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Testimony of David Cole

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Hearing: ALIEN GANG REMOVAL ACT OF 2005

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U.S. House Judiciary Committee

Subcommittee on Immigration, Border Security and Claims
Mr. COLE. I want to make four points about this bill. First, that it imposes guilt by association, resurrecting the worst tactics of the McCarthy era, targeting people not for their own individual culpable conduct, but for their mere association with groups that we have blacklisted.

Second, that the procedure by which we blacklist—we would blacklist groups under this bill—is on its face unconstitutional and in conflict with governing decisions of the D.C. Circuit.

Third, that the bill radically expands the grounds for deportation for crimes from aggravated felonies, which is already a very broad concept, to essentially minor misdemeanor assault offenses that merit no jail time whatsoever. Nonetheless, they would be deportable offenses under the statute.

And fourth, that this statute, by barring asylum and withholding to people based solely on their association in blacklisted groups, violates our obligations under international law not to send people back to countries where they're going to be persecuted simply because we find that they're a member of a group we don't like. It's one thing to send someone back to a country to be persecuted where they have been found to be a serious criminal or a terrorist, it's another thing to send someone back to a country where they're going to be persecuted simply because we find that they're a member of a group that we don't like, without any showing that they've engaged in any criminal activity.

Terrorism, crime, gang crime, violent crime, they're all problems, they're all serious problems that we need to respond to, but the challenge here, as with the challenge with respect to terrorism, is whether we can respond while remaining true to the principles upon which this country was founded. Unfortunately, this bill fails in remaining true to those principles. So let me talk about those four points.

First, it imposes guilt by association. It is already a deportable offense for a gang member, or indeed any other foreign national who is convicted of an aggravated felony, a
very broad term that as this Committee no doubt knows, includes misdemeanors, misdemeanors, includes shoplifting crimes and the like. What this bill does is make people deportable who have never committed a crime in their life, who are not suspected of committing a crime, who are merely deemed by the Department of Homeland Security to be a member of a group which is deemed by the Attorney General to be a bad group. Bad groups have bad people in them. They also have good people in them. This bill makes no distinction between the two. It deports anyone who is found to be a member of any group which has been blacklisted by the Attorney General. That's guilt by association.

If you took the McCarthy era laws that this Congress repealed in 1990, and you just substitute "criminal street gang" for "communist," that's what this bill would be. It essentially takes that approach where we punished people not for their own individual culpable conduct, but for their association with groups that we didn't like, and rendered them deportable. That's what this bill does, and it violates the first amendment right of association, and violates the fifth amendment right of an individual to be treated as an individual and not treated as culpable based on your associations.

Secondly, the designation process is patently unconstitutional. It provides no notice to the group that is designated. It provides no opportunity to the group that's designated to provide any evidence in its defense. It doesn't even allow the group to approach the Attorney General about its designation until 2 years after it's been designated.

And although it gives the gang the right to go to court to challenge its designation in court, in the D.C. Circuit, it doesn't allow the group to provide any evidence in challenging its designation. The evidence is solely that which has been created in a one-sided administrative process with no notice and no opportunity to respond. That very process has been held unconstitutional by the D.C. Circuit in the National Council of Resistance of Iran case, in the context of foreign terrorist organizations with presence here in the United States. A fortiori, it violates the Constitution with respect to domestic groups of three or more individuals who happened to have committed two or more gang
crimes at some point in their history.

Third, it radically expands the grounds for inadmissibility and deportability far beyond your aggravated felonies, to—as I point out in my testimony—misdemeanor assault offenses that are found by the criminal justice system to merit no jail time whatsoever. We would turn those into deportable offenses that not only render the person deportable, but deny him any relief whatsoever.

I'll conclude there.