

Evaluation in turbulent times - How is evaluation accommodated in emergency policy-making: A comparison of post 9/11 emergency legislation in the UK and the US

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Introduction

There is a commonly held assumption that principles and practice of evidence-based policy-making struggle to meet policy-making demands in turbulent times. In terms of evaluation, it seems logical to assume that as decision makers need to find answers to emergent policy issues in difficult times the normal stages of policy cycle are less relevant and applicable.

This paper is not concerned with how decision makers arrive at decisions or use evaluation to shape decisions in times of urgency. It aims to look at how evaluation is or is not accommodated within emergency policy making. In other words, does emergency policy making allow for explicit ex-post evaluation and monitoring of the policy introduced? This question seems especially relevant to assess whether evaluation matters in turbulent times. Though it may be true that evaluation in these times matters less to decision makers hoping to arrive at quick policy answers given the pressures that they are under; the relative accommodation of evaluation in the policy itself can give an indication of the importance of evaluation and accountability in the wider policy making process and also the willingness of policy makers to return to the normal cycle and allow for policy reversal.

Theory suggests that path dependent institutional setups and policies are often only truly challenged in times of particular crisis when the “unthinkable” can be implemented (see Krasner 1988). In this sense, institutional change is limited or incremental except for in periods of sudden systemic change or collapse (see Thelen and Steinmo 1992). However, we also know that the type of challenge is important. It could be that events do not affect the fundamental macro-institutional configuration such as the organisation of the state and core executive, but merely produce a more limited sectoral change in policy areas or for instance evaluation practice (Knill, 2001; van Stolk 2005). Indeed, when facing severe turbulence, one response might be to retrench in the core architecture of the state while another response might be to innovate institutionally. Turbulence could work differentially as noted for ‘europeanisation’ literature in Central and Eastern Europe by Knill (2001). Where turbulence does not challenge the macro-institutional set-up, it is more likely that sectoral changes can be explained by actor-based explanations. Actors are likely to be interested in gains in efficiency (Hall and Taylor 1996) and power (Dunleavy 1991) as the domestic opportunity structure changes due to turbulence. Actors have an interest in institutional survival and expanding organisational capacities (Scharf 1997; Dunleavy 1991). Thus, turbulence might not change the macro-institutional configuration but create pressures for sectoral adaptation such as in evaluation practice.¹ Actors then have a choice to use such pressures to their advantage or deflect such sectoral adaptation by putting specific evaluation conditions such as ex-post monitoring or sunseting in new policy to

¹ We call changes in evaluation practice as sectoral adaptation even though evaluation itself is a distinctively cross-sectoral policy practice.

ensure that they can return to the pre-emergency evaluation practice and political status quo. It is not just about whether turbulence changes evaluation practice, but also to what extent evaluation practice was embedded initially and to what extent new practice that arises from turbulence is likely to be embedded.

Scope of research, methods and hypothesis

The focus of the paper is the introduction of emergency policy after 9/11 in the UK and US. The research for this analysis relies on documentary analysis of two kinds. Firstly, the paper reviews emergency legislation to see what evaluation processes are present in the emergency legislation that was introduced in the post 9/11 period. Secondly, the chapter reviews secondary documents such as reports by Supreme Audit Institutions, other independent reports and academic papers commenting on the effectiveness and evaluation components of the legislation. The research builds on comparative case study analysis (Yin, 2003) using a most similar case study design. In case selection, the prime consideration was that the UK and the US 2001-2005 emergency legislation and the subsequent use of review clauses show similarities (Table 1).

Table 1. Case selection matrix

Case	Emergency legislation	Review clauses
US	Yes	Yes
UK	Yes	Yes

The paper tries to test a number of hypotheses associated with the introduction of emergency legislation. A key consideration is that evidence-based policy-making plays a lesser role in turbulent times as existing evaluation paradigms are challenged and the timescales required to collect and interrogate evidence might be too long, given the perceived urgency of the situation. So we test the following hypothesis:

1. Evaluation is less important in emergency policy making, i.e. there is a clear drop in the quantity and quality of evidence used.

A question here entails a drop in quality and quantity of evidence from the normal policy cycle. Here we use two common accepted practices in policy making in the US and the UK: the extent of policy planning through for instance regulatory impact assessments; and the extent of parliamentary scrutiny (see OECD 1999; OECD 2010).

We also know that policy makers in turbulent times incorporate tactics that allow for a return to the policy making practice of before the moment of crisis (Wegrich et al, 2005). A good example is the use of sunset clauses in legislation, which allow policy makers to return to legislation after a period of time to evaluate its effectiveness (Wegrich et al 2005). The assumption here is that given the scope of emergency legislation and the short time of consideration by policy makers that the

subsequent use of review clauses could lead to ex-post return to a more normal policy cycle and/or policy reversal when evidence is considered or the emergency situation abates.

The question then is what facilitates a return to a more normal policy. Hence, we test five more explanatory hypotheses (a-d).

2. Review clauses are more likely to facilitate a return to normal policy-making and/or policy reversal if:
 - a. The emergency situation abates;
 - b. They require extensive review;
 - c. Institutional veto points are relatively weak;
 - d. Emergency legislation does not alter the core macro-institutional setup; and
 - e. Political developments open up a window of opportunity (e.g. change of government).

Case studies: US and UK

The terrorist attacks of 11 September 2001 in the United States triggered immediate policy reactions in the US as well as in the UK. Similarly, the 7 July 2005 London bombings (together with the failed bombing attempts of 21 July same year) had a widely felt impact on the UK institutional setup and regulatory environment.

The USA PATRIOT Act of 2001 and the Homeland Security Act of 2002: A challenge to core institutions

The *USA PATRIOT Act of 2001*² was written into law by George W. Bush on 26 October 2001, less than seven weeks after 9/11 terrorist attacks and 3 days after it was first introduced to the House of Representatives. The short timelines did not allow for any substantive ex ante evaluation and the relevant evidence gathered prior to 2001 was scattered at best. This Act granted federal officials greater powers to track down and intercept terrorists' communications for both law enforcement and for foreign intelligence purposes. It did not substantially alter the core institutional set-up neither at the federal nor at the state level; nevertheless, it instituted sectoral changes by expanding or creating new bodies within existing institutional structures and also increased the competences and extended the jurisdiction of law enforcement and intelligence agencies. This made the Act of 2001 highly controversial as the erosion of civil liberties was questioned and concern was raised over the expansion of the powers of the executive. Moreover as Olson posits, the US Congress and Senate could not exercise their responsibility for critically reviewing this legislation on the basis of more substantial evidence (Olson, 2006).

The Act contains sunset clauses terminating sixteen of its sections on December 31st 2005³ (Section 224), but did not call for any specific review or evaluation. Nonetheless, in principle, the sunset and

² Acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (Public Law 107-56).

³ The sunset applied to the following sections: **201** (wiretapping in terrorism cases); **202** (wiretapping in computer fraud and abuse felony cases); **203(b)** (sharing between wiretap information); **203(d)** sharing foreign intelligence information; **204** (FISA surveillance pen wiring/trap and trace exceptions); **206** ('roving' FISA wiretaps); **207** (duration of FISA surveillance of foreign agents); **209** (seizure of voicemails messages pursuant to warrants); **212** (emergency disclosure of electronic surveillance), **214** (FISA pen register/trap and trace

renewal would allow the review of critical clauses and the derogation of emergency powers given to the executive. The USA PATRIOT Improvement and Reauthorization Act of 2005 makes permanent fourteen out of these sixteen sections (Public Law 109–177) without much additional evaluation evidence collected (Olson 2006). It also created a new sunset for December 31st 2009 for two sections, provided for greater congressional and judicial oversight, and established a new Security Division within the Department of Justice. These sections were reauthorized for an additional one year in early 2010 while their amendments are debated in committees of the Senate and the House of Representatives (S.1692).

The *Homeland Security Act of 2002* (Public Law 107–296) was signed into law by George W. Bush on 22 November 2002 more than a year after the 9/11 terrorist attacks and the enactment of the USA PATRIOT Act of 2001. It can be regarded as the logical continuation of the dearth of legislative changes following 9/11. The Act was preceded by the creation of the Office for Homeland Security (in charge of producing a comprehensive National Security Strategy) and the Homeland Security Council (in charge of coordinating and advising upon domestic security issues) in October 2001 (Executive Order 13228). Most importantly, pre-2001 evaluation evidence has already pointed at the deficiencies of coordination among agencies catering towards domestic security: the Hart-Rudman Commission, established in 1998, already recommended the creation of a National Homeland Security Agency, a recommendation which was neglected at that time. The 9/11 attacks provided critical impetus for change in the direction previously suggested by evaluation (Noftinger et al, 2007).

The Act of 2002 instituted the largest change in the American executive since the creation of the Department of Defense in 1947 by creating the Department for Homeland Security (DHS) which integrated twenty two existing and separate federal agencies including the Immigration and Naturalization Service, the Secret Service, the Customs Service, the Federal Emergency Management Administration and the Border Patrol. DHS' goals were to plan, coordinate and integrate US government activities relating to homeland security at the cabinet level. The changes of the 2002 Act can be regarded as a core institutional and administrative reconfiguration.

The Act of 2002 does not contain any review clauses which are comparable to the USA PATRIOT Act; however, several Government Accountability Office (GAO) reviews took place since 2002 which significantly impacted on the institutional set-up created by the Homeland Security Act. Evaluation focussed pre-eminently on issues of efficiency and effectiveness and did not question the overall concept and legitimacy of a centralized federal department; however, it pointed out to a number of crucial problems of the DHS such as the lack of detailed and measurable goals, dedicated personnel, and leadership support that would advance the integration process of highly disparate institutions entailing different organizational cultures (Purpura, 2007). There is evidence that evaluation findings exerted considerable influence on the post-2002 development of the organizational structure of DHS (GAO, 2004). Furthermore, it is worth mentioning that the flaws of policy response to the Hurricane Katrina's damage further advanced the restructuring process of DHS providing an additional instance of emergency induced institutional change which we, however, cannot discuss here due to text length limitations.

authority); **215** (FISA access to tangible items); **217** (interception of computer trespasser communications); **218** (purpose for FISA orders); **220** (nationwide service of search warrants for electronic evidence); **223** (civil liability and discipline for privacy violations); **225** (provider immunity for FISA wiretap assistance);

The Anti-Terrorism, Crime and Security Act of 2001 and the Prevention of Terrorism act of 2005: A potential for effective ex-post evaluation

Similar to the USA PATRIOT Act of 2001 the *Anti-Terrorism, Crime and Security Act of 2001* (2001 Chapter 24) was enacted quickly after the 9/11 terrorist attacks: the one hundred twenty three page long bill was introduced to the Parliament in 19 November 2001 and entered into force in 14 December 2001. Thus, the Act faced little effective parliamentary scrutiny (Metcalf, 2008). The goal of the Act was to provide the UK Government with increased powers to counteract potential terrorist threats. The introduction of 2001 Act had significant consequences including additional powers for the police, measures related to information sharing and to the security of airports. These, nevertheless, can be regarded as sectoral changes in the institutional set-up and regulatory environment in spite of the broader implications relating to the balance of power between the executive and parliament.

The changes it produced expanded the powers and jurisdiction of police and law enforcement agencies by giving them extended and quicker freezing powers over criminal assets and the ability to detain international terrorists without prior trial. The latter contravened the European Convention on Human Rights; however, it was kept in place by applying a temporary derogation framed as 'public emergency situation'. It also enabled HM Customs and Excise and the Inland Revenue to disclose information and to intelligence services and for law enforcement purposes. Commentators noted the erosion of civil liberties and the increased powers of the executive and of the UK security apparatus (Metcalf, 2008).

Of crucial importance is the fact that the Act of 2001 required a sunset clause (Section 29) for the most controversial part of the legislation, namely the deportation and detention of suspected international terrorists (Section 21-23 of Part 4). That is, Sections 21 to 23 were deemed to expire in fifteen months from the passage of the Act and the Secretary of State was required to decide over their continuation or otherwise every year. This allowed the parliament an annual opportunity to debate over the controversial issues. The Act also ordered an independent review of these controversial sections (Section 28). Furthermore, the whole Part 4 of the Act was deemed to expire on 10 November 2006. Finally, no later than two years after the Act was passed, a Commission of Privy Councillors was required to comprehensively review the Act which entitled the oversight body to specify any part of the Act which was to cease within six months (Section 122).

Both the Parliamentary Review Committee of 2003 and the Committee of Privy Councillors deemed the Act as not a sustainable way of addressing the problem of terrorist suspects, incoherent in several respects, and incompatible with other legislation. Regardless, the Home Secretary issued a Continuance Order in 2004 claiming that Part 4 of the Act is vital for combating terrorism and represents the cornerstone of anti-terrorist policies which is a necessary proportionate response to the current threat (Home Secretary, 2004). This represents a clear case where the executive decided against evaluation evidence and oversight bodies' recommendations.

The *Prevention of Terrorism Act of 2005* is directly related to the above discussed Anti-Terrorism Act of 2001 as one of its triggers, besides the London bombings, was the Law Lords' ruling of 16 December 2004 that the detention without trial of nine foreigners the Anti-terrorism Act of 2001 was unlawful. Unlike the previously discussed laws, the passage of this one (on 11 March 2005) was preceded by an extensive parliamentary debate which led to a compromise where the controversial

sections of the bill were accepted by the opposition in return for sunset clauses. The key focus of the 2005 Prevention Act was the detention of terrorist suspects. It made provisions to impose 'control orders' (substantive restraints on liberty in the form of quasi-civil injunctions) on nationals and non-nationals where the Home Secretary had reasonable suspicion that the individual is or has been involved in terrorism-related activity. Thus, this Act can be considered as a readjustment to the legal framework established by the Anti-terrorism Act of 2001. The review clause of the 2005 Act required its annual review; the whole Act was annually renewed since then.

Comparative analysis

This section briefly reviews the two hypotheses introduced above. The *first hypothesis* relating to the quantity and quality of evaluation used in emergency policy making is clearly supported by evidence of the two countries. In both cases, no prior policy evaluation took place and most parliamentary scrutiny was suspended or postponed. The most striking case is provided by the USA PATRIOT Act of 2001 where the Act was written into law within seven weeks of the 9/11 terrorist attacks and within three days after it has been introduced to the legislative: effectively no evaluation took place. Similarly, the UK Anti-terrorism Act of 2001 was rushed through the legislative process with little actual evaluation (Metcalf, 2008). In the case of the Homeland Security Act of 2002 evaluation evidence gathered as early as 1998 was invoked; however, no direct relevant evaluation work took place as the Office for Homeland Security and the Homeland Security Council did not publish any reports of this kind. This has led to the omission of important aspects in the institutional reconfiguration, e.g. disparate organizational cultures of the integrated federal agencies. Finally, throughout the discussions leading up to the enactment of the Prevention of Terrorism Act of 2005 the available evaluation evidence was largely ignored by the government. This evidence was generated under the numerous reviews of the Anti-Terrorism Act of 2001.

The *second hypothesis* relates to the explanations of the different uses of evaluation or review clauses and different outcomes of reviews in terms of policy reversal in the UK and the US. Based on the case study material the UK shows more extensive use of review clauses than the US and displays a slight reversal of the emergency powers conferred to the executive while the US by and large made permanent most of the temporary clauses in 2005. The two UK bodies which carried out evaluations of the Anti-Terrorism Act of 2001, the Parliamentary Review Committee of 2003 and the Committee of Privy Councillors, accumulated considerable amount of evidence directly relating to the most controversial sections of the Act (e.g. Privy Counsellor Review Committee, 2003). Furthermore, the passage of the Prevention of terrorism Act of 2005 can be considered as slight policy reversal as it somewhat circumscribed the executive's power to detention. Whereas in the US, the USA Patriot Improvement and Reauthorization Act of 2005 mostly made the temporary sections of the USA PATRIOT Act of 2001 permanent without much reference to evaluation evidence (Olson 2006). The only remaining temporary sections were reauthorized for an additional year in early 2010 (S.1692), which together with the continual existence of DHS justifies the claim that there has been no policy reversal in the US and only limited use of evaluation.

At the outset of the analysis, we hypothesised that the combination of emergency legislation and review clauses should have produced some changes in policy for at least two reasons: first, the circumstances requiring the emergency legislation are likely to change over time. Second, the legislation is often introduced very quickly without much consideration of evidence or review; hence, review clauses, which are present in the US and the UK, are likely to be exercised by either

the executive or the legislative. However, we find marked differences in policy reversal as well as in the use of evaluation which we need to explore further.

In explaining why actors engage differently with review clauses, we explore first how much opportunity the review clauses offered to reverse and review emergency legislation. Most markedly, the US emergency legislation offered only weak review opportunities and only after a relatively long period following the emergency situation: section 224 of the USA PATRIOT Act of 2001 set sunset to 16 of its sections without requiring any specific review and the Homeland Security Act of 2002 offered no review requirement at all. Whereas, the UK emergency legislation required much shorter timeframes for reviews and explicitly called for evidence reviews on effectiveness and appropriateness: the Anti-Terrorism Act of 2001 called for review within fifteen months and allowed only for an annual renewal of sunsetted clauses; moreover, it explicitly stipulated the requirement of an independent review process. Similarly, the Prevention of Terrorism Act of 2005 introduced annual reviews. Each of these provided a range of opportunities for actors to accumulate evidence and debate emergency legislation.

Furthermore, actors in the executive and legislative are constrained by the scope of legislation. An important and more specific difference between the two cases is that the US emergency legislation introduced macro-institutional changes whereas the UK legislation brought about only sectoral changes. In the US, the USA PATRIOT Act and the Homeland Security Act resulted in a large re-organisation of the core executive with a centralisation of power over borders, intelligence, and other functions. Any change in the US after the 2005 Reauthorisation Act would require further changes in the core executive or a repeal of existing emergency legislation. There are substantial political implications, and therefore it would not be in the President's interest to give up executive prerogatives of power. Nor, would any political party waste political capital to repeal parts of legislation and be seen to be soft on terrorism. Thus, the veto points were strengthened in 2002 and 2005 to an extent that made policy adaptation and reversal unlikely.

In the UK, the emergency legislation, while extending police and executive powers, did not result in a major macro-institutional reconfiguration. Moreover, review clauses were never repealed; instead they were annually renewed amidst intensive debate and significant use of evaluation. This allowed for reconsideration of evidence and repeal of provisions made under emergency conditions. In essence, the emergency legislation in the UK shows sectoral adaptation and did not tie the executive and legislative indefinitely to the legislative program. Moreover, it must be noted that the legislative and executive bodies engaged differently with evidence. While legislative review committees did not perceive the urgency of indeterminate detention, the executive constantly argued that it provided the fundamental core in the fight against terrorism, with law enforcement bodies arguing for its continuation.

In terms of political turnovers, it seems likely that political turnover creates opportunities for policy review. In the UK, the current Conservative and Liberal Democrat government seems likely to review a number of provisions of the 2001 and 2005 Acts out of concern for the encroachment of government on civil liberties such as the right of the government to keep information on citizens and the restoration of the rights to non-violent protests (See for instance section 10 of the Conservatives and Liberal Democrat Coalition Agreement). On the other hand, in the US, the Obama administration from 2008 onwards by and large continued the emergency policy introduced by the Bush

administration, which can be at least partially accounted for the already established new institutional structure and the weak review clauses.

Conclusions

The question we posed ourselves is to what extent evaluation is accommodated in emergency legislation. The answer seems to be somewhat. While it is clear that there was a marked drop in the quantity and quality of evidence collected at the time of the introduction of emergency legislation, both the UK and US introduced review clauses in the post 9/11 emergency legislation. These clauses were used to different degrees and to some extent make up for a lack of upfront scrutiny and planning.

Our initial expectation was that over time as the emergency situation abates and new evidence is collected, the reviews will allow emergency legislation to be adapted. However, as we see from the cases, only the UK shows some signs of policy reversal based on extensive evaluation. The mere presence of review clauses and the elapse of time are not sufficient predictors of a return to the previous status quo and evaluation practice. The real question then is to what extent policy makers have an opportunity to make use of the review clauses. Table 2 highlights the key variables of the analysis.

Table 2. Summary of cases along key independent and dependent variables

Starting point		Explanatory variables			Outcomes	
Case	Emergency legislation	Review clauses	Institutional change	New government	Policy reversal	Use of evaluation
US	Yes	Weak	Core administration	Yes	No	Minor
UK	Yes	Strong	Sectoral	Yes	Partial	Extensive

It can be expected that the presence of review clauses and political turnover would change the opportunity structure in such a way that actors would seek changes in emergency legislation. However, two further factors are important: the strength of the review clause and the scope of the legislation. In the US, the clause only allowed some aspects of the Patriot Act to be reviewed in 2005. By 2005, the Homeland Security Act of 2002 had institutionalised many parts of the Patriot Act and had re-organised the core executive. Any substantive reversal of the Patriot Act in 2005 would require a further re-organisation of the core executive. In addition, it would be seen as reversing the key policy against terrorism. No legislative actor saw this as a way to further a political agenda (Olson 2006). In addition, the executive where power had been centralised would unlikely cede power without prompting from the legislative. In the UK, the clauses were more onerous and required annual reviews. Moreover, the legislation had not substantially altered the organisation of the executive. Hence, the debate concerned mostly sectoral and technical changes in policing and intelligence practice. Reviews were more effective in bringing new evidence in the debates on policy

adaptation and the political turnover in 2010 is likely to have a further impact on the emergency legislation of 2001 and 2007.

The conclusion seems to be that ex post reviews can to some extent make up for the absence of upfront scrutiny and planning, but only when legislative and executive actors have a real opportunity to use the review clause to shape policy. This opportunity is more likely to exist when the scope of legislation is limited and when legislative clauses allow for regular or permanent reviews.

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