

2007

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David D. Cole

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### Recommended Citation

David D. Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 Fordham L. Rev. 2541 (2007).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss5/12>

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## Against Citizenship as a Predicate for Basic Rights

### Cover Page Footnote

Professor, Georgetown University Law Center. These remarks were made on September 30, 2006, at the New Dimensions of Citizenship Symposium held at Fordham University School of Law. This is an edited version of Professor Cole's remarks.

## AGAINST CITIZENSHIP AS A PREDICATE FOR BASIC RIGHTS

*David D. Cole\**

The subject of my remarks will be citizenship, or more precisely the lack thereof, as a wedge issue on matters of rights, the rule of law, and the war on terror. I will argue that we ought to be careful about relying on citizenship as a rallying call for rights and protections precisely because the distinction between citizenship and its lack has proven to be such a tempting avenue for illegitimate trade-offs between liberty and security.

I will begin by talking about two cases—the first case in my career that involved national security and civil liberties and the most recent such case in which I was involved.

The first involved a woman named Margaret Randall,<sup>1</sup> an American-born poet who left the United States in the 1960s, became a Mexican citizen while married to a Mexican man, and then lived for about two decades in Mexico, Cuba, and Nicaragua, before returning to the United States when she was in her fifties. The United States decided it did not want her back, and sought to deport her on the ground that she had advocated communism in her poetry, her journals, and the like.<sup>2</sup>

Thus, I found myself in my first trial as a young lawyer in 1984, in El Paso, Texas, defending this American-born poet who was being deported for advocating communism. The argument was that she had lost her American citizenship when she took Mexican citizenship. She had become an alien—and as an alien she was subject to the McCarran-Walter Act, which at the time made foreign nationals deportable if they had advocated communism.<sup>3</sup>

We lost that case in the trial-level immigration court<sup>4</sup> but won at the Board of Immigration Appeals<sup>5</sup> on the ground that she was a U.S. citizen—not on the ground that foreign nationals have the same rights as citizens to advocate communism or whatever else they want to advocate.<sup>6</sup> Instead, the

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1. See *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988); David Cole, *What's a Metaphor?: The Deportation of a Poet*, 1 *Yale J.L. & Liberation* 5, 10 (1989).

2. See *Randall*, 854 F.2d at 475-76.

3. *Id.* at 473.

4. *Id.* at 477-78.

5. Cole, *supra* note 1, at 6.

6. See *id.*

Board ruled that she was still a U.S. citizen and, therefore, no matter how much she advocated communism in her poetry, the government could not deport her.<sup>7</sup>

This summer I handled the naturalization trial of Aiad Barakat, a Palestinian who I have been representing for about twenty years.<sup>8</sup> His case dates back to 1987, when a group of Palestinians in Los Angeles, subsequently dubbed the “L.A. Eight,”<sup>9</sup> were arrested, placed in maximum security confinement, and put into deportation proceedings on the ground that they were associated with a faction of the Palestine Liberation Organization.<sup>10</sup> For twenty years, we have argued in that case that foreign nationals and citizens ought to have the same speech and associational rights as citizens, with limited success.<sup>11</sup> None of the eight has been deported, but the government has not abandoned its efforts to deport them.

During the course of the twenty-year “L.A. Eight” case, Aiad Barakat became a permanent resident and applied for citizenship. He was denied naturalization on the basis of his alleged political affiliations.<sup>12</sup> We then filed a suit in federal court and had a one week trial this past summer on whether or not he deserved to become a U.S. citizen. At the close of the trial, the judge ruled that he could in fact become a U.S. citizen.<sup>13</sup> At the celebration dinner that evening, Aiad jokingly proclaimed that it is now the “L.A. Seven.” Because he is now a citizen, he need not worry about being punished for his political affiliations and beliefs.

While I am pleased that my clients in both of these cases prevailed and are here and able to exercise their rights, my own view is that their rights to speak out and to associate freely should turn in no way on whether they are citizens or foreign nationals. Citizenship is an important and sometimes all-encompassing topic of academic and political inquiry, as the wide range of topics discussed at this Symposium illustrates. My point is a cautionary one. It is important to decouple the concept of citizenship from claims about civil liberties. It is especially important for academics and activists who advocate expanding concepts of citizenship as a way of expanding rights to be cognizant of the danger such claims may create for those who are not citizens. The temptation to exploit the line between citizens and foreign nationals, especially in times of crisis, on matters of basic rights

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7. *Id.*

8. *See, e.g.*, Press Release, Am. Civil Liberties Union, Federal Judge in California Grants Citizenship to Palestinian Man After 20 Years (June 23, 2006), available at <http://www.aclu.org/immigrants/discrim/26013prs20060623.html> [hereinafter ACLU Press Release].

9. *See id.*

10. *See e.g.*, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 473 (1999).

11. *See, e.g.*, *Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989) (holding that foreign nationals residing in the United States have the same First Amendment rights as citizens, and declaring the ideological deportation grounds of the McCaran-Walter Act unconstitutional), *aff'd in part, rev'd in part on other grounds*, 970 F.2d 501 (9th Cir. 1992).

12. *See Reno*, 525 U.S. at 473-74.

13. *See, e.g.*, ACLU Press Release, *supra* note 8.

suggests that we should be careful about advancing theories that may inadvertently reinforce that temptation.

I will illustrate the dangers we confront by reviewing how the distinction between citizens and foreign nationals has played a defining role in the Bush Administration's response to the threat of terror posed, or at least recognized, in the wake of September 11.

In late 2006, Congress enacted the Military Commissions Act (MCA),<sup>14</sup> which subjects anyone whom the executive says is an unlawful enemy combatant to military trials in which defendants can be tried, convicted, and executed on the basis of coerced testimony,<sup>15</sup> hearsay,<sup>16</sup> and summaries of classified evidence that they do not have a meaningful way to confront.<sup>17</sup> The law provides for only limited judicial review in the D.C. Circuit<sup>18</sup> and strips the federal courts of habeas jurisdiction over the terms and conditions of the confinement of these detainees.<sup>19</sup> So if "enemy combatants" are being tortured, for example, they have no access to courts to raise that claim.

Congress passed this law in response to the U.S. Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*,<sup>20</sup> holding that the President's executive order setting forth rules for military tribunals violated a federal statute and Common Article 3 of the Geneva Conventions.<sup>21</sup> In the MCA, Congress declared, *ipsi dixit*, that the procedures that it established satisfy the requirements of Common Article 3; namely, that trials must be conducted in a regularly constituted court providing "all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>22</sup> But then, perhaps because Congress was not quite sure that it had in fact satisfied Common Article 3, the law goes on to provide that no one can raise the claim that the procedures violate Common Article 3, because no one is permitted to invoke the Geneva Conventions in the context of even the limited judicial review that is provided.<sup>23</sup>

These rules, however, do not apply to all persons accused of being unlawful enemy combatants, but only to foreign nationals so accused.<sup>24</sup> That double standard, subjecting foreign nationals to procedures, obligations, and burdens that we would not likely tolerate if they were applied to ourselves, has been one of the central leitmotifs of the war on

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14. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10 & 28 U.S.C.).

15. 10 U.S.C.A. § 949a(b)(2)(C) (West 2006).

16. *Id.* § 949a(b)(2)(E).

17. *Id.* § 949d(f).

18. *Id.* § 950d(d).

19. 28 U.S.C.A. § 2441.

20. 126 S. Ct. 2749 (2006).

21. *Id.* at 2795-97.

22. *Id.* at 2797 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138).

23. 10 U.S.C.A. § 948b(g).

24. *Id.* § 948d(a).

terror. Time and again, the Administration has argued that foreign nationals do not deserve the same rights as citizens, and that we can do to them what we could not do to ourselves.

The other principal theme of the war on terror is that the President can do no wrong. The President has argued that his authority under the Commander-in-Chief Clause to decide how to “engage the enemy,” as his lawyers put it,<sup>25</sup> is unconstrained by any statute, constitutional limitation, or international law.

These twin assertions of power are related. The first claim, the argument that foreign nationals do not deserve the same rights as citizens, sets the stage for the second. One of the principal points of my book *Enemy Aliens*<sup>26</sup> was that if you look at prior national security crises in this country, in every instance, the first targets were foreign nationals. But also in every instance, the tactics employed against foreign nationals were ultimately extended to U.S. citizens.<sup>27</sup> The government eases the introduction of repressive security measures by targeting them at foreign nationals, but then gets used to employing unchecked power vis-à-vis one group and seeks out ways to extend similar power to others.

No one has better captured the initial move of targeting foreign nationals than Louis Post, who was writing about the Palmer raids, in which the government responded to a series of terrorist bombings in 1919 by rounding up thousands of foreign nationals, none of whom were accused or found guilty of being involved in any of the bombings. Post wrote, “[T]he delirium [caused by the bombings] turned in the direction of a deportations crusade with the spontaneity of water flowing along the course of least resistance.”<sup>28</sup>

Since September 11, we have seen many examples of this “course of least resistance,” up to and including the Military Commissions Act. During the roundups after September 11, thousands were picked up, locked up, called terror suspects, held in secret, often initially without charges, tried in secret, and presumed guilty until proven innocent. Virtually all of them were, in fact, determined to have no connection to terrorism. These measures were defended on the ground that they were applied only to foreign nationals, and we could employ procedures against them that would be unacceptable if applied to citizens.

Similarly, the government defends its treatment of the detainees at Guantánamo Bay by proclaiming that because they are foreign nationals outside of our borders, they have no constitutional rights, period. Some of

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25. See, e.g., David Cole, *The Dictator Defense*, Salon.com, Feb. 10, 2006, <http://www.salon.com/opinion/feature/2006/02/10/dictator/>.

26. David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (rev. ed. 2005).

27. *Id.* at 85.

28. Louis F. Post, *The Deportations Delirium of Nineteen-Twenty: A Personal Narrative of an Historic Official Experience* 307 (1923).

those held there will be tried in military tribunals, again under rules that apply exclusively to foreign nationals

There is no legal reason why military tribunals should apply only to foreign nationals.<sup>29</sup> We used them in World War II against citizens and foreign nationals alike.<sup>30</sup> A citizen tried and convicted by a military tribunal in the *Ex parte Quirin*<sup>31</sup> case objected, in essence, "Wait a minute; you can't do this to me; I'm a citizen."<sup>32</sup> The U.S. Supreme Court replied (to paraphrase), "No, it doesn't matter whether you're a citizen or a foreign national; if you're an enemy, you can be tried in a military commission."<sup>33</sup>

So there is no legal impediment to trying citizens in military tribunals. The impetus for excluding citizens is political. It is easier to sell such truncated procedures if you can say to the American public, as Dick Cheney did when the first military commission order was issued,<sup>34</sup> that when foreigners come and attack us, they do not deserve the same rights and guarantees as U.S. citizens. Again, the message is, "We're not taking away your rights; we're taking away somebody else's rights."

After September 11, the Bush Administration launched what is surely the most extensive campaign of ethnic profiling that we have seen in this country since World War II. It did not lock up 110,000 people because of their ethnicity, as we did then, but it did require 80,000 to come in for special registration simply because they were foreign nationals from Arab and Muslim countries; it called in another 8000 for FBI interviews simply because they were young men from Arab and Muslim countries; and it locked up more than 5000 foreign nationals, virtually all of them Arabs and Muslims, none of whom turned out to be terrorists.<sup>35</sup> When defending this policy in Congress, Michael Chertoff testified that the Bush Administration "emphatically rejected ethnic profiling."<sup>36</sup> His next sentence: "What we have looked to are characteristics like country of issuance of

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29. See, e.g., Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), reprinted in 10 U.S.C. § 801 (Supp. IV 2004); Press Release, White House, President Issues Military Order (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

30. See, e.g., Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942).

31. 317 U.S. 1 (1942).

32. See *id.* at 24, 37-38.

33. See *id.* at 37-38.

34. Dick Cheney, Vice President, Remarks to the U.S. Chamber of Commerce (Nov. 14, 2001), available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html>.

35. See David Cole, *Less Safe, Less Free*, Salon.com, Nov. 19, 2004, <http://archive.salon.com/opinion/feature/2004/11/19/justice/index.html?pn=2>; see also Cole, *supra* note 26, at xx, 24-26, 47-51.

36. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 23 (2001) (statement of Michael Chertoff, Assistant Att'y Gen., Criminal Division, Department of Justice).

passport . . . .”<sup>37</sup> Once again, the justification is “we do it to them, not to us.”

Perhaps one of the most outrageous examples of this double standard was the secret decision by the Justice Department, only disclosed when Alberto Gonzales was up for confirmation as Attorney General, to interpret the international treaty banning cruel, inhumane, and degrading treatment not to apply to foreign nationals held overseas in CIA black sites.<sup>38</sup> Here you have an international treaty that purports to define *human* rights, yet the claim is, “Well, it actually only protects Americans and foreign nationals held within the United States.”

Finally, consider Maher Arar,<sup>39</sup> the Canadian who upon changing planes at JFK was pulled out of line, locked up for a week, denied access to a lawyer, and ordered deported on the basis of secret evidence. When asked to be sent on his way to Canada, for which he held a connecting ticket, he was told, in effect, “You don’t need that connecting flight coupon because we’ve chartered a federal jet for you—to Syria.”<sup>40</sup> In Syria, he was locked up for a year without charges and tortured.<sup>41</sup>

In a lawsuit I am litigating with the Center for Constitutional Rights on behalf of Arar, we have challenged as unconstitutional the federal authorities’ rendering of Arar to Syria to be tortured.<sup>42</sup> The government’s response is that Arar does not have any rights because he is a foreign national who never formally entered the United States.<sup>43</sup> Accordingly, the government maintains, he has no right not to be forcibly redirected to a country in order to be tortured.

In sum, the Administration has consistently treated the “enemy alien” in this “war on terror” as without rights in order to maximize executive discretion in how it engages the enemy. At the same time, we have also seen significant examples of how this move paves the way for broader assertions of executive power. The executive has claimed that with respect to torturing suspects, detaining enemy combatants, and warrantless wiretapping of American citizens, the President is effectively above the law. It claims that he cannot be constrained by statutes that give courts power to review the legality of detention, or that make it a crime to torture<sup>44</sup> or

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37. *Id.*

38. See John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, Newsweek, May 24, 2004, at 26, available at <http://www.msnbc.msn.com/id/4989481/>.

39. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

40. *Id.* at 252-53.

41. *Id.* at 254-56.

42. *Id.*

43. See *Arar*, 414 F. Supp. 2d at 274.

44. See, e.g., Memorandum from Jay S. Bybee, Office of the Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, at 1 (Aug. 1, 2002), available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_20020801\\_JD\\_%20Gonz\\_.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf).



engage in warrantless wiretapping,<sup>45</sup> because the President's options cannot be restricted when he engages the enemy in wartime.<sup>46</sup> Those arguments are an extension of the initial claim, namely that the President cannot be constrained with respect to one particular class of people, foreign nationals. The Commander-in-Chief claims assert unfettered power over everyone, even if predicated on the need to deal with "the enemy."

The Supreme Court rejected the Bush Administration's claim of unfettered executive power in both *Rasul v. Bush*,<sup>47</sup> the Guantánamo Bay detainees case, and *Hamdi v. Rumsfeld*,<sup>48</sup> the case involving a U.S. citizen captured in Afghanistan and held as an enemy combatant. In *Hamdi*, Justice Sandra Day O'Connor wrote for the Court, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."<sup>49</sup>

*Hamdi* involved a U.S. citizen, and the Court emphasized that fact approximately twenty-five times in its opinion,<sup>50</sup> without ever explaining what relevance citizenship had to whether Hamdi had constitutional rights as against his detention here. In the end, the Court held that Hamdi's due process protections required a fair hearing before an impartial tribunal.<sup>51</sup>

In fact, Hamdi's citizenship should not even have been relevant to the due process issue. Due process analysis in this setting essentially consists of weighing the government's interests in national security against the individual's interest in a deprivation of liberty.<sup>52</sup> On neither side of that scale should it make any difference whether a detained individual holds a U.S. or Saudi Arabian passport. If people pose a threat to national security, it does not matter what passport they have, and if they are locked up, they are deprived of the same liberty, regardless of what passport they have. Yet the Court repeatedly described the right as the right of a citizen to these kinds of protections.<sup>53</sup>

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45. See, e.g., Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

46. See David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 Wash. & Lee J. of Civ. Rts. & Soc. Just., Fall 2006, at 16 (citing and discussing executive claims of uncheckable Commander-in-Chief power).

47. 542 U.S. 466 (2004).

48. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

49. *Id.* at 536 (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)).

50. See generally *id.*

51. *Id.* at 535.

52. *Id.* at 528-29 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

53. See, e.g., *id.* at 537 (stating that "a citizen detained as an enemy combatant is entitled to [due] process" and that "due process demands some system for a citizen detainee to refute his classification [as a terrorist]" (emphasis added)).

A much better way of approaching the issue is reflected in the British Law Lords' decision in *A & Others v. Secretary of State for Home Department*,<sup>54</sup> which reviewed a post-9/11 law that permitted the government to lock up foreign nationals as suspected terrorists indefinitely without charges.<sup>55</sup> The Law Lords declared this law incompatible with the European Convention on Human Rights precisely because it impermissibly distinguished between foreign nationals and citizens.<sup>56</sup> The Lords reasoned that it is irrational to treat only foreign nationals in this way because—along the lines of the due process argument I have just made—whether they have a British passport or a Pakistani passport, the threat they pose to national security is the same, and they have the same liberty interests.<sup>57</sup> So to target foreign nationals selectively in this way is fundamentally wrong as a matter of human rights, not citizenship.

The best test of our commitment to the rule of law is how we treat the most vulnerable among us. Basic protections of liberty, of freedom from torture and related abuse, are not, and should not be, deemed privileges or rights of citizenship, but *human* rights that stem from the fact of our common humanity, not our particular nationalities.

I used as the epigraph for *Enemy Aliens* a quote from Hermann Cohen (a Talmudic scholar commenting on the Bible, not the Constitution, but I think his words are relevant here). He wrote, "The alien was to be protected, not because he was a member of one's family, clan, or religious community; but because he was a human being. In the alien, therefore, man discovered the idea of humanity."<sup>58</sup>

The real challenge we face in the wake of September 11 is whether we can rediscover that idea of humanity. In doing so, it is essential to decouple the notions of citizenship and basic human rights.

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54. *A (FC) & Others (FC) v. Sec'y of State for Home Dep't* [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>.

55. *Id.*, [2005] 2 A.C. at 91-92.

56. *Id.*, [2005] 2 A.C. at 127.

57. *Cf. id.*, [2005] 2 A.C. at 116.

58. Cole, *supra* note 26, at vii (quoting the words of Hermann Cohen included in the commentary to chapter VII, verse 6, in *Jeremiah: Hebrew Text and English Translation* 52 (H. Freedman ed., rev. ed. 1985)).