

## **Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties**

**by Nancy Chang. New York: Seven Stories Press, 2002, pp. 168, ISBN 1-58322-494-7.**  
(Reviewed by Andrew Neal, SPIRE, May 2004)

Nancy Chang's small and accessible book tackles the purported threat to American civil liberties posed by legislation and executive measures enacted in response to the events of September 11<sup>th</sup> 2001. This issue has been extremely rousing politically, not least because of the irony that although the September 11<sup>th</sup> attacks have been officially characterised as an 'attack on freedom', the governmental response to those attacks appears to hold that freedom in scant regard. Chang, a senior lawyer at the Centre for Constitutional Rights in New York, seeks to impress upon the reader the inappropriateness, unconstitutionality and indeed immorality of the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) and associated executive measures undertaken without recourse to the usual constitutional and institutional limits. The book adds to a rapidly expanding body of literature and debate in this area, and although undoubtedly a very worthy and necessary contribution, will have to face significant competition.

As befits a lawyer, Chang approaches the issue through extensive reference to landmark legal judgements. Structured into four chapters, her first offers a concise history of well-known challenges to civil liberties enacted by US governments in times of fear and political crisis. Hence Chang discusses the challenges posed to Constitutional rights by various wartime acts of law; the abuse of power by the FBI in its cold-war era counter-intelligence program, COINTELPRO, which sought to disrupt and discredit the lawful and legitimate political activities of the Left and the civil rights movement; and the detention and interrogation of tens of thousands of suspected political dissidents during the 'Red Scare' Palmer Raids of the World War 1 era and the internment and relocation of hundreds of thousands of innocent Japanese-Americans in the aftermath of Pearl Harbour, in both cases not leading to a single conviction for treason or espionage. All of these abuses were struck down in the courts, and were subsequently generally recognised as having been morally wrong.

Having established the crisis-laden history of American civil liberties, Chang is then able to systematically show that many of these past mistakes are being repeated and indeed exceeded. She breaks down the implications of the USA PATRIOT Act, detailing the ambiguity of its new definition of terrorism, the effectively secret property searches and wiretaps it facilitates, and the distinction in terms of rights that it makes between full US Citizens and other US residents. The Act's shockingly swift and barely challenged passage through Congress has been well-documented, but, as Chang notes, much of what has been done since September 11<sup>th</sup> has not even been carried out under the aegis of legislation.

Accordingly, chapter three charts what Chang describes as "edging toward government by executive fiat." Here she attempts to recount the fate of as many as 2000 Muslim men detained, predominantly without criminal charge, since September 2001. I use the word 'attempts' because, as Chang explains, efforts to obtain information about these men have been persistently obstructed by the justice department, signalling the emergence of a culture of secrecy that has been hitherto alien to the US. Detainees have been held incommunicado, moved without notice, and effectively been denied access to counsel. Although many have been charged with minor immigration violations, none have been charged with any offence relating to terrorism or even been shown to be associated with terrorism in any way. Although the number held has dropped, it is still unclear how many are still being detained. Chang calls them "America's disappeared".

The final chapter is more explicitly political, and comes down on the side of political activism in the face of an intolerance of dissent, the sweeping of civil disobedience and protest into the category of an exceptionally broad definition of 'domestic terrorism', guilt by association, intimidation by law enforcement agencies, and the crushing weight of national demands for 'patriotism'. She concludes by calling for people to exercise their rights to protest, dissent and demand information in order to hold to account those in government and law enforcement who might restrict those rights.

This book achieves much in such a small space. Its historical contextualisation of the current crisis of civil liberties is excellent, as is its basic background material about the American constitution, all of which will be particularly welcome to non-expert or non-American readers. Although by no means a serious academic text, this book would serve as a useful introduction to anyone approaching the burgeoning issue of security and liberty anew. Its extremely thorough referencing of recent and historical legal cases would provide an excellent resource for those who wish to pursue the issue at greater depth or support their own theoretical claims with empirical detail. On the other hand, an index would have been welcome. These are no mean achievements for a small text that is unashamedly targeted at the popular market, as revealed by the presence of fashionable radicals such as Noam Chomsky and Howard Zinn in the same series of titles.

There are however some significant flaws that will irk the serious academic reader. The US Constitution is consistently lauded as a sacrosanct work of genius that represents the pinnacle of human justice and liberty. There is no debate about what 'freedom' or 'liberty' might mean within the US, let alone in countries that do not have the good fortune to have a United States Constitution of their own. This is an overwhelmingly inward looking book. Of course, Chang's political position is clear from her language and publishing associations, but the political subtext boils down to a one-sided argument about who legitimately speaks for America, and indeed what the 'real' America is. Is 'American liberty' the collection of political rights enshrined in the constitution, or the liberty of America to be whatever it wants to be and pursue whatever foreign policy it wants to pursue, with scant regard to everyone else? Of course, Chang would fall into the first camp, but the problem remains that these two positions cannot easily be separated from each other: one side defends liberty against the government, while the other side supposedly defends liberty against its aggressors by doing what is 'necessary'. This problem is exemplified by the book's complete lack of enquiry or even speculation about the causes of the September 11<sup>th</sup> attacks or terrorism generally. Likewise, the 'illegal combatants' held in Guantanamo Bay do not receive a mention. In fact, there seems to be no sense that terrorism is a political issue at all; the September 11<sup>th</sup> attacks are simply a rupture in time that has brought about a new era of challenges to civil liberties. Perhaps this is asking too much of such a book, which if taken for what it is deserves ample merit for being colourfully readable and empirically useful.

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## ***The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11***

by **Stephen J. Schulhofer**. *New York: Century Foundation Press, 2002, pp. 83, ISBN 0-87078-482-X.*  
(Reviewed by Andrew Neil, SPIRE, May 2004)

Stephen J. Schulhofer's *The Enemy Within* shares much in common with Chang's *Silencing Political Dissent*. It is of a similar length, and has been similarly sponsored by an independent political organization, in this case the Century Foundation, which claims to offer non-partisan analyses of pressing political issues. Although the book does not seem as geared toward the popular market as Chang's work, for academic purposes this is a good thing, because while the text is not as eminently accessible as Chang's and although the format is not as attractive, it is the more serious piece. Whereas Chang will slip

easily into a well-defined market segment and largely preach to a converted readership, Schulhofer takes on the more difficult task of evaluating anti-terrorism policy not just in terms of its liberality or constitutionality, but on its own terms. That is, he actually asks the question: will post-September 11<sup>th</sup> legislation and executive measures actually succeed in preventing terrorism? For the record, his answer is mostly no.

Schulhofer is a Professor of Law rather than a practicing lawyer, and as one would expect, he makes ample reference to landmark legal cases. He is also well aware of the history of executive and indeed congressional disregard for civil liberties in wartime. Rather than taking the moral high ground or invoking lessons from history however, Schulhofer goes beyond case law with a deft command of policy, procedure and practice. This enables him to take a very systematic approach to recent developments, laying out in detail how new policy and practice differs from old. More importantly, Schulhofer is able, by delving into the sprawling and barely reviewed USA PATRIOT Act, to distinguish between logical updates to out-of-date elements of law-enforcement, illiberal right-wing opportunism, and genuine but ill-considered anti-terrorism measures. This scrupulous attention to detail lends the book a methodical and never-inappropriate sharpness.

The three strands of argument that Schulhofer establishes in his introduction and reinforces in his conclusions largely govern his approach. These are: 'bad compromises', where civil liberties have been damaged in return for no significant anti-terrorism gain; 'September 11 opportunism', where new investigative and law enforcement powers with no relation to terrorism have been 'slipped into' the new legislation to take advantage of the sense of emergency that gripped the nation and Congress at the time the USA PATRIOT Act was railroaded onto the statute books; and 'unchecked executive power', where the checks and balances of the American constitution have been circumvented or indeed destroyed. This approach offers a balanced perspective, so that instead of engaging in a debate about the meaning or application of America's now-mythical founding ideals, Schulhofer can make some important critical distinctions.

When discussing the issue of surveillance powers for example, Schulhofer is very clear about the *status quo ante*. The right to privacy is enshrined in the Fourth Amendment, and accordingly surveillance and wiretapping are subject to the requirement of 'probable cause' and judicial authorisation. However, the Foreign Intelligence Surveillance Act (FISA) of 1978 creates a whole different set of more lenient rules for gathering intelligence information when there are grounds to believe subject of surveillance is the agent of a foreign power. As befits the general view that international relations is a dangerous world of intrigue, espionage and unpleasant necessity, there is no requirement that criminal activity is believed to be underway or imminent.

The USA PATRIOT Act subtly alters the requirements for FISA so that the gathering of foreign intelligence material now only has to be a 'significant purpose' - not the sole purpose - of the surveillance operation. When combined with a definition of 'foreign agent' that could include anyone employed by any foreign organisation, including legitimate political parties, interest groups and charities, the expanded FISA powers make possible the extended, clandestine surveillance without judicial review of targets accused of no wrong doing. Importantly however, under the new rules it is legally legitimate if the surveillance turns up evidence of criminal activity unconnected with foreign intelligence. This kind of 'fishing expedition' goes against the Fourth Amendment requirement of 'probable cause'. Perversely, this means that a rapist or murderer has more legal protection than anyone connected with a foreign organization. More gravely, these constitutional flaws could actually jeopardise the possibility of securing convictions for terrorism offences because the evidence gathered may be inadmissible. It seems that the US government's determination to make terrorism investigations and prosecutions a special case are actually counter-productive - they may show that the government is 'doing something', but they undermine the due process of the criminal convictions that could be secured where 'terrorist' attacks are genuinely being planned.

By analysing policy developments in relation to the practices they replaced, rather than in relation to the ideals embodied in the Bill of Rights, Schulhofer avoids the soapbox tone that plagues some radical writers. This lends him more not less rhetorical force. Because his at times polemical criticism is meted out in a far more considered manner, it comes across as being more genuinely deserved. This is useful, because perhaps criticism of governmental ineptitude is more likely to stick than more general criticism

against illiberal neo-conservatives. Of course, despite wearing his non-partisan credentials on his sleeve, Schulhofer cannot avoid giving away a certain politics. By engaging with current US government policy on its own terms, he inevitably accords it some legitimacy. Although not advocating a particular position or world-view in the way that much of the popular political literature does, Schulhofer betrays an acceptance that the prevention of terrorism is a pressing policy issue, and as a result there is little reflection on the rhetorical use of the terrorism label or indeed the concept of liberty. On the other hand, he avoids high minded idealism of Chang, and as a result the arguments put forward will be less easy to dismiss.

Although Schulhofer does not offer the colourful political zeal of many popular critical texts, his meticulous attention to detail means that *The Enemy Within* is the more usable text. Engaging with a debate on the actual content and effects of policy, as Schulhofer does, is a more difficult task than fighting one's corner in the argument about what kind of America people want to live in. The result is a book that is sometimes a little dry, but is nevertheless necessarily fastidious. Ideologues will not enjoy reading between the lines, but as an exercise in policy analysis *The Enemy Within* is masterful.