Abstract
Since 9/11, US citizens have been subject to a series of measures that have undermined their civil liberties. These changes were intended to enhance security and were supported by Congress with little dissent. Cherished values such as habeas corpus and the right to a fair trial were removed while the abduction and torture of ‘illegal combatants’ became accepted practice in the name of the war on terror. It is doubtful whether the US was actually at ‘war’; if so, the laws of war should have covered its response. US citizens appear to have accepted their loss of freedom because it was portrayed as a choice between security and civil liberties. There appears to be little prospect for any rapid reversal of the new legislative regime. Such measures have been adopted before in times of national emergency but often proved counterproductive. The US Government’s response to 9/11 has led to concerns about the health of US democracy and its future direction.

Since the attacks of 9/11, citizens of the US have paid a price, not only in military deaths and the threat of terrorist attack, but also in substantial legislative changes to their rights and liberties. The US Government has stated that these rights and liberties have been restricted to enable the prevention of terrorism and the prosecution of either actual or potential terrorists thereby maintaining security. Much of the reasoning for these restrictions depends on statements and arguments that the US is at ‘war’. This article will examine the viability of this argument and the ramifications of the legislative changes in the new security climate. An integral component of these changes is the weakening of habeas corpus, the principle of a right to trial. This article will also consider the changes to habeas corpus and the consequences for democratic governance as well as the treatment and detention without charge or trial of suspects under Executive Order. The use of fear by the government has also been instrumental in promoting the acceptance of the attack on civil liberties. The examples in this article will demonstrate the degree to which individual and collective civil liberties have been affected along with the reasons, justifications and mechanisms for their change.

The shift in internal security policy post-9/11
The attacks of 9/11 changed the world and the perceived security of many nations. They ‘were signposts of a new era, a turning point in our history’ Hagel (2004, 64). The attacks also initiated significant changes to US Government legislation resulting in one of the more clever politically-prompted acronyms. Congress passed the 1,016 Sections of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Patriot) Act 2001 on 24 October, five weeks after the US Justice Department submitted the first 342 page draft.

The Act gives increased powers to the government to collect all forms of electronic surveillance including telephone calls, voicemail, internet use and email. It also facilitates and increases the grounds for a Foreign Intelligence Surveillance Act (FISA) order. This Act was passed in 1978 to provide a distinction between domestic wiretapping cases and those in which foreign intelligence was involved in order to protect US citizens’ Fourth Amendment rights. The amendments to FISA substantially remove many of those rights (Jaeger, Bertot, and McClure, 2003). Other provisions of the Patriot Act include financial disclosure requirements for institutions regarding their customers’ transactions, the detention of immigrants suspected of terrorism for indefinite periods, the issue of covert search warrants, the forcible collection of DNA samples from federally convicted prisoners and the power to access medical, tax and library records.

Above all, the Act encoded unprecedented and wide-ranging powers for the Executive while reducing oversight of those powers by Congress and the judiciary (Chang 2006, 369-371). At the time, Congressman Barr warned that they had enacted ‘a massive suspension of civil liberties … that will come back to haunt us terribly’ (Silberstein 2002, 123). The need for the Patriot Act was also predicated on the assumption that the government possessed insufficient intelligence gathering powers to prevent 9/11 whereas, in fact, the intelligence was indeed available. It was, however, ineffectively analysed and acted upon (Strossen 2004, 368). One of the most
The erosion of Habeas Corpus

The 1679 Habeas Corpus Act (UK) encoded common law dating as far back as the Twelfth Century regarding the right of a prisoner to be brought before a court to test the legality of their detention as well as to ensure they were not being maltreated or tortured. Habeas corpus was enshrined in Art.1 S9 of the US Constitution which states that,

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

To date this suspension had occurred only during the Civil War and WWII. As well as ensuring the right to a trial for all suspects habeas corpus has been a cornerstone of the judicial process and limits the power of the Executive to detain at will. However, post-9/11 habeas corpus has been restricted or removed for terrorism suspects.

The increased role of the military in domestic security affairs post-9/11 has had profound implications for the marginalisation of habeas corpus and the subsequent erosion of civil liberties. Although the US Posse Comitatus Act 1878 prohibits the military from intervening in the control of civilians, the Defense Authorization Act 1999 in effect permitted the federal deployment of the military during emergencies. The former Associate Director for National Preparedness at the Federal Emergency Management Agency has stated that, ‘It is time to rescind the existing Posse Comitatus Act and replace it with a new law.’ Meanwhile President Bush instructed lawyers ‘to review the Posse Comitatus in light of new security requirements in the War on Terror’ as the act was said to ‘greatly restrain the military’s ability to participate in domestic law enforcement’ (Brinkerhoff 2002). However, it is widely accepted that the military is totally unsuited to civilian law enforcement. They do not have the appropriate training, they have a rigid command structure in which grievances are easily ignored and in which there is no means of redress, and they are accountable only to the President as Commander in Chief. Thus military deployment enables the by-passing of all established accountability mechanisms making their use increasingly attractive to authoritarian Governments. Simpler regulations enabling the detention of suspects are also a crucial component of authoritarianism.

Another of the ways in which the US Government responded to the 9/11 attacks was the Military Executive Order of 13th November 2001 concerning the ‘Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism’ (Bush 2001b). This involved the decision by the Executive to use military tribunals to try alien terrorists outside the American civilian and military legal systems with severe restrictions concerning the rights of the accused, lawyer access and client confidentiality. Using this order, the government classified detainees as ‘illegal enemy combatants’, a class unrecognised by the Geneva Conventions. The term was first used by the Supreme Court in 1942 (Ex Parte Quirin, 317 U.S. 1) when it upheld the right of military tribunals to try Nazi saboteurs, however, the term has never been defined by the Supreme or any other court, or by the government (Supreme Court 2005). Certainly, the French Resistance in WWII would have qualified as illegal combatants under this criterion.

The loss of habeas corpus and other civil liberties impacts more on non-citizens who are in an even more vulnerable position legally. They do not enjoy the same rights as citizens, and the few that they have can be easily evaded. They are also frequently isolated socially with no one to plead their case with the authorities. For an identical offence, non-citizens are frequently treated in a wholly different manner. Non-citizens can also be used by Governments for testing controversial measures such as detention without trial as they find it difficult to make their complaints heard. Compare the detention, plea bargain, trial and imprisonment of John Walker Lindh, a US citizen detained in Afghanistan, as against the detention without trial of non-citizen detainees in Guantánamo and elsewhere. It thus appears that even an ‘illegal’ American combatant is never quite as guilty as an illegal non-American combatant. Hence, it could be stated that one of the greatest losses from the erosion of civil liberties is the observation by other nations that laws are applied unequally by a government that espouses democratic values (Heyman 2003, 113).

Currently, an unknown number of non-citizens are detained in Guantánamo Bay and in other even less transparent prisons around the world to which US-friendly countries have permitted their ‘rendition’. Despite the Executive’s desire to remove the right of habeas corpus from the Guantánamo detainees, in Rasul v. Bush ‘the Supreme Court rejected the President’s assertion that US courts lack the jurisdiction to hear the claims of Guantánamo prisoners that they were being held illegally’ and that they could therefore apply for the writ (Brecher and Smith 2006). In another instance, José Padilla, a US citizen who was declared an ‘illegal enemy combatant’, was detainted in solitary confinement in a navy brig for more than three years. Finally, the Administration charged

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and imprisoned him under civilian jurisdiction just before his application for habeas corpus was due to be heard by the Supreme Court. In Brown v. Vasquez in 1992, the Court recognised the fact that the writ of habeas corpus is ‘the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action’ (BBC 2005; Brecher and Smith 2006). Furthermore, Justice O’Connor of the US Supreme Court in Hamdi v. Rumsfeld, disagreed with President Bush’s assertion that he has the ultimate decision in deciding whether to imprison someone whom he classes as an enemy combatant, stating that,

The very core of liberty secured by our Anglo-Saxon system of separation of powers has been freedom from indefinite imprisonment at the will of the Executive … (Darmer 2004, 359)

Hence, it was the Executive’s fear that the Supreme Court would release Padilla that obliged them to imprison him under civilian jurisdiction, thereby giving him all the rights that pertain therefrom.

**Treatment of detainees**

It is, however, the issue of the treatment of detainees that raises the greatest concerns about civil liberties. Although abuses took, and may still be taking, place at Guantánamo, there is at least the permanent presence of a member of the Red Cross while lawyers are permitted to visit inmates. Detainees ‘rendered’, that is abducted, by the US to other countries, however, have no rights whatsoever. They are subject to no documented process or procedure for their detention and interrogation and, it is widely surmised that they have undergone torture, though possibly short of the ‘organ failure’ suggested as an acceptable standard by Bush’s White House Counsel Alberto Gonzales (Darmer 2004, 314). It should be noted that torture is illegal under both international and US law as well as under Article 5 of the Universal Declaration for Human Rights which states that ‘(n)one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Under the US War Crimes Act of 1996, it is also a federal crime for any American to commit violations of the Geneva Conventions, including the ‘willful killing, torture or inhumane treatment’ of detainees (Foot 2004, 6; Holtzman 2005). Nevertheless, the Geneva Conventions and ‘the US law prohibiting torture were both described by Gonzales, as “quaint” ’ (Gore 2004) which is an interesting view of an international convention that the US has ratified. FBI e-mails released under the Freedom of Information Act disclose that although torture was not specifically condoned, coercive techniques by interrogators were authorised in an Executive Order signed by President Bush and approved by Defense Secretary Donald Rumsfeld (Brecher and Smith 2006). However, the order cannot be traced and the President asserts that he never authorised torture. In contrast, the House Judiciary Committee Democratic Staff reported that there is a:

... prima facie case that the President, Vice President and other members of the Bush Administration violate a number of federal laws, including…international treaties prohibiting torture and cruel, inhuman and degrading treatment (Brecher and Smith 2006).

Five days after 9/11, Vice-President Dick Cheney argued that the government needed to ‘work through, sort of, the dark side’ also stating that,

A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in. And so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective (Cheney 2001).

It thus appears probable that the Executive approved, sanctioned and condoned treatment of detainees that flouted international conventions as well as international and national law. In October 2004, ex-presidential candidate, Al Gore, spoke of ‘the uneasy feeling that something very basic has gone wrong with our democracy’ (Gore 2004). By January 2006, several Republican senators had condemned the ‘signing statement’ given by President Bush regarding the Executive’s interpretation of, and unwillingness to implement, the recently passed ban on torture and rights to habeas corpus in the McCain and Graham-Levin amendments to the 2006 Defense Spending Bill (Jurist 2005). It is harder to imagine a greater loss of civil liberties, and a more serious crime by a government, than the arbitrary arrest, abduction and torture of anyone, let alone of foreign nationals whom it appears unable or unwilling to prosecute under existing laws.

**Why the policy shifted**

Legislative changes were justified on the grounds that US was at ‘war’ and its national security was threatened. President George Bush (2001a) called the events of 9/11 ‘...more than acts of terror, they were acts of war’ while Justice Rehnquist of the Supreme Court stated that in time of war, civil liberties inevitably suffer (Darmer 2004, 28). However, several sources decry the use of the term ‘war’ for 9/11 or the military response as it gives the perpetrators, and the subsequent conflict, an undeserved status as well as being terminologically imprecise (Greenwood 2002, 301; Howard 2002, 8; Heyman 2003, 19-33). It is also

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suggested that ‘war’ is normally waged between states, although in the past the term has been used for any US federal battle, whether it be against drugs, poverty or the decades long war against communist influence (Sherry 1995, x). Furthermore, even if this were the case, then the laws of war should have covered the response and its consequences to the combatants. As will be explained, this did not happen. Additionally, Congress did not declare war; indeed, in the case of the alleged perpetrators, Al Qaeda, there was no state to declare war against. If the US was not at war, Rehnquist’s primary justification for the erosion of civil liberties therefore appears to fail. Mueller (1999, 43) states that average annual deaths from terrorism in the US are less than those caused by ‘lightning, deer accidents, or peanut allergies’. But the events of 9/11 and the threat of terrorist attack have had a profound effect on the nation’s psyche.

Another aspect that requires consideration is whether the US Government exploited 9/11 to further the introduction of authoritarian legislation while simultaneously eroding civil liberties. The government stated that measures were necessary to improve the detection and conviction of terrorists, however, Zinn warns that ‘war is … an opportunity for tighter controls of the country’s own population’ (Zinn in Silberstein 2002, 123). Reading various statements, it is not difficult to conclude that governments and their officials find it easier to justify curtailment of civil liberties when war is invoked. Whatever the reason for increasing authoritarianism and control of the population, civil liberties can only obstruct this process.

Gaining compliance

The citizenry’s acceptance of the loss of freedoms against an increase in security is also worth examination. Golden (in Howard, Forest and Moore 2006) considers that the balance is difficult and that as security increases, freedom necessarily decreases. Although total freedom with little security for citizens leads to anarchy, excessive security moves a state towards dictatorship. Above all, it is an easy policy achievement for governments to increase their power over its citizens; it requires minimal resources, involves no extra taxation and causes little noticeable change to daily life. When such measures are portrayed as a ‘choice between national security and personal safety versus civil liberties’, it appears that citizens are prepared to lose the latter (Strossen 2004, 366-367). Hence the authoritarian path in times of decreasing security, and especially after terrorist attacks, is one that is easily implemented by governments and accepted by the people.

It is also necessary to evaluate the use of fear in subduing the citizenry to accept a loss of their civil liberties. Part of the mechanism for passing authoritarian legislation comes from what Chomsky calls ‘the resort to fear’ and the way it is used to discipline the domestic population. The generation of fear, he suggests, has a long history cites Heidegger’s 1935 depiction of Germany as the ‘most endangered’ nation in the world gripped in the “great pincers” … of Russia and America’ with a duty ‘to lead the resistance … ’ (Chomsky 2005). Memorably, Herman Goering stated:

[T]he people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and then denounce the peacemakers for lack of patriotism and exposing the country to danger. It works the same in any country. (Kennedy 2004, 194).

Some fifty-five years later, Vice-President Dick Cheney warned the American people about the War on Terror, ‘It may never end. At least not in our lifetime’ (Cheney in Kennedy 2004, 195). The ‘choice between war and endless war’ (Giraldi, Hopkins and McConnell 2004) will necessarily have concomitant effects on citizens’ civil liberties as the terrorist threat waxes and wanes. Referring to Herman’s essay The Banality of Evil, Pilger (2004) quotes ‘Doing things in an organised and systematic way rests on “normalisation”’ while requiring ‘… the experts, and the mainstream media to normalise the unthinkable for the general public’. Although referring primarily to US military activities in Iraq, he also applied this ‘normalisation’ to the domestic population. In the US, the use of five terror alerts since 9/11 has helped maintain the normalisation of a climate of fear and insecurity. Brooks states that President Bush’s has created ‘negative frameworks’ with the public using, catastrophic words and phrases [that] are repeatedly drilled into the listener’s head until the opposition feels such a high level of anxiety that it appears pointless to do anything other than cower …[and] creates a dependency dynamic between him and the electorate (2003).

This prepares the population for further authoritarian measures to protect their security while simultaneously eroding their civil liberties. Kennedy (2004, 196) suggests that, ‘The easiest thing for a political leader to do is appeal to our fear, our hatred, our greed, our prejudices’.

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Undoubtedly, the use of fear is a potent weapon for facilitating authoritarian legislation.

It is doubtful whether the loss of civil liberties achieves the goal of increased security. Neier (in Darmer 2004, 31-40) quotes many examples in US history when civil liberties were diminished, but with no measurable improvement in security. WWI pacifists, post-war anarchists and Reds, the internment of Japanese Americans in WWII and the McCarthy and Vietnam eras all involved a loss of domestic civil liberties that did nothing to improve the state’s security, although they had a profound effect on the American psyche. It could even be suggested that it had the opposite of the effect intended by entrenching dissent while driving it underground.

It is also doubtful whether the long and complex US Patriot Act could have been drafted within 12 days of 9/11. It appears probable that major elements of the legislation were already in draft form before 9/11. Referring to European anti-terrorism legislation, Haubrich (2003) comments that,

A remarkable aspect of the laws is certainly the speed with which they were rushed through the national legislative processes, a procedure that would normally, and certainly in cases where civil liberties are about to be restricted, involve years of negotiations between various interest groups, political parties and expert committees.

Although a draft bill cannot sway judicial decisions, it is disconcerting that increasingly restrictive national legislation appears to await every decreasing level of national and international security. The drafting and rapid passing of legislation has implications for society that have not been examined regarding governments’ preparation for a further deterioration in security and the future civil liberties of their citizens. If terrorist-related offences decrease or are minor, government can say their legislation is preventative, whereas if they increase, they can then state that more draconian legislation is needed. The August 2006 arrests in London of alleged terrorists planning to explode devices on aeroplanes en route to the US can only but reinforce the asserted necessity of existing legislation followed by a stunned public accepting even more draconian measures.

Post-9/11, the US made substantial changes to its domestic legislation regarding potential terrorism that has eroded the civil liberties of their citizens. It also appears that this legislative path may have been considered well in advance of the 9/11 attacks. On the principle that absolute security is impossible, it is worth considering how far the US Government would be prepared to travel down the draconian legislative path in the maintenance of security. If further terrorist attacks should occur, and recent legislation is any guide, US citizens can expect a further erosion of their civil liberties. Certainly, recent anti-terrorist legislation and the loss of habeas corpus give a sharp reminder as to how far down the road of authoritarian government and lost civil liberties the US has already travelled.

**List of legislation consulted**

- **Aviation and Transportation Security Act** (US 2001)
- **Defense Authorization Act** (US 1999)
- **Foreign Intelligence Surveillance Act** (US 1978)
- **Freedom of Information Act** (US 1966)
- **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act** (US 2001)
- **Posse Comitatus Act** (US 1878)
- **USA Act** (US 2001)
- **War Crimes Act** (US 1996)
- **Human Rights Act** (1988)

**List of cases consulted**

- **Brown v. Vasquez** (US Supreme Court, 1992)
- **Hamdi v. Rumsfeld** (US Supreme Court, 2004)
- **Hamdan v. Rumsfeld** (US Supreme Court, 2005)

**References**


Bio

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