

Trading Liberty for Security after September 11

David Cole

The devastating terrorist attacks of September 11 have made all of us feel vulnerable in ways that we have never felt before, and many have argued that we may need to sacrifice some of our liberty in order to purchase greater security. But for the most part what we have done since September 11 is not to make the hard choice of choosing which of our liberties we are willing to forego, but rather to sacrifice their liberties—those of immigrants, and especially of Arab and Muslim immigrants—for the purported security of the rest of us. This double standard is an all too tempting way to strike the balance—it allows citizens to enjoy a sense of security without sacrificing their own liberty, but it is an illegitimate trade-off. It is likely to be counterproductive, as it will alienate the very communities that we most need to work with as we fight the war on terrorism. And in the end, it is a false trade-off, because what we do to immigrants today often creates a precedent for what we do to U.S. citizens tomorrow.

Just as we have done in other times of crisis, in the wake of September 11 we have substituted broad-brush guilt by association for targeted measures directed at specific guilty conduct, and have circumvented procedures designed to identify the guilty while protecting the innocent. But most of these measures have been directed at noncitizens. Congress has made immigrants deportable for their political associations, excludable for their speech, and subject to indefinite detention on the basis of an executive official's certification. The Justice Department has carried out a massive preventive detention campaign, detaining between 1,500 and 2,000 persons since September 11, nearly all immigrants. The Attorney General has called them "suspected terrorists," but not a single one has been charged with involvement in the crimes of that day. (The only person who has been charged, Zaccarias Moussaoui, was arrested before September 11, and thus was not part of the campaign). And we have asserted the authority to hold foreign citizens as "enemy combatants" on Guantanamo without charges, without trial, and without any hearings until we determine that the "war on terrorism" is over.

But while these initiatives were introduced as being limited to noncitizens, as if to say that Americans need not worry about their rights, the government has already begun to extend similar treatment to citizens. In the most stark example, it has now asserted that it has unilateral authority to imprison United States citizens indefinitely, incommunicado, without charges, without trial, and without access to a lawyer, simply because the President has declared them "enemy combatants," or in President Bush's vernacular, "bad guys." When the President initially introduced the notion of military justice in November 2001 with an order setting up military tribunals, he assured the American people that the tribunals would try only noncitizens. Yet now he has claimed the right to hold American citizens indefinitely without any trial whatsoever.

Some have argued that wartime sacrifices in civil liberties are necessary but temporary, and that our liberties will reemerge once the battle subsides. But the "war on terrorism" is likely to be a permanent war. When Defense Secretary Donald Rumsfeld was asked how long the U.S. military would keep detained its "enemy combatants" on Guantanamo, he explained that in his view, the war on terrorism would be over only when there are no longer any terrorist organizations of potentially global reach remaining for the detainees to join. The modern world gives everyone "potentially global reach," so on this view, the war will not be over until terrorism is eradicated from the globe, a prospect far less likely than a cure for the common cold. This war is permanent, and we will be living with the choices we make today for the rest of our lives.

So as we consider how our government should respond to the new threat of terrorism, we must avoid the easy way out of thinking that the sacrifices will affect only immigrants, or that the sacrifices will only be temporary. Rather, we must ask what sacrifices we are willing to make across the board and permanently. Only then will we have any chance of striking a proper balance between liberty and security.

Foreign Policy In Focus Policy Report September 2002

Foreign Policy in Focus is a joint project of the Interhemispheric Resource Center (IRC) and the Institute for Policy Studies (IPS). The project depends on sales and subscription income, individual donors, and grants from The John D. and Catherine T. MacArthur Foundation, General Service Foundation, and various church organizations. *In Focus* internships are available.

Editorial inquiries and information:

IRC Editor

Voice: (505) 388-0208

Fax: (505) 388-0619

Email: tom@irc-online.org

IPS Editor

Voice: (202) 234-9382 ext. 232

Fax: (202) 387-7915

Email: martha@ips-dc.org

<http://www.fpif.org/>

HISTORY

This is hardly the first time that we have responded to fear by targeting immigrants and treating them as suspect because of their group identities rather than their individual conduct. In World War I, we imprisoned dissidents, most of them immigrants, merely for speaking out against the war. In World War II, we interned over 110,000 persons, again many of whom were immigrants, not because of individualized determinations that they posed a threat to national security or the war effort, but solely for their Japanese ancestry. And in the fight against Communism, which reached its height in the McCarthy era, we made it a crime even to be a member of the Communist Party, and passed the McCarran-Walter Act, which authorized the government to keep out and expel noncitizens who advocated Communism or belonged to the Communist Party.

While today's response may not yet match these historical overreactions, it is characterized by the same mistakes of

principle—targeting vulnerable groups not for illegal conduct but for group identity or political affiliation, treating legitimate political activity as if it were a criminal offense, and bypassing measures designed to protect the innocent.

GUILT BY ASSOCIATION AND POLITICAL SPYING

In October 2001, Congress passed the USA Patriot Act, under a threat from Attorney General John Ashcroft. Among other things, it imposes guilt by association on immigrants, a philosophy that the Supreme Court has condemned as “alien to the traditions of a free society and the First Amendment itself.” Before the advent of the Patriot Act, aliens were deportable for engaging in or supporting terrorist activity. The Patriot Act makes them deportable for virtually any associational support that they offer to a “terrorist organization,” irrespective of whether the alien's support has any connection to violence, much less terrorism. The Act defines “terrorist organization” as any group of two or more persons that uses or threatens to use a weapon against person or property, and therefore reaches any group that has ever been involved in a civil war or a crime of violence.

Under this provision, an alien who sent coloring books to a daycare center run by a designated organization would be deportable as a terrorist, even if she could show that the coloring books were used only by three-year-olds. Indeed, the law extends even to those who support a group in an effort to counter terrorism. Thus, a Quaker immigrant who sent a book by Gandhi on the virtues of nonviolence to seek to persuade a group to disavow violence would also be deportable as a terrorist.

Penalizing people for such conduct violates both the First and Fifth Amendments. All persons in the United States have a First Amendment right to associate with groups that have lawful and unlawful ends, so long as they do not

further the group's illegal ends. And the Fifth Amendment dictates that “in our jurisprudence guilt is personal.” Without some connection between the alien's support and terrorist activity, the Constitution is violated.

Some argue that money is fungible, so support of a group's lawful activities will simply free up resources that will be spent on terrorism. But that argument proves too much, for it would authorize guilt by association whenever any organization engages in some illegal activity. Donations to the Democratic Party, it could be argued, “free up” resources that are used to violate campaign finance laws, yet surely we could not criminalize all support to the Democratic Party simply because it sometimes violates the campaign finance laws. Moreover, the fungibility argument assumes that every marginal dollar provided to a designated group will in fact be spent on violence, but in many cases that assumption is not warranted. No one would seriously contend, for example, that every dollar given to the African National Congress in the 1980s for its lawful anti-apartheid work in South Africa freed up a dollar that was spent on violence.

Guilt by association breeds the worst kind of political spying, as the excesses of the McCarthy era taught us. Yet these laws practically invite the FBI to engage in widespread political spying, because they criminalize otherwise innocent political activity. That invitation has been seconded by Attorney General Ashcroft's decision to loosen the guidelines that govern FBI domestic criminal investigations, by specifically authorizing FBI agents to spy on political meetings and demonstrations without any basis for believing that any criminal activity is planned. The FBI guidelines were introduced in the 1970s after revelations about abusive FBI spying on and infiltration of civil rights and anti-war groups. We are now poised to return to the excesses of the past, only this time the targets will be Arabs and Muslims.

IDEOLOGICAL EXCLUSION

The Patriot Act also resurrects ideological exclusion, the practice of denying entry to aliens for pure speech. It excludes aliens who “endorse or espouse terrorist activity,” or who “persuade others to support terrorist activity or a terrorist organization,” or who belong to groups so advocating. Excluding people for their ideas is flatly contrary to the spirit of freedom for which the United States stands. For that reason, Congress in 1990 repealed all such grounds in the Immigration and Nationality Act. September 11 notwithstanding, surely we are a strong enough country, and our resolve against terrorism is powerful enough, to make such censorship unnecessary.

DETENTION VERSUS DUE PROCESS

Shortly after September 11, John Ashcroft announced that he would use every law on the books to catch “suspected terrorists” and lock them up. That preventive detention campaign has now involved the arrest of some 1,500-2,000 persons, yet not a single one has been charged with the crime under investigation or with terrorism. In fact, not only have none of the detainees been charged with a terrorist crime, but most have been affirmatively cleared by the FBI of any involvement in September 11, Al Qaeda, or any terrorist activity. The government’s policy has been to find some pretext to arrest, and not to release or deport until the FBI has cleared the individual. In sum, we reversed the general rule—these persons, nearly all immigrants, were presumed guilty, arrested, and only then investigated and if cleared, released or deported.

The DOJ has been unwilling to disclose even the most basic information about the largest group of detainees, those held on immigration charges. It refuses even to identify who is detained. The immigrants are tried in secret proceedings, closed to

the public, the press, or even family members. Immigration judges are instructed not to list the cases on the docket, and to refuse to confirm or deny that the case even exists if asked about it. Such a widespread practice of secret detentions and secret trials is unprecedented. Two federal courts have declared the practice unconstitutional, and a third federal court has ordered the government to disclose the names of the detainees under the Freedom of Information Act, but the government has appealed.

The administration also dramatically changed the rules that govern its authority to detain immigrants. Shortly after September 11, it gave the Immigration and Naturalization Service (INS) the authority to hold aliens without charges for an unspecified “reasonable” period in times of emergency. Many were held for weeks, and some for over a month, without any charges. The administration also changed the rules so that if an immigration judge orders an alien’s release, the INS prosecutor can effectively overrule the judge and keep the alien locked up simply by filing an appeal.

The Patriot Act goes still further, giving the Attorney General unilateral authority to detain aliens on his own say-so, without any hearing or opportunity for the alien to respond to the charges. The Attorney General may detain any immigrant whom he certifies as a “suspected terrorist.” The Patriot Act defines “suspected terrorist” so broadly that it includes virtually every immigrant who has been involved in a barroom brawl or domestic dispute, as well as aliens who have never committed an act of violence in their life, and whose only offense is to have provided humanitarian aid to an organization disfavored by the government. In some instances, the law authorizes the Attorney General to hold such persons indefinitely.

This provision violates the most basic elements of due process. It authorizes preventive detention of persons who pose no

danger to the community or risk of flight. It authorizes detention without any notice or hearing. And it allows the INS to detain aliens indefinitely, even where they prevail in their removal proceedings by obtaining relief from removal. This is akin to detaining a prisoner after he has been pardoned.

Were a city police chief to arrest 1,500-2,000 persons in connection with the investigation of a crime, hold and try the vast majority of them in secret, give his prosecutors the power to overrule judges, and charge not a single one with the crime under investigation, he would be out of a job. Yet John Ashcroft’s astoundingly unsuccessful campaign to detain “suspected terrorists” has garnered relatively little attention and criticism. In part this is because of the fear we all feel. But in even larger part it is because virtually all of those detained have been Arab and Muslim noncitizens.

MILITARY JUSTICE

In November 2001, President Bush issued an unprecedented military order that authorizes dispensing with criminal trials and trying all aliens accused of terrorist acts or harboring terrorists in military tribunals. After much criticism, the military issued regulations that provided aliens in such proceedings with some protections. Yet even as amended, defendants in military tribunals will have no appeal to any independent court, and their conviction can be based on secret evidence that neither the defendant nor anyone outside the military would have an opportunity to review. In essence, the executive branch—and specifically the military—will be judge, jury, and executioner.

As yet, however, the military has not instituted a single trial. It has found it more convenient to hold individuals without trial, and has asserted the authority to hold persons indefinitely as “enemy combatants” incommunicado, without charges, and without access to lawyer. None of the hundreds of foreign citizens

held on Guantanamo has had any kind of hearing at all.

That treatment, initially limited to noncitizens, has now been extended to U.S. citizens, in the cases of Yaser Hamdi and Jose Padilla. These two men, U.S. citizens, are held under essentially the same conditions as the foreign citizens on Guantanamo. The government has argued in legal proceedings that it has unlimited authority to hold them indefinitely, and that the courts have no role to play in questioning the executive's detention even of U.S. citizens. In short, even if Hamdi and Padilla are wholly innocent, they have no recourse.

OPERATION TIPS AND NATIONAL ID CARDS

As the Hamdi and Padilla cases illustrate, the administration has grown increasingly bold in its assertions of authority, and has already begun to cross the citizen/noncitizen line that it initially relied upon to introduce many of its initiatives. Two recent examples are the proposals for a national identity card and for Operation TIPS, a program encouraging citizens to spy on one another. These proposals would affect all of us. We would all have to carry an official identity card, making it much easier for the government to trace our every step. And we would all have to worry about our neighbors or the delivery man spying on us and reporting any unusual behavior to the authorities. In practice, of course, Arabs, Muslims, and those who might be mistaken for Arabs or Muslims would bear the brunt of the harm, as they would disproportionately be the targets of identity stops and private snooping. But in another sense, we would all be affected, as the introduction of these programs would significantly change American life as we know it. Precisely for the latter reason, both proposals have received extensive criticism from across the political spectrum. At the insistence of Congressman Dick Arme, the House of

Representatives' bill on the proposed Homeland Security department expressly bars development of a national identity card and implementation of the TIPS program. As these examples illustrate, the political process can much more reliably strike a balance between liberty and security when everyone has an interest on both sides of the line.

WHY WE SHOULDN'T RELY ON DOUBLE STANDARDS

The double standards outlined in this paper are wrong, unlikely to make us more secure, and likely to come back to haunt us all. First, as a constitutional matter, due process and political freedoms of speech and association are not limited to citizens, but apply to all persons within the United States. The Constitution does limit some rights to citizens—the right to vote and the right to run for certain federal offices—but those limitations only underscore that when the Constitution says “no person” shall be denied due process, it means no person. The Supreme Court has stated that the First and Fifth Amendments acknowledge no distinction between citizens and aliens living here. This understanding, moreover, is consistent with international human rights law, which guarantees to citizens and noncitizens alike the same due process and political speech and associational rights.

Second, these measures are unlikely to make us more secure. By penalizing even wholly nonviolent, and counter-terrorist associational activity, we are likely to waste valuable resources tracking innocent political activity, drive other activity underground, encourage extremists, and make the communities that will inevitably be targeted by such measures far less likely to cooperate with law enforcement. And by conducting law enforcement in secret, and jettisoning procedures designed to protect the innocent and afford legitimacy to the outcome of trials, we will encourage people

to fear the worst about our government. As Justice Louis Brandeis wrote nearly seventy-five years ago, the framers of our Constitution knew “that fear breeds repression; that repression breeds hate; and that hate menaces stable government.” In other words, maintaining our freedoms is itself critical to maintaining our security.

These double standards are also likely to undermine our legitimacy abroad. International terrorism is a transnational phenomenon, and requires a transnational response. But if other nations see that we are resorting to double standards, imposing on their citizens burdens we would not tolerate for our own, they are likely to be less eager to cooperate with us in the war on terrorism. Our allies have openly criticized our treatment of foreign citizens held on Guantanamo, and Spain has said that it would not extradite persons accused of being involved in the September 11 attacks unless we promise not to try them before military tribunals. Our unilateral attitude in defying the International Criminal Court and refusing to join international environmental accords only underscores the sense that the United States is unwilling to subject itself and its citizens to the obligations that the rest of the world bears.

Finally, as the Hamdi and Padilla examples illustrate, what we do to aliens today provides a precedent for what can be done to citizens tomorrow. In the long run, then, for reasons of principle, security, and self-interest, we should resist the easy path of trading immigrants' liberties for our own sense of security. When it comes to fundamental rights of fair process, speech, and association, we should impose on them only those burdens that we are willing to bear ourselves.

David Cole is a professor of constitutional law at Georgetown University Law Center, a volunteer attorney with the Center for Constitutional Rights, and legal affairs correspondent for *The Nation*.