

Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism

David Cole

New York: The New Press, 2003. 316 pages.

David Cole, a professor at the Georgetown University Law Center, is a brilliant constitutional attorney and an outstanding advocate of civil liberty. In *Enemy Aliens*, he articulates the case that Attorney General John Ashcroft's abridgements of the civil liberties of non-citizens and alleged "enemy combatants" in the name of the war on terrorism is at once part of an old strategy of establishing such constitutionally questionable actions against those people least politically able to defend themselves and, at the same time, the first step to expanding such incursions against civil rights into the population at large.

Cole writes with the meticulous care appropriate to a legal mind of the first caliber and with a graceful and literate rhetorical style. "The line between citizen and foreigner, so natural during wartime," he writes (p. 5), "is not only easy to exploit when restrictive measures are introduced, but also easy to breach when the government later finds it convenient to do so." Cole writes with authority on facts of which too many Americans are completely ignorant: selective detention and deportation based on religion or national origin, secret trials (or no trials), prolonged interrogation "under highly coercive, incommunicado conditions ... and without access to lawyers," and "indefinite detention on the attorney general's say-so" (p. 5).

Cole presents the historical precedents that justify his thesis. In 1988, President Ronald Reagan signed a bill apologizing for the appalling detention of Japanese-Americans during World War II. However, that internment was an extension of the Enemy Alien Act of 1798, "driven by nativist fears of radical French and Irish immigrants" (p.7), but still on the books. The "Palmer Raids" of the early twentieth century, wherein thousands of for-

eign nationals were rounded up for their “suspected political associations,” implemented legislation that J. Edgar Hoover and A. Mitchell Palmer had wanted to see applied to citizens as well. With the onset of the cold war, “Hoover got what he had wanted” (p. 8). He documents how this pattern has been followed in the current climate, for example, with the freezing of American charities’ assets. A draft of the proposed toughening of the Patriot Act would “turn even native-born citizens accused of ties with terrorist groups into ‘aliens’ by stripping them of their citizenship” (p. 8).

Cole addresses sociological and diplomatic issues, as well as moral and legal ones. If you suspect that there are terrorists among a community, it makes more sense to work with a law-abiding community to help identify potential threats than to alienate them (p. 9). Behavior indicating that we see no need to adhere to international standards has placed “our credibility on matters of international law and human rights ... at low ebb” (p. 10).

The book is divided into four parts. Five chapters on “Responding to 9/11” demonstrate the role that the fear inspired by the terror attacks of 9/11 has played. Seven chapters on “History Lessons” explore how the bogeymen of communism and terrorism have been used to advance the encroachment on civil liberties, starting with aliens and then moving on to citizens. A single chapter each on “Security” and “The Right Thing to Do,” plus a conclusion on “Breaking the Cycle,” form the final two parts of the book.

The government has argued that uncovering terrorist plots is “akin to the construction of a mosaic” (p. 20). Since the individual pieces of even the most sinister mosaic may themselves be innocuous, this model provides the justification for access to every bit of data on anyone, especially since potential terrorists may lead “quiet, law-abiding lives until they receive the call to strike” (p. 20). This could justify “the detention of virtually anyone” (p. 21), holding them without bond, even when the person is neither a flight risk nor a danger to the community. Knowing how freedom-loving American citizens might react to this awesome authority, the government has been careful to exercise it mainly against non-citizens for now (p. 21).

Within weeks of 9/11, John Ashcroft had rounded up over 1,000 foreigners (mainly Muslims and/or Arabs, not one of whom was charged with terrorism) for “preventative detention,” a program “shrouded in mystery,” (p. 25) despite the fact that “most of the judges who have reviewed the government’s secrecy policy have found it unlawful” (p. 30). “The government has refused to provide even the most basic information, beginning with how many people it has locked up,” let alone their names (p. 25). Of the over

5,000 people “preventatively” detained by May 2003, “not one has been charged with any involvement” with the 9/11 attacks (pp. 25-26). Cole uses numerous examples to detail how the government has managed to circumvent legal protections like bond, presumption of innocence, and a public and speedy trial. Where no pretext can be found for suspicion, people are held as material witnesses “based solely on a prediction about their reluctance to testify” (p. 37). Cole documents harsh treatment of witnesses and government lies used to obtain warrants (p. 38).

In chapter 2, Cole shows how the “disappearance” of people, notorious in Latin American dictatorships, has come to the United States. Chapter 3 documents how, despite George W. Bush’s campaign pledge against it, ethnic profiling has been expanded. Chapter 4 reveals the duplicity of the Patriot Act in distinguishing between domestic terrorism, narrowly defined in commonsense terms, and terrorism by foreign nationals defined to include not only ordinary violent crimes but also nonviolent and otherwise lawful activities. The criminalization of guilt by association with “disfavored political organizations” is the “centerpiece” of the act (pp. 58 ff). Chapters 5 through 11 explore how even American citizens have become vulnerable. Chapter 11 looks at specific cases of guilt by association and secret evidence. Chapters 12 through 14 demonstrate how terrorism has replaced communism as the pretext for expansion of state authority and discretion, and how double standards facilitate the process.

Selective enforcement effectively gives the state the power to chill political speech otherwise uncompromisingly protected by the Constitution. To those who ask if there is an alternative to a police state in fighting terrorism, Cole notes that the withdrawal of troops from places like Saudi Arabia, a less lopsided policy in Palestine/Israel, and “a commitment to the rule of law at home and abroad” could only help in the long run (p. 206). Cole is rightly concerned that any measure of safety yielded by double standards is more than offset by a loss of credibility (p. 207). “The Bill of Rights were viewed not as a set of optional contractual provisions enforceable because they were agreed upon by a group of states and extending only to the contracting parties, but as inalienable natural rights that found their provenance in God” (p. 214).

With keen scholarship and eloquent voice, David Cole has identified and articulated the ways in which the United States is becoming more like the dictatorial regimes to which it seeks to “bring democracy.” This is a must-have book for both Muslim reformers who would like to see the

Muslim world gain liberty and for Americans who seek to prevent their country from losing hers.

Imad A. Ahmad
President, Minaret of Freedom Institute
Bethesda, Maryland