



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2003

Security and Freedom: Are the Governments' Efforts to Deal With Terrorism Violative of Our Freedoms?

David Cole


Georgetown University Law Center, cole@law.georgetown.edu

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/75>

29 Can.-U.S. L.J. 339-349 (2003)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Civil Rights and Discrimination Commons](#)

GEORGETOWN LAW

Faculty Publications



January 2010

Security and Freedom: Are the Governments' Efforts to Deal With Terrorism Violative of Our Freedoms?

29 Can.-U.S. L.J. 339-349 (2003)

David Cole

Professor of Law

Georgetown University Law Center

cole@law.georgetown.edu

This paper can be downloaded without charge from:

Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/75/>

SSRN: <http://ssrn.com/abstract=929527>

Posted with permission of the author

SECURITY AND FREEDOM - ARE THE GOVERNMENTS'
EFFORTS TO DEAL WITH TERRORISM
VIOLATIVE OF OUR FREEDOMS?

David D. Cole[†]
U.S. Speaker

One of the most common things that is said about September 11th is that it changed everything. In some respects, that is true. In the most important respects it would be more accurate to say it has changed everything for some, far more than it has for others. One instance of that can be seen in a pole that National Public Radio did one year after September 11th.¹ They asked people to what extent their life had changed. They asked them whether they had to give up any important rights or freedoms in the war on terrorism. Only seven percent said yes. I think that is a telling statistic. I think the reason for that is we have not, in the wake of September 11th, been forced to ask which of our rights we as American citizens are willing to give up in order to gain more security.

The attacks of September 11th have left all of us feeling vulnerable in ways that we were privileged not to have to felt before September 11th. There may well be a need to recalibrate the balance of liberty and security. That is not the question our government has asked us. Rather, the question it has asked us is, are you willing to give up their rights and their liberty for your security? The they being the foreign nationals; more specifically Arab and Muslim nationals. That is an easy way to strike the balance between liberty and security for a politician, because foreign nationals have no voice in the

[†] David Cole is a professor at Georgetown University Law Center, a volunteer staff attorney for the Center for Constitutional Rights, the legal affairs correspondent for *The Nation* and a periodic commentator on National Public Radio's *All Things Considered*. He has litigated many First Amendment cases, including *U.S. v. Eichman*, which extended First Amendment protection to flagburning. The *American Lawyer* named him one of the top 45 public sector lawyers in the country under the age of 45. He is the author of several books, including *No Equal Justice: Race and Class in the American Criminal Justice System* (1999), which was named the Best Non-Fiction Book of 1999 by the Boston Book Review, the best book on an issue of national policy in 1999 by the American Political Science Association, and was awarded the Alpha Sigma Nu prize from the Jesuit Honor Society in 2001. Professor Cole received both his undergraduate and law degrees from Yale University.

¹ 2002 *Civil Liberties Update*, NATIONAL PUBLIC RADIO/KAISER FAMILY FOUNDATION/KENNEDY SCHOOL OF GOVERNMENT, Sept. 2002, at 6, available at www.kff.org/content/2002/3263/Civil_Liberties_Toplines.pdf

political process. Citizens do. So, you put citizen security interests on one side and the liberty interests of a group who has no voice on the other side. You can see where the balance is struck.

SACRIFICING THEIR LIBERTY FOR OUR SECURITY

What I am going to do tonight is attempt to illustrate how we have relied upon this double standard in striking the balance between liberties and security since September 11th. Then I want to argue that double standard is first, wrong as a normative matter; second, counterproductive as a security matter; and, third, illusory, because what we do to foreign nationals in the name of security almost inevitably eventually gets extended to U.S. citizens.

Double Standard

First, the case for this double standard. When you look at what we have done and when you look in particular at the most egregious sort of erosions of rights that we have put in place since September 11th, they are almost all focused on foreign nationals. The first and probably the most extreme is the campaign of mass preventative detention undertaken by our Attorney General, John Ashcroft, in the wake of September 11th. He made a number of very public speeches right after September 11th in which he compared himself favorably to Robert Kennedy seeing that Lloyd Benson was not in the room; and then he said, just as Bobby Kennedy said, he was willing to lock up a Mafia Mobster for spitting on the sidewalk, I am going to use every law I have from immigration law to criminal law to keep suspected terrorists off the street.² I am now warning you suspected terrorists, if you so much as overstay your visa by one day, we will lock you up to keep America safe. Indeed, they have done just that since September 12th.

The results of that are really quite striking. I do not think the full details are known because so much about the process has been secret. For example, we know that in the first seven weeks, 1200 people were locked up. We do not know at this point, a year and a half later, how many people in total have been locked in this campaign. Why? Because for the first seven weeks, the government was giving us a running total, sort of like McDonald's does, how many hamburgers have we sold today. The Justice Department's equivalent is how many people we locked up today.

People then started asking questions about that number. They said you locked up 1,200 people. How many of those people that you have locked up have been charged with the events of September 11th. The answer was zero.

² *Ashcroft on Terrorist and Immigration*, CNNFN: THE MONEY GANG, Oct. 31, 2001, available at 2001 WL 23673925.

The answer to this day is still zero. The only person charged in the acts of September 11th is Zacharias Musawi.³ Of course, he was picked up before September 11th and before this dragnet took place. Then people said how many people of those first 1,200 have been charged with any crime related to terrorism and the answer again was zero. These suspected terrorists were not charged with terrorist crimes. Today, a year and a half later, there have been three people preventatively detained who have actually been charged with terrorist-related crimes. They are currently on trial in Detroit. We will see whether they are convicted or acquitted.

That is three. As I count it, the government stopped after the first seven weeks telling us what its total was. From the various programs you can sort of piece together that they have thus far arrested over 4,000 people in programs associated with the war on terrorism. Just taking their numbers, the 1,200 in the first seven weeks. Another 1,100 in something called the absconder apprehension initiative, which identified the fact that there were 350,000 people in United States who have deportation orders, final deportation orders, and have not left, so we should get rid of them. But what we are doing is prioritizing the deportation of Arabs and Muslims. Under that program we rely on the theory that they are more likely to be terrorists and based on that, we have detained 1,100 people. We have another program called the Special Registration Program, which you probably heard about in recent months. This program asks foreign nationals only from 25 designated predominantly Arab and Muslim countries to come in and register. In connection with that program, we have locked up 1,800 hundred people. So, you add that, plus the 1,100 plus 1,200 and you come to 4,000. Out of that number of “suspected terrorists” we have three charged with anything related to terrorism.

Of the first 1,200 the vast majority have been affirmatively cleared. Not only have they not been charged with terrorism, but they have been affirmatively cleared of any connection of terrorism, because the government’s explicit policy was to lock them up whether or not there were any charges. Many people were locked up for weeks without any charges whatsoever. To find some charge, usually it was some sort of an immigration charge, but then to hold them regardless of the resolution of that charge until the FBI had determined they were innocent. So, instead of innocent until proven guilty, we have suspects who are guilty until proven innocent.

For example, people would get locked up, then charged with having overstayed their visa. I represent a number of people like this, who said, “Okay, I overstayed my visa. You are right. I will go home.” Now,

³ *U.S. v. Zacarias Moussaoui*, 4th Cir., Criminal Indictment (Dec. 11, 2001), available at www.usdoj.gov/ag/moussaouiindictment.htm

ordinarily, that would be the end of the case, but not here because we were not really interested in deporting them.⁴ We were interested in locking them up, investigating them, and interrogating them. They stayed locked up for three, four, five, and even six months after they agreed to leave and after a Judge said they could leave just so the FBI could investigate them while they were in detention. What the FBI did in virtually every case was clear them. Once they were cleared, they were allowed to leave.

These individuals were held in secret.⁵ Their names, to this day, are not public. Those who were held on immigration charges were tried in secret. Their immigration hearings, no matter how routine and without regard to whether any confidential information was going to be presented in the hearing, were closed. Closed means closed to the public, closed to the press, closed to legal observers, and even closed to family members. A woman could be seeing her husband deported from the country and she was not even able to attend the hearing to determine his fate. The Judges were ordered not to list these cases on the public docket and to refuse to confirm or deny if asked whether such a case exists. That treatment was extended only to foreign nationals and predominantly, though not exclusively, through the immigration power.

Military Tribunals

The second piece of evidence is the military tribunal order issued in November by President Bush.⁶ It says that people who are fighting for Al Qaeda and commit war crimes can be tried in a military tribunal. Not a hugely a surprising proposition in what we call a war, but what was interesting about it was that it applied only to non-citizens fighting for Al Qaeda. Now, why not citizens fighting for Al Qaeda? Why not John Walker Lynn?⁷ The answer is not that there was any legal impediment to putting

⁴ The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders, U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL (Feb. 2003), Report No. I-2003-004 available at www.usdoj.gov/oig/inspection/03-04/purpose.htm

⁵ *Detention Operation Manual*, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, Feb. 11, 2002, available at www.immigration.gov/graphics/lawsregs/guidance.htm

⁶ EXEC. ORDER 66 FR 57833, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at 2001 WL 1435652 (Pres.).

⁷ *U.S. v. John Philip Walker Lindh*, Affidavit in Support of a Criminal Complaint and an Arrest Warrant (Jan. 15, 2002), available at www.usdoj.gov/ag/criminalcomplaint1.htm; *U.S. v. John Philip Walker Lindh*, Criminal Indictment (Feb. 5, 2002), available at www.usdoj.gov/ag/2ndindictment.htm; Lindh pled guilty on July 15, 2002 to nine counts of supplying services to the Taliban, in violation of 50 U.S.C. § 1705(b), 18 U.S.C. § 2 and 31 C.F.R. §§ 545.204 and 545.206(a), and to a one-count of carrying an explosive during the commission of a felony in violation of 18 U.S.C. § 844(h)(2). Lindh was sentenced to 20 years. *U.S. v. Lindh*, 227 F. Supp.2d 565, 567 (E.D.Va. 2002).

citizens into that system. In fact, we have tried citizens in military tribunals in prior wars. We did it in World War II. It was upheld by the Supreme Court.⁸

The answer was a political one. I think it was made clear when the person who really runs the country, Dick Cheney, made the following statement on the day that the issue order was issued. He said when a foreigner comes in to attack us, he does not deserve the same rights and guarantees that an American citizen does.⁹ So, again, here is the message to the American people. It is not your rights at stake. It is their rights. They are the ones we are going to be imposing military justice on.

Ethnic Profiling

The third piece of evidence is ethnic profiling. Now, the government says it does not engage in ethnic profiling. There is great testimony from Mike Chenoff, who is the head of the Criminal Division in the Justice Department, very responsible for running a lot of this. He was testifying before Congress and he said, "We adamantly refuse to engage in ethnic profiling."¹⁰ Then the next sentence. "What we do is target foreign nationals from countries where Al Qaeda support is thought to exist."¹¹

Now, when you look at the list, it is all Arab and Muslim countries. Is England on there? Richard Reid came from England.¹² There are a number of Al Qaeda people locked up in England. We tried to extradite several. But England is not on there. Is France on there? Zacharias Musawi came from France. Is Germany on there? Remember, Germany is where 9-11 was master-minded. No. It is not on there. Is Spain on there? Spain is probably where the highest number of Al Qaeda people have been arrested,¹³ outside of Pakistan, and still the answer is no.

⁸ *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding use of military tribunals to try foreign nationals and U.S. citizens accused of fighting for the enemy and violating the laws of war during World War II).

⁹ "These people are not American citizens. They come into the United States or they conspire to support attacks designed to kill thousands, perhaps hundreds of thousands, of Americans, innocent people - men, women and children. They should not be entitled to the same kind of treatment that an American citizen would, going through the normal law enforcement process." CBS, 60 MINUTES II, Nov. 14, 2001, available at 2001 WL 7139620.

¹⁰ *Hearing on Preserving Freedoms While Fighting Terrorism*, SENATE JUDICIARY COMMITTEE (2001), available at 2001 WL 1519738 (F.D.C.H.).

¹¹ *Id.*

¹² *U.S. v. Richard Colvin Reid*, Criminal Indictment (Jan. 16, 2002), available at www.usdoj.gov/ag/reidindictment.pdf

¹³ *Sixteen Al Qaeda Suspects Arrested in Spain*, ASSOCIATED PRESS, Jan. 24, 2003, available at www.foxnews.com/story/0,2933,76468,00.html

The list is comprised of predominantly Arab and Muslim countries. These individuals come from a predominantly Arab or Muslim countries, are a male, and have been subjected to “voluntary” interviews from the FBI.¹⁴ A voluntary interview from the FBI is a bit of an oxymoron. But the FBI has been targeting only males from these countries. You are required to submit to special registration, where we want to know how you are different.¹⁵ We do not care where the Brits and the Canadians are at this point. We care where the Saudi Arabians are. You are subjected to prioritized deportation under Absconder Apprehension Initiative.¹⁶ Most recently, you are subjected to detention upon coming to the country-seeking asylum.

If you come from any of these countries male or female, 90 years old or ten years old, you are automatically detained for the period of time it takes to resolve your asylum case. Detained without regard to whether you need to be detained, without regard to whether you are a flight risk, or a danger to the community. You are automatically detained because you are from an Arab or Muslim country. That is not considered ethnic profiling. Why? Because we are targeting foreign nationals based on the country they come from. It just happens to be the case most of them are Arab or Muslim.

USA Patriot Act

The final piece of evidence is the Patriot Act.¹⁷ It was a massive piece of legislation, but the worst provision of the Patriot Act are those targeted at foreign nationals that authorizes deportation based on innocent association with proscribed organizations. It authorizes exclusion of foreign nationals at

¹⁴ *Testimony of Viet Dinh, Hearing on Dept. of Justice Oversight Before the Senate Judiciary Committee* (2001), available at 2001 WL 1553668 (F.D.C.H.) (detailing the Nov. 9, 2001 order by the attorney general to U.S. attorneys and members of the federal and state anti-terrorism task forces to meet with specific non-citizens in their jurisdiction and provided instructions outlining the procedures and questions to be asked during the voluntary interviews); *Remarks of Attorney General John Ashcroft Before the Commerce, Justice, State and Judiciary Subcommittee of the Senate Appropriations Committee* (2003), available at www.usdoj.gov/ag/testimony/2003/040103appropstestimony.htm (stating they have conducted 11,000 voluntary interviews in connection with the Iraqi Task Force plan to combat terrorism).

¹⁵ John Ashcroft, National Security Entry-Exit Registration System (June 6, 2002), available at www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm (detailing the three components of NSEERS: fingerprinting and photographing at the border; periodic registration of aliens in the United States thirty days or more; and exit controls to help the Immigration and Naturalization Service remove aliens who overstay their visas).

¹⁶ *Guidance for the Absconder Apprehension Initiative*, U.S. DEPUTY ATTORNEY GENERAL MEMORANDUM, Jan. 25, 2002, available at <http://news.findlaw.com/hdocs/docs/doj/absconder012502mem.pdf>

¹⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, PUB.L. 107-56, 115 Stat. 272, (Oct. 26, 2001).

the border based not on conduct, but based on their speech alone. If they say something we consider to undermine the war on terrorism, we can keep them out. According to John Ashcroft, everything I have said undermines the war on terrorism. Fortunately, I am a U.S. citizen, so you cannot keep me out. This is very broad authority indeed. Its provisions allow the Attorney General on certification to lock up foreign nationals who are considered, in his view, suspected terrorists.

Counter Productive

Now, you compare those actions to some of the actions that have been proposed, it actually would affect all of us. Operation Tips was a proposal to go out and recruit 11,000,000 American citizens to spy on each other.¹⁸ They were going to recruit the utility guy and mail deliverer and people who have some reason to get in your home or into your business. They were going to spy on us.¹⁹ Americans found out about it and said that is going to change the way we feel about our delivery person, certainly, and our country. It was banned by Congress at, Dick Army, the Republican Majority House Leader's insistence.²⁰

The National I.D. Card has been a serious proposal, however it was killed by Congress after September 11th.²¹ Total Information Awareness was another remarkable program in which the Pentagon was going to create a data mining capability to mine all of the data out there, public or private sector about all of us and search it for patterns of terrorist activity.²² The

¹⁸ *Strengthening Homeland Security Since 9/11*, OFFICE OF THE WHITE HOUSE PRESS SECRETARY, April 11, 2002, available at 2002 WL 535449. (stating Operation TIPS, Terrorist Information and Prevention System, allows millions of government workers to identify and report suspicious activities linked to terrorism and crime); Barbara Comstock, Operation Tips Program, U.S. DEPT. OF JUSTICE, July 16, 2002, available at www.usdoj.gov/opa/pr/2002/July/02_ag_405.htm

¹⁹ "The industries that will be involved in Operation TIPS represent workers who have regular routines that take them down roads, rivers, coastlines, and public transit routes, and through neighborhoods and communities. Their jobs make them uniquely well positioned to understand the ordinary course of business in the area they serve, and to identify things that are out of the ordinary. Many of these industries already have taken steps to offer their employees a voluntary way to report this type of information, but they are looking to the Department of Justice to offer a comprehensive, reliable and cost-effective voluntary reporting system." *Id.*

²⁰ Nat Hentoff, *Conservatives Rise for the Bill of Rights!*, VILLAGE VOICE, April 25, 2003, available at www.villagevoice.com/issues/0318/hentoff.php

²¹ 2001 CONG. US HR 5005 107th CONGRESS, 2d Session HR 5005 Reported in House July 24, 2002, H. R. 5005, Sec. 815 [Report No. 107-609, Part I] to establish the Department of Homeland Security, and for other purposes. (killing the proposed national identification system).

²² *Privacy: Q&A on the Pentagon's "Total Information Awareness" Program*, AMERICAN

public relations problem began when they decided to call it Total Information Awareness. Second of all, they put it in the Pentagon. Third of all, they created a logo for it, which consists of a pyramid with huge computer eye at the top, and above it the saying, "Knowledge Is Power."²³ Finally, they put John Poindexter in charge of it. Poindexter was convicted of lying to Congress. His conviction was reversed on a technicality about immunity, not on a finding that he had not lied to Congress. Congress killed it as it applied to U.S. persons. It is barred from being implemented as applied to U.S. persons, not foreign nationals, but U.S. persons.

So, let me briefly suggest why this is wrong, counter-productive, and illusory. It is not wrong to assume that the threat comes predominantly from abroad. If you are talking about Al Queda, it is likely to be Arab or Muslim foreign nationals, given our intelligence about who is in Al Queda. What is wrong is to deny basic human rights to foreign nationals in this struggle. The rights I am talking about are rights of due process, First Amendment Rights of speech, association, and equal protection. Those rights under our Constitution are not limited to citizens. The right not to be discriminated against in the vote, the right to run for a federal elected office is limited to citizens. These other rights are framed as applying to persons or people or rights of criminal process. The accused. Therefore, they have been applied to everybody within the United States; at least without regard to your citizenship status. The same thing is true with the Canadian Charter, which refers to everyone's rights, not to citizenship rights.²⁴ The same thing is true with human rights covenants, all of which identify these as basic rights that apply to all persons without regard to what passport you happen to hold in a given country.

Second, it is counter productive as a security matter. Counter productive it seems to me because it forfeits the legitimacy of the war on terrorism. If we are going to win the war on terrorism, we need to be seen as acting in a legitimate and justice seeking mode. Not in a double standard mode that says we are willing to impose on you foreigner things we are not willing to tolerate for ourselves. That undermines the credibility of the effort and that then has two pernicious effects. First, it alienates the very communities that we need most to be building bridges to if we are going to try to find the small number of Al Queda people out there. We are much more likely to find them

CIVIL LIBERTIES UNION, April 20, 2003, available at www.aclu.org/Privacy/Privacy.cfm?ID=13652&c=130

²³ *Privacy: Total Information Awareness*, AMERICAN CIVIL LIBERTIES UNION, available at www.aclu.org/Privacy/Privacylist.cfm?c=130 (showing original logo transforming into the new logo).

²⁴ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

if we have good relations with the Arab/Muslim community here. If we have good relations with Arab and Muslim countries abroad, we are not going to have good relations when they see we impose on them burdens we are not willing to impose on ourselves or western immigrants. It is really the sort of flip side of the American exceptionalism that we have seen in foreign policy under this administration, and the domestic side, again, it is American exceptionalism. We are entitled to these rights. You are not.

Illusory

Finally, it is illusory, because if you look at history, indeed, even recent history, what starts with foreign nationals almost inevitably gets extended to U.S. citizens. One of the most shameful periods in American history is the Japanese/American Internment during World War II when 110,000 people of Japanese decent were locked up based solely on their race.²⁵ Seventy thousand of them were U.S. citizens. That was simply an extension to the citizenry of the enemy-alien concept that says during wartime. You can lock them up, under our law.²⁶ Lock up anyone who is a national of the country with which we are at war.

It was extend under the argument, according to Lieutenant General John Dewitt, the head of the military program, who said, "a Jap is a Jap."²⁷ It did not matter whether they were a citizen or a foreigner, the racial strains were undiluted. The same thing is true of the McCarthy era, which people remember as a time when tens of thousands of Americans lost jobs, lost their reputations, and were locked up for their political association. That did not come out of nowhere. It was essentially an extension to citizens of practices developed in 1919-1920 in the Palmer raids,²⁸ where we targeted foreign nationals after a series of terrorist bombings and ended up deporting 800 of

²⁵ Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131 (2000).

²⁶ *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944). (holding that exclusion of citizens of Japanese ancestry from their homes was a permissible exercise of military judgment due to the "definite and close relationship to the prevention of espionage and sabotage"); War and National Defense Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No. 100-383, 102 Stat. 903 (1988). (acknowledging the internments as grave injustices and ordering Congress to pay victim \$20,000 each as reparations for their internment).

²⁷ Brief of Japanese American Citizens League, Amicus Curiae at 198, *Korematsu v. United States*, 323 U.S. 214 (1944), No. 22, reprinted in 42 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 309-530 (Philip B. Kurland & Gerhard Casper eds., 1975).

²⁸ Robert K. Murray, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, at 69-71 (1955).

them for political associations, not for their involvement in the bombing. Even here, in this crisis, we see this.

In the area of military justice, remember I mentioned earlier Dick Chaney's quote, "Foreigners do not deserve the same rights that American citizens do?" That is because we thought all the people on Guantanamo Bay were foreigners.²⁹ Then it turned out one of them was a U.S. citizen.³⁰ So, what did we do? We took him off Guantanamo and put him in naval brig off West Virginia where he has been held ever since, under the same questions as those on Guantanamo.³¹ His name is Yasser Esam Hamdi. He is an American citizen because he was born here. He has been held here, incommunicado, without charges, without a trial, without access to a lawyer for about a year and a half.³²

We are doing the same thing with Jose Padilla, simply the President has labeled him an enemy combatant or in President Bush's words, "A bad guy."³³ The government's argument is if the President labels who is a bad guy, when a member of that group goes into the military justice system there is essentially no judicial review; an extension from foreign nationals to U.S. citizens.

The last example comes from a proposal, just a proposal not yet actually introduced on the floor, but leaked, called the Domestic Security Enhancement Act or Patriot II. The Patriot Act was named in large part to suggest that anyone who would oppose it was unpatriotic, of course. The Patriot Act II has a provision if you are associated with terrorists, you will presumptively have your citizenship stripped, including native-born citizens.³⁴ Now we are going to turn citizens into foreign nationals. So for reasons of self-interest, for reasons of security, and for reasons of

²⁹ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001); Katharine Q. Seelye & Steven Erlanger, *U.S. Suspends the Transport of Terror Suspects to Cuba*, N.Y. TIMES, Jan. 24, 2002, at A1; Katharine Q. Seelye, *For America's Captives, Home Is a Camp in Cuba, With Goggles and a Koran*, N.Y. TIMES, Jan. 20, 2002, at A14; Katherine Q. Seelye, *A Nation Challenged: The Captives; On Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. TIMES, Jan. 17, 2002, at A16.

³⁰ *U.S. citizen captured on battlefield and alleged to be Al Qaeda member*, N.Y. TIMES, July 2002.

³¹ Kelli Arena and Terry Frieden, *No immediate charges for second U.S. Taliban suspect*, CNN.COM, April 9, 2002, at www.cnn.com/2002/US/04/09/hamdi.not.charged/?related

³² *Hamdi v. Rumsfeld, et. al*, E.D. Va. Civ. Action No. 2:02cv348 (May 2002) <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums53102stymt4.pdf> (requesting emergency stay pending appeal of court order allowing Hamdi access to a public defender).

³³ *U.S. Circumvents Courts With Enemy Combatant Tag*, HUMAN RIGHTS WATCH, June 12, 2002, available at www.hrw.org/press/2002/06/us0612.htm

³⁴ Declan McCullagh, *Perspective: Ashcroft's Worrisome Spy Plans*, CNET NEWS.COM, Feb. 10, 2003, at <http://news.com.com/2010-1071-983921.html>

principle, I think we should resist this tendency to strike the balance between liberty and security by targeting foreign nationals for measures that we would not tolerate for ourselves. Thanks a lot.

