

Where Liberty Lies: Civil Society and Individual Rights in America's 'War on Terror' After 9/11

By Candice Colman



Professor Cole explains the importance of civil society for safeguarding civil liberties.

The Bush Administration's response to 9/11 has been widely criticised by civil society groups both within the USA as well as globally for curtailing civil liberties and abrogating human rights. In the final Castan Centre event for 2012, Professor Cole reflected on the first decade post-9/11 and the lessons that civil society can learn about the relationship between counter-terrorism & human rights. Professor Cole teaches constitutional law at Georgetown University Law Center. He has published works on civil rights, criminal justice and constitutional law and has litigated on constitutional issues arising out of the First Amendment, which protects free speech.

Professor Cole began with an overview of US government responses to national security crisis over the years, noting that a prevalent culture of Presidential infallibility extended from President Lincoln's suspension of habeas corpus during the American Civil War, to President Roosevelt's detention of American and Japanese nationals during WWII for their ethnic identity. Bearing that culture in mind, he suggested that the most interesting thing about the decade post-9/11 is not the Bush Administration's 'overreaction' to this admittedly 'horrific attack', but rather, the fact that the Bush Administration was forced to curtail virtually all of its most aggressive anti-terror measures over its 8 year term. Professor Cole argues that the rollback was in part a response to resistance mounted by civil society groups.

Professor Cole noted the authorisation of the CIA to engage in torturous tactics and the disappearance of suspects in 'black sites', as well as the erosion of the rule of law through policies including the unilateral creation of a military commission system. These commissions could authorise execution in response to evidence from torture victims without the avenue of judicial review.

He further noted the widespread concern over the purported inapplicability of the Convention Against Torture and the Geneva Convention to foreign detainees outside US borders. He compared President Bush's claims to uncheckable override powers as Commander-in-Chief to President Nixon's infamous statement in response to a previous instance of warrantless wire-tapping of US citizens: 'My understanding in that if the President does it, that means it's not illegal.'

Yet, despite this theory of leadership which was in sharp contradiction with the principles of constitutional law, Professor Cole argued that from 2004 onwards the Bush Administration was 'more law abiding' than during its first term.

During its second term, the Bush Administration curtailed their torture practices, released 500 detainees from Guantanamo Bay, and introduced a judicial basis for wire tapping, none of which was mandated by Congress or decisions of the Supreme Court. Professor Cole argued that it was in part a result of pressure from civil society groups, such as Human Rights Watch, Human Rights First, the Center for Constitutional Rights, the American Civil Liberties Union and others, made up of citizens who had come together in their commitment to a certain set of human rights or constitutional standards on civil liberties. He argued that the filing of law suits, issuing of reports, leaking of top secret government memos, and public protesting by individuals who were committed to a strong constitutional basis for non-derogable human rights standards was ultimately helped bring about a significant decrease in the 'lawless' measures used by the Bush Administration in the name of national security.

According to Professor Cole this resurrection of rule-of-law standards has continued during the Obama Administration. He cited the official cessation of the 'Enhanced Interrogation Tactics' torture program of the CIA, and the publicising of the government memos that authorised it; as well as the further release of detainees from Guantanamo Bay as evidence of this. Overall, Professor Cole felt that the Obama Administration had a mixed record on human rights. On the one hand, President Obama refused to rely on Commander-in-Chief powers and showed his determination to be constrained by the laws of war notwithstanding a court decision to the contrary. On the other, Professor Cole remains concerned by the Obama Administration's widespread use of state secrets privileges to avoid accountability for past rights violations, as well as the expansion of the targeted drone killing program. Thus, the need for civil society resistance remains.

Professor Cole closed by suggesting that in the decade after 9/11 civil society groups have been surprisingly effective in curtailing the abuse of human rights by the US executive, legislative and judicial powers. The audience left with a strong impression of the integral role a robust civil society has to play in safeguarding civil liberties.