26

"Strategies of the Weak"

Thinking Globally and Acting Locally toward a Progressive Constitutional Vision

DAVID COLE

Sometimes, despite their best intentions, bureaucrats manage to say something truly revealing. In March 2005, the Department of Defense issued *The National Defense Strategy of the United States*.[1] At page 5, the document warns, "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes, and terrorism."

This is a remarkable statement, as it not only dismisses the rule of law, and especially international law, as a strategy of the weak, of no interest to the "strong" United States, but likens it to terrorism itself. When a nation is attacked, as the United States was on September 11, 2001, by fanatics willing to commit suicide in order to inflict untold suffering on thousands of innocent civilians, one might think that the rule of law would be on the nation's side. Yet, to the Bush administraton's Defense Department, the rule of law was merely a tactic of the enemy, akin to terrorism itself.

The Defense Department's sentiment echoed the early warning of then Attorney General John Ashcroft in his first testimony before Congress after 9/11, in which he insisted that those who raised "phantoms

of lost liberties … only aid terrorists."[2] But those were the words of a contentious and often impolitic attorney general in the heat of the moment. The Pentagon document, a formal articulation of national defense strategy issued years after the attacks, suggests that this perspective took on the status of official dogma in the Bush administration.

In fashioning a progressive vision of constitutional law, we ought to *endorse* a strategy of the weak, minus, of course, the terrorism. As progressives respond to the security threats that 9/11 has revealed in the United States (and elsewhere), we need to think about using not just constitutional law, but international forums, judicial processes, and constitutional politics—not to challenge our strength as a nation, but to restore and reinforce the principles upon which the nation's strength must ultimately rest. This would be a strategy of the weak in two senses: It insists on the importance of respecting the rights of the most vulnerable, and it is designed for those without immediate access to state power (because even when Democrats are in the majority, progressives are unlikely to be in the majority). Properly understood, however, this strategy of the weak should also be seen as a strategy of the strong, for it promotes the long-term interests of the nation-state, from the standpoint of both security and liberty, to respect human rights and the rule of law.

Any attempt to strategize about the future of constitutional law must keep three present realities in mind. First, the struggle to protect ourselves from terror is likely to continue to be a driving force of federal and state policies and laws for the foreseeable future. The Bush administration defined the struggle as a war on terror rather than a war against an identifiable *adversary*—even one as elusive as Al-Qaeda—and insisted that the war was global in scope and would not end until we vanquished all terrorist organizations of potentially global reach.[3] Such a war would by definition never end. But even if the struggle is defined more realistically as a conflict with Al-Qaeda, it is likely to continue for the foreseeable future. And because technological advances have made it increasingly possible for small groups of individuals to do widespread damage, security challenges will continue even in Al-Qaeda's wake.

More concretely, the way the Bush administration pursued the war on terror, and in particular its engagement with Iraq, has energized and expanded the forces arrayed against the United States, by sharply increasing anti-American sentiment throughout the world, and by taking the focus off defeating Al-Qaeda in its stronghold. In July 2007, the National Intelligence Estimate, reflecting the consensus views of all U.S. intelligence agencies, reported that Al-Qaeda had reconstituted

itself in the border regions of Pakistan. And the threat is not limited to Al-Qaeda, but extends to independent groups of like-minded individuals, not directed or controlled by Al-Qaeda, but inspired to act against the United States and its allies out of opposition to the nation's policies and practices in Iraq, in Israel, in the Middle East generally, and toward Arabs and Muslims in particular. International terrorist incidents tripled in 2004 over 2003, and one-half of that increase was directly attributable to terrorist incidents in Iraq itself.[4] In 2005, there were 360 suicide bombings, compared to an average of about 90 a year over the preceding five years.[5] Just as the Afghanistan conflict with the Soviet Union served as a recruiting and training ground for Osama bin Laden and other Islamic fundamentalist terrorists, so, too, Iraq performed that function in more recent years. As the then-director of Central Intelligence, Porter Goss, told Congress in 2005, "[T]hose who survive will leave Iraq experienced and focused on acts of urban terrorism. They represent a potential pool of contacts to build transnational terrorist cells, groups, and networks."[6]

In a 2003 internal army memorandum, Defense Secretary Donald Rumsfeld asked, "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training, and deploying against us?"[7] While it may never be possible to answer that question with certainty, it appears that, as of this writing, seven years after 9/11, we are losing ground from this vantage point, and the threat of terrorist attacks will likely loom large for the rest of our lifetimes.

While the Obama administration can be expected to take a much more respectful attitude toward human rights and the rule of law than the Bush administration did, any significant future terrorist attack will almost inevitably prompt renewed calls for more intrusive government surveillance, further restrictions on speech and associations thought to be connected with terrorism, and the like. Indeed, the revival of arguments for ethnic profiling in the United States in the wake of the July 7, 2005, London subway bombings demonstrates that the attack need not even be local to spark calls for greater security measures.[8] The need for security is, in the end, insatiable.

The second reality that progressives must confront as they think about a constitutional vision and strategy is the reality that they will face a hostile majority on the Supreme Court for the foreseeable future and that they are unlikely to see truly progressive majorities in either house of Congress. While Democrats managed to take control of Congress in 2006, and although a Democrat won the presidency in 2008, there is no

necessary equation between Democrat and progressive, especially on issues of security. In August 2007, for example, a Democratic Congress enacted the Protect America Act, giving the executive branch sweeping authority to conduct warrantless wiretapping of Americans as long as the "target" of the surveillance was a person overseas. And the last Democratic president, Bill Clinton was far from progressive on matters relating to security. It was under his administration and at his urging, for example, that Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, which gutted habeas corpus review for prisoners challenging the constitutionality of their convictions, enacted a sweeping "material support" law that effectively imposed guilt by association, and authorized a special court to deport foreign nationals on secret evidence.

This suggests that it is an insufficient answer to call for "constitutionalism outside the courts," because the very reason many rights are constitutional in nature is that the ordinary political process is especially unlikely to be hospitable toward them.[9] Thus, a progressive vision of constitutional rights must confront the fact that we are not only likely to face an unfriendly Supreme Court, but are also unlikely to hold the reins of power in the political branches on these issues. This is the fundamental challenge of constitutionalism—how to advance rights protections in a democracy for those who need protection precisely because they lack access to democratic power.

Third, a progressive constitutional strategy must take into account the fact that the world is changing in ways that may be used to our advantage. We may well be in the midst of a quasi-revolutionary moment, akin to the transformations of the New Deal, but on a global scale. The rapid globalization of world markets, accelerated by the technological innovations of the Internet, has altered law and politics in fundamental ways. Transnational legal regimes are growing in number and importance, and international grassroots politics, eased by the worldwide Web, have become possible in ways that could not have been imagined only a decade ago. Meanwhile, the worldwide economic collapse of 2008 has demonstrated that the neo-liberal faith in unregulated markets is entirely unsatisfactory.

Indeed, while the analogy is far from perfect, the paradigm shift can be compared to that which the nation experienced in the New Deal. At that point, economic realities fueled a shift in basic understandings about the relative roles of federal and state governments. Before the New Deal, federal economic regulation was thought to infringe on state autonomy, or individual freedom, or both, and was therefore deemed

suspect. Moreover, individual rights protection was also thought to rest largely with the states. But in the wake of the Great Depression, the nation came to see the economy as an integrated national phenomenon requiring federal regulation and also increasingly saw rights protection as the responsibility of the federal government.

The shift in the twenty-first century is from federal to transnational regulation. Global markets need transnational regulation, and a series of treaties and executive agreements have fostered the development of transnational economic regulation. At the same time, the last fifty years have seen a human rights revolution, as a multitude of human rights treaties and enforcement systems have been drafted, adopted, ratified, and implemented the world over. While these developments are not necessarily formally interrelated, in both instances as the significance of sovereign borders has broken down, regulation at the international level has become more necessary and more acceptable. Sometimes, the developments are quite closely interrelated, as for example in Europe, where entry into the European Union requires an agreement to be bound by the European Court of Human Rights, and where the European Court of Justice, which adjudicates transnational trade and economic disputes, has imposed human rights mandates on its member states. But even without such formal ties, the fact that trade and communications are becoming increasingly global puts pressure on traditional notions of sovereignty, thereby facilitating the development and implementation of international and transnational standards. While the transformation is ongoing, and not without substantial hurdles and resistance, the trend line seems inevitable, and the global extent of the 2008 economic crisis has underscored the need for coordinated transnational responses.

Any program for constitutional progress must take into consideration these three realities. I do not suggest that these are the *only* realities that must be considered,[10] but they are three of the most important factors for constitutional reformers to take into account. Any program that does not grapple with these features is virtually doomed to failure.

So what are the normative and strategic implications of these features of the political and legal landscape? The first factor—a long-term struggle to establish security from terrorism—means that government security measures are likely to pose some of the most significant constitutional challenges between now and 2020. The rights at stake will run the gamut, from freedoms of speech and association, to liberty, privacy, equality, and the right to know. Structural issues involving the separation of powers are also likely to be recurrent. Bush administration lawyers maintained that the president in his capacity as commander in chief

had unilateral unchecked power to detain human beings without trial as "enemy combatants" and to disregard criminal prohibitions on torture and warrantless wiretapping.[11] While President Bush did not prevail on these contentions, and President Obama has said that he will take a less aggressive view of executive power, it is still the case that, as Franklin Delano Roosevelt's attorney general, Francis Biddle, once said, "The Constitution has not greatly bothered any wartime president."[12]

Moreover the communities whose rights have most been under attack since 9/11 have been, and are likely to continue to be, foreign nationals, and especially Arabs and Muslims. Societies beset by fear too often seem willing to sacrifice the liberties of the most vulnerable in the name of promises of security for the majority, and the United States' post–9/11 response followed this pattern.[13] Government officials repeatedly stressed that security measures were targeted at foreign nationals, not U.S. citizens, at "them," not "us."

For example, government officials chose Guantánamo Bay as a place to hold "enemy combatants," and chose to hold only foreign nationals there, in part so that it could argue that no U.S. law limited their actions. The government argued consistently that, as foreign nationals beyond our borders, the Guantánamo detainees had no constitutional rights. That argument failed in *Boumediene v. Bush*, when the Supreme Court ruled that Guantánamo detainees were constitutionally entitled to the writ of habeas corpus, but the government continues to maintain that foreign nationals outside our borders are not entitled to constitutional protections even when in U.S. custody.

The military tribunals initially established to try some of the Guantánamo detainees for war crimes applied only to foreign nationals accused of terrorism, not to U.S. citizens. The rationale? As Vice President Richard Cheney explained, foreigners who attack the United States "don't deserve the same guarantees and safeguards that would be used for an American citizen."[14] And when the Supreme Court invalidated those tribunals and ruled that, among other things, they contravened the Geneva Conventions, Congress responded by explicitly authorizing the tribunals with minor changes, again only for foreign nationals, by eliminating habeas corpus for foreign nationals deemed to be enemy combatants and by barring foreign nationals from invoking the Geneva Conventions in any lawsuit against the federal government or its officials arising out of their detention or treatment.

Detainees held at Guantánamo, in CIA "black sites," and elsewhere in the war on terror have been subjected to a wide variety of humiliating, cruel, and degrading practices designed to coerce them into providing

information. They have been deprived of sleep, exposed to extreme heat and cold, bound and shackled to bare floors for so long that they have urinated and defecated on themselves, been forced to wear women's underwear and pictures of naked women, and injected with intravenous fluid and then barred from going to the bathroom, so that they urinate on themselves.[15] The government's defense of such practices was twofold: (1) It read the prohibition on torture extremely narrowly, to apply only to the most extreme forms of physical and psychological coercion;[16] and (2) it interpreted the prohibition on "cruel, inhuman, and degrading treatment" not to apply at all to foreign nationals interrogated outside our borders.[17]

These initiatives suggest that the most fundamental threats to constitutional freedoms likely to arise in the next decades will be, at least initially, selectively targeted at foreign nationals and particularly Arab and Muslim foreign nationals. If progressives are to meet those challenges, we must articulate and defend a constitutional vision that resists the temptation to sacrifice the rights of a vulnerable minority for the apparent security of the majority.

The best example of a progressive constitutional vision responsive to these challenges is found not in any Supreme Court opinion, but in the 2004 decision of the Law Lords, the United Kingdom's highest court, which declared a post–9/11 law that authorized indefinite detention without trial of foreign terror suspects to be "incompatible" with the European Convention on Human Rights.[18] What condemned the measure, according to the Law Lords, was *precisely* its differential treatment of foreign nationals and citizens. The lords reasoned that the threat an individual poses to national security does not turn on what passport he has. Nor does the interest in liberty from indefinite detention vary with citizenship; it is owed to all human beings in equal measure. Thus, if indefinite detention was not necessary to deal with British subjects suspected of terrorism, it was not necessary for foreign nationals similarly suspected. The Law Lords lack the power to invalidate legislation, but Parliament nonetheless responded to the decision by replacing the indefinite detention law with a more limited authority to impose "control orders" on terrorist suspects, equally applicable to British citizens and foreign nationals.

The significance of the Law Lords' decision goes far beyond the specific law at issue in that case. If Parliament is forced to treat British citizens and foreign nationals alike absent a good reason for distinction, it will be much harder to adopt repressive security measures. Where everyone's rights are at stake, the political process is more likely to

ensure that a reasonable accommodation is reached—perhaps not in the heat of the moment, when the politics of fear is especially powerful, but over the long run. Thus, the mandate to treat foreign nationals and citizens equally will likely serve as a significant brake on rights-restrictive measures in the United Kingdom.

While the specific source of the Law Lords' opinion was the European Convention on Human Rights, the same principles can be grounded in the U.S. Constitution. The Due Process Clause provides that "no *person* shall be deprived of life, liberty, or property without due process of law." Due process analysis, like that of the Law Lords, examines the individual's interest in liberty and the state's interest in national security. Here, too, there is no legitimate basis for drawing any distinctions based on citizenship; a terror suspect poses the same dangers and has the same interests in liberty regardless of his country of passport.

The point can be generalized further. Apart from the right to vote and the elusive "privileges and immunities of citizenship," virtually all of the individual rights in the Constitution extend to "persons," "people," or "the accused" and are not limited to citizens. The Bill of Rights was understood as a list of "natural rights," given by God, and not only to Americans. That original understanding is recapitulated today in the universalist understanding of human rights that animates the various human rights treaties, which predicate their protections on human dignity. Human dignity does not turn on citizenship.

Along these lines, one of the least thought-through maxims of U.S. constitutional law is the notion that the Constitution does not protect foreign nationals beyond our borders. At one point, all law was thought to be territorially bounded, including constitutional law, so much so that U.S. citizens were not protected by the Constitution from their own government when they were abroad. But the Supreme Court long ago rejected that notion. Until *Boumediene*, however, it had clung, at least in dicta, to the idea that the Constitution did not extend to foreign nationals beyond our borders. But the cases cited for that principle are much more limited, and there is little reason that the Constitution should not constrain the federal government wherever it exerts its sovereign power, as that power is defined and delimited by the Constitution and its Bill of Rights. At a minimum, due process, which protects all persons deprived of life, liberty, or property, should restrict government actors whenever and wherever they impose the official force of the state on human beings to lock them up, subject them to water-boarding or similar measures, or render them to other countries so that others can torture them. While the precise process that is due might well vary

depending on the circumstances in which government power is exercised, there is no reason that due process should be inapplicable altogether simply because the United States is acting outside rather than inside its physical borders.

Despite its deep resonance with international human rights law, U.S. constitutional law is a long way from adopting this human dignity view, in which passports are not relevant to certain basic protections. As an example, consider the Supreme Court's decision in *Hamdi v. Rumsfeld*,[19] holding that the president cannot detain a U.S. citizen captured fighting for the enemy on the Afghanistan battlefield as an enemy combatant without a fair hearing before a neutral decision maker at which the detainee has an opportunity to prove that he is not in fact an enemy combatant. The majority opinion in *Hamdi* mentioned the fact that Yaser Hamdi is a U.S. citizen forty-two times in a relatively short opinion, even though as an analytic matter, the Court gave no reason that his citizenship status should matter to the process he was due.

In addition, the Court has frequently tolerated treatment of foreign nationals that it would not find constitutionally acceptable for U.S. citizens.[20] For example, while citizens cannot be punished retroactively for conduct that was legal at the time they engaged in it, foreign nationals can be deported for conduct that was legal at the time they engaged in it, at least under some circumstances.[21] And while citizens cannot be selectively prosecuted based on their race, religion, or political associations, foreign nationals can be selectively targeted for deportation on such bases.[22]

To advance a progressive agenda in this regard, then, it is plainly not enough to articulate an appealing constitutional vision. One needs also a strategy for bridging the gulf between contemporary reality and constitutional vision. On the question of tactics, we need to consider the second and third realities noted above—namely, a conservative Supreme Court and a democratic political process that is, by design, unfriendly to minority interests, and a shrinking world in which national borders are becoming less significant. We must learn to take advantage of the latter development to offset the obvious disadvantages posed by the former.

Even though we face substantial hurdles in every arena, progressives cannot give up on legislative initiatives, litigation, or lobbying the executive branch. On particular issues and at particular times, one or another of the three branches may be more hospitable to progressive claims. Congress, for example, may be a better forum for raising issues of privacy protections in the Internet age than the courts may be. The Supreme Court's Fourth Amendment jurisprudence has long adopted

the wooden and increasingly unacceptable notion that, once one shares information with a third party, one no longer has any expectation of privacy vis-à-vis government efforts to obtain that information from the third party.[23] Congress has frequently responded to those decisions by creating statutory protections for privacy with respect to matters such as bank records, medical records, video store records, and the like. Because privacy concerns tend to be broadly shared, they sometimes facilitate bipartisan coalitions, and legislative avenues may prove promising.[24]

On other issues, the courts are likely to remain the most promising forum for protection, even in an era of Republican-dominated courts. Consider, for example, the enemy combatant dispute. Virtually every newspaper across the United States editorialized against President George W. Bush's position that he could lock up United States citizens as enemy combatants without hearing or trial. Yet despite this widespread criticism of this policy, Congress did absolutely nothing to stop it. It took the Supreme Court, composed predominantly of justices appointed by Republicans, to stand up to the president. When it did so, Congress responded by giving the president most of what he wanted, in the Military Commissions Act of 2006, while simultaneously seeking to strip the federal courts of habeas corpus review of the president's actions. It took the Supreme Court, in *Boumediene*, to undo what Congress had done.

The election of Barack Obama has created great hope that mainstream politics can support a progressive political vision. But part of Obama's appeal was that he eschewed an identifiably progressive message, instead seeking to unite a majority around a more abstract desire for "change." Obama may indeed prove to be a progressive president, but that remains to be seen. It is quite possible that, until there is a fundamental shift in national politics (not simply a widespread disaffection with a particular Republican president), none of the federal branches of government will be a very promising venue for advancing a progressive constitutional vision. Progressives may need to look for support elsewhere. And here is where the last of the three factors noted above offers some hope. In light of the powerful trend toward globalization, progressive constitutionalists need to take a page from the book of the late environmentalist René Dubos, who argued that one must "think globally, and act locally."[25] Progressives need to think globally and act locally on matters of constitutional rights.

What does this mandate entail? First, we should not be afraid to look to conceptions of international human rights as a way of buttressing and extending constitutional rights at home. Doing so is likely to be

particularly useful in defending the rights of foreign nationals because, as noted above, human rights generally do not differentiate between citizens and noncitizens. But the appeal of international human rights law is not limited to this area of law and extends to such issues as the death penalty, criminal justice, gay rights, and economic and social rights, where international human rights standards often reflect more robust visions than does current U.S. constitutional law. Appeals to international human rights may support claims that the U.S. Constitution should be read progressively, to conform as much as possible with such principles. Even when they are not directly enforceable, international human rights norms can exert pressure on the content of constitutional law, as the Court and the country may feel some pressure to conform to broad international consensus about the fundamental character of certain rights. Skeptics often object that international law is vague and antidemocratic, but the same can be said of the Constitution itself; like international human rights, it speaks in generalities, not with the "prolixity of a legal code," as Chief Justice John Marshall famously said, and by design the Constitution is antidemocratic. In another sense, however, both constitutional rights and international human rights are profoundly democratic. They have been developed through a democratic process of consensus and ratification at the nation-state level. And they are designed to protect precisely those rights that democracies, left to their own devices, are least equipped to protect.

In addition, framing arguments in international human rights terms may facilitate the mobilization of international pressure for change at home. As Professor Mary Dudziak has shown in her historical work on civil rights during the Cold War, international concerns can facilitate domestic reforms; the fight against segregation was spurred by a desire on the part of the federal government to deflect communist criticism of racial subordination in the United States.[26] Progressives need to think self-consciously about how to harness international opinion to further their ends, at least where international standards support progressive goals. Framing arguments in international human rights terms as well as in constitutional terms can facilitate this result. When critics argued that detention at Guantánamo violated the U.S. Constitution's Due Process Clause, foreign observers may have felt ill equipped to evaluate the claim. When the arguments, by contrast, were made in terms of the Geneva Conventions, the Convention against Torture, or the International Covenant on Civil and Political Rights, observers in other countries owed no deference to U.S. interpretations and had more standing to offer their own views. And as Guantánamo itself

demonstrated, international pressure can play a significant role in bringing about change in U.S. policies and practices.

Progressive constitutionalists can also learn from the tactics employed by human rights lawyers and activists. Human rights activists, after all, are accustomed to acting in settings where they have little or no access to power. Accordingly, they have developed strategies that do not rely on access to power. They stress the publication of investigative reports, the exchange of information, public education, and grassroots activism—all with the goal of shaming the powers-that-be into acting in ways more consistent with human rights principles. Often shut out of the channels of official state power, human rights activists have learned to harness civil society itself as a checking force on state power.

In appealing to international human rights, moreover, progressive constitutionalists should seek to frame arguments that appeal not just to moral concepts of justice and human dignity, but to the United States' need for legitimacy on the world stage. Human rights and the rule of law are valuable not just because they are the right thing to do, but because they are essential to security itself. As reactions to Abu Ghraib and Guantánamo have graphically illustrated, when the United States violates basic human rights principles, there is a real danger that its actions will aid the enemy, both by spurring enemy recruitment and by reducing the willingness of other nations to cooperate with us. As obvious as this may seem, the *National Defense Strategy* quoted at the beginning of this chapter suggests that the Bush administration never got it.

In addition, human rights appeals may prod action at home precisely because they appeal to norms that are, at their root, consistent with American ideals. The United States has long prided itself as a human rights leader. It played an important role in the development of the human rights tradition, and its annual State Department reports focus on human rights abuses around the world. Americans feel comfortable with that vision of their country. They are less likely to feel comfortable with a vision of the United States as a human rights violator. Accordingly, the shaming that human rights activists so heavily rely upon to do their work may have added power in the United States, precisely because of our self-conception as a rights-respecting nation.

As an example of this human rights strategy at work, consider Guantánamo. When the military first announced that it would be holding enemy combatants there, few were willing to come to the detainees' defense. The Bush administration described the detainees as "the worst of the worst." Legal challenges seemed certain to lose. The precedent

was dead set against the detainees, as the Supreme Court in World War II had held that "enemy aliens" held as combatants abroad during wartime could not sue in U.S. courts.[27] The detainees lost in the district court and lost again unanimously in the court of appeals.[28]

But the detainees' claims that their treatment violated not only due process but the Geneva Conventions and international human rights guarantees resonated with the rest of the world. Guantánamo soon became a focal point of international criticism of U.S. antiterrorism policy. The fact that the United States was detaining nationals of forty-two different countries gave many countries a vested interest in the policies there. The British were especially vocal in their criticism, and President Bush was forced to negotiate a return of the British detainees at Guantánamo to their homeland.

The international opprobrium directed at U.S. policy at Guantánamo Bay very likely played a role in the Supreme Court's surprise decision to accept review of the lower courts' rulings in the cases in 2003, and in its equally surprising ruling against the government in 2004. In the first Guantánamo case to be heard by the Supreme Court, *Rasul v. Bush*, 175 members of Parliament, the Commonwealth Lawyers Association, the International Commission of Jurists, the Human Rights Institute of the International Bar Association, and the International League for Human Rights, among others, filed amicus briefs. And public criticism was heard from the British Law Lords, the European Parliament, and even the International Committee for the Red Cross, which departed from its strict policy of *not* publicly criticizing the countries whose detainees it is monitoring.[29] All three of the Court's rulings in Guantánamo cases have gone against the president. In its 2008 decision in *Boumediene v. Bush*, the Court invalidated the Military Commissions Act's repeal of habeas corpus, for the first time ever declaring invalid joint action of the president and Congress acting together on a matter of national security. While the Guantánamo litigation is ongoing, and the makeup of the Court has grown considerably more conservative, the litigation has already achieved remarkable success, pressuring the government to open up access to Guantánamo for the press, lawyers, and human rights observers; to release approximately five hundred detainees; to explain the bases for the initial detentions at Guantánamo; to modify its interrogation tactics to eliminate reliance on physically coercive tactics; and to provide hearings, albeit inadequate, to those whom the government originally claimed were entitled to no process whatsoever. President Obama promised to close the facility altogether. All of this was achieved through a litigation, public education, and organizing campaign that

insisted on the basic humanity of even "the worst of the worst" and that employed the tactics of human rights to push back an administration that initially acted as if human rights and the rule of law were inconvenient obstacles to be cast aside in the war on terror.

A progressive constitutional vision for the future must take into account the continuing threat of terrorism; a conservative Supreme Court; the likelihood that neither of the political branches will be especially progressive on constitutional rights issues, even under a Democratic administration; and the fast-paced developments toward globalization and the diminished significance of national sovereignty. We will be best served by a strategy that looks outward as well as inward and that seeks to employ the rhetoric and tactics of the international human rights movement to help frame our constitutional vision. We should steer clear of appeals to citizenship in favor of the more universal claim of human dignity, which rests ultimately on personhood. While he was not a framer, the nineteenth-century Kantian philosopher Hermann Cohen had it right, in this commentary on the Bible: "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."[30]

We need to rediscover the idea of humanity. If we can do that by 2020, we will have made real progress.

Notes

1. Department of Defense, *The National Defense Strategy of the United States of America* (Mar. 2005), available at http://www.globalsecurity.org/military/library/policy/dod/d20050318nds1.pdf.

2. John Ashcroft, *Testimony before the Senate Judiciary Committee* (Dec. 6, 2001), transcript available at http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm.

3. President George Bush, *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001), transcript available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

4. U.S. State Department, *Patterns of Global Terrorism 2004* (Apr. 27, 2005), available at http://www.state.gov/s/ct/rls/c14818.htm.

5. David Sands, *Suicide Bombing Popular Terrorist Tactic*, Washington Times, May 8, 2006.

6. Senate Select Committee on Intelligence, *Hearing on Current and Projected National Security Threats to the United States*, 109th Cong., 1st sess., Feb. 16, 2005 (testimony of Porter Goss).

7. Memorandum from Donald Rumsfeld to General Dick Myers et al., *Re: Global War on Terrorism* (Oct. 16, 2003), available at http://www.globalsecurity.org/military/library/policy/dod/rumsfeld-d20031016sdmemo.htm.

8. Michelle Garcia, *New York Police Sued over Subway Searches*, Washington Post, Aug. 5, 2005, at A3; Sarah Kershaw, *Suicide Bombings Bring Urgency to Police in U.S.*, New York Times, July 25, 2005, at A14.

9. See, e.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

10. Other realities to consider include the growing power of multinational corporations, increasing global and domestic wealth disparities, global warming, the deadlock that campaign spending and redistricting practices have placed on electoral politics, and the increasing alienation of the underclass, to name but a few.

11. Memorandum from Jay S. Bybee to Alberto Gonzales, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), reprinted in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005); David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 Wash. & Lee J. Civ. Rts. & Soc. Justice 1 (2006).

12. Francis Biddle, *In Brief Authority* 219 (Doubleday 1962).

13. See generally David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New Press, rev. ed., 2005).

14. Elisabeth Bumiller and Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, New York Times, Nov. 15, 2001, at B6.

15. See, e.g., Lt. Gen. Anthony R. Jones and Maj. Gen. George Fay, *Investigation of Intelligence Activities at Abu Ghraib* (Aug. 2004), available at http://www.information-clearinghouse.info/article6784.htm; Josh White, *Abu Ghraib Dog Tactics Came from Guantánamo*, Washington Post, July 27, 2005, at A14.

16. See Memorandum from Jay S. Bybee, *supra* note 11.

17. Human Rights First, *Human Rights First's Analysis of Gonzales Testimony before the Senate Judiciary Committee and His Written Answers to Supplemental Questions* (Jan. 24, 2003), available at http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/hrf_opp_gonz_full_012405.asp.

18. *A (FC) and Others (FC) v. Secretary of State for the Home Department* (2004) UKHL 56 (Dec. 16, 2004).

19. 124 S. Ct. 2711 (2004).

20. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (when regulating immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens").

21. E.g., *Galvan v. Press*, 347 U.S. 522 (1954).

22. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

23. See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988); *United States v. White*, 401 U.S. 745 (1971).

24. For the moment, the Protect America Act of 2007 casts substantial doubt on this prediction, but it is nonetheless true over the longer term that Congress has been more protective of privacy than has the Supreme Court, at least where the privacy of the majority is potentially at stake. See Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* 13–57 (Random House, 2004).

25. René Dubos, *The Wooing of Earth* (1980).

26. Mary Dudziak. *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2000).

27. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

28. *Al Odah v. United States*, 321 F. 3d 1134 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002).

29. United Kingdom Parliament, *Publication of Report: Foreign Policy Aspects of the War against Terrorism* (Feb. 2, 2004), available at http://www.parliament.uk/directories/

house_of_lords_information_office/bplist.cfmGuantánamo; Johan Steyn, *Guantánamo Bay: The Legal Black Hole* (Nov. 25, 2003; Twenty-Seventh F. A. Mann Lecture, delivered by Law Lords to British Institute of International and Comparative Law), available at http://www.nimj.com/documents/Guantánamo.PDF; Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantánamo Bay*, New York Times, Oct. 10, 2003, at A1.

30. H. Freedman, ed., *Jeremiah* (Soncino Books of the Bible, rev. ed., 1985), 52 (quoting Hermann Cohen).