

# Counterterrorism Legislation and the US State Form: Authoritarian Statism, Phase III

**Christos Boukalas**

The counterterrorism legislation introduced in the US after 11 September 2001 (hereafter *SII*) has been mainly conceptualised - by both critics and supporters - as an 'internal' legal development. Seen as an 'encroachment to liberty', as part of a 'state of emergency', or a necessary fortification of 'national security', the value and desirability of legal provisions has been almost exclusively assessed by reference to other legal provisions and, ultimately, the Constitution itself. This article attempts to invigorate the discussion about post-September 11 counterterrorism legislation by breaking this self-referential framework. Adopting a particular ('strategic-relational') approach to state-theory, cross-referenced with an inclusive conceptualisation of politics, it assesses legislation as part of *political* production with effects through the overall field of politics.

Politics is understood as a process coextensive with that of social institution and organisation – a socially-inclusive activity, punctuated by the institution of the State. The State is seen in turn as an expression of social relations mediated by institutional materiality.<sup>1</sup> As such, legislation is a doubly mediated expression of social relations - mediated by the State and within the State - and can therefore reveal something about the *state form*, that is, the organisation of state institutions, the orientation and modalities of state power, and their bearing upon the overall political terrain.

In this context, this article examines the specifics of US counterterrorism legislation regarding the organisation of the police mechanism, the modalities of its activity, its targets and objectives, and the implications of these for the broader political terrain. In doing so the article attempts an amalgamation of a Castoriadian conceptualisation of politics with a strategic-relational state-theoretical reading of counterterrorism legislation, to argue that the US is currently undergoing a reconfiguration of 'authoritarian statism', a state form characterised by the organic development and proliferation of authoritarian elements within the institutional cell of the republic. This article assesses the latter as *political* production and aims to spell out its political implications. In so doing it is situated against the mainstream interpretations of counter-terrorism legislation introduced since 2001.

## **The State (and Politics)**

The liberal Left has tended to conceptualise counterterrorism legislation as an infringement of constitutional freedoms driven by a specific administration's power-lust.<sup>2</sup> The mainstream Right (whether Republicans like Dinh or 'communitarians' like Etzioni) notice some 'tensions' with the rule of law but try and justify the measures as an emergency defence necessitated by vital, imminent threat.<sup>3</sup> Both approaches fundamentally accept that such threat is vital and necessitates augmented governmental powers to police the population. The issue is therefore framed as 'striking a balance' between 'liberty' and 'security', with each approach arguing for a different optimal point in such equation. The equation - and its 'solution' - is contained within the sphere of law: the tendencies introduced by counterterrorism legislation are seen as a strictly legal development and so is their (desirable or not) reversal. Thus both approaches treat law as a self-referential, self-explanatory framework, isolated from (the 'rest' of) social reality and the Constitution becomes the ultimate referential point, with which all social activity must comply.

Another approach, found in many US Law Schools, seeks to underline the importance of the developments in counterterrorism legislation for the configuration within and among the three 'branches' of government.<sup>4</sup> It contextualises the conjuncture as a reshaping of the governmental structure in which Executive powers are augmented to the detriment to those of the Legislature. Scheuerman connects this to a perceived need for acceleration of decision-making and challenges the adequacy of the Executive to correspond to such need. As it breaks with the self-referential mould of 'legalism/constitutionalism', and shows the pertinence of legislation to the structure and articulation of state mechanisms, this approach is far superior to its 'legalistic' counterparts. Nevertheless, it effectuates a radical closure of the very question it starts to pose: the question of *politics*, to which that of legal production pertains. Thus, in close convergence with very conventional 'political science', it circumscribes politics to the framework of state-structure, and a very peculiar one at that, consisting of three branches engaged in a zero-sum power-relation.<sup>5</sup>

This article aims to foreground the politics of counter-terrorism legislation, but in a very different way. If we think of politics as the unceasing process of instituting, organising, and directing society, and 'society' as a field of reference coinciding with that of the political process, then the political process necessarily involves everyone in society, albeit to different degrees and not always explicitly. All political production

is initiated in society as social forces engage in dynamic relations with social organisation at their stake. In this terrain of social dynamics and antagonism, the state is situated at a neuralgic point. It is the only entity that can formalise policies and render them obligatory, resulting to its constitution as a centre of flows and a main political player. Its authority to compel is again instituted by society itself. Similarly, struggles over policy in which it participates contribute to the (re)shaping of its institutional materiality and the modalities of its powers. Thus, the state is seen in terms originally outlined by Poulantzas and Jessop in the ‘strategic-relational’ approach: as a relation among social relations. Crucial among them are those between the state apparatus and state power; state structure and strategy; and the state’s ‘inside’ and ‘outside’. Let me first say a few things about each of these in turn.

The state is an institutional ensemble; as such it neither possesses nor generates ‘its own’ power. ‘Power’ refers to the capacity of social forces to advance their interests in opposition to the capacity of countervailing forces to advance theirs. Nonetheless, ‘power’ can only exist insofar it materialises in practices and institutions. Hence, the state apparatuses are sites of contestation and elaboration of power-relations among social forces; and at the same time their configuration conditions the play among social forces.<sup>6</sup>

State actors are essential in elaborating the political strategies of social forces, while at the same time the historically-specific configuration of state structures favours some kinds of strategy and hinders others. Conversely, political strategies (re)shape the state’s structural assemblage, so that at any given moment, state structure is the condensed outcome of past strategies, in interaction with developing ones.<sup>7</sup>

Politics is the constitutive element of society inasmuch it condenses the overall objective of communal living through an antagonistic process –a process whose content, meaning and limits coincide with those of ‘society’. The state signifies a differentiation between the political process and other social activities, circumscribing the former to the statal sphere of competence, thus rendering the state separate from ‘society’. Thus statehood constitutes a radical division of political labour.<sup>8</sup> Instituted as identical to the public sphere, the state is represented as the expression of the general interest, in juxtaposition to the individual interests that rule the private sphere of (‘civil’) society.<sup>9</sup> Its claim to monopolise institutive authority is based on the twin claim to represent the ‘general interest’ and to possess the knowledge of political science.<sup>10</sup> Due to this monopoly, political strategies can only succeed inasmuch they

are incorporated in the ‘general line of force’ of state power – or successfully destroy the political system. Importantly, such strategies may implicate the lines of division between the state and its ‘outside’, resulting to redefinition of the ‘political’ and the ‘social’.

The theoretical lynchpin for this relation-of-relations between apparatus and power, structure and strategy, and most broadly state and society, is the notion of the ‘state form’; that is, the historically specific articulation among these relations. In this context, legislation is a doubly codified political activity: it is assumed under state monopoly, and, within the state, under a special institutional culture (distinctive ritual, history, reference and jargon, and a dedicated state branch). Furthermore, legislation broadly defines the scope and methods of state activity, hence codifying the relations between the state and its ‘outside’. Thus, legislation constitutes a ‘design’ of the state-mechanism and the blueprint for exercising state-power. While by no means exhausting the question, it can provide important *indications* about the state form.

### **Patriot(s) in Congress: Procedural Anomaly or State Strategy?**

The USA PATRIOT Act (henceforth ‘Patriot Act’, ‘Patriot’ or ‘the Act’) effectuates through 342 pages changes to more than 15 statutes, ranging from electronic surveillance to immigration control, from money-laundering to compensation for terrorism victims. It reappraises a wide variety of subjects already inscribed in the coercive agenda in the light of the ‘top priority’ status accorded to counterterrorism.

The Attorney General submitted the first Patriot draft just one week after the attacks and demanded that Congress enact it within a week. Final drafts were prepared in closed, ‘over-the-weekend’ meetings involving Administration officials and Senate and House leaders. The bill was never subject to a Senate committee debate; the House heard no testimony from the bill’s opponents; and amendments proposed by the House Subcommittee on the Constitution were ignored. The bill was formally introduced in the Senate on 5 October 2001 and enacted six days later. It was introduced *and enacted* in the House on 12 October under a procedure barring any amendments, while Representatives based their vote on summaries. Thus a bill of central importance was passed without deliberation or examination.<sup>11</sup> The votes in the Senate were: 98 vs. 1; and in the House of Representatives 356 vs. 66. The President signed it into law on 26 October. The haste meant that a bill intended to ‘protect the

American people from further attacks' was enacted without any assessment of the failures that facilitated the 9/11 attacks or its relevance to preventing future failures.

Two conclusions can already be drawn. First the Legislature's normal decision-making process is disrupted. And, second, the knowledge informing the legislating process is monopolised by the Executive. Legislative time is radically speeded up, showcasing what Scheuerman terms an 'accelerated Legislature'. The 'motorisation' of legal production is a structural element in the post-war polity, largely resulting from the mode of statal presence in the economy, which speeds up policy-making time to match that of capital turnover.<sup>12</sup> This happens at the expense of 'deliberation', as if 'speed' and 'deliberation' were entities in a zero-sum equation. Nonetheless, in Patriot's legislative process 'deliberation' *did* occur: behind closed doors among a restricted 'club' of Congress members. In other words, the Legislature operated as a special committee of the Executive – as much in terms of time/rhythm as procedurally.

Furthermore, Congress did not know what the Bill it was passing was supposed to counteract -the process lacked any factual basis. The ignorance of how the attacks of 11 September occurred meant that the only knowledge about 'terrorism' and its operation came from the Executive. In this context, the police apparatus successfully (and easily) re-framed its failure as one of an overtly 'liberal' legal system. The Executive's monopoly on truth was never once challenged by any entity in the political scene regarding either the validity of such truth or the right to monopolise it. In short, this was an eloquent case where the Executive dictated both the content and the process of legal production. Nonetheless, the Executive did not *force* Congress to comply. The Legislature had all necessary resources (legal, ideological, procedural) to resist pressures and thereby assert and preserve its specific role in the policy-making process. Rather, Members –passively or not- were accomplices to this 'procedural' anomaly.

Further legislation confirms this unity of purpose between the two branches. In 2003 Congress saw a flood of counterterrorism/homeland security legislation, as six major Acts, piecemeal amendments and legislation drafts were brought before the Members. This second wave of counterterrorism legislation sought to expand, intensify or fine-tune Patriot's provisions and to restructure the coercive apparatus. In every case there was proper and full deliberation, both in the informal select members' club and the formal structure of Committees and Assemblies. The Legislature had recovered its

function and rhythm, and the ‘psychological’ impact of the attacks was smothered. Yet, this sober Congress enacted every proposal put before it (bar one: the ‘Victory’ Act). What was ‘put before it’ was further expansion/intensification of the draconian Patriot provisions and a legal framework permitting greater unaccountability to policing operations. In other words, Congress, although no longer ‘under the influence’, continued to surrender the population to brutal penalisation and arbitrary control, and connived in the decline of legislative and judicial oversight of the Executive. This occurred without frictions and with comfortable majorities. For example, the most important 2003 bill –the Homeland Security Act- was debated in Congress from July to November and passed with a House majority 299 to 121. Not only the two State-branches, but also both governing parties fully supported expanding the scope of coercion.

More than four years after passing Patriot, in February 2006, Congress had the opportunity to exterminate 16 Sections of the Act, scheduled to expire in late 2005. After long debate it chose to take nothing back. The Patriot Improvement and Reauthorization Act rendered permanent 14 out of 16 expiring Sections and renewed the other two until the end of 2009. Rather than an Executive or Republican coup, ‘counterterrorism’ legislation is beyond doubt *a state strategy, involving branches and parties in unison, and it consolidates over time.*

### **The Provisions (I): Redefining Policing**

Legislation in general defines the structure and operation of state mechanisms, sets priorities and limits to their function, charts the scope and methods of state activity, and (thus) codifies the relations between the state and the population. Furthermore, as the state is a form-determined condensation of social forces and a central locus of social antagonism, the same goes for legal production. It is both informed by and informs the relation of forces in the field of social antagonism; legislation is inherently political. It constitutes the abstract blueprint for the exercise of power within a given state form, and with the same token it provides testimony on the latter’s character.

The ‘war on terrorism’ has significantly re-drawn this ‘blueprint’. Counterterrorism legislation implicates a shift in the operational and organisational character of the state, signifying a shift in the relation of forces in the sphere of social antagonism. It is along these lines that I examine/interpret the legislation here - in reference to broader

dynamics, rather than its self-referential sphere of law. For this reason I examine counterterrorism legislation that implicates the life of the totality of the population, leaving aside some ‘exceptional’ decrees which, while granting the state maximum permission in the exercise of force, do so only in relation to tiny, politically marginal categories.

There are two different frameworks in the US legal system for conducting domestic surveillance. Most common is that provided by Title III of the US Code, which regulates surveillance regarding criminal investigations, conducted by law-enforcement personnel, with a view to legal prosecution. In this process, the government, through the Justice Department, requests the judge within whose jurisdiction the surveillance will occur to issue a warrant. The petition is based on ‘reasonable suspicion’ or ‘probable cause’ to believe that a specific suspect is involved in criminal activity. The warrant specifies the person, places and methods of surveillance. The second framework is provided by the Foreign Intelligence Surveillance Act (FISA). FISA surveillance was originally restricted to counter-intelligence. This meant that investigations did not have any criminal prosecution objective and that people could become targets of a FISA investigation regardless if they were suspected of any illegal activity. FISA regulated surveillance in the context of foreign intelligence investigations, carried out by intelligence personnel, for the purpose of intelligence collection on the activity of ‘foreign powers’ or ‘agents of foreign powers’. FISA investigations are authorised by a secret court (FISA Court or FISC), a judicial body consisting of nine judges. The only party present before FISC is the Justice Department via surveillance applications approved by the Attorney General. Prior to the Patriot Act, of about ten thousand applications FISC had rejected two.<sup>13</sup>

Patriot Act effectuates a radical rearrangement of this double framework by augmenting the government’s investigatory powers and (further) releasing them from judicial control – this regarding both Title III and FISA. But more importantly, the Act introduces FISA process into criminal investigations. This is a monumental move, and certainly (along with the definition of ‘domestic terrorism’) the most important move brought about by the Act. It provides the policing mechanism an alternative avenue to investigate and prosecute when ‘levels of suspicion’ are too weak to satisfy criminal investigation criteria, and subjects the population to an intrinsically deregulated surveillance and prosecution process. At the same time, it initiates a

tremendous shock-wave that engulfs the roles of the Judiciary and the Executive in coercion, and the structure and operational mode of the policing mechanism.

The introduction of FISA into the framework of 'normal' criminal prosecution is brought by a subtle change in phrasing: before Patriot, FISA investigations could be initiated if the Justice Department claimed that foreign intelligence was "*the purpose*" of the investigation. Patriot changes that requirement to "*a significant purpose*" (Sec.218). Thus the FISA process is now open to the participation of law enforcement, while its findings are automatically valid for criminal prosecution.<sup>14</sup> This inverts the FISA process by introducing it to an area it was not meant to be, and by placing its authority in the hands of criminal prosecutors. Likewise, it potentially cancels Title III, providing law enforcement a leeway to bypass it: if they cannot justify Title III surveillance, they can use the much lower threshold required for initiating a FISA investigation. Directly related to this treatment of FISA is the *fusion* of law-enforcement and intelligence functions within the policing mechanism. Sections 203 and 905 of the Patriot Act permits law-enforcement personnel to participate and direct FISA investigations, and commands the Attorney General and the CIA Director to produce guidelines for their common use of FISA.<sup>15</sup>

So, the Act attempts to amalgamate the two distinct categories of 'policing': the police mechanism is meant to *act in the unconstrained framework of intelligence operation in order to prosecute crime*, with one important addition: crime should now be prosecuted *before it happens*. It will be 'too late' and 'no good' if 'another attack' occurs. It is the orientation of the police apparatus towards pre-emption that dictates the rearrangement of its operational framework towards intelligence. This reorientation seeks to homogenise the policing apparatus by introducing continuity of purpose, compatibility of operation techniques, uninterrupted flow of information, directives, and so on.

The Homeland Security Act (HSA) goes further in that direction. Title V mandates federal supervision, funding and coordination of local police and emergency personnel, thus bringing them under federal control. Local police personnel amount to 3 million employees. Their inscription to federal control provides the real muscle that would implement counterterrorism measures. Finally, HSA provides for the construction of a single body of command of this unified mechanism, the Department of Homeland Security (DHS), centralising thus the control of all policing activity in

US territory on a single point –the DHS Secretary who operates directly under the authority of the President.

Together, Patriot and HSA unify the coercive apparatus, both horizontally and vertically. The centralisation introduced by the DHS does not refer to direct operational control of the agencies, but to the introduction of a central directory upon a multi-layered and multi-tentacled mechanism. So, counterterrorism legislation indicates the restructuring of the policing mechanism, as a *constant plexus, locally run on the basis and centrally controlled at the top*.

Patriot's most controversial provision is another FISA amendment, Section 215. It permits even low-grade FBI officers to access records or any 'tangible object', as part of an investigation to 'keep the US safe from terrorism'.<sup>16</sup> This expands FISA's initial record-access authorisation (applicable to certain types of 'third party' like courier, accommodation, vehicle rental) to absolutely every interaction that is kept on record. In order to gain such access the government has to certify to FISC that the records are sought in an investigation that involves 'foreign intelligence' or 'terrorism' interest. Courtesy of the 'significant purpose' amendment, there is no need to suggest suspicion that the targets are agents of a foreign power, or engaged in illegal activity. And, as with all FISA applications, the government is not subject to judicial review, while the FISC has no capacity to scrutinise the governmental claims.<sup>17</sup> While originally FISA did not require its target to be suspected of 'illegal' activity, as Patriot scraps the 'foreign intelligence' requirement FISA can now be applied to investigate people not suspected of anything at all.<sup>18</sup> While this is the case for all FISA provisions post-Patriot, Section 215 takes a further leap: *it does not demand a 'target' at all*. It permits the FBI to conduct 'blanket' investigations, using its record-obtaining power without presenting any individual as a suspect. Warrants may encompass entire collections of data, enabling the FBI to sweep up entire databases indiscriminately.<sup>19</sup>

The same regime of investigation that Section 215 laid down in relation to FISA is reproduced in the framework of 'normal' policing. Section 505 permits the government to obtain a number of personal records by producing a National Security Letter (NSL): a self-issued subpoena produced by FBI agents unilaterally. Again, the NSL authority permits the government to collect entire databases of information, targeting not a number of suspect individuals, but everybody.<sup>20</sup> The novelty these twin sections introduce is to re-orient surveillance towards 'totalitariness', an operational scope that *covers the entirety of individuals and of their interaction*. The fact that the

Patriot Act provides two different, mutually independent, legal provisions to do so portrays this quest as persistent. Patriot provides the legal architecture for a major shift in the operation of surveillance, one that brings the totality to be its sole, homogenous target. Thus, the one unified police mechanism is set to investigate one and homogenised social body.

To assist this unified police mechanism Patriot has brought about a shift in the spatio-temporal mix of policing. It has introduced ‘roving surveillance’, the legal capacity of the police to use a warrant acquired in a jurisdiction beyond the limits of jurisdiction, thus instituting electronic surveillance (telephone, e-mail) and physical search warrants to be of nationwide value - instead of limited to the issuing court’s jurisdiction that was hitherto the case. A search warrant obtained by a magistrate authorises the search of a person’s property to be executed within or outside the district, not excluding searches abroad. In addition, the police can delay notifying both the target and the court of a search and seizure (‘sneak and peek’) operation. It is entitled to do so if it determines that real-time notification may cause “any adverse impact” to the “government’s interests”, while the length of the notification delay is only specified as a “reasonable period”. These ‘roving’ provisions apply to both Title III and FISA investigation frameworks.<sup>21</sup>

A common feature of the ‘roving’ provisions is their lack of legal standards. The nationwide value of the warrant means the issuing court has no power to overview activities that may be taking place in another jurisdiction. And the requirements for obtaining a ‘roving’ warrant are practically non-existing: the FBI does not need to show reasonable suspicion of criminal activity. It only has to certify to a judge that the warrant will be relevant to an ongoing criminal investigation and the judge has no authority to reject the request.<sup>22</sup>

The combined effect of these provisions is increased authority of the Federal Executive to act on its own discretion. They ‘emancipate’ it from the control of the Judiciary, whose participation in investigations tends to become ornamental – settling thus the issue of the ‘double patronage’ of the police.<sup>23</sup> While this ‘emancipation’ is a trait that characterises the Act in its entirety, these provisions produce a *unified, uninterrupted, operational terrain for the coercive mechanism*. Hence, the ‘roving warrants’ (Sections 206, 214, 216, 219, 220) cancel the boundaries of jurisdictions and the borders between the 50 US states regarding electronic surveillance; while the ‘sneak & peek’ provisions (Sections 219, 213) shatter another ‘frontier’, that of

‘private space’. They flatten the juridico-ideological hurdles to police activity, creating a smooth space for the enhanced movement of the coercive mechanism.

The roving surveillance provisions also diminish the needed time of police intervention, by rendering redundant the process of application and approval for warrants each time the investigation shifts its attention on the map. The ‘spatial’ provisions of the Act are at the same moment ‘*temporal*’ and can be grouped together with those that extend the duration of surveillance under FISA authority: from 45 to 90 days for physical search orders, and from 90 to 120 days – and through consequent renewals up to a year- for electronic surveillance and physical search orders (Sec.207).<sup>24</sup>

Taken together, the provisions referring to investigation/prosecution design a homogenised and unified coercive mechanism, set to police the totality of a homogenised population and all its activity, in a unified socio-political territory. Within this total scope of surveillance/prosecution, counterterrorism legislation designates the primary focus of policing to be the population’s political activity. This takes us to the directly political character of ‘counterterrorism’.

### **The Provisions (II): Criminalising Politics**

As is well known, the Patriot Act modifies the pre-existing definition of ‘international terrorism’ to create a new criminal category: domestic terrorism. Section 802 of the Act defines domestic terrorism as activities that:

- (A) Involve acts dangerous to human life that are a violation of the criminal laws of the US or of any State;
- (B) Appear to be intended: i) to intimidate or coerce a civilian population; ii) to influence the policy of a government by mass destruction, assassination, or kidnapping; and
- (C) Occur primarily within the territorial jurisdiction of the US.

The first clause of the Section provides against something already covered by law. It sets a necessary, but not sufficient, condition in defining ‘terrorism’. The condition that specifies terrorism as such is given in the second clause. The activity in question must: ‘Appear to be intended: to intimidate or coerce a civilian population’; or to ‘influence the policy of a government by mass destruction’. Hence, it is not the

‘content’ of an action that designates it as ‘terrorist’ but the actor’s (apparent) intention. ‘Terrorism’ is a criminal category defined not by ‘objective’ deed, but by ‘subjective’ conviction. This signifies a substantial re-orientation of the justice system, that tends to address not anymore the act, but the inherent conviction of the actor, and that not as defined by the actor, but as understood by others.

Moreover, the definition (Section 802-B, II) informs that the Act seeks to protect ‘the policy of a government’ from being ‘influenced’ by certain means.<sup>25</sup> The ‘good’ to be protected is the ‘policy of a government’. ‘Intimidation’ and ‘coercion’ are never defined the Act. Neither is what ‘policy’ of what ‘government’ is to be protected, nor under what conditions is justifiable to ‘influence’ a government. What transforms a crime into ‘terrorism’ is the actor’s perceived intention to influence the (any) governmental policy. ‘Terrorism’ is the illegal activity that agents of the Executive and/or the Judiciary interpret as being politically motivated against governmental policy or institutional normality. Thus, the definition raises the ‘public order’ – that is, the structures, institutions and practices of a society - to the status of a self-referent ‘legal good’ to be protected by force. The promotion of the ‘policy of a government’ and more broadly a historically specific configuration of ‘social order’, as a legally protected good, is a serious indication of an authoritarian polity, wherein the act of the State (‘government policy’) is *the only permissible source of social change*.

Once the political motivation becomes ‘apparent’, crime X is no longer merely crime X. It is ‘terrorism’. It rises to a qualitatively different, much aggravated status, which requires subjecting those suspected of committing it to ‘special’ investigatory techniques, juridical procedures and penal treatment. This becomes apparent from the list of crimes (Sec.808) the Act sets alongside the general definition in Section 802, which, when the surplus value of political motivation is attached, are thereby said to constitute ‘federal terrorist crimes’. Featuring in this list of 38 ‘items’ are assault against federal high office holders, intimidation, conspiracy to destroy property of a foreign government, malicious mischief against US government property, and computer hacking. Many of the penalties for these crimes are doubled, ranging from 20 years to life.<sup>26</sup> Finally, as part of the 2003 ‘wave’, Congress passed legislation providing for lifelong supervision of ex-convicts of non-violent ‘terrorism crimes’ like computer crime ‘causing severe financial damage’, and apply the death penalty to all terrorist crimes not already subject to it, if death results from the act.<sup>27</sup>

These provisions dramatically exceed the general principle of ‘danger to human life’ that the ‘definition’ prescribes as necessary condition for ‘terrorism’ to exist. They include virtually every federal crime and refer for the most part to *protection of property rather than life*, including some that without the ‘terrorism’ designation would be mere misdemeanours. Once the extra gravity of subversive political motivation becomes ‘apparent’ they become ‘terrorism’ and may be sentenced to life imprisonment or death.

This penalisation overkill has a heavily symbolic dimension -its main significance is ideological. Most obviously it designates the socially ‘good’ from ‘bad’. But, more importantly, in a gesture of reassurance for some and open threat to others, these provisions are ‘symbolic’ in the sense that they emphasize the state’s willingness to employ violence to counter actions intended to ‘influence’ its activity. This reminder is by no means limited to law: anything from unilateral pre-emptive warfare to ‘visible’ police presence in the city, from the consistent defence of the US right to torture ‘terrorists’ to the presidential prerogative to monitor communications of US citizens, go well beyond the framework of counterterrorism legislation. This parade of violence may or may not influence the decision of a few people whether to proceed to mass assassination or not, but it certainly warns the majority about what their opinions and activities should be to avoid the armed and itchy hand of the state. In other words, the threat of extreme punishment shapes the formation and expression of political conviction. The penalisation provisions have an important ‘deterrence’ value not for fundamentalist mass-assassins but for the expression of ‘dissident’ views and ‘subversive practices’ by the majority. *Far from being a legal side-effect*, and certainly not any kind of ‘abuse’ of legal procedure, *the repression of political activity is inscribed in the very core of ‘counterterrorist’ legislation.*

Perhaps the most important and largely overlooked provisions of HSA concern the issue of ‘critical infrastructure’, a term without legal definition. The HSA leaves such designation to Executive prerogative. The President and/or the DHS Secretary are authorised to select and designate as ‘critical infrastructure’ the facilities of any private company. The designation signifies a special regime of protection. Namely, once the company submits information about the situation of its infrastructure to the government (and even if it does so orally), any disclosure about its condition is prohibited. Moreover, the company is automatically offered immunity, even if its vulnerabilities result from criminal negligence, while the law does not require either

the company or the DHS to proceed to corrective measures (HSA, Sec.212 to 215). Thus, all manners of enterprise, once designated as ‘critical’ will avoid both publicity and prosecution for threats they may pose to their personnel and the neighbouring population.

Likewise HSA Section 871 enables the DHS Secretary to establish Advisory Committees, and grants him the authority to keep policy-making decisions therein secret. As private corporations are key participants in Advisory Committees (notorious among them is the Vice-President’s Energy Task Force), the Act provides precisely that the direct participation of capital in forming the policies of the State will remain hidden. Finally, the Secretary is given broad latitude to award contracts to companies even on a basis irrelevant to ‘homeland security’, such as the possibility of losing US-based jobs. Hence, the Secretary is allowed to award contracts practically at will (HSA/Sec.835).<sup>28</sup> Thus, the so-called counterterrorism legislation protects government policy from being ‘influenced’ by the population, while at the same time institutes its ‘influence’ by (selected) capital, and officially protects it from public knowledge and control. This move is at the very heart of counterterrorism policy. Much more than a racist project or one of cultural bigotry, ‘counterterrorism’ is a strategy to exclude all classes but (the) One from politics. Again, as with everything else, while legislation provides a thread in deciphering this core issue, it can neither confirm it fully, nor show its full extent.<sup>29</sup>

### **State-Form Shift: Authoritarian Statism, part III**

I have been arguing that one of the key features of the legislation is that it homogenises and unifies the US into a single territory regarding policing, undermining the significance of juridico-political entities below the national level. Sub-national entities lose control over ‘their’ respective territories regarding law enforcement. This indicates a possible reversal of a hitherto established trend towards a ‘relativisation’ of scales of governance.<sup>30</sup> Counterterrorism legislation in the US shows the ‘national’ level presiding over a flattened domestic territory. Moreover, this ‘flattening’ motion extends to ‘private space’, which, historically, has been one of the most important inner barriers to the bourgeois state. Finally, this spatial unification is intrinsically related to the enhancement of speed, it is a condition for the latter. The

homogenisation of investigative space is directed by a perceived need to revolutionise investigative time.

The need to enhance speed justifies a second act of unification dictated in the legislation: that of the coercive apparatus. The legislation here provides for a three-pronged approach. Firstly, the judiciary is subjected to the spatiality and temporality of the coercive mechanism, is excluded from the investigation/persecution process, and banished from the coercive partnership. Secondly, the police mechanism of state and local government is subjected to federal control. Again, this indicates that the national gains predominance, not only regarding scales, but also mechanisms of governance. It also reorganises the coercive apparatus in a structure marked by great disparity (decentralisation) at the base with concentration of the 'overall' control (centralisation) at the top. Finally, the federal policing mechanism is horizontally homogenised by merging the two main police functions (enforcement and intelligence).

In sum, the restructuring of the coercive mechanism results in the monopolisation of coercive powers by the federal Executive, both horizontally and vertically, at the expense of the other federal 'branches' and lower-tier governments. But the reshuffling of cards among governmental entities is only the secondary motion effectuated by the legislation. The primary one consists of a vast augmentation of governmental powers vis-à-vis the citizenry. This primary motion largely conditions the 'structural' one described above, and is expressed in the new modalities and targets of policing. The intelligence and criminal prosecution functions of the apparatus are homogenised into a 'criminal intelligence' mould, where the intelligence function is predominant. This inflated role of intelligence is dictated by an operational turn of law-enforcement towards pre-emption: identifying, disrupting and persecuting (criminal) activity before it occurs. In turn, this homogenises the mechanism's target: the intelligence/pre-emption turn signifies a radical shift where not only everyone becomes potentially suspect of uncommitted crimes, but also 'all' (people, activity) is suspicious. Yet the key category for police targeting is political activity. It cannot be stressed enough that the core of counterterrorism legislation (the 'domestic terrorism' crime) is the criminalisation of attempts undertaken by parts of the citizenry to influence statal policy. As 'terrorism' is the criminalisation of the political conviction 'behind' the act, counterterrorism is an attempt to shield the socio-political regime. Finally, the social order that counterterrorism seeks to protect

is the governance of social affairs by joint state-capital ventures. Its measures are a powerful message of caution to anything that, to one degree or the other, challenges this social order.

Examining law as a particular codification of social relations that provides an abstract framework for the exercise of power means that law can testify on the latter's character. In these terms, counterterrorism legislation indicates a sudden deepening/hardening of the republic's authoritarian features and tendencies. Before indulging in perceptions of a supposed 'dictatorial derailment' of US polity, it must be recalled that the vast augmentation of state powers vis-à-vis the citizenry, and their arbitrary monopolisation by the Executive, are not the result of a coup, but smoothly handed by the Legislature, in perfect inter-branch and inter-party synergy.<sup>31</sup> The institutions of political democracy keep their shape, and continue to function normally; there is no attempt to cancel constitutional democracy, but rather to transform it towards more exclusive forms. This is undertaken not only by the 'right-wing' party, but is common ground for both dominant parties. And crucially, there is not a representation crisis between the dominant class and its political parties and networks, nor is there (yet) a developed right-wing popular movement.<sup>32</sup> In short, the 'homeland security' state is *not an exceptional state*, but an authoritarian transformation within the institutional context of the bourgeois republic. This implies that counterterrorism features should not be treated as a temporary 'emergency' blip, but as permanent ingredients of the polity. Characteristically in 2006-2008, when other War on Terrorism aspects (Iraq, Guantanamo) are being reconsidered, the 'home front' is constantly strengthened.

This organic development of authoritarian elements within a democratic context indicates the usefulness of 'authoritarian statism' as a framework for analysing transformations of the state. The term was coined by Poulantzas in the late 70s to account for a reconstruction of the state apparatus, its mode and terrain of operation, to the direction of "intensified state control over every sphere of socio-economic life *combined with* radical decline of the institutions of political democracy and with draconian and multiform curtailment of so-called 'formal' liberties". It is not a fascist state, nor a chrysalis form of such a formation: "*it rather represents the new 'democratic' form of the bourgeois republic in the current phase of capitalism*".<sup>33</sup> In other words, authoritarian statism is not an exceptional state form but a normal form of capitalist state, which nonetheless incorporates, normalises and renders permanent

a variety of emergency-type features: an increased concentration of power at the upper summits of the Executive; the erosion of the rule of law; the reversal of the political function of parties that prevent participation and initiative from the basis; the material inflation of the administration and the increase of its political significance; and the rise of a (hidden) parallel network of power that bypasses formal channels of interests' representation in the state.<sup>34</sup>

We can distinguish two earlier phases of authoritarian statism, each accommodating different articulations of governmental practice, structure and strategy. The first phase, described by Poulantzas, was an attempt to counter the crisis of the Keynesian welfare configuration, via (and within the context of) the national state. The second, occurring under neo-liberal hegemony, implicated a relativisation of scales of governance, proliferation of its mechanisms, and a radical break with the welfare state and Keynesian political economy, towards more competitive and openly antagonistic to the subaltern classes 'Schumpeterian' strategies.<sup>35</sup> Each of these phases has seen a further concentration of state power at the Executive and an increased criminalisation of political activity.

While we are in some sense witnessing an intensification of these features of authoritarian statism, the 'homeland security' context effectuates a crucial break with hitherto articulations of the authoritarian statist form, justifying talk of a new third phase. For Poulantzas authoritarian statism constituted a reforming of the state apparatus related primarily to its economic functions.<sup>36</sup> The concentration of power in the Executive and the post-hoc derailment of legal production resulted from the state's role in monopoly capitalism of handling the dynamics of the –'integral'- economic sphere. Similarly, in the second phase, workfarist tactics as much as the relativisation of scale and proliferation of governance mechanisms were articulations of a broad *economic* strategy.

Now the 'intensified state control over every sphere of socio-economic life' is primarily effectuated by *coercive* means and under a 'security' imperative. During previous phases, developments were pursued under the overarching aegis of the state *economic* apparatus. The present intensification of authoritarian statist trends is occurring under the aegis of the *coercive* apparatus. Combined with the ideological shift of legitimacy basis from 'economic performance' to 'homeland security'; the capacity of the security mechanism to protect, subsidise and invite select capital in policy-making mechanisms; and the development of a dynamic sector of 'security'

production and economy, *the coercive apparatus is in fact replacing the economic in being the predominant among the state mechanisms.*<sup>37</sup>

As the state is a social relation and a strategic factor in the field of social dynamics, this re-articulation of the state form signifies an important reconfiguration in that field. In these terms, the present shifts in the state form signify the effective appropriation of the state by capital (or fractions thereof), and a simultaneous attempt to ‘fortify’ this position against any other class. The bourgeoisie occupies the mechanism of effective social power, construes it as a fortress, and declares it ‘under siege’.

This state-theoretical examination of the legislation captures the evolvment of pre-existing elements into an historically novel articulation. Intelligence-based pre-emption, already present since the 70’s, ceases to be a ‘special’ function and becomes the dominant operative paradigm, seeking moreover to engage the totality of the population and social interaction into policing relations, with special attention reserved for political activity.<sup>38</sup> The scope and operational terrain of policing is thus radically augmented, while – crucially - the coercive apparatus becomes thoroughly ‘politicised’: it is restructured as an uninterrupted continuum operating under direct presidential control. The mutation of social interactions into a policing relation, combined with the ‘security imperative’ dominating state policy and the rise of the (proliferating/centralised) coercive apparatus into prominence, signify an alteration of the state form towards a hardened version of authoritarian statism.

These developments cannot be affirmed or fully assessed by examining the legal ‘blueprint’. Even the charting of the abstract ‘design’ of the state form should consider budget policy and allocation of money to implement the legislation; while a full-bodied assessment would necessarily include its actual implementation, including its impact in shaping state mechanisms and practices, or risk interpreting a high-impact symbolic gesture.<sup>39</sup> Nonetheless, the modality of its introduction (sustained convergence between parties and ‘branches’), and the institutional innovation it has triggered leaves no doubt that the counterterrorism legislation largely exceeds the ‘symbolic’ terrain: it constitutes a programmatic declaration of intention of the ‘state as a whole’ and hence provides an important insight to prevailing strategies and the forces they predominately serve.

In these terms, the ‘homeland security’ rearrangement of the current phase of authoritarian statism is transforming the state into a strictly and openly oligarchic

authority, determining politics on the overlapping objectives of ownership and security. At the same time, it should also be noted that while the first configuration of authoritarian statism, intended to counter the ‘Keynesian’ crisis, excluded popular input through the party system, and the second, during the neo-liberal transition, banished labour from the formal policy-making process, the current phase attempts to strangle ‘informal’ popular political expression at a distance from the state. Thus, every new phase involves the disruption of a particular channel (party, union, streets), resulting to an *increasingly thorough insulating of state policy from popular politics*. This is linked to the increasingly formalised participation of capital in policy-making, such that ‘homeland security’ brings the parallel power structures of joint state-capital governance characteristic of authoritarian statism inside the institutional framework of the state and under its protection. The consolidation of (any) consensus on the basis of ‘obedience in exchange for protection’, the predominance of the coercive mechanism, and the prohibition of popular politics, together signify a ‘pre-emptive’ shielding of bourgeois rule against actual and potential popular challenges.

These developments can no longer be seen as a parenthesis pertinent to an ‘emergency state’ or the authoritarian style of a certain Administration. They are prevailing elements of an overall state-strategy, ‘locked’ in its institutional materiality, and pertinent to the interest of the bourgeoisie as a whole. They are inscribed in and constitute the current form of capitalist state in the US, and hence should be considered as elements of a (relatively) *permanent* reconfiguration of the political terrain. Accordingly, any reversal of these tendencies *cannot* occur as/by a reversal in the legislation alone; it would necessarily involve reshaping the broader political configuration.

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<sup>1</sup> By ‘State’ I exclusively refer to the ‘modern’ state; I have no intention to include other forms of statehood.

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<sup>2</sup> American Civil Liberties Union (ACLU) *Upsetting Checks and Balances*, 2001; ACLU *Civil Liberties After 9/11*, 2002; ACLU *Bigger Monster, Weaker Chains*, 2003; Nancy Chang *Silencing Political Dissent. How post 9/11 antiterrorism bills threaten our civil liberties*, Seven Stories Press, NY 2002; Stephen J. Schulhofer 'No Checks, No Balances: Disregarding Bedrock Constitutional Principles' in Richard C. Leone and Jr. Greg Anrig eds *War on our Freedoms – Civil Liberties in an Age of Terrorism* The Century Foundation, NY 2003; Corey Robin 'Fear American Style – Civil Liberty After 9/11'; in: Stanley Aronowitz and Heather Gautney (eds) *Implicating Empire: Globalisation and Resistance in the 21<sup>st</sup> Century* Stanley, Basic Books, NY, 2002

<sup>3</sup> Viet Dinh *Title III of the USA Patriot Act* Bankroft Associates, Washington DC, unknown date; cf. Anthony Lewis 'Security and Liberty: Preserving the Values of Freedom' in *War on our Freedoms*; Amitai Etzioni *How Patriotic is the Patriot Act?* Rutledge, NY 2004

<sup>4</sup> William E. Scheuerman *Rethinking Crisis Government Constellations*, 9/4: 492-505, 2002; Bruce A. Ackerman *Before the Next Attack* Yale University Press 2006

<sup>5</sup> This synopsis does not do justice to the intellectuals mentioned. Especially Scheuerman (*Liberal Democracy and the Social Acceleration of Time* Johns Hopkins University Press, Baltimore 2004, p.1-25) acknowledges developments in the economy as the underlying factor for shifts of modality and power within the state. Yet, his framework restricts the political to an autonomous institutional universe separate from social dynamics; and consisting of (an hierarchical configuration of) three antagonistic branches.

<sup>6</sup> Nicos Poulantzas *Political Power and Social Classes* New Left Books, London, 1973, p.104; Nicos Poulantzas *State, Power, Socialism* New Left Books, London, 1978, pp.44-45,147-152; Bob Jessop *State Power* Polity, Cambridge 2008, p.44-45

<sup>7</sup> Nicos Poulantzas *State, Power, Socialism*, p.136-142

<sup>8</sup> Cornelius Castoriadis 'Done and To Be Done' (1989), p.408 in David Ames Curtis ed *The Castoriadis Reader*, Blackwell, Oxford 1997; Georgios Contogeorgis *Political System and Politics* Polytypo, Athens, 1985 (Greek edition), pp. 15-24; Georgios Contogeorgis *Democracy as Freedom* Patakis, Athens, 2007 (Greek edition), p.26-38

<sup>9</sup> Peter Bratsis *Everyday Life and the State Paradigm*, London, 2007, p.27-50

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<sup>10</sup> Nicos Poulantzas, *State, Power, Socialism*, p.218-219; Cornelius Castoriadis 'On the Content of Socialism' (1957) in *The Castoriadis Reader*, p.51-52; Cornelius Castoriadis 'The Greek Polis and the creation of Democracy' (1983) in *ibid*, p.274-277

<sup>11</sup> Nancy Chang, *Silencing Political Dissent*, p.43; David Cole & James X. Dempsey *Terrorism and the Constitution* New Press, NY, 2002, p.151; EFF (Electronic Frontier Foundation) *EFF Analysis of the Provisions of the USA PATRIOT Act that Relate to Online Activities*, 2001; ACLU *Independence day 2003*, 2003

<sup>12</sup> William E. Scheuerman *Liberal Democracy's Time* University of Minnesota, Minneapolis, 2003, p.42; William E. Scheuerman *Liberal Democracy and the Social Acceleration of Time*, p.105-107; cf. Carl Schmitt *Die Lage der europäischen Rechtswissenschaft* (The Situation of European Jurisprudence), Tuebingen: Universitäts-Verlang, 1950

<sup>13</sup> Patrick S. Poole *Inside America's Secret Court* [<http://fly.hiwaay.net/~pspeople/fiscshort.html>], 2000; Nathan C. Henderson *The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications* Duke Law Journal 52/1:179-209, 2002; Philip Colangelo *The Secret FISA Court: Rubber Stamping on Rights* Covert Action Quarterly, unknown date

<sup>14</sup> CRS (Congressional Research Service) *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, 2001, p.14-15; US Senate *America after 9/11: freedom preserved or freedom lost?* Judiciary Committee Hearing, 2003, Nadine Strossen's Statement, p.5-6

<sup>15</sup> CRS, *ibid*, pp. 5-6, 51-52

<sup>16</sup> CRS, *ibid*, p.11

<sup>17</sup> ACLU *Seeking Truth from Justice*, 2003, p.2; ACLU *Unpatriotic Acts*, 2003, p.46

<sup>18</sup> Rutherford Institute *Memorandum: Life, Liberty and the Pursuit of Terrorists* 2003, p.3-4

<sup>19</sup> US House of Representatives *Anti-terrorism investigations and the Fourth Amendment after September 11, 2001* Subcommittee on the Constitution Hearing, 2003, p.19; ACLU *Seeking Truth from Justice* 2003, p.6; CDT (Centre for Democracy and Technology) *Setting the record straight: an analysis of the Justice Dept.'s Patriot Website* 2003, p.2

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<sup>20</sup> CRS, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, p.46; US House of Representatives, *ibid*, p.17-19; US Senate, *ibid*, pp.7, 30

<sup>21</sup> US House of Representatives, *ibid*, p.15-17; US Senate, *America after 9/11: freedom preserved or freedom lost?*, p.24; CRS, *ibid*, p.7; Rutherford Institute, *ibid*, 2-3; CDT, *ibid*, p.2

<sup>22</sup> US House of Representatives, *ibid*, p.17; ACLU *Independence day 2003*, p.3

<sup>23</sup> Mark Neocleous *The Fabrication of Social Order. A Critical Theory of Police Power* Pluto Press, London, 2000, p.106

<sup>24</sup> CRS, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, p.7-8

<sup>25</sup> The other sub-clause *to protect the population, from being 'intimidated' or 'coerced'* is completely empty: 'Coerced' into doing what, the Act does not say –it would be impossible, since the juridical constellation acknowledges to the 'population' no power to implement a collective will; collective will and implementing powers are state monopoly.

<sup>26</sup> CRS, *ibid*, p.46-52

<sup>27</sup> ACLU *ACLU Documents White House Push to Pass Patriot II Piecemeal in Congress*, 2003; ACLU *Patriot Act II Provisions in HR10 As Passed by House*, 2004

<sup>28</sup> Nancy Talanian *The Homeland Security Act: the decline of privacy, the rise of Government Secrecy* Bill of Rights Defence Committee, 2003

<sup>29</sup> Further testimony for this can be drawn from an examination of conceptual and operational premises of the security apparatus. There, the category 'employee' is systematically merged with that of 'terrorist', while security workers are subjected to a quasi-feudal regime of working relations (Christos Boukalas *Empire and Reich: War on Terrorism and the Political Metalaxis of the US* Lancaster University, 2007, pp.147-151, 242-244).

As for access of social forces articulated on a basis other than class, it will depend on the permission they get from a particular administration, or the support they can mobilise within the state as 'opposition' gestures –i.e. to the degree in which their objectives can be inscribed into the strategy of a capital fraction.

<sup>30</sup> Chris Collinge *Spatial Articulation of the State: Reworking Social Relations and Social Regulation Theory* University of Birmingham, Centre for Urban and Regional Studies, 1998; Bob Jessop *The Future of the Capitalist State* Polity, Cambridge, 2002

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<sup>31</sup> For the ‘dictatorial derailment’ thesis see: Andrew Arato *The Bush Tribunals and the Spectre of Dictatorship* Constellations 9/4: 457-476, 2002

<sup>32</sup> Dimitris Belandis *In Search of the Internal Enemy* Proskinio, Athens (Greek Edition), 2004, p.122-123; Nicos Poulantzas *Fascism and Dictatorship* New Left Books, London, 1974

<sup>33</sup> Nicos Poulantzas *State, Power, Socialism* New Left Books, London, 1978, pp.203-204, 209 (original emphasis)

<sup>34</sup> Scheuerman (*The State of Economic Emergency* Cardozo Law Review 21:1869-1894, 2000) comes to similar conclusions by discussing the proliferation of emergency powers throughout the 20<sup>th</sup> century. Nonetheless, his assessment mainly concerns the ‘interior’ of the state, especially the relations among the ‘branches’; it misses i.e. what is crucial in AS: the augmentation of state powers/control over society.

<sup>35</sup> Bob Jessop, *The Future of the Capitalist State*, p.96-140

<sup>36</sup> Nicos Poulantzas, *State, Power, Socialism*, p.163-179

<sup>37</sup> Christos Boukalas *Empire and Reich: War on Terrorism and the Political Metalaxis of the US*, pp.139-147, 155-157

<sup>38</sup> For the 70’s reality see: Martin Oppenheimer and Jane Canning *The National Security State: Repression within Capitalism* Berkeley Journal of Sociology, 1979, 23:1-33 (regarding the US); and Nicos Poulantzas, *State, Power, Socialism*, pp.186,210,220 (regarding Western Europe)

<sup>39</sup> Murray J. Edelman *The Symbolic Uses of Politics* University of Illinois, 1964, p.23-29. For an assessment of institutional practices the legislation has triggered, see: Christos Boukalas, *Empire and Reich*, 127-185