



2002

## Terrorizing Immigrants in the Name of Fighting Terrorism

David Cole

*Georgetown University Law Center*, [cole@law.georgetown.edu](mailto:cole@law.georgetown.edu)

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/1829>

---

29 Hum. Rts. 11 (2002)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Immigration Law Commons](#), and the [National Security Law Commons](#)

# Terrorizing Immigrants in the Name of Fighting Terrorism

By David Cole

It is often said that civil liberties are the first casualties of war. It may be more accurate to say that *immigrants'* civil liberties are the first to go. In the wake of the devastating terrorist attacks of September 11, we all feel vulnerable in ways that we have never felt before, and many have argued that we may need to sacrifice our liberty in order to purchase security. In fact, however, what we have done is to sacrifice the liberties of some—immigrants, and especially 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. In the end, moreover, 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.

Our response to September 11 has been all too familiar. Just as we have done in other times of crisis, 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. Congress has made immigrants deportable for their political associations and excludable for pure speech, and subject to indefinite detention on the basis of an executive official's certification. The Department of Justice (DOJ) has launched a massive preventive detention project, detaining over 500 immigrants on routine immigration charges, in connection with the investigation of the attacks of September 11. These immigrants are being tried in secret proceedings, in cases that are not even listed on the docket. And the DOJ has given Immigration and Naturalization Service (INS) prosecutors

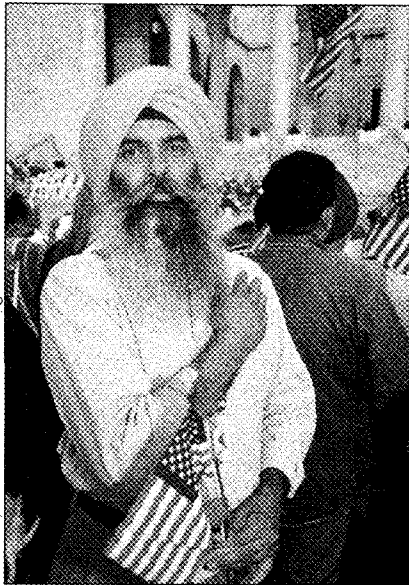


Photo by Robert Landau/Corbis Sygma

in removal cases the authority to keep immigrants detained even after an immigration judge has ordered their release. In this and other ways, we have sacrificed basic commitments to equality by trading a minority group's liberty for the majority's purported security.

## 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, for merely speaking out against the war. In 1919, the federal government responded to a politically motivated bombing of Attorney General A. Mitchell Palmer's home in Washington, D.C., by rounding up 6,000 (and eventually deporting 556) suspected immigrants in thirty-three cities across the country—not for their part in the bombings, but for their political affiliations.

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 other proscribed ideas, or who belonged to the Communist Party or other groups that advocated proscribed ideas.

While today's response does not yet match these historical overreactions, it is characterized by some of 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

The problems begin with the USA Patriot Act (Patriot Act), enacted in haste under threats from Attorney General John Ashcroft that if another terrorist incident occurred before the law was signed, Congress would be held responsible. 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 activity* with a "terrorist organization," irrespective of whether the alien's support has any connection to an act of violence, much less terrorism. And because the Act defines "terrorist activity" to include virtually any use or threat

to use a weapon against a person or property, and defines a "terrorist organization" as any group of two or more persons that engages in such an act, the proscription on political association potentially encompasses every organization that has ever been involved in a civil war or a crime of violence, from a pro-life group that once threatened workers at an abortion clinic, to the ANC, the IRA, or the Northern Alliance in Afghanistan.

Once a group is designated as a "terrorist group," aliens are deportable for asking people to join it, fundraising for it, or providing any kind of material support to it, including dues. Indeed, the law extends even to those who support a group in an effort to counter terrorism. Thus, an immigrant who offered his services in peace negotiating to the IRA in the hope of furthering the peace process in Great Britain could be deported as a terrorist.

This is guilt by association, because it treats aliens as culpable not for their own acts, but for the acts of those with whom their conduct is associated. Guilt by association, the Supreme Court has ruled, violates the First and Fifth Amendments. All people 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

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. However, no one would seriously contend that every dollar given to the ANC for its lawful anti-apartheid work freed up a dollar that was spent on that organization's terrorist activity.

#### **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," in ways that the secretary of state determines undermine U.S. efforts to combat terrorism. It also excludes aliens who are representatives of groups that "endorse acts of terrorist activity" in ways that

11. (The DOJ has halted its practice of publicizing the total number detained so we don't know how much higher the actual figure may be.) As of December 2001, over 500 persons were still being held in federal custody, with an untold number of others being held in state and local custody. Yet, as of that same time, only one person had been charged with involvement in the crimes perpetrated that day—Zaccarias Moussaoui. Department of Justice officials claim that about ten or twelve of the detained may be linked to Al Qaeda, but of course that only raises a question about the rest. 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 being 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 cases even exist. Such practices are unprecedented. But what we do know, mostly from enterprising investigative journalists, suggests that the vast majority have all but the most attenuated connections to the events of that terrible day. Most of those detained appear to be Arabs or Muslims.

The administration has dramatically changed the rules governing its authority to detain immigrants. Shortly after September 11, the INS unilaterally amended a regulation governing detention without charges. The regulation had required the INS to file charges within twenty-four hours of detaining an alien; under the new regulations, detention without charges is permissible for forty-eight hours, and for an unspecified "reasonable" period beyond forty-eight hours in times of emergency.

Before September 11, the INS could detain any alien placed in removal proceedings for as long as the proceedings lasted—in many cases several years. However, it could do so only if it had reason to believe that he or she posed a threat to national security or a risk of flight, and the alien was entitled to seek

### **The Patriot Act resurrects ideological exclusion.**

personal." Without some connection between the alien's support and terrorist activity, the Constitution is violated.

Some argue that the threat from terrorist organizations abroad requires compromise on the principle prohibiting guilt by association. But this constitutional principle was developed in connection with measures directed at the Communist Party, an organization that Congress found to be a foreign-dominated organization that used sabotage and terrorism for the purpose of overthrowing the United States by force and violence, and that was supported by the world's other great superpower.

Others argue that money is fungible, so support of a group's lawful activities

similarly undermine U.S. efforts to combat terrorism.

Excluding people for their ideas is flatly contrary to the spirit of freedom for which the United States stands. It was for that reason that Congress repealed all such grounds in the Immigration and Nationality Act in 1990, after years of embarrassing politically motivated visa denials. We are a strong enough country, and our resolve against terrorism is powerful enough, to make such censorship wholly unnecessary.

#### **Detention versus Due Process**

The government has detained well over 1,200 persons in connection with the investigation of the attacks of September

release from an immigration judge. Under a new regulation, however, even if the immigration judge rules that the alien should be released, INS prosecutors can keep him locked up simply by filing an appeal of the release order. They need not make any showing that their appeal is likely to succeed. Appeals of immigration custody decisions routinely take months and often more than a year to decide.

The Patriot Act goes still further, giving the attorney general unilateral authority to detain aliens on his say-so, without any 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 a "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 crime is that he or she provided humanitarian aid to an organization disfavored by the government.

This provision raises several basic constitutional concerns. It mandates preventive detention of persons who pose no threat to national security or risk of flight, and without any hearing. And it allows the INS to detain such aliens *indefinitely*, even where they prevail in their removal proceedings. This is akin to detaining a prisoner even after he has been pardoned.

The provision permits certification and detention on mere "reasonable grounds to believe" that an alien has engaged in terrorist activity, a standard that the INS has likened to the "reasonable suspicion" required for a brief stop and frisk under the Fourth Amendment. But under the Fourth Amendment, "reasonable suspicion" does not even justify a custodial arrest, much less indefinite detention.

The provision also permits detention for up to seven days without filing any charges. Yet, the Supreme Court has ruled in the criminal setting that charges must be filed within forty-eight hours except in the most extraordinary circumstances. In short, hundreds of immigrants not charged with any crime, much less involvement in the September 11 attack, are being detained in secret, even where judges rule that there is no

basis for detention, and without going before a judge at all.

### **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. In such tribunals, the defendant would have none of the rights that attach to a criminal trial. The trial could be held in secret, classified information could be

## **Immigrants are being detained in secret.**

used against the defendant without affording him an opportunity to confront or rebut it, the rules of evidence would not apply, there would be no jury, a conviction would require only a two-thirds vote of the military officers who presided, there would be no appeal to a court, and the penalty could include execution. In essence, the executive branch—and specifically the military—would become judge, jury, and executioner. (The Department of Defense is developing regulations that may provide some protections, but those regulations had not been issued at the time of this writing.)

Military tribunals are not unprecedented in wartime, and they have been upheld as a means to try enemies for offenses against the laws of war. Even if one could argue that we are in a de facto war with Al Qaeda, the tribunal's jurisdiction is not limited to members of that group, but extends to any noncitizen accused of engaging in international terrorism or harboring persons so engaged, irrespective of whether the individual is linked in any way to the attacks of September 11, or the group that perpetrated those attacks.

Noncitizens put on trial here for criminal offenses are entitled to all the same rights as U.S. citizens, including the right to a public trial, to a trial by jury, to confront the evidence against them, to discover exculpatory evidence and suppress illegally seized evidence, and to the assistance of counsel. These paramount rights are not limited to citizens, but attach to every criminal trial, because only such

safeguards ensure that we protect the innocent while convicting the guilty. We have tried thousands of noncitizens under these principles, for terrorism, espionage, sabotage, and subversion. The president has made no showing that wholesale abandonment of that practice is either necessary or authorized.

Interestingly, the decision to limit the jurisdiction of the military tribunals to noncitizens appears to have been purely political. In 1942, the Supreme Court held that in wartime, military tribunals could

be used to try citizens as well as noncitizens, as long as they were fighting for the enemy. Thus, there is no constitutional justification for the limitation, and it appears to be a purely pragmatic political calculus—namely, that the American people would be less likely to object if someone else's liberties are threatened. One official is reported to have said that the administration didn't think it would be fair to subject citizens to such tribunals. But the fairness of the procedures does not vary with the identity of the defendants. Here, too, we seem all too willing to sacrifice *their* rights for our security.

Finally, there is good reason to doubt whether these measures will in fact make us safer. By penalizing even wholly lawful, 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 sta-

*continued on page 22*

individual proof, Congress found it necessary to enact a blanket punishment." Thus, whether Mr. Bajakajian had been taking \$357,114 out of the country or \$3 million, it would all have been subject to forfeiture. For what? For failing to fill out the U.S. Customs form.

Under the new law, of course, the government will be able to "adduce affirmative proof of another crime"—bulk cash smuggling. The only question is whether the Court will see through this ruse. The question it should ask is not whether this change in the law will give the government a useful tool in the war on crime—it will in those relatively few cases in which real criminals are caught—but whether that tool is consistent with the Eighth Amendment's prohi-

bition of excessive fines. After all, not everyone seeking to quietly transport his own currency in or out of the country is a terrorist. There are many tools that would be useful in the war on crime and terrorism but not all are constitutional.

### Conclusion

The irony of this is that the two measures discussed in this article, had they been in place on September 11, probably would have done little or nothing to protect us against the terrorist attacks. To the best of our knowledge, none of the terrorists committed a crime in or against a foreign country. Thus, no property they owned in this country would have been subject to seizure or forfeiture. Likewise, it does not appear that

any of them was engaged in bulk cash smuggling. Given the low probability of being detected in light of the number of people and packages that pass through U.S. Customs every day, this measure will hardly drive terrorists either to report or transfer funds through channels that report. What these measures will do, however, is cost domestic and foreign financial institutions huge sums of money in record keeping expenses and reporting, while ensnaring, along with a few of the guilty, a good number of perfectly innocent people. That's no way to fight terrorism.

---

*Roger Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.*

---

## Alien Justice

*continued from page 15*

ural choice to try such enemies of civilization as bin Laden and his associates. Although the court has not yet come into existence, and its jurisdiction is prospective only, the requisite sixty ratifications likely will be obtained in a few months. Many international legal experts, including the UN High Commissioner for Human Rights, have concluded that the September 11 attacks constitute "crimes against humanity," a central feature of the ICC's jurisdiction. Though it could not try the perpetrators of these attacks, the events of September 11 make clear the importance of getting the ICC up and running as soon as possible. The closest U.S. allies in the current military effort—including the United Kingdom, which ratified the ICC treaty in the midst of offering the U.S. its support in the war on terror—believe that the ICC represents the future of international justice in the new millennium. Yet, the United States continues to spurn it, even in the aftermath of our national tragedy, signaling support of a bill sponsored by Senator Jesse Helms (R-N.C.) that would prevent the ICC from ever coming into existence. Ultimately, however, the hard-headed multilateralism that the Bush administra-

tion now preaches must lead it to overcome its objections to the ICC and join with its allies in supporting this important new institution. When the gavel comes down at the start of the ICC's first trial of an international terrorist, U.S. opposition will likely start to come down too.

Of course, the international options for trying terrorist suspects are not limited to the ICC. Some experts have suggested expanding the jurisdiction of the Yugoslav war crimes tribunal to include terrorist offenses and war crimes committed in Afghanistan. Others suggest that the UN Security Council establish a new tribunal to try Al Qaeda members. Additional alternatives include some type of hybrid, Lockerbie-style court, or military trials conducted in jurisdictions outside the United States.

Although each of these options carries its own set of complications, none would require us to forsake our cherished institutions of justice. The military

commissions authorized by the president's order have no place in a country committed to protecting liberty through the rule of law and separation of powers. The United States stands for these principles internationally, and will be judged by how well it cleaves to them in this time of crisis.

On November 13, President Bush announced he had signed the order permitting use of military commissions. As Bush was leaving for his Texas ranch for a meeting with Russian President Putin, Deputy White House Counsel Timothy Flanigan announced "The order's signed and nobody's ashamed of it."

Someone should be.

---

*Elisa Massimino is director of the Washington, D.C., office of the Lawyers Committee for Human Rights, where she is responsible for advancing all aspects of the Lawyers Committee's human rights agenda in Washington, D.C.*

---

## Fighting Terrorism

*continued from page 13*

ble government." In other words, freedom and security need not necessarily be traded off against one another; maintaining our freedoms is itself critical to maintaining our security.

---

*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. Portions of this article are adapted from Professor Cole's testimony on the anti-terrorism bill in Congress.*