

Whatever happened to martial law?

Detainees and the logic of emergency

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Began teaching the detainee lessons such as stay, come, and bark to elevate his social status up to that of a dog. Detainee became very agitated.

Guantánamo guard diary entry, 20 December 2002

What is a detainee? The term has been given a new lease of life as a result of the authoritarianism that has followed the attacks on the World Trade Center, in which the state has ‘detained’ countless numbers of people without charge or trial. The label ‘detainee’ serves to separate their status from that of both ‘prisoner’ and ‘prisoner of war’, and has been central to the legal manipulation of attempts to free them or even to criticize their treatment. Leaving aside the obvious fact that many of those being detained have been tortured and almost all have been subject to inhumane treatment, the central issue surrounding them concerns one of the supposed foundation stones of liberal democracy: the principle of habeas corpus. In being interned without charge or trial the figure of the detainee is an affront to this fundamental right of liberty and the associated belief that any form of imprisonment must follow the rule of law. The detainee necessarily involves derogation by the state from the fundamental norms of human rights. In this sense the detainee is central to precisely the kind of rule against which liberal democracy purports to set itself: forms of ‘totalitarian’ rule or ‘police states’ in general. ‘Detainee’ comes to us from the French *détenu* and its original reference point was the French ‘police state’ of the eighteenth century. In particular, given the militarized context of the wider ‘war on terror’, the detainee also smacks of regimes which employ the military as a means of policing civil order. Symptomatically, detainees are usually also held in spaces, camps or prisons controlled by the military. The detainee, in other words, is an emblematic figure of martial law.

The question ‘what is a detainee?’, then, begs another question: ‘what is martial law?’ More to the point, how can so many individuals now be held as ‘detainees’ without a declaration of martial law on the part of those sovereign entities detaining them? Indeed, whatever happened to martial law as a form of rule? Here, I trace the contemporary logic of martial law through a critical genealogy of its history. This logic and genealogy tell us something interesting about the nature of rule in contemporary capitalist states. This rule, I suggest, has involved the transformation of martial law into a form appropriate for liberal democracies. What I am tracing, then, is in some sense the *liberalization* of martial law. This liberalization occurred through the generation of new concepts that permitted the most important practices of martial law to be carried out, but in a form more easily defended on liberal terms: *emergency powers* and *national security*. I link some of the overlapping themes and assumptions of these two ideas that animate the new liberal authoritarianism to the history of martial law. The political intention behind making such links is to develop further the critique of security. This is a pressing political task for the Left, which, rather than develop such a critique, has tended instead to accept the liberal grounds of much of the current debate about security. This has left it unable to do much more than reiterate liberal demands for a ‘return to law’ or argue for a better ‘balance’ between liberty and security.¹

Military law to martial law

Until around the 1830s martial law was equated with military law – the rules for governing armed forces in the field. In its original meaning the term thus referred to jurisdiction over soldiers of the Crown and alien enemies. The Petition of Right of 1628, for example, sought to limit the abuse of monarchical powers by making martial law applicable only to soldiers, and

thus held that the Crown had no authority to administer military law within the realm during a time of peace. Likewise, the Mutiny Act of 1689 permitted the trial and punishment of soldiers by courts martial and allowed the king to 'proclaim martial law' for the government of the army during peace and war. No one suggested that civilians would ever be subject to it. This remained so through the eighteenth and into the nineteenth century.

In the first half of the nineteenth century, however, the concept gradually took on a new meaning. A major factor behind the new meaning was an increasing use of martial law in governing occupied territories. Where on the mainland the British state could muddle through well enough with sporadic use of the Riot Act to maintain order, martial law came to be increasingly used in that standard locale of political experimentation, the colonies: in Barbados in 1805 and 1816; Demerara in 1823; Jamaica in 1831–32 and 1865; Canada in 1837–38; Ceylon in 1817 and 1848; Cephalonia in 1848–49; Cape of Good Hope in 1834–35, 1849–51 and 1852; the Island of St Vincent in 1863; and on several occasions in Ireland.² As such declarations increased it became apparent that martial law involved a kind of suspension of law. In an opinion delivered after the Canada emergency of 1838, Crown law officers commented that 'martial law is stated by Lord Hale to be in truth no law, but something rather indulged than allowed as a law'.³ In a heated debate in the House of Commons in April 1851 concerning the repression of rebellion in Ceylon, the Duke of Wellington and Earl Grey agreed that because martial law is neither more nor less than the will of the general who commands the army, martial law means no law at all.⁴ They were no doubt bolstered in such a claim by the fact that the constitutional authorities of the time were beginning to argue that in times of crisis constitutional norms might have to be abandoned. Henry Hallam, in his widely read *Constitutional History of England*, commented that

there may indeed be times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel the temporary abandonment of constitutional forms. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction.⁵

In other words, what was emerging was the belief that martial law may be applicable not simply to the military, but to the use of the military to maintain order, and that central to this was the suspension of some fundamental liberties.

A parallel can be traced in the US context, where the main dispute concerned the attempt by militant Rhode Islanders to adopt a written constitution for the state in 1841. Their desire for popular sovereignty led them to assemble a popularly elected convention, drafting a constitution, submitting it for ratification and then declaring it ratified, following which they elected officials to a people's government scheduled for inauguration in May 1842. The response from the authorities was to declare martial law and mobilize the state militia across the entire state. Hundreds were arrested without warrant and detained without a clear statement of charges. Many Rhode Islanders believed that since the military was being used in a way never before seen in American history, this clearly would not stand the test of being subject to actual law, and so they instituted two suits in late 1843 and early 1844. One focused specifically on the legitimacy of the substitution of military for civilian authority and the deliberate suspension of due process. The Circuit Court dismissed the cases after cursory hearings, but the issue at stake was deemed so important that it made it to the Supreme Court in 1849.

In the intervening years, a debate took place concerning the definition of martial law. Two books published in 1846, William C. DeHart's *Observations on Military Law* and John Paul Jones O'Brien's *Treatise on American Military Laws*, sought to distinguish martial from military law and argued that the constitution in fact sanctioned martial law as the only means of defence when civil institutions were closed or suppressed by emergency conditions. In the meantime, the war in 1846 nearly doubled the size of the Union, which now contained a considerable 'alien' population supposedly unfamiliar with American institutions and apparently incapable of self-government. The obvious question arose: surely martial law was appropriate for such a situation and such people? By the time the Rhode Island case was decided in 1849, Justice Story was able to argue that the situation in 1842 had been 'so urgent, that its [Rhode Island's] legislature judge[d] a resort to the most extraordinary means of resistance necessary, and accordingly declare[d] martial law'. He went on to suggest that 'Martial law is the suspension of the common law, for the purpose of giving summary power to the military.' Moreover, the court also argued that the insurrection constituted 'a state of war' and, according to Justice Taney, 'a State may use its military power to put down an armed insurrection'; it also argued that the state was itself the final arbiter in such a decision. The court thus held that the declaration of martial law to subdue the

Rhode Island insurrection was acceptable, adding that such government actions should not be questioned in a court of law.⁶ This decision – the *Luther* decision, following *Luther v. Borden* in which Luther originally challenged the search on his house and being placed under arrest – altered the understanding of martial law in America, ratifying a process that had been taking place since the early 1830s: martial law now appeared to refer to the establishment of prerogative governmental powers for dealing with situations thought to constitute some kind of crisis or emergency. And since insurrections constituted a form of war, they must form some kind of crisis, for which martial law becomes appropriate and during which fundamental liberties can be suspended. This argument was then easily applicable at national level. As a consequence, one finds the decision in *Luther* being invoked through the use of martial law by the Lincoln administration and into the twentieth century.

What we find, then, is an enormous historical shift taking place in the nineteenth century concerning the logic and focus of martial law, a shift which allowed the state to avail itself of the right to use special, constitutionally prescribed powers in situations in which ‘public security and order’ were thought to be in danger. This shift had its parallel in a shift in the understanding of the ‘state of siege’ in civil law. The state of siege took as its precedent, on the one hand, the Roman dictatorship and, on the other, the history of conferring plenary powers upon the commander of a besieged fortress. But during the nineteenth century the concept slipped from the military to the political

sphere and became applicable to civilians in periods of crisis or emergency. The French constitution of 1800, for example, allowed for the suspension of civil liberties and rights in the places and for the time determined by law ‘when the security of the state required’, while the Acte Additionnel of 1815 adopted the terminology of ‘state of siege’ to describe the general regime of exception. But the key shift came in the imposition of a state of siege in Paris between June and October 1848, and a new ‘Law on the State of Siege’ of 9 August 1849, which sought to regulate the issues surrounding such states, including their declaration and termination. By then, the logic inherent in the law was that a state of siege entailed the same processes as those of martial law: an increase in executive power vis-à-vis the legislature and judiciary, a shift of power to military authority, and the suspension of basic liberties and rights including the power of detention. As with the development of martial law, the ‘state of siege’ shifted gradually from a military to a political register, referring less and less to military encounters with enemy forces and more and more to questions of internal disorder.⁷

The history of both martial law and the state of siege is the history of a shift from regulation of the military within the state to regulation by the military of the whole social order on behalf of the state. ‘Martial law’ and, relatedly, the ‘state of siege’ move from being a code for the internal governance of military power to a rationalization for the use of military power across the face of society in which basic liberties and rights and possibly even the law *tout*



court are suspended. This was comfortably in place by the late nineteenth century, as shown by a number of key cases. In 1902, in *Marais v. General Officer Commanding; Ex parte D.F. Marais*, the Judicial Committee of the Privy Council found that because war had become so extended and the conditions of emergency so diverse, the rule that martial law only applied when the ordinary courts could no longer physically convene was no longer operative. For Frederick Pollock writing in the *Law Quarterly Review*, the judgment tried to 'keep alive the fallacious notion that martial law is identical or logically connected with military law', when in point of fact it was that 'martial law' is now simply the name for 'acts done by necessity for the defence of the Commonwealth when there is war within the realm'.⁸ In the USA, Governor Peabody declared martial law in Colorado in 1903 and 1904, suspending habeas corpus, imposing a curfew, and detaining without trial the president of the miners' union Charles Moyer. Moyer bought a suit for damages for being detained without trial, alleging that he had been deprived of liberty. The Supreme Court in *Moyer v. Peabody* (1909) affirmed the dismissal of the action, suggesting that the governor is rightly the final judge and that any individual right to liberty must yield to the necessities of the moment. In so doing the court transformed much of the 1849 Taney judgment into binding law.⁹

What was at stake in these judgments was the possibility of using martial law during times of 'peace' or, rather, reconceptualizing 'war' so that broader moments of crisis, rebellion or insurrection could be brought under its remit. And if these constituted wars of sorts then surely there could be no objection to the use of martial law powers. It is important to note that this question and these themes came to the fore in states which were developing into liberal democracies. Through martial rule or the state of siege, liberal democracies were handed a political manoeuvre which provided a means of liberating executive power from constitutional restraints and suspending basic liberties. But the ruling class recognized that within the broader context of an increasingly democratized polity, declarations of martial law were becoming increasingly inflammatory. The initial solution to this problem was to consider its modern employment a 'qualified' form of martial law. This was granted by the decision in *Commonwealth ex. rel. Wadsworth v. Shortall* (1903), which generated the notion of a 'qualified martial law' that could be put in force for the preservation of public peace and order – the ordinary courts remained open and so liberty in general appeared untouched, but for

the accomplishment of its intended purpose it was martial law with all its powers.¹⁰

As the twentieth century progressed, however, and Western states became more liberal-democratic and incorporated more and more of the working class into the system, even a 'qualified' martial law sounded a little too harsh, a little too violent, a little too undemocratic; a little too, well, martial. So new forms of policing 'disorder' were required which used some of the key practices of martial law but eschewed the label. What was needed was a new form of language, less obviously violent and without the military overtones. This was found in the logic of emergency.

Martial law to emergency powers

At the end of May 1922 it was suggested at a meeting of the British Cabinet that martial law should be formally introduced in Northern Ireland to deal with the emergency in the province following the partition. The suggestion was rejected on the grounds that martial law powers were, in effect, already being exercised.¹¹ But how? How could martial law be exercised without being declared? In dealing with this the Cabinet was revisiting a problem it had faced for the whole of Ireland prior to partition. In 1916 martial law had been declared for Ireland, and yet even then Prime Minister Asquith insisted in the Commons that despite the formal declaration, 'martial law has never been put in force for any practical or effective purpose in Ireland'. Rather, he suggested, 'there is no proceeding which has been taken [in Ireland] which could not be justified by the Defence of the Realm Act'.¹² His reference was to the Defence of the Realm Act of 1914 (DORA), which identified certain conditions necessitating the circumvention of fundamental rights. For the following five years the 'emergency powers' granted by the DORA – though they were not yet formally described as such – were integral to the running of the UK. At the same time, the aura and ideology surrounding martial law began to be transformed. Hence Asquith's claim that martial law had not really been put in force in Ireland. This explains the rather bizarre situation, pointed out by the military governor at the time, General Sir John Maxwell, that martial law had been proclaimed and extended in Ireland even though virtually all the public bodies were at the time passing resolutions condemning martial law.¹³

In a range of memos, Maxwell pointed out that martial law *sensu stricto* had not been put into operation anywhere, even in Dublin, and put his finger on the key issue: that discussion of martial law merely encouraged public grievances and so fanned

the flames of the struggles taking place. Moreover, such an inflammatory decision was unnecessary given that the practices of martial law could be conducted under DORA, as they were in Ireland. The leaders of the rebels were eventually tried and executed under DORA, not by military tribunals under martial law. In other words, the *effect* of martial law could be achieved without the inflammatory use of the term 'martial law' and possibly even without its declaration. As Asquith commented in a Cabinet meeting,

all the trials and sentences have been carried out under the statutory powers of the Defence of the Realm Act. There is no single case in which it has been or is likely to be necessary to resort to what is called 'Martial law' and there is no adequate ground for its continuance.¹⁴

The real beauty of this process was that when martial law was formally lifted, virtually nothing changed in the running of the province, which continued to be governed according to the regulations of DORA.

The introduction and use of DORA stand as a bridging moment between martial law and emergency powers doctrine in Britain. Following this, measures that *seemed* like martial law could be introduced under the new logic of 'emergency powers'. The important move in Britain came with the first Emergency Powers Act of 1920 (EPA). The EPA granted to the executive extensive use of the military to preserve security and order and, within this, the potential suspension of basic rights and liberties. They were, formally, emergency powers, but the use of martial law was still recent enough for most people to recognize them for what they were: when they were being exercised during the General Strike, the former Solicitor General for the Labour government commented that the government had introduced 'what is really martial law'.¹⁵ Symptomatically, it was this historical moment that saw the adoption of the term 'detainee' into the English language: the *Oxford English Dictionary* records it appearing in Crowell's *Dictionary of English Grammar* of 1928.

At this historical moment the main purpose and use of emergency powers were also becoming clear. For all the talk about the need for such powers in times of 'war', the focus of the legislation was industrial disputes and labour revolts. And so the emergency powers granted by the EPA came to be exercised during virtually all the industrial disputes throughout the twentieth century: a miners' strike of 1921, and then again in 1924 during a London Transport strike, for eight months during 1926 to manage the General Strike (even though the Strike itself lasted only a few

days), through the 1948 and 1949 dockworkers' strikes, the 1955 railway strike, the 1966 seamen's strike, the 1972 miners' and dockworkers' strikes, the 1973 strike by miners and Glasgow fireworkers, the 1975 refuse collectors' strike, and the 1977–8 fireworkers' strike.¹⁶ In other words, it was class war, the political administration of capital, and the policing of civil society that lay behind the powers in question.¹⁷ That this is so can be seen by similar powers exercised elsewhere. Article 48 of the Weimar Constitution of 1919, for example, made reference to the use of armed force and the suspension of rights 'if public security and order in the German Reich are seriously disrupted or threatened' (leading one commentator to note that 'the amazing flexibility of its grant of powers ... can only be compared with the common law institution of martial rule').¹⁸ During the Weimar period these powers were used largely for labour disputes and to manage the crises of capital.

What we see developing with this use of emergency powers is a twofold process and application: first, a broadening of the *definition* of what constitutes an emergency, taking the notion well beyond military conflicts and crises; second, a drastic increase in the *scope* of emergency powers. This twofold process and application had at their core the 'disorder' and 'insecurity' generated by labour unrest, socialist agitation and colonial rebellions, all understood within the broader rubric of the need to administer capitalist modernity. This use of emergency powers to crush rebellions and political struggles built, albeit tenuously, on the limited understanding of an emergency situation as one involving violent conflict. But such use of emergency authority as a political instrument ultimately foreshadowed the open employment of emergency power *during peacetime*; indeed, they played a key role in eliding any differences between war and peace.¹⁹ Thus emergency powers are in fact more interesting, politically more revealing, and more challenging, when considered in terms of periods of 'peace' and the everyday functioning of civil society, for they are then revealed as nothing less than a persistent attempt at imposing 'order' on an oppositional labour movement and obedience on radical political organizations. And for these reasons emergency powers come to be exercised as a *permanent* feature of the political landscape and not in 'states of exception'. The tradition of the oppressed teaches us that the 'state of emergency' is not the exception but the rule.²⁰

We can push this a little further by turning to the development of emergency powers in the USA. In the early 1970s an increasing concern about the use

of emergency powers prompted the Senate to establish a Special Committee on the Termination of the National Emergency. The aim was to examine the use of emergency powers in the USA and to propose how to bring them to an end. The report which eventually emerged opens with the following pronouncement: 'Since March 9, 1933, the United States has been in a state of declared national emergency.' It went on: 'In addition to the national emergency declared by President Roosevelt in 1933, there are also the national emergency proclaimed by President Truman on December 16, 1950 during the Korean conflict, and the states of emergency declared by President Nixon on March 23, 1970, and August 15, 1971'. In other words, the report found that not only was the Vietnam War being conducted under forty-year-old emergency legislation, but the whole of America seemed to be governed under the same powers.²¹ As the Committee notes, a forty-year state of emergency can in no way be defined as 'temporary'. The USA had, in effect, been in a 'permanent state of emergency'.

The permanent nature of this state can be seen, ironically, by the National Emergencies Act, 1976 (NEA) and the International Emergency Economic Powers Act, 1977 (IEEPA), which followed. These were expected to constrain the executive authority exercised via emergency powers. The four existing states of emergency and the majority of the emergency statutes were to be terminated as of 1978, and new procedures were created for delegating legislative power to the president. But the new legislation *kept in place* the key provisions which had underwritten emergency law through the twentieth century, namely Section 5(b) of the Trading With the Enemy Act of 1917 (TWEA) and the key sections of the United States Code dealing with emergencies. And so, more or less immediately following the final termination of the four states of emergency, there was a new declaration of a national emergency – in November 1979 in response to the US embassy being seized and hostages taken in Tehran. Since then, over thirty national emergencies have been declared, all the way up to the one announced on 14 September 2001.²² In other words – and we might add, contra the current excitement about the present 'state of exception' – the USA spent most of the twentieth century and, so far, all of the twenty-first century in a state of emergency.

The USA is far from alone here. United Nations research in the 1990s found many of the states declaring themselves in a state of emergency had presented their emergency as permanent – either *de jure* or *de facto*: Zambia from 1964 to 1991, Zimbabwe from

1965 to 1990, Peru from 1981 onwards, Pakistan from 1977 to 1985, Malaysia from 1969 onwards, Ireland from 1976 to 1995, Brunei from 1962 onwards. The long and depressing list goes on and on: Turkey's public emergency for more than 77 per cent of the period between June 1970 and July 1987, including a continuous stretch of almost seven years from September 1980 to May 1987; Greece's formal state of war mobilization from 1974 to May 2002; India's twenty-one uses of the constitutional emergency clause between 1950 and 1983; Egypt's almost continuous state of emergency since 1967; Columbia's forty-year state of emergency, just one instance of the wide use of emergency powers across the South American sub-continent. As one of the UN reports points out, 'if the list of countries which have proclaimed, extended or terminated a state of emergency were to be projected onto a map of the world ... the resulting area would cover nearly three-quarters of the Earth's surface'.²³ Three quarters of the earth's surface, then, in which states have derogated from fundamental human rights obligations, on a more or less permanent basis.

What is notable about this global reach of emergency powers is that while a few of the openly authoritarian regimes remain happy to use the language of martial law, most of them prefer instead to talk about emergency powers. The latter better connotes neutrality and necessity, eliding any difference between working-class rebellions, socialist unrest, and 'natural' emergencies such as floods and famines. And the extent to which the language of emergency is far more politically acceptable – internationally and domestically – than 'martial law' is evidenced by the fact that the potential use of emergency powers is now written into the constitution of every state. In other words, the liberalization of martial law has coincided with the constitutionalization of emergency powers. All of this has helped obscure the fact that perhaps the central feature of emergency powers is precisely the key feature of martial law: the suspension of habeas corpus and thus the possibility of detention without trial. And yet, as a recent congressional report on the current national emergency in the USA notes, 'since the conclusion of World War II, martial law has not been presidentially directed or approved for any area of the United States.'²⁴ The same might be said of many of those states which have been administered under emergency conditions. In other words, the explicit declaration of martial law in situations which were understood implicitly to be emergencies of some sort has been transformed into the explicit use of emergency powers involving the implicit use of martial

law powers. To fully grasp this, however, we need to link the emergency concept to its younger partner: national security.

Emergency powers to national security

'This Nation asks for action, and action now', said the new leader on 4 March 1933. 'I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems', he went on. 'It can be accomplished in part by... treating the task as we would treat the emergency of a war ... I shall [use] the one remaining instrument to meet the crisis – broad Executive power to wage a war against the emergency.' Thus spoke Franklin D. Roosevelt in his inaugural address. Two days after his speech, and without congressional approval, Roosevelt declared a state of emergency. Ostensibly this aimed at a 'bank holiday' in order to resolve the fiscal problems, but Roosevelt was later explicit about its use:

The full meaning of that word 'emergency' related to far more than banks: it covered the whole economic and therefore the whole social structure of the country. It was an emergency that went to the roots of our agriculture, our commerce, and our industry; it was an emergency that had existed for a whole generation... It could be cured only by a complete reorganization and a measured control of the economic structure. It could not be cured in a week, in a month, or a year.²⁵

This ideology underpinned a series of proclamations, promulgations and institutional developments throughout the 1930s, mirroring the use of emergency powers in the UK and Germany as a means of economic regulation in general and class management in particular. The Agricultural Adjustment Act 1933, for example, began with a 'Declaration of Emergency' and held that the emergency was undermining the public interest through adverse effects on key agricultural commodities, while the National Recovery Act of the same year gave the president a more or less unlimited right to issue regulations concerning industry. The New Deal, in other words, was emergency rule writ large.²⁶

This particular emergency rule, however, was also conducted under the logic of security. For as well as describing the situation as one of war, Roosevelt also constantly gave 'security reasons' for his programme. In June 1934, Roosevelt announced that the New Deal was to 'place the security of the men, women and children of the Nation first'.

We are compelled to employ the active interest of the Nation as a whole through government in order to encourage a greater security.... If, as our Consti-

tution tells us, our Federal Government was established among other things, 'to promote the general welfare,' it is our plain duty to provide for that security upon which welfare depends.... Hence I am looking for a sound means which I can recommend to provide at once security against several of the disturbing factors in life.²⁷

Later that month he created the Committee on Economic Security (CES) to prepare for 'A Program of National Social and Economic Security'. The choice of language here would turn out to be of major historical importance.²⁸ To understand why, we need to note that by 1934 various socialist activists and radical social insurance experts had been increasingly highlighting the 'insecurity' of contemporary capitalism. The economist Abraham Epstein, for example, had published *Insecurity: A Challenge to America* (1933), while Max Rubinow had been articulating demands for 'a complete structure of security' in a book titled *The Quest for Security* (1934). Harold Laski published a series of lectures given in the USA as *Liberty in the Modern State* (1930, reissued in 1937) with economic insecurity as a main theme. Harold Lasswell reiterated the theme in *World Politics and Personal Insecurity* (1934), as did ex-President Hoover in *The Challenge to Liberty* (1934). The years 1933 and 1934 were also one of the few periods in American history of intense class conflict, with almost 2,000 work stoppages involving around 1.5 million workers, which led many, including Roosevelt, to believe that a communist revolution was possible.²⁹

Roosevelt's adoption of the rhetoric of security in mid-1934 represented an attempt to simultaneously manage this moment of class struggle, outflank critics and build on the suggestions of writers close to him such as Laski. Throughout 1934 and 1935 Roosevelt could barely stop speaking about security, now identified as 'the main objectives of our American program'.³⁰ On topics as diverse as banking legislation, industrial relations and the gold standard, security had become *the* major theme. It had become *the* concept of the New Deal.

At the heart of the New Deal, then, lay an ideological circuit between emergency powers and security. The supposed concern for the security of the nation and its citizens could be used to justify emergency measures, and emergency measures would be exercised in the name of security. This ideological circuit would come to permeate the exercise of state power for the rest of the twentieth century. And within this circuit lay a set of traditional 'martial law' operations, not least the possibility of suspending basic liberties and derogating from human rights norms. The quantitative

highpoint of this in the United States is the detention in February 1942 of more than 112,000 people, of whom approximately 70,000 were American citizens; the qualitative highpoint is the treatment of detainees held since 11 September 2001. Emergency measures conducted in the name of security, or, if you prefer, security measures conducted in a state of emergency.

Yet this is not the whole story. The ideology of security being developed in the 1930s was very much an ideology of what became known as *social* security. The *Economic Security Bill* eventually became the *Social Security Act* of 1935. And what became both possible and legitimized in the name of social security was nothing less than a reordering of contemporary capital. On the one hand, the projects organized in the name of social security (most notably a new system of social insurance and pensions) were very much aimed at the working class. As well as working against trade-union radicalism, they went some way to help reshape notions of responsibility and risk, independence and thrift among the working class, and thereby fostering new conceptions of citizenship and social solidarity. Through this the industrial working class became increasingly ordered around a regime of insurance contributions administered by the state. On the other hand, the idea of social security became important to the way capital reorganized itself during this period, which leapt at the opportunities offered by the new regime of insurance generated by the social security measures. As part of the new deal being developed, corporations came to offer a degree of what they could now happily call 'security', but they did so very much on their own terms, without making old-age or illness support an employee right, by maintaining managerial control, and by shifting emphasis away from the political arena to private individual economic relationships. In other words, what emerged as part of the logic of social security was a means for *reshaping* capital and the behaviour of workers around a new regime of insurance. Social security became a central tool for fabricating a new order, one which reshaped working-class expectations and patterns of behaviour, re-established capital accumulation as the main goal, and thus provided 'security' for the system as a whole.

According to Bruce Ackerman, the New Deal was a crucial moment in American constitutional history, legitimizing the activist state and consolidating the foundations of activist government.³¹ We might add that it could do so because it placed a conception of social security at the centre of the activist state and a new 'social' liberalism. As a principle of forma-

tion, security had become a key part of the political administration of capitalist modernity and from here on in 'security reasons' could be cited for any and every attempt at a political reordering of society. This created the opening for the ideological power and political force of the idea of *national* security following World War II. When the ruling elites in postwar America looked for a new category to grasp the logic of national and international order, they had a range of options. 'National security' was ultimately thought to be a more expansive term than 'defence' (which was seen as too narrowly military) and far more suggestive than 'national interest'. But 'national' security also picked up on the logic of 'social' security that had been developed a decade previously: namely, that a fundamental reordering could take place under the rubric of security. NSC-68, the most significant national security document to emerge in this period, glosses this as 'positive participation in the world community', which, it explains, means a policy 'designed to foster a world environment in which the American system can survive and flourish'.³²

It was this sort of assumption that gave rise to the Marshall Plan and Truman doctrine, to Bretton Woods institutions, the International Monetary Fund and the General Agreement on Tariffs and Trade. All can be read as projects for both national security and for the reordering of global capital, since these were understood as part and parcel of the same project and in the same terms. In conjoining security and the reordering of international capital the USA was able to gain ideological support for both the politico-strategic and the economic dimensions of liberal order-building. And it has been in the name of security that the USA has seen fit to reorder – overtly or covertly – the affairs of a myriad nation-states, including those with democratically elected governments, and thereby to restructure the international order more generally. Under the guise of national security the USA has sought to reshape international society, administering global order according to a security doctrine which pays little or no respect to the human rights in which it purports to believe.

This fabrication of a secure order had huge domestic ramifications, including the rise of a national security state with powers of surveillance, purges of suspicious persons from positions of responsibility, loyalty tests, and the policing of cultural production. More than anything, it involved the shaping of national identity around the logic of security, giving rise to a political and cultural fabrication of loyal citizens identifying fully with their national state. What I have elsewhere

called the security–identity–loyalty complex has its roots in the logic of national security that emerged in the late 1940s, but can be traced all the way down to recent developments such as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001) – an Act of and for national security but which has at its heart the fabrication of national identity and loyalty, given away by the Act’s acronym: USA PATRIOT. As a mechanism for policing internal dissent and shaping political behaviour it should be read as the sister document to the National Security Strategy of September 2002.³³

With this recent legislation and security strategy we may appear to have come a long way from martial law. But the argument in such documents is that which has always lain at the heart of martial law: originally, the suspension of fundamental liberties and then, in the twentieth century, derogation from human rights norms. This new ‘anti-terror’ legislation, copied and repeated elsewhere – in the UK we might point to the Anti-Terrorism, Crime and Security Act (2001), Section IV of which allows detention – merely reproduces the same possibilities for internment and thus consolidates the logic of detention that appeared originally in the early emergency powers legislation, in turn adopted from martial law. It is here that the contemporary figure of the detainee needs to be situated. For although the detainee appears an affront to all human rights agreements and to any understanding of human freedom, as a figure constituted through emergency powers and in the name of security the detainee is in fact provided for within the constitutions of liberal democracies and easily justified on the grounds of liberal order-building.

It is tempting to say that what liberal democratic states have managed to do with the concept of national security and the logic of emergency powers is to return to the original meaning of habeas corpus. The idea that habeas corpus is the touchstone of liberty, nothing less than the ‘writ of liberty’ embodied in legislation, is very much a seventeenth-century invention, peddled by liberal thinkers ever since. But the original purpose of habeas corpus was not to protect the liberty of the people from the sovereign in general and from wrongful imprisonment in particular, but to *secure their presence in custody*. ‘Habeas corpus’ was to ‘have the body’. As Edward Jenks notes, when one explores the origins of habeas corpus one makes a rather embarrassing discovery: namely, that ‘whatever may have been its ultimate use, the writ ... was originally intended not to get people out of prison,

but to put them in it’.³⁴ It would be easy to suggest that this genealogy of habeas corpus undermines its later guise as a fundamental right of liberty, but, as Nasser Hussain points out, this would be a little trite.³⁵ It would be more telling to suggest that the original principle provided for by habeas corpus is never really quite allowed to disappear; rather, it remains as the iron fist in the velvet glove of liberal constitutionalism. For to the extent that the writ of habeas corpus has been included in all liberal democratic constitutions and international conventions on human rights, so too has the possibility of its suspension, always justified on the same grounds: in times of emergency and for the sake of national security. Martial law provided the state with the possibility to ‘have the body’ and detain the body for as long as it thought necessary. And whatever contemporary human rights legislation and international agreements say, this right to ‘have the body’ – the right, that is, to ‘have’ the detainee – will never be given up by the state. Indeed, the only right regarded as *truly* fundamental by the state is its own right to derogate from human rights norms and ‘have’ whichever bodies it wants. Such derogation is rooted historically in martial law and now, for contemporary liberal democracy, it is embedded in emergency powers and national security.

Notes

1. I criticize the former of these in ‘The Problem with Normality, or, Taking Exception to “Permanent Emergency”’, *Alternatives*, vol. 31, no. 2, 2006, pp. 191–213; and the latter in ‘Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics’, *Contemporary Political Theory*, vol. 6, no. 2, 2007.
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 15. Cited in K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945*, Oxford University Press, Oxford, 2000, p. 184.
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 28. For a longer account of the argument here see Mark Neocleous, 'From Social to National Security: On the Fabrication of Economic Order', *Security Dialogue*, vol. 37, no. 3, 2006, pp. 363–84.
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