Richard Reid, the sneaker bomber, are any indication. Both men are being tried before the federal courts, not a military tribunal. But, one can never be sure as long as the law remains in the books.⁷¹ In any case, even if the tribunals were never to sit at all, the existence of a law that explicitly makes a distinction between citizens and noncitizens and gives the accuser the final word will continue to send an undesirable signal both at home and abroad, making it that much more difficult for “We the People” to constitute a community of equals and to make the post-Cold War world congenial to human rights and the rule of law.⁷²

⁷¹ In fact, a couple of weeks after this lecture was delivered, *The New York Times* carried an article that detailed an apparent discussion within the Administration on the subject of whether to abort the Justice Department’s prosecution of Zacarias Moussaoui in a federal court and to move his case to a military tribunal. This clearly suggests that we have not heard the last of military tribunals. See Philip Shenon & Eric Schmitt, *Threats and Responses, the 9/11 Suspects; White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say*, N.Y. TIMES, Nov. 10, 2002, § 1, at 17.

⁷² The President is both the accuser and the individual to whom the accused will make his or her final appeal. See *Military Order*, *supra* note 12, §§ 2, 4(c)(8).

