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# BRIEFING

## SAFEGUARDING CIVIL LIBERTIES

*William Roper: "So now you'd give the Devil the benefit of law!"*

*Sir Thomas More: "Yes. What would you do? Cut a great road through the law to get to the Devil?"*

*Roper: "I'd cut down every law in England to do that!"*

*More: "Oh? And when the last law was down, and the Devil turned round on you -- where would you hide, Roper, the laws all being flat. This country's planted thick with laws from coast to coast -- man's laws, not God's -- and if you cut them down -- and you're just the man to do it -- do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake."*

~ Robert Bolt, *A Man for All Seasons* (1954)

### *Introduction*

Britain has a long and proud history of protecting civil liberties against arbitrary government action, stretching back to 1215 and the Magna Carta. For the most part though, these liberties were not laid down in statute, but rather formed part of the common law. They were respected by the state as a matter of tradition or convention. For centuries that was enough. In recent years however, our traditional liberties have come under sustained attack from ever more illiberal governments. Plainly, it is now necessary to move beyond the idea that our traditional rights and liberties are safe because they are so well established. Action is needed to restore, reaffirm, and sustain them.

In an almost systematic way Britain's traditional civil liberties have been slowly and steadily undermined. The time is overdue when institutions have to be set in place to safeguard them in the future.

### *Habeas Corpus*

Habeas corpus, or more properly *Habeas corpus ad subjiciendum*, is Latin for "you may have the body subject to examination". Put simply, you may not be detained without a trial. The principle dates to Anglo Saxon times and

For more information contact:

Dr Madsen Pirie  
020 7222 4995





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was already common law before it was included in the Magna Carta. It was formalized by The Habeas Corpus Act passed by Parliament in 1679 and achieved an almost mythical status in the country's psyche. All of that ended on 13 December 2001 when The Anti-terrorism, Crime and Security Act was signed into law – less than a month after it was introduced in Parliament. This allowed the suspension of habeas corpus in regard to terrorism suspects who cannot be prosecuted. Of course, in order to become a 'terrorism suspect', one needs only the agreement of a single judge. The Government's defeat over their first attempt to bring in a law that would have allowed a suspect to be detained for 90 days without charge does not seem to have stopped them, and measures are already afoot to bring the legislation forward again.

### *Trial by Jury*

The right to trial by jury is an ancient right and a cornerstone of British justice, and can also be traced right back to the Magna Carta, which said: "No free man shall be seized or imprisoned, or stripped of his rights or possessions... except by the lawful judgement of his equals." The right to trial by jury is important because juries are independent of the State and its judicial and police systems. They provide the best protection for the innocent, as well as involving ordinary citizens in the administration of justice. Yet the right to trial by jury has come under sustained attack.

Thanks to the Criminal Justice Act 2003, trials can be held without juries if they are particularly complex or long. This has made judge-only trials standard practice in cases of serious fraud, but it is unlikely they will remain restricted to that area. Evidential complexity is an excuse that could be made concerning a whole range of trials.

### *Double Jeopardy*

Occasionally, a right that protects us all may have consequences that are difficult to accept. The right not to face trial twice on the same charge, or double jeopardy, as it is popularly known, is one such right. It is one of the oldest rules in the English Common Law, stretching back to at least the 12<sup>th</sup> century. However, the Criminal Justice Act 2003 overturned this 800-year old right in cases where "new and compelling evidence" could be produced. Double Jeopardy existed to protect all of us from a state where we could be brought to trial over and over again until we were found guilty. By allowing that right to be eroded, even a little, we put ourselves and our liberties at risk.

### *The right to remain silent*

The fifth amendment of the US Constitution is a remarkable piece of writing. In one paragraph it guarantees Americans to the right to due process of law





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and freedom from Double Jeopardy. But its most famous clause is the right to remain silent – “No person ... shall be compelled in any criminal case to be a witness against himself.” As with much of the bill of rights, it was imported from English common law and as with much of that common law we are slowly losing it. Instead of affirming the right when a policeman arrests a suspect, he will now say, “You do not have to say anything, but it may harm your defence if you fail to mention when questioned something which you later rely on in court.” The first part means that they still cannot force you to say anything, but the second part means that staying silent can be taken as incriminating yourself.

### *Other judicial rights*

Displaying a real zeal for wrecking the traditions of British justice, the government has also eroded the presumption of innocence and the principle that you may not be sentenced without conviction. In many financial cases the burden of proof now falls on the defendant. That means he must prove that he is innocent (i.e. he must prove that the money is rightfully his), and if he does not he will be presumed guilty. In other criminal cases the ‘proceeds of crime’ can be confiscated by the state, before the defendant is even convicted of the offence in question.

### *Freedom of Speech*

Free speech is the most fundamental of all rights. It is the foundation of democracy and the guarantee that all of our other rights will be protected. In Western democracies we take this right for granted, so intrinsic is it to our way of life and our collective conscious. It gives us the power to question and criticise our government, to debate all ideas without fear of the state and to express ourselves in any way we see fit. It is a powerful weapon for keeping governments honest. To take just one example, no country with guaranteed free speech has ever suffered a famine.

Yet free speech is hard to accept. Many people are who are free to say what they like will say things that others do not want to hear. But no matter how repugnant the things they say, only by guaranteeing freedom of speech for the people we disagree with can we guarantee this freedom for ourselves. As Voltaire said, “I disapprove of what you say but I will defend to the death your right to say it.” We are not talking of people having the right to incite murder or other criminal acts – that has long been an offence. We are talking of the right to express opinions.

Laws against religious hatred chip away at this protection. Holocaust denial may be absurd, but recent EU moves to ban it are a troubling interference in our right to discuss history. They set an unfortunate precedent which could





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be extended to other areas; once the dam has been breached, the waters pour through.

We can no longer protest in this country within a mile of Parliament – exactly the place where some might say that protests need to be made.

#### *Privacy & ID cards*

Legislation passed since 1997 has given the state unprecedented access to our private lives and personal information. The Regulation of Investigatory Powers Act 2000 made it compulsory for UK internet service providers to monitor users' email and web browsing habits. This information must be passed on to the authorities if demanded and the user may not be informed. These powers were, the government assured us, only to be used for matters of national security but in 2002 they attempted to extend the Act so that almost any government department or civil servant could demand access to our private records. In the face of opposition the Extension Act was dropped - only to be reintroduced a year later.

A similar case of the government forging ahead with illiberal plans in the face of widespread opposition is compulsory national identity cards. In spite of the enormous cost and lack of clear benefits, the government seems hell-bent on introducing ID cards and, even worse, a national identity database to back it up. This would entail the accumulation of vast quantities of personal data, to be held on a central database and available to the state authorities (along with computer hackers).

#### *The problem*

Threats to civil liberties always come one piece at a time and always sound reasonable at first. Many of the erosions of our traditional liberties, outlined above, are fairly modest in scope and, ultimately, well intentioned. Who would disagree that criminals should be locked up or that the country should be safe from terrorists? But, as the saying goes, the road to hell is paved with good intentions.

Under constant pressure from the 24-hour news media to take action, the government is blissfully chipping away at the very foundations of liberty in this country and - given the doctrine of parliamentary sovereignty, as well as the absence of a written constitution - there is little to stop them. Most politicians pay lip service to the ideals of civil liberty, but too few are prepared to really stand up for them. It is time for an independent body to hold fast where politicians yield.





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### *The Solution*

Since our elected representatives seem unable to resist the desire to 'look tough' and further infringe our ancient rights, a new approach is called for. The proposal made herein is for **the establishment of an independent judicial body tasked with a review of the state of civil liberties in Britain**, and to report on how these liberties have been affected by recent legislation. It is envisaged that the panel be composed of retired senior judges, well respected by their colleagues within the legal profession, and with the weight of experience requisite to the importance of their new task.

The liberties review panel would sit, hear witnesses, evidence and argument, and would deliver interim reports on various aspects of our traditional liberties, including those referred to above. They would establish the broad principles which apply, and under which newly proposed legislation could be challenged.

This body's members, once appointed, would be independent of government, and not subject to its requests or instruction. It would be authorized to make public recommendations concerning how liberties might be protected, and, where necessary, restored. Its pronouncements would not have the force of law, but it is envisaged that the body would be so prestigious and authoritative that governments would not feel able to ignore its recommendations, or to dilute significantly the proposals it made to conserve and entrench the liberties which have been our birthright.

To those who say that such a body would effect a change to the constitution of this country by limiting the effective powers of elected governments, the reply can be made that it is recent governments which have changed that largely unwritten constitution, and that such a judicial body would have only the moral authority to restore that balance and to restrain the ambitions of an advancing legislature in the future.

To ascertain the level of public support for such a proposal, a YouGov poll was commissioned, asking the question, "Would you support or oppose a proposal to establish a judicial body, tasked with reviewing the state of civil liberties in Britain, the effect on them of recent legislation, and authorized to make public recommendations of ways to safeguard them?" The results were overwhelmingly in favour: of those expressing an opinion (more than three-quarters of those polled) **76% supported this proposal**.

Establishing a judicial body such as the one proposed would not solve all of the problems which civil liberties face in Britain from a variety of sources, but it would be a significant step in the right direction. **Britain was once the home of liberty. With resolution and commitment, it can become so again.**

