

2004

David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003)

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Recommended Citation

19 *Conn. J. Intl. L.* 423 (2004) (book review).

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BOOK REVIEW ESSAY

ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM

By David Cole. New York: The New Press, 2003, Pp. 256.

Elizabeth M. McCormick

INTRODUCTION

In his State of the Union address January 20, 2004, President Bush declared that the United States is a nation called to great responsibilities. “The greatest of these responsibilities,” he continued, “is the active defense of the American people.”¹ With this introduction, the President set the stage for the central theme of his address to Congress and the nation – the preeminent role of the United States in the war on terrorism. The President recognized the efforts of “hundreds of thousands of American servicemen and women deployed across the world in the war on terror,” of law enforcement and intelligence agencies tracking terrorist threats, and of the new Department of Homeland Security patrolling our coasts and borders, and concluded that “their vigilance is protecting America.” The President cautioned, nonetheless, against false hopes that the danger is behind us. “We must continue to give homeland security and law enforcement personnel *every tool they need to defend us*. And one of those essential tools is the Patriot Act, which allows Federal law enforcement to better share information, to track terrorists, to disrupt their cells, and to seize their assets.”²

The President’s focus in his State of the Union address on the United States’ efforts to fight terrorism at home and abroad is not surprising. Since September 11, 2001, Americans have been understandably preoccupied with what their government is doing to protect them from future terrorist attacks. While their fears have on some level been assuaged by reports of the capture of certain Taliban and Al Qaeda leaders, by the creation of a new Department of Homeland Security to protect the nation against future terrorist threats, and by heightened security at

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1. President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html> [hereinafter 2004 State of the Union Address].

2. *Id.*

airports and borders, many Americans have questioned whether the government's responses to the terror threat have been effective or appropriate.³ Some have criticized the United States for taking actions in the name of national security that ignore the interests of the international community and violate international law.⁴ Still others have argued that the government's efforts to enhance security have resulted in an unacceptable loss of privacy and liberty for many people living in the United States.⁵ Indeed, President Bush's assertion that "this great republic will lead the cause of freedom," has been challenged by many who believe that the United States' war on terrorism has instead undermined its legitimacy as a champion of liberty, democracy, and human rights.

David Cole's *ENEMY ALIENS, DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM*, sets forth a comprehensive and intelligent assessment of the ways in which the war on terror has put the United States and its citizens at risk.⁶ Cole argues persuasively that actions taken by the United States since September 11 in the name of national security – rather than achieving a "peace founded upon the dignity and rights of every man and woman,"⁷ – have sacrificed the liberties of non-citizens and will ultimately jeopardize the liberty and security of all citizens.

When a democratic society strikes the balance between liberty and security in ways that impose the costs of security measures equally on all, one might be relatively confident that the political process will achieve a proper balance. Since September 11, we have repeatedly done precisely the opposite, sacrificing the rights of a minority group – noncitizens, and

3. See MIGRATION POLICY INSTITUTE, *AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* (2003) [hereinafter *AMERICA'S CHALLENGE*]; Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 NO. 39 INTERPRETER RELEASES 1401 (Oct. 13, 2003); Cam Simpson, Flynn McRoberts and Liz Sly, *Immigration Crackdown Shatters Muslim's Lives*, CHI. TRIB., Nov. 16, 2003, at 1.

4. See LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* 73-88 (2003) [hereinafter *LAWYERS' COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL*]. In response to such criticisms related to the wars in Afghanistan and Iraq, President Bush declared, "From the beginning America has sought international support for our operations in Afghanistan and Iraq, and we have gained much support. *There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few. America will never seek a permission slip to defend the security of our country.*" 2004 State of the Union Address, *supra* note 1 (emphasis added).

5. See U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (April 2003) (released June 2, 2003) [hereinafter *INSPECTOR GENERAL'S REPORT*]; LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL*, *supra* note 4; Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (Aug. 2002).

6. DAVID COLE, *ENEMY ALIENS, DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003). David Cole is a professor at Georgetown University Law Center, a volunteer staff attorney with the Center for Constitutional Rights, and legal affairs correspondent for *The Nation*.

7. 2004 State of the Union Address, *supra* note 1.

especially Arab and Muslim noncitizens – in the name of the majority’s security interests.”⁸

Although Cole recognizes that mediating the tension between liberty and security on the backs of non-citizens is politically tempting because citizens do not lose their rights and non-citizens do not vote, he presents a compelling four-part argument for resisting this temptation and, instead, asking citizens and non-citizens to bear any costs of enhanced security equally.

First, the distinction drawn between citizen and non-citizen is illusory in the long run and ultimately, Cole argues, all citizens’ rights are in the balance when the government selectively sacrifices foreign-nationals’ liberties in the name of national security. Second, a history of overreaction in times of crisis suggests that selectively burdening the aliens among us with a loss of fundamental rights is a move that we will undoubtedly regret in the long run. According to Cole, we can instead avoid that cycle of overreaction and apology by determining from the beginning to strike the balance between security and liberty equitably for all. Third, the double standard is counter-productive as a security measure because it undermines the legitimacy, both in the United States and in the international community, of the government’s efforts to combat terrorism. Cole’s fourth and most compelling argument for refusing to engage in the double standard for citizens and non-citizens is that it is morally and constitutionally wrong. The rights and freedoms of non-citizens which have been restricted, Cole argues, are human rights, not privileges of citizenship. Our ability as a nation to recognize and protect these rights for citizens and non-citizens alike will, he promises, ultimately be the test of “the character of America’s future.”

THEIR LIBERTY, OUR SECURITY

The disproportionate burden borne by non-citizens since September 11 in exchange for enhanced security is beyond cavil.⁹ Non-citizens have been subjected to interviews, registration, automatic detention, and removal. They have been tried in secret and subjected to lengthy and coercive interrogation without benefit of

8. COLE, *supra* note 6, at 5.

9. An assessment of whether or not these measures actually serve to enhance security is central to Cole’s argument against the double standard. See also AMERICA’S CHALLENGE, *supra* note 3, at 7 (“The U.S. government’s harsh measures against immigrants since September 11 have failed to make us safer, have violated our fundamental civil liberties, and have undermined national security.”) See also Simpson, McRoberts and Sly, *supra* note 3 (assessing the impact of post-9/11 immigration policies aimed at men from Muslim countries); Stevenson Jacobs, *Terror Suspects Reach 2-Year Mark At Guantanamo - Prisoners Still Waiting For Charges, Trials*, S. FLA. SUN-SENTINEL, Jan. 11, 2004, at A7 (describing the indefinite detention of hundreds of foreign nationals designated as enemy combatants – including three boys aged 13 to 15 – at Camp X-Ray in Guantanamo Bay, Cuba); Carol Morello, *This is the First Time I Saw the American Sky*, WASH. POST, Feb. 3, 2004, at B1 (describing the prolonged detention of a Tibetan nun seeking asylum in the U.S. as part of a post-9/11 Department of Homeland Security policy permitting the automatic, arbitrary and open-ended detention of asylum-seekers); INSPECTOR GENERAL’S REPORT, *supra* note 5 (detailing verbal and physical abuse of immigration detainees, overly restricted access to counsel, and prolonged detention without charge or access to bail).

counsel. They have been excluded or removed from the United States based on speech or wholly innocent political associations. They have been subjected to indefinite detention on the whim of the Attorney General. These "security measures" were the subject of little protest, Cole argues, because they were aimed at non-citizens. Where the government, on the other hand, has taken steps to enhance security that would have had a broad impact on the liberties of United States citizens, the response has been entirely different.¹⁰ Indeed, though many Americans expressed a willingness after September 11 to sacrifice civil liberties for more security, the sacrifices demanded so far have been primarily from non-citizens, and Cole offers example after shameful example of how the war on terror has been waged largely through measures targeting foreign nationals.

The Immigration Law Nostrum

Beginning with the earliest days of the war on terror, Cole describes the Justice Department's efforts to use immigration law as a pretext to apprehend and detain people who might commit terrorist acts in the future. Attorney General John Ashcroft's strategy of preventive detention, aimed almost entirely at non-citizens, emerges as one of the primary weapons in the war on terror. It is a strategy Cole recognizes as a failure on a couple of levels.

First, the preventive detention program has proven to be an absurdly blunt instrument with which to identify and apprehend terrorists. Though the actual numbers are impossible to ascertain because the government has been generally unwilling to disclose even the most basic information about the detainees,¹¹ Cole estimates that more than five thousand people had been detained by May 2003.¹²

10. Operation TIPS (Terrorism Information and Prevention System), which involved a plan to recruit millions of private individuals to snoop on their fellow citizens and share what they found with the Department of Justice, was ultimately deleted from the final version of the Homeland Security Act. Republican Majority Leader Dick Armey, who led the fight against TIPS, declared that he would not allow a law enabling "Americans to spy on one another." Nat Hentoff, *The Death of Operation TIPS*, VILLAGE VOICE, Dec. 13, 2002, at <http://www.villagevoice.com/issues/0251/hentoff.php>. Vocal public criticism led to a similar fate for a proposal for national identity cards for citizens and the application of the Pentagon's "Total Information Awareness" program to citizens. Cole, *supra* note 6, at 6.

11. In response to these secret arrests, numerous public interest groups filed a lawsuit under the Freedom of Information Act, 5 U.S.C. § 552, and the First Amendment, to force disclosure of the number, names, locations, and lawyers of people arrested in the post-September 11 terror investigations. See *Ctr. for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 215 F. Supp. 2d. 94 (D. D.C. 2002). The government argued that disclosure of the information would threaten national security because it would inform terrorist organizations which of their members had been apprehended. The United States District Court for the District of Columbia ruled that the detainees' identities had to be disclosed, rejecting the government's argument that a release of diverse pieces of information about the detainees would permit the terrorists to piece the government's anti-terrorism strategy together as in a "mosaic." *Id.* The Court of Appeals reversed, holding that the "judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." *Ctr. for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003), *cert. denied* 124 S. Ct. 1041 (2004).

12. This number includes people arrested in connection with a Special Registration Program directed at Arab and Muslim non-citizens and the Absconder Apprehension Initiative, which gave priority to tracking down and removing the 6000 Arabs and Muslims among the more than 300,000 aliens in the United States with outstanding removal orders.

Of these, not a single one has been charged with involvement in the events of September 11.¹³ Only five have been charged with terrorist-related crimes, three non-citizens and two citizens. “[B]y the government’s own account, nearly all of the thousands it has detained in the war on terrorism have turned out to have nothing to do with terrorism.”¹⁴ The government’s resources, Cole implies, would have been more productively spent on non-immigration related anti-terror initiatives.¹⁵

Cole next criticizes the Justice Department’s use of the immigration law as a pretext to target non-citizens, without any basis for suspecting them of terrorist activity. He points out that, despite the department’s focus on foreign terrorists, the majority of those charged with terrorism crimes since September 11, like the perpetrator of the most deadly terrorist attack on United States soil before September 11, Timothy McVeigh, were United States citizens. In other words, since it cannot be said that the terrorist threat comes entirely from abroad, the decision to wage the war on terror against non-citizens in particular was misguided and cynical. Cole goes on to describe the pretextual use of the immigration law as follows:

the immigration law functions largely as does the traffic law for drug law enforcement: it affords a convenient pretext for targeting millions of individuals. And just as the traffic laws facilitate “driving while black” enforcement, so the immigration law has permitted ethnic profiling. In the wake of September 11, Ashcroft targeted the Arab and Muslim immigrant community, and stretched, twisted, exploited, altered and in many instances, violated immigration law to achieve his preventive detention goal.¹⁶

This selective enforcement of the immigration laws has permitted the government to take aliens into custody and detain them while they investigate suspected terrorist activities. The alien might be brought in on a minor violation that would otherwise be ignored by immigration officials, or he might be brought in and detained, at least initially, without even an allegation of any immigration

13. Zacarias Moussaoui, the supposed twentieth hijacker, was arrested before September 11. Sarah Downey, *Who is Zacarias Moussaoui?*, NEWSWEEK, Dec. 14, 2001, at <http://msnbc.msn.com/id/3067363>.

14. Cole, *supra* note 6, at 26. Cole has even suggested that, given the abysmal success rate of the preventive detention program, it is in fact only because his targets are foreign nationals and not citizens that John Ashcroft still has a job. David Cole, *Terrorism’s Heritage? Legislative and Executive Responses to Terrorism and Their Constitutional Ramifications*, Remarks at Co-Sponsored Program of Sections on Constitutional Law and Immigration Law, Association of American Law Schools Annual Meeting (Jan. 3, 2004).

15. See AMERICA’S CHALLENGE, *supra* note 3, at 7 (“Our research indicates that the government’s major successes in apprehending terrorists have not come from post-September 11 immigration initiatives but from other efforts such as international intelligence activities, law enforcement cooperation, and information provided by arrests made abroad.”)

16. Cole, *supra* note 6, at 24-25.

infraction. When existing immigration law has not offered the government enough flexibility to accomplish its enforcement and intelligence mission, the law has been changed. For example, a post-September 11 amendment to the immigration regulations allows detention without charge for up to forty-eight hours and for "an additional reasonable period of time" in cases of emergency or other extraordinary circumstance.¹⁷ Prior to that amendment, the regulations required a determination on charges and on custody or release within twenty-four hours of the warrantless arrest of an alien.¹⁸ Another new regulation allows counsel for the Department of Homeland Security, in certain cases, to keep an alien in custody after an immigration judge orders release by simply asserting that DHS will file an appeal.¹⁹ The release order is automatically stayed, regardless of the likelihood that DHS will succeed on appeal. Regulations like these, Cole suggests, exemplify the usefulness of the immigration laws as a pretext. That is, the use of immigration law and procedures for preventive detention allows the government to avoid constitutional requirements of criminal law procedures -- access to courts, representation by counsel, probable cause hearings, public access, and access to bail.²⁰

Even commentators who might disagree with Cole's criticisms of the use of immigration law as a pretext have recognized the potential for abuse that over-reliance on immigration detention as a response to terrorism presents. David Martin, Professor of Law at the University of Virginia and former INS General Counsel, rejects the view that arresting aliens who have overstayed visas or entered the United States without inspection is merely a technical or pretextual use of the immigration laws.²¹ "Those whose immigration violations are unearthed because of enforcement actions started for other purposes, such as steps against terrorism, have no legitimate complaint if they are then placed into removal proceedings,"

17. See 8 C.F.R. § 287.3(d).

18. See 8 C.F.R. § 287.3(d), 62 Fed. Reg. 10390, Mar. 6, 1997. ("Custody procedures. Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 24 hours of the arrest whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.")

19. 8 C.F.R. § 1003.19(h)(4)(i)(2) ("Automatic stay in certain cases. In any case in which the district director has determined that an alien should not be released or has set a bond of \$10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Service's filing of a Notice of Service Intent to Appeal Custody Redetermination... and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals. The stay shall lapse if the Service fails to file a notice of appeal with the Board... within ten business days of the issuance of the order of the immigration judge.")

20. The Center for Constitutional Rights has filed a lawsuit on behalf of non-citizen detainees held after September 11. The complaint alleges that plaintiffs were detained despite having received and accepted deportation orders and were subjected to severe conditions during detention, including beating, verbal abuse, solitary confinement and denial of right to religious practice. *Turkmen v. Ashcroft*, CV-02-2307 (E.D.N.Y., second amended complaint filed June 18, 2003).

21. Statement of David Martin to the National Commission on Terrorist Attacks Upon the United States, Dec. 8, 2003, at http://www.9-11commission.gov/hearings/hearing6/witness_martin.htm (last visited Feb. 29, 2004) [hereinafter Martin Statement to National Commission on Terrorist Attacks].

Martin argues.²² Nevertheless, noting the Supreme Court's affirmation in *Zadvydas v. Davis*²³ that "freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects," Martin has concluded that "the government's use of detention after September 11 often fell short of this standard . . . Many times the Department, although initially justified in its use of detention, did not follow through with needed measures to file charges in a timely fashion, to keep detention to a minimum, or to release or deport promptly those whose continued detention should not have been seen as justifiable."²⁴ Referring to the amendment extending the permissible pre-charge detention period, Martin calls for its repeal and notes that "[e]scape hatches, especially ones bounded only by vague terms like 'reasonable period' simply invite sloppy implementation and departure from the limiting principles that should govern the use of detention."²⁵ Similarly, he recommends revisiting the regulation authorizing automatic stays of release orders, because of indications that it was "being used routinely and without careful calculation by the enforcement agencies of the individual merits that led the [immigration judge] to reduce bond in the first place."²⁶ Thus, while Martin believes that it is perfectly legitimate to use the immigration laws to remove aliens from the United States who might be involved in terrorism,²⁷ he recognizes, like Cole, that these same aliens are entitled to a full and fair process for determining whether they should be detained or removed.

Unfortunately, a lack of access to information about the government's terror investigations has, at a minimum, made it difficult to determine to what extent aliens targeted by these investigations are being afforded due process. If secrecy has been a key component in the government's war on terror in general,²⁸ it has been no less important, Cole contends, in the context of the preventive detention program. Ten days after September 11, Chief Immigration Judge Michael Creppy, at the direction of the Attorney General, issued a memo to all immigration judges

22. *Id.*

23. 533 U.S. 678 (2001)(holding, in a review of habeas petitions brought by aliens held in INS custody well beyond the mandated 90 day post-removal order period, that indefinite post-removal detention is not permitted).

24. Martin Statement to National Commission on Terrorist Attacks, *supra* note 21, at 5.

25. *Id.*

26. *Id.* at 7.

27. "When the immigration agency is seeking only deportation as the ultimate sanction, it is simply good government to file only the simplest and most straightforward charge – typically an overstay or EWI charge, which can be proven from government records or the absence thereof... Terrorism charges pose, in contrast, significant challenges of case management and proof... There is simply no point in adding those complications if there is another easily provable charge. The person's removal from the country is the same whether the charge is overstay or terrorism." *Id.* at 4.

28. See LAWYERS' COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL, *supra* note 4, at iii. ("The two years since September 11 have seen a shift away from the core U.S. presumption of access that is essential to democratic government – the presumption that government is largely open to public scrutiny... Today the default in America has become just the opposite – the work of the executive branch increasingly is conducted in secret.")

with "special instructions for cases requiring additional security."²⁹ Among other things the memo ordered that all cases designated as of "special interest" to the Department would be conducted in secret, with no visitors, family, or press permitted to be present during hearings, and prohibited any release of information about the case, including even the confirmation or denial that the case was on the docket.³⁰ This order was contrary to the usual practice in Immigration Court of allowing public and press access in the absence of an individualized determination by an immigration judge to close a hearing to protect the interests of a witness, party or the public. Although the government asserted that the order was based on both the privacy interests of the detainees and national security interests, Cole rejects this explanation for a couple of reasons.³¹ First, in most of the "special interest" cases, there was no classified information involved.³² Second, the order did not prohibit detainees or their lawyers from releasing information about a special interest case or hearing and, as a rule, the government took no steps to otherwise prevent disclosure of case related information. Despite the alleged concerns about national security, Cole argues, "the government itself did not take the steps one would fully expect it to take were disclosure of the information presented at the hearings truly a threat to national security."³³ Cole suggests that the real motivation for the secrecy was public relations. Simply put, the government wanted to keep the public from discovering that thousands of people had been locked up for no good reason and that the government's broadly cast net had yielded no suspects.³⁴ Such a revelation would, at a minimum, reflect badly on the government's efforts in the war on terror and undermine the public's confidence in the government's ability to protect them.³⁵

29. Memorandum from Chief Immigration Judge Michael Creppy to All Immigration Judges Re: Cases Requiring Special Procedures (Sept. 21, 2001)(relaying details of order from Attorney General Ashcroft)(on file with author).

30. *Id.*

31. Cole is not alone in his criticism of secret hearings. Lawsuits were filed in federal courts in New Jersey and Michigan seeking an order requiring that the hearings be open, with mixed results. *See* Detroit Free Press v. Ashcroft, 195 F. Supp. 2d. 937 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002)(affirming district court's grant of an injunction prohibiting the closing of the hearings). *But see* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002)(reversing district court decision enjoining the Attorney General from denying public access to immigration hearings).

32. Cole reports that none of the 611 special interest proceedings before May 2002 involved classified information. Cole, *supra* note 6, at 27.

33. *Id.*

34. Cole suggests that the secrecy has not, in any event, been effective as a public relations tool, and others have suggested that the Department's decision to close immigration hearings "only increased suspicion that Arab- and Muslim-Americans were being treated under a different standard of due process." *See* AMERICA'S CHALLENGE, *supra* note 3, at 9-10.

35. Cole, *supra* note 6, at 30. In the end, secret hearings were not enough to protect the public image of the government's preventive detention program. In June 2003, the Inspector General of the Justice Department issued a report highly critical of the Justice Department's post-September 11 detention policies and practices. *See* INSPECTOR GENERAL'S REPORT, *supra* note 5. The report documents numerous abuses related, *inter alia*, to the classification of detainees as "of interest," the procedures for notice of charges, the clearance process, bond and removal issues, and conditions of detention. The report alleges, among other things, that many detainees were subjected to physical and verbal abuse, unjustifiably denied bail, detained for unduly long periods, and refused access to counsel. *Id.*

Targeting Enemy Combatants

The government has been similarly interested in maintaining a veil of secrecy with regard to the detention and treatment of hundreds of foreign nationals held at a United States military base in Guantanamo Bay, Cuba. These detainees, all captured as part of the war on terror, and purportedly taken into custody for their connections with Al Qaeda or the Taliban, have been held incommunicado, without access to counsel, without charge, and without any kind of hearing – some for more than two years.³⁶ The detention, according to the Bush administration, is pursuant to the military's power to capture and detain, during wartime, enemy combatants,³⁷ and the President has ordered that anyone arrested as an enemy combatant in the war on terror be tried by military tribunal.³⁸ Cole points out that, although the Constitution permits trial by military tribunal for citizens accused of fighting with the enemy, at least initially the administration limited the application of military justice to non-citizens. Cole suggests that this was a decision based on politics, not law, which in the end proved well-calculated. Though there was widespread condemnation from human rights organizations and the international community in connection with the treatment of non-citizen "enemy combatants,"³⁹ it was not until military custody was imposed on two United States citizens that there was a comparably critical reaction from the American public. According to Cole, the ultimate extension of the enemy combatant designation to citizens Yasser Hamdi and Jose Padilla,⁴⁰ and the dramatically different public response to their arrests and detention, is indicative not only of the willingness of the American public to allow non-citizens to disproportionately sacrifice their freedom for the security of the

36. Neil A. Lewis, *U.S. Will Free 5 Britons Held At Cuba Base*, N.Y. TIMES, Feb. 20, 2004, at A20.

37. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Arts. 3-5, 6 U.S.T. 3316, 75 U.N.T.S. 135. "Combatants and civilians are treated differently under humanitarian law. Combatants – defined principally as 'members of the armed forces of a Party to a conflict' – may be held as prisoners of war until the end of the hostilities as a means of preventing them from returning to participate in the conflict." LAWYERS' COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL, *supra* note 4, at 51, citing Brief of Amici Curiae Experts on the Law of War (Judge Patricia Wald, et al.) in support of Petitioner-Appellee/Cross-Appellant Jose Padilla and Partial Affirmance and Partial Reversal, at 14; Padilla v. Rumsfeld, available at http://www.lchr.org/uslaw/padilla_war_exp.pdf (last visited Aug. 31, 2003).

38. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

39. See *U.S. Criticized on Guantanamo Prisoners*, N.Y. TIMES, Jan. 10, 2004, at http://www.kuwaitidetainees.org/media/AP_011004.htm (last visited Feb. 20, 2004); Richard Cohen, *Lawless in Guantanamo*, WASH. POST, Jan. 20, 2004, at A19; *Guantanamo Inmates Get New Rights*, BBC NEWS, Feb. 13, 2004, at <http://news.bbc.co.uk/go/pr/ft/-2/hi/americas/3487543.stm> (last visited Feb. 21, 2004).

40. Yasser Hamdi was allegedly captured on a battlefield in Afghanistan fighting for the Taliban. Jose Padilla was arrested in Chicago O'Hare Airport for allegedly planning to detonate a radioactive "dirty bomb" and meeting with members of Al Qaeda. Though not held at Guantanamo, both Hamdi and Padilla have been held incommunicado, without trial or charges, and denied access to counsel. Legal challenges to their detention are pending. See *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), cert. granted 124 S.Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), cert. granted 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027).

majority, but also of the ease with which the government's distinction between citizen and non-citizen can be blurred in times of crisis. The political momentum which initially permitted the infringement of the rights of foreign nationals can all too quickly spin out of control, Cole argues, and take with it the freedoms of citizens and non-citizens alike.

As applied to both citizens and non-citizens, Cole argues that the government has far exceeded its authority under the Geneva Convention to detain enemy combatants. The detainees, first of all, have not been afforded the minimal legal rights established for prisoners of war under the Convention, including the right to a hearing on the issue of whether or not they are enemy combatants.⁴¹ Given the nature of the untraditional war at issue, and the fact that, like Jose Padilla, many of those detained at Guantanamo were not captured on the battlefields of Afghanistan,⁴² Cole suggests that it is not at all clear that all of the detainees are proper prisoners of war. Indeed, there is compelling evidence that many non-combatants may have been captured in the far-reaching hunt by the U.S. and its allies for supporters of Al Qaeda and the Taliban.⁴³ Cole points out that in the Gulf War, the military held nearly 1200 hearings to determine the status of prisoners and two thirds of those captured were ultimately determined to be non-combatants. Although none of the Guantanamo detainees have been provided with a hearing to determine whether they are legitimately held, more than ninety have been released so far, the result of a "long and arduous intelligence process of deciding who remains a danger and who can be released."⁴⁴ In view of the releases to date, as well as the government's recent statement that some detainees could be held for many years,⁴⁵ Cole's argument that the detainees are entitled to a hearing before a competent tribunal to determine their status is all the more compelling.

Cole rejects the government's blanket assertion that all of those detained in the war on terror are "unprivileged combatants" not entitled to the protected status of prisoners of war. He asserts that President Bush's November 2001 order, calling for the indefinite detention and trial by military tribunal of all persons apprehended

41. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 37, at art. 5. Padilla and Hamdi have been able to obtain extremely limited judicial review of their detentions. In Hamdi's case, the Court of Appeals concluded that because it was undisputed that Hamdi had been captured in "a zone of active combat in a foreign theater of conflict," the court could not question the government's factual assertions that he is an enemy combatant. *Hamdi*, 337 F.3d at 345. In Padilla's case, a three judge panel of the Second Circuit Court of Appeals ruled that the President had no authority under the Constitution to imprison an American citizen as an enemy combatant without any charge and without judicial review when he was arrested on U.S. soil, unarmed, and far from any field of combat. *Padilla*, 352 F.3d 695. The Supreme Court will hear the appeals in both cases this spring.

42. Among the approximately 650 detainees, there are nationals of forty countries arrested in Afghanistan, Bosnia, Gambia and, possibly, Mauritania. LAWYERS' COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL, *supra* note 4, at 53.

43. *Id.* at 54 (noting that families of many of the detainees insist that their detained relatives were humanitarian workers and that some of those released appeared upwards of seventy years old).

44. Lewis, *supra* note 36.

45. *Id.*

in connection with the war on terror,⁴⁶ is in contravention of Convention provisions that prohibit the trial of prisoners of war for lawful acts committed during combat. With regard to the Taliban, the United States has taken the position that because the fighters did not wear uniforms distinguishing themselves from civilians and some members engaged in war crimes, the Taliban as a whole is not entitled to prisoner-of-war protections.⁴⁷ A similar position has been taken with regard to members of Al Qaeda.⁴⁸ Cole points out that, even if defensible, “the administration’s position fails to entertain the very real possibility that some of the detainees *may not have been involved in combat at all*.”⁴⁹ Therefore, while the indefinite detention of these so-called enemy combatants has been tolerated by the citizenry because it has for the most part been “directed at someone other than themselves,”⁵⁰ the detainees are nonetheless entitled to some process for determining their status.⁵¹

Cole is not alone in his demands for a fair process for the Guantanamo detainees. There has been a significant amount of public criticism, and a number of legal challenges to the government’s liberal use of the enemy combatant doctrine to justify prolonged, incommunicado detention. The Lawyers’ Committee for Human Rights has called for the U.S. government to carry out its obligations under the Geneva Convention to provide detainees with an individualized hearing in which their status as civilians or prisoners of war may be determined, and to immediately release those determined not to have directly participated in armed conflict.⁵² Similarly, David Martin has called on the administration to remember that the laws of war, which permit the preventive detention of captured combatants until the end of hostilities, bring with them certain fundamental protections, including protections designed to distinguish combatants from civilians. “At the very least, in the context of prolonged preventive detention, the principle [of distinction] calls for an effective mechanism that gives detainees a timely opportunity to show that they are in fact innocent civilians and to win prompt release in that case.”⁵³ Habeas corpus petitions have been filed on behalf of a number of the detainees, seeking to compel the government to reveal the legal basis for the detentions, and the Supreme

46. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *supra* note 38.

47. Press Secretary Ari Fleischer, Statement in the James S. Brady Briefing Room (Feb. 7, 2002), available at <http://www.us-mission.ch/press2002/0802fleischerdetainees.htm> (last visited Feb. 20, 2004) (“The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda.”)

48. *Id.* (“Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the Treaty.”)

49. Cole, *supra* note 6, at 42 (emphasis in original).

50. *Id.* at 46

51. *Id.* at 43.

52. LAWYERS’ COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL, *supra* note 4, at 72.

53. Martin Statement to National Commission on Terrorist Attacks, *supra* note 21, at 15.

Court is expected to rule on the legality of the detentions before the summer.⁵⁴ In addition, a request for precautionary measures from the Inter-American Commission on Human Rights has been issued, urging the United States to take urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.⁵⁵

While the administration continues to assert that those detained at Guantanamo are enemy combatants who pose a threat to the United States and its allies, and who have no right to judicial review of their status, a significant number of the detainees have been released or are scheduled to be released in the near future.⁵⁶ Whether or not the releases were in fact prompted by the heightened public criticism or by the Supreme Court's decision to hear the detainees' appeals is a subject of some speculation.⁵⁷ In any event it appears that, even though the administration still has not acknowledged that any of the detainees are in fact entitled to any protections under the Geneva Convention, the releases may be part of "a message to the court that you can trust us in the government to deal fairly with these people."⁵⁸ Cole anticipates that message and argues against allowing the exercise of unchecked executive detention authority. Indeed, Cole explains, it is precisely because the government has proven untrustworthy in the past that we should resist the temptation to allow an expanded use of that detention power again.

RELIVING HISTORY

If we are not vigilantly aware of our actions and attitudes toward non-citizens in this war on terror, we are destined as a nation, Cole contends, to repeat the same mistakes we have made countless times in the past. These are mistakes that we will inevitably regret for a number of reasons, not the least of which is that "security

54. The cases have been consolidated and the petitions for writ of certiorari have been granted for the limited purpose of determining whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. See *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. Mar. 11, 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-343).

55. The United States has rejected the IAHR's recommendation, asserting that the IAHR lacked jurisdiction to interpret the Geneva Convention and that, in any event, the precautionary measures were not necessary or appropriate because the legal status of the detainees is already clear – unlawful combatants not entitled to POW status. *Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba* (Apr. 15, 2002), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/4-15-02GovernmentResponse.pdf.

56. In early December 2003, a government spokesperson announced that as many as 140 detainees were scheduled to be released. Nancy Gibbs with Viveca Novak, *Security breaches. Suicidal detainees. A legal challenge heading to the Supreme Court. Welcome to Guantanamo*, TIME MAG., Dec. 8, 2003, at 40. By mid-February, more than 80 had been released and six more were scheduled for release. Lewis, *supra* note 36.

57. Upon hearing of a statement by U.S. officials that some detainees were there because they had been kidnapped by Afghan warlords and sold for the bounty the U.S. was offering for al-Qaeda and Taliban fighters, David Martin replied, "If this report is true, we should be ashamed that it has taken this long, nearly two years in most such cases, to recognize and rectify the error." Martin Statement to National Commission on Terrorist Attacks, *supra* note 21, at 15.

58. Lewis, *supra* note 36 (quoting Michael Ratner, Center for Constitutional Rights).

measures targeted at immigrants have virtually always laid the groundwork for future deprivation of citizens' rights."⁵⁹

Before beginning a lengthy discussion of the United States' appalling history of selectively targeting the aliens among us for a loss of rights and liberties, Cole explains that ambivalence toward non-citizens has run deep in the American psyche for generations. While on the one hand a nation of immigrants, proud of our heritage and diversity, at the same time there exists a general suspicion of immigrants, "based on their racial, religious, and ethnic difference, and their radical associations and ideas."⁶⁰ As a result, "we have incarcerated and deported foreign nationals for their ideas, their beliefs, and the company they keep, while employing summary procedures to do so."⁶¹ These measures were, according to Cole, initially uncontroversial precisely because they were targeted at foreign nationals, a group easily and frequently demonized in times of crisis. "Only when the government's tactics affected a sufficiently large number of citizens did the country recognize the errors of its ways."⁶²

From the Palmer Raids to the Japanese internment to the Cold War, Cole traces the history of America's overreaction to perceived security threats from abroad with a pattern of overreaction and political repression aimed first at foreign nationals and inevitably extended across the citizen-noncitizen divide. Indeed, Cole suggests that, historically, anti-alien sentiment and tactics have been widely exploited in the government's efforts to rationalize political repression. In other words, because it has proven relatively easy in times of national crisis to harness public antipathy toward the foreigner among us, the government has been able to gain public support for what would be intolerable restrictions on liberty if applied to citizens, only to later extend the restriction to citizens:

Virtually every significant government security initiative implicating civil liberties – including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention – has originated in a measure targeted at non-citizens. The government has frequently defended such measures – legally and politically – by arguing that the threat stems from abroad, and that non-citizens do not deserve the same rights and protections as U.S. citizens But almost as inevitably, government officials have thereafter extended similar security measures to U.S. citizens.⁶³

Cole's discussion of the Japanese internment of World War II, undoubtedly the most extreme and shameful example of the historical pattern discussed above,

59. Cole, *supra* note 6, at 90.

60. *Id.*

61. *Id.*

62. *Id.* at 87.

63. *Id.* at 85.

reveals both how easily the citizen-noncitizen distinction is breached, and how the extension of restrictive security measures to citizens is most readily accomplished through the prism of race. Though carried out under the auspices of the Enemy Alien Act, the order for internment of persons of Japanese descent was extended from the beginning to Japanese-Americans, as well as Japanese nationals. One hundred ten thousand people were detained, seventy thousand of whom were U.S. citizens, and deemed to be presumptively loyal to Japan. Cole points out that no German-Americans or Italian-Americans were detained during this time, and suggests that the ease with which Japanese-Americans were encompassed into this category of *enemy aliens* is explained by racism. "The close interrelationship between anti-Asian racism and anti-immigrant sentiment made the transition from enemy alien to enemy-race disturbingly smooth."⁶⁴ That the government's motives were based on racist stereotypes is, according to Cole, substantiated by the fact that none of the Japanese-American detainees was ever charged with or convicted of any crime of espionage, treason, or sabotage. Nevertheless, he acknowledges that the absence of evidence of criminal activity did not lessen the demands for their internment. "[I]n arguments that foreshadow the 'sleeper' theories advanced about Al Qaeda today, government officials argued that the very fact that Japanese aliens and citizens living among us had not taken any subversive action only underscored how dangerous they really were."⁶⁵

Though in the end there is broad consensus that internment based on race or national origin is wrong and that the Supreme Court decisions upholding the government's anti-Japanese measures were wrongly decided, the Enemy Alien Act has not been repealed. Because this act authorizes the prolonged detention, without constitutional safeguards, of persons deemed dangerous based on a political opinion presumed from national origin, Cole suggests that perhaps we have not learned a lesson from history, that we remain capable – even if not necessarily poised – to once again scapegoat the non-citizen in times of fear and crisis. He reminds us of the true lesson that needs to be learned from the tragedy of the Japanese internment: "These propositions do not become wrong only when applied to U.S. citizens, but are wrong as applied to any human being."⁶⁶

The importance of this lesson is underscored by the fact that Fred Korematsu, a U.S. citizen imprisoned in a Utah internment camp during World War II, has authorized the submission to the Supreme Court of an amicus brief, in his name, on behalf of non-citizens detained at Guantanamo.⁶⁷ In 1942, Korematsu, then 22 and

64. *Id.* at 97.

65. *Id.*

66. *Id.* at 100.

67. The brief was filed in the cases of *See Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), *cert. granted* 124 S.Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696), *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. Mar. 11, 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-343), and *Rasul v. Bush*, 215 F. Supp. 2d 55 (D. D.C. July 30, 2002), *aff'd*, *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. Mar. 11, 2003) (consolidated appeal), *cert. granted*, *Rasul v. Bush*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-334). *Al Odah* and *Rasul* are being held at the Guantanamo Bay facility in Cuba, and *Hamdi*, a U.S. citizen, in a military brig in Virginia. Peter Schuler, *Stone Writes Fred Korematsu's Amicus Brief, As History Repeats*, U. CHI. CHRON. (Nov. 6, 2003).

working as a welder in an Oakland, California shipyard, refused to be put into an internment camp. He was arrested, convicted, and ultimately sent to an internment camp in Utah, where he and his family remained for the duration of the war. In *Korematsu v. United States*,⁶⁸ the Supreme Court upheld his conviction, ruling that because the United States was at war, the government could, on the grounds of military necessity, constitutionally intern him without a hearing and without any adjudicative determination that he had done anything wrong. Korematsu's brief admonishes the court that "in order to avoid repeating the mistakes of the past, the Supreme Court should make clear in these cases that the United States respects fundamental constitutional and human rights – even in times of war. These cases present the Supreme Court with a direct test of whether it will meet its deepest constitutional responsibilities to uphold the law in a clear-eyed and courageous manner."⁶⁹ According to Professor Geoffrey Stone, who authored the brief on Korematsu's behalf, "Fred Korematsu has committed himself to ensuring that Americans do not forget the lessons of their own history."⁷⁰

LEGITIMACY AND DOUBLE STANDARDS

Nous sommes tous Américains. We are all Americans. This was the headline in *Le Monde* on September 13, 2001, a headline which expressed a sentiment shared by many across the world. "How can we not feel," the article began, "as in the most grave moments of our history, profoundly linked with this people and this nation, the United States, with whom we are so close and to whom we owe freedom, and therefore our solidarity."⁷¹ The point of view reflected here was not unique. In the aftermath of the terrorist attacks, the United States enjoyed the overwhelming support and compassion of the international community. Moreover, there was a sense that the only appropriate response was for the international community to unite in its condemnation of these barbaric attacks and their perpetrators. Almost immediately, however, it became clear that the United States' response to the attacks would fail on many levels to garner the support of many of its allies. Indeed, perhaps the most troubling aspect of the United States' response was the perception that the United States was not particularly interested in reaching out to form the kinds of coalitions that might succeed in preventing another massive terrorist attack. Rather than seeking solidarity with its allies, Cole suggests that the United States ultimately squandered much of the good will it enjoyed after September 11 because it adopted a unilateral foreign policy and a double standard imposing restrictions on the liberties of non-citizens that were not imposed on citizens. The resultant lack of legitimacy in the international

68. 323 U.S. 214 (1944).

69. Schuler, *supra* note 67.

70. *Id.*

71. Jean Marie Colombani, *Nous Sommes Tous Américains*, LE MONDE, Sept. 13, 2001 (translation by author).

community, as well as in foreign national communities in the United States, has undermined rather than enhanced national security.

As an initial matter, Cole points out that many of the tactics undertaken after September 11 in the name of national security were, in addition to being constitutionally and morally objectionable, largely ineffective and counterproductive as security measures. The massive arrests, interrogations, and detentions of foreign nationals from predominantly Arab and Muslim nations did not succeed in uncovering any substantial leads in the war on terror. This is not particularly surprising, Cole notes, since ethnic profiling has been largely discredited as a law enforcement tool. Rather, the real danger of such methods is that they waste valuable resources that would be better spent on law enforcement measures that focus on what a person has done or plans to do, rather than who the person is:

The proxies of Arab or Muslim identity or nationality are so inexact and overbroad that virtually all of those questioned, registered or detained have proven to be innocent of any terrorist activity. Locking up several thousand people with no connection to terrorism is hardly a cost-effective way to improve security.⁷²

Worse still, the wide net cast in an investigation based only on racial or national identity, will certainly not yield those real terrorists who do not fit the ethnic profile, and may not even detect those who fit the profile but whose involvement in terrorist activities is less obvious than race or nationality.⁷³

Cole suggests that the decision to target Arab and Muslim men for registration, interviews, arrest and deportation effectively labeled an entire, overwhelmingly law-abiding community as suspect and turned the members of that community "from willing allies to wary adversaries."⁷⁴ This opinion has been widely shared. Khaled El Fadl, Professor and Distinguished Fellow in Islamic Law at UCLA Law School, has cautioned that "an important part of winning the war against terrorism is actively resisting and guarding against the alienation of any part of our citizenry It is elementary that the more united our stand against terrorism, the more effective we will be."⁷⁵ Similarly, Vincent Cannistrano, former chief of operations and analysis at the CIA's Counterterrorism Center suggests that targeting Muslim

72. Cole, *supra* note 6, at 185.

73. The danger of missing important pieces of evidence in such an indiscriminate investigation has been emphasized by counterterrorism expert Juliette Kayyem of Harvard's John F. Kennedy School of Government: "The pure accumulation of massive amounts of data is not necessarily helpful, especially for an agency like the INS that already has trouble keeping track of things The idea that [the special registration program] has anything to do with security, or is something the government can do to stop terrorism, is absurd." LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL*, *supra* note 4, at 37.

74. Cole, *supra* note 6, at 191.

75. Khaled El Fadl, Statement to the National Commission on Terrorist Attacks Upon the United States (Dec. 8, 2003), at http://www.9-11commission.gov/hearings/hearing6/witness_elfadl.htm (last visited Feb. 29, 2004).

and Arab communities terrifies, angers, and drives into hiding the very people who could most assist the investigations:

When we alienate the communities . . . we undermine the very basis of our intelligence collection abilities because we need to have the trust and cooperation of people in those communities. If someone comes from the outside who is a stranger, comes into the community, the people who are long established in that community know it or are in a position to know it, and therefore to provide early warning information. But if the FBI conducts sensitive interviews with community leaders at the same time that that community has been rounded up by the INS, forced to report, and everyone forced to report knows that if they are illegal, they are not a document holder, that they can and will be deported, you've really kind of eliminated the ability to get information that you really need.⁷⁶

Therefore, according to Cole and others, if there are terrorists hiding in the Arab and Muslim communities in the United States, it is more likely that they will be discovered if the government takes steps to engender trust and cooperation, rather than fear and outrage, among those living there. By failing to do this, and instead sending a message that the fundamental rights of foreign nationals, especially Arab and Muslim non-citizens, are expendable, the government has lost legitimacy in these communities and squandered a valuable law enforcement opportunity.

This loss of legitimacy extends overseas, where the United States has been widely criticized for measures selectively targeting non-citizens and for an unwillingness to abide by rules that govern the rest of the world. Through its failure to heed its obligations under international law, its willingness to bypass the United Nations Security Council, and its prolonged detention of hundreds of foreign nationals, the United States has compromised its moral authority and its ability to maintain broad international support. These double standards, Cole contends, hinder international cooperation essential to identifying and capturing those plotting against us. "Intelligence and law enforcement support will turn at least in part on the extent to which we are fighting for a broad principle of justice, rather than for our own parochial self-interest."⁷⁷ Just as Benjamin Franklin declared during the American Revolution that "[w]e fight not just for ourselves but for all mankind,"⁷⁸ Cole suggests that the United States must demonstrate that self-interest is not its only motive for action. Robert Kagan expressed a similar sentiment with his proposition that "[e]ven at times of dire emergency, and perhaps especially at those times, the world's sole superpower needs to demonstrate that it

76. Comments of Vincent Cannistraro at the 26th Annual National Legal Conference on Immigration and Refugee Policy (Apr. 3, 2003), *quoted in* LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL*, *supra* note 4, at 38-39.

77. Cole, *supra* note 6, at 195.

78. See Robert Kagan, *A Tougher War For the U.S. Is One of Legitimacy – Can America Afford to Fight Its Enemies Without the Help of Its Friends?*, N.Y. TIMES, Jan. 24, 2004, at B7.

wields its great power *on behalf of its principles and all who share them.*"⁷⁹ To the extent that the United States abandons the principles of justice and democracy in the war on terror, it risks a loss of legitimacy and a consequent loss of ground to its enemies. Like other critics of the war on terror, Cole recognizes that the "'terrorists' greatest threat is to the survival of principle" and that our enemies thrive when they succeed in forcing us to abandon our principles.⁸⁰

Cole does not exaggerate when he asserts that the character of America's future is at stake, and his criticism of American exceptionalism has been echoed around the globe and at both ends of the political spectrum. The Department of State has reportedly received complaints from many of the forty-two nations whose citizens are being held in Camp X-Ray in Guantanamo,⁸¹ and the international press has resoundingly condemned the post-September 11 treatment of non-citizens by the United States government.⁸² Judge Johan Steyn, a senior judge in Britain's House of Lords, has called the United States' indefinite detention of alleged enemy combatants at Guantanamo Bay a "monstrous failure of justice."⁸³ *The Economist* magazine declared America's abuse of power over the Guantanamo prisoners "unworthy of a nation which has cherished the rule of law from its very birth," accused the United States of "alienating many other governments at a time when the effort to defeat terrorism requires more international co-operation in law enforcement than ever before," and concluded that "America's casual brushing aside of the Geneva Convention . . . made America's invocation of these same conventions on behalf of its own soldiers during the recent Iraq conflict sound hypocritical."⁸⁴ Indeed, according to *Washington Post* columnist Richard Cohen, "the word Guantanamo has become shorthand throughout the world for American arrogance and unilateralism."⁸⁵

Cole offers a number of concrete proposals for enhancing security without sacrificing principle or undermining legitimacy. Underlying each of his suggestions is an admonition against any measure that unfairly burdens a minority group with a loss of liberty in order to keep the majority safe. Measures which

79. *Id.* at B9 (emphasis added).

80. Cole, *supra* note 6, at 197; see also Khaled El Fadl, Statement to the National Commission on Terrorist Attacks Upon the United States, *supra* note 75.

81. *A Place in the Sun, Beyond the Law*, *ECONOMIST*, May 10, 2003, at 12.

82. See *Legal Double-Standards Are Not the Way to Win a War Against Terrorism*, *INDEPENDENT*, Jan. 14, 2002, at 3, quoted in Cole, *supra* note 6, at 195 (stating "An effective campaign against terrorism requires the support, not just of Arab and Muslim countries, but of many other countries in the developing world which are quick to sniff out Western hypocrisy. If the alleged terrorists detained in Guantanamo Bay are denied democratic standards of justice or treated inhumanely, the campaign will be seriously damaged.")

83. Jacobs, *supra* note 9. See also Johan Steyn, *Guantánamo: A Monstrous Failure of Justice*, *INT'L HERALD TRIB.*, Nov. 28, 2003, at 6 ("Democracies must defend themselves . . . But in times of war, armed conflict or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis. One tool at hand is detention without charge or trial. Ill-conceived, rushed legislation is passed granting excessive powers to executive governments which compromise the rights and liberties of individuals beyond the exigencies of the situation. Often the loss of liberty is permanent.")

84. *A Place in the Sun, Beyond the Law*, *supra* note 81.

85. Richard Cohen, *Lawless in Guantanamo*, *WASH. POST*, Jan. 20, 2004, at A19.

result in increased airport security, tighter immigration restrictions and border control, or even potentially suspect limits on access to information about building weapons of mass destruction, but which inconvenience or restrict *all of us equally*, may strike an acceptable balance between liberty and security Cole suggests, because the political process can be expected to correct any excess or abuse. On the other hand, measures which distinguish between citizen and non-citizen, or single out a particularly vulnerable minority, come at a substantial cost in terms of our legitimacy among those who might be our partners in the war on terrorism. In a rare moment of agreement with John Ashcroft, Cole quotes the Attorney General back to himself: "To those who pit Americans against immigrants and citizens against noncitizens . . . my message is this: Your tactics only aid terrorists... They give ammunition to America's enemies, and pause to America's friends."⁸⁶

DOING THE RIGHT THING

In his final chapter, Cole's arguments turn from the practical to the humanistic as he lays out his case for why the distinctions between citizen and non-citizen relied on so heavily in the war on terror are just plain wrong. He sets forth a compelling argument for why such distinctions are neither constitutionally justified nor consistent with international law. The rights and liberties which have been under assault in the war on terror – political and religious freedoms, due process, equal protection of the laws – are not privileges of citizenship, but are "inherent in what it means to be a free person with human dignity."⁸⁷ Moreover, Cole reasons that trading non-citizens' basic human rights in the name of security is wrong as a normative matter. "When we balance liberty and security . . . we should respect the equal dignity and basic human rights of all persons because it is the right thing to do."⁸⁸ Our nation's overwhelming failure to do so in the wake of September 11, he warns, signals the loss of our own humanity.

Cole begins by challenging the widely held perception that non-citizens enjoy many fewer rights than do citizens, pointing out that the Constitution presumptively extends not just to citizens but to all who are subject to American legal obligations and to all physically present in the United States.⁸⁹ With the exception of the right to vote and to hold public office, the Constitution makes no distinction between the rights of citizens and non-citizens and, Cole points out, the

86. Cole, *supra* note 6, at 208 (citing *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Committee on the Judiciary*, 107th Cong. 313 (2001)(testimony of Attorney General John Ashcroft).

87. Cole, *supra* note 6, at 11.

88. *Id.* at 226.

89. Although Cole does not specifically address the issue of whether the Constitution extends to non-citizens detained in a military installation outside of the United States, the Guantanamo detainees would no doubt at least fall into the category of persons subject to American legal obligations. As the petitioners in the *Rasul* and *Al Odah* cases have argued, the fact that the detainees are in a territory over which the United States has complete jurisdiction and control and where only U.S. law applies supports the extension of the Constitution to Guantanamo. Moreover, as discussed above, Cole is emphatic that the Guantanamo detainees are guaranteed certain fundamental rights under international law.

courts have repeatedly recognized non-citizens' constitutional rights to due process, equal protection and free speech. Beyond the Constitution, Cole argues that there are certain basic rights to which all persons are entitled by virtue of their humanity and points out that these rights – due process, equal protection, and political freedoms – are recognized by international human rights instruments as applying to nationals and non-nationals alike.⁹⁰ Finally, he looks to the practice in other states as the basis for a normative argument for extending fundamental rights to non-citizens. Cole offers several examples – from Sweden to Canada to Great Britain to Germany – of constitutional and statutory provisions granting equal rights and freedoms to citizens and non-citizens alike. In light of this broad consensus, Cole contends that “the rights of political freedom, due process, and equal protection are among the minimal rights that the world has come to demand of any society.”⁹¹

Beyond their humanity, Cole argues that non-citizens, by virtue of their lack of franchise and a history of anti-immigrant animus in the United States, are particularly deserving of heightened protection of their fundamental rights. Unable to participate in a political process that has on numerous occasions in the past ignored and even obliterated the rights and interests of non-citizens, the case for extending the Bill of Rights to non-citizens is all the more compelling. Moreover, Cole argues the nature of the rights at issue – due process, equal protection,⁹² and political freedom – provides no reasonable basis for distinguishing between citizens and non-citizens. Free speech promotes values and interests – autonomy, critical thinking, self-expression, and curbing government excess – in which citizens and non-citizens have an equal stake. Similarly, Cole argues, the interests at stake when the state seeks to deprive an individual of life, liberty, or property do not usually depend on the citizen/non-citizen distinction. “While the definition of most constitutional rights contains an implicit consequentialist balance, the balance should be struck equally for all – even if it might appear convenient or politically tempting to strike it differently for some.”⁹³

CONCLUSION

Although President Bush declared in his State of the Union address that “because of American leadership and resolve, the world is changing for the

90. The Universal Declaration of Human Rights explicitly guarantees these rights to “all members of the human family.” Cole, *supra* note 6, at 214, quoting RICHARD B. LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* (1984), at 41. In addition, the International Covenant on Civil and Political Rights extends its protections to everyone “irrespective of his or her nationality or statelessness.” *Id.*, citing General Comment 15, *The Position of Aliens Under the Covenant*, Human Rights Committee, U.N. Doc. HRI/GEN/I/Rev. I, at 18 (1994), 27th Sess., 1986, at para. 7.

91. Cole, *supra* note 6, at 215.

92. Cole acknowledges that relevant differences between non-citizens and citizens do justify some classifications based on alienage, but argues that beyond those limited differences noncitizens are presumptively entitled to equal protection. Cole, *supra* note 6, at 227.

93. *Id.* at 222.

better,”⁹⁴ Cole raises serious doubts about the legitimacy of that leadership. Contrary to the president’s assertions, he suggests that in fact America’s war on terror has irreparably harmed the lives of many vulnerable and innocent people. America has lost its credibility as the leader of the democratic world because, despite the President’s declaration that “God has planted in *every human heart the desire to live in freedom*,”⁹⁵ time and again since September 11 our government has trampled on the freedoms of foreign nationals in exchange for the freedom and security of American citizens. Rather than leading the cause of freedom, America has sent the message that in times of crisis the rights and liberties of some can be selectively dispensed with. This hypocrisy, Cole argues, has come at the cost of our security, our liberty, and our integrity as a nation. “How we treat foreign nationals, the paradigmatic other in this time of crisis,” he concludes, “ultimately tests our own humanity.”⁹⁶ While on the one hand Cole optimistically challenges America to learn from the lessons of history and to commit, in this war on terror, to treating the fundamental rights of citizens and foreign nationals equally, ENEMY ALIENS, DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM offers a convincing albeit dismal assessment of how the United States is likely to fare on a test of humanity.

94. 2004 State of the Union Address, *supra* note 1.

95. *Id.*

96. Cole, *supra* note 6, at 227.

