

Crisis Authority, the War on Terror and the Future of Constitutional Democracy

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Italian political philosopher Giorgio Agamben has predicted the decline of liberal democracy at the hands of an overreaching executive in all present day democratic political systems. According to Agamben, crises, and the use of exceptional authority, or “the state of exception” as coined by Carl Schmitt, have allowed the executive branch to acquire legal powers beyond its original purpose, and this is eroding the balance of powers and checks on authority. To dispute this claim, I investigate the War on Terror, which Agamben cites as having led to “pure de-facto rule” (Agamben, 2005). I explore the acceptance of exceptional authority by the public, the exact legal violations of the president, the termination of the exception and the subsequent legal recovery. I suggest that, based on present day circumstances, Agamben’s predictions may be heavy-handed.

Introduction

Thomas Jefferson once wrote, “To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means” (Jefferson, 2000). President Jefferson suggested that deviation from the law, from the American constitution, is acceptable, or even necessary, in some circumstances. Some would find this to be shocking, but in reality numerous American presidents have endorsed this logic. President Abraham Lincoln, who issued the Emancipation Proclamation, won the Civil War, and introduced legislation to reunify the country after the termination of the war, is portrayed as one of the greatest American presidents ever to have taken office. But Lincoln also broke constitutional law by assembling the military prior to congressional approval, suspending habeas corpus, and approving military trials to deter desertions in the north among other illegal actions. Despite his legal infractions, Lincoln was not impeached and Congress systematically approved his actions during and after the war (Farber, 2003). This follows President Jefferson’s logic perfectly: President Lincoln’s breach of the law was justified because it is believed that his extralegal actions worked proactively to defend the life of the nation.

Eight years of the War on Terror have ignited doubts as to the legitimacy of presidential law breaking. In the wake of September 11th, the country was confronted with the need for a decision on how to react to the organization that had attacked American civilians on American soil. The Bush administration bolstered presidential authority and domestic surveillance, adopted the rhetoric of a “war” against terrorism, and stated that they would “do whatever it takes to protect Americans” (Bush, 2001). Eight years later, American citizens now know the reality of these promises, including: torture, indefinite detentions, wiretapping, extraordinary rendition, and trial by military commissions. President Jefferson’s

logic would suggest that the Bush administration's actions, though they were illegal, were legitimate if they worked proactively to defuse a serious crisis. However, President George W. Bush, as of October 20th, 2008, had "a 25 percent approval rating, which is an all-time low," (Meacham, 2008) and, "Just one-third (32%) give the President positive ratings for his handling of the war on terror while 61 percent give him negative ratings"(The Harris Poll, 2008). These polls suggest that, even though the country has not seen a terrorist attack since September 11th, President Bush's policies in the War on Terror have come with a political cost. Such responses to the president's policies raise the questions: how does the government acquire crisis authority to begin with and how does the polity reinstate the rule of law and checks and balances following the conclusion of the crisis?

To understand how the justification of crisis authority sticks and becomes policy, the term requires closer scrutiny. Throughout history there have been moments when the mechanisms of a government were perceived as inadequate means to cope with an immediate challenge. For a totalitarian state, the reaction to such challenges is uncomplicated: it has absolute sovereignty and may take whatever action it deems necessary without deference to the law because the totalitarian state is the law. Conversely, a constitutional democracy has popular sovereignty, which means its actions are ultimately accountable to its citizens. When faced with a novel challenge, democratic government leaders are faced with two choices: they may either argue for exceptional powers by framing the issue as a crisis or they may respond with policies within the existing mechanisms of government. In this sense crises are not a definable or tangible concept; they are the acceptance of exceptional government powers brought about by government speech acts and the public's approval.

Giorgio Agamben has deemed moments of crisis authority "states of exception" (Agamben, 2005), a term that was originally introduced by Carl Schmitt in the early 20th century (Schmitt, 1985). To induce the state of exception, government leaders frame the challenge as an issue of national security. This process has been termed "securitization" by Ole Waever and involves persuasive dialogue between the government, media and public (Waever, 1995). By successfully applying the national security frame, government policies are exempt from normal obligations to transparency, relevant constitutional and international laws and the balance of powers among the branches of government.

Either a conclusive end to the "crisis" or the persistence of political and legal arguments supporting a move away from the state of exception could induce what Waever calls "desecuritization" (Waever, 1995). Desecuritization, like

securitization, is similarly grounded in the persuasiveness of government speech-acts and the sentiment of the nation's citizens. Dissimilarly, desecuritization removes the national security frame from the issue and hence exposes it to the normal processes of the government. This latter aspect of desecuritization gives rise to a process of legal recovery entailing transparency of government actions and review by the institutions within the government and the public. If the consensus is that the extralegal actions were legitimate, then what results is an expansion of executive powers within the exception. If certain policies are deemed illegitimate, then arguably the executive should be constrained from using such means in the future.

Agamben, however, posits World War I as the beginning of "exceptional legislation by executive decree," which he argues became a "regular practice in the European democracies" (Agamben, 2005). After the war, many Western democracies allowed the state of exception to expand and eventually applied it to all types of crisis scenarios, including armed conflict, economic depression, natural disasters and internal sedition. Agamben argues that this tendency has shifted power in liberal democracies from the legislature and judiciary to the executive and has led to the rise of executive dominance in Western politics. Agamben states that "At the very moment when it would like to give lessons in democracy to different traditions and cultures, the political culture of the West does not realize that it has entirely lost its canon" (Agamben, 2005). Indeed, Agamben goes as far to describe the growth of executive authority as "a threshold of indeterminacy between democracy and absolutism" (Agamben, 2005). To cross such a threshold would mean the creation of absolute sovereignty within popular sovereignty. Such a trend is alarming, as it would seem to give democratic legitimacy to "authoritarian" actions.

However, I argue that Agamben has overlooked the role of the public and the media in the acceptance of the state of exception, and their ability to instigate desecuritization, and that Agamben has neglected desecuritization and the subsequent legal recovery. In this paper I will investigate an instance of the state of exception: the American War on Terror. I will show that successful securitization elicited media, public and inter-governmental consensus, and that a widespread change in this consensus led to desecuritization. I will review the executive's extralegal actions to illustrate the policy outcomes of the state of exception. Finally, I will investigate the legal recovery following desecuritization to raise questions concerning Agamben's prediction of the relative growth of the executive's authority. To begin, clear definitions of the state of exception and securitization are needed.

The State of Exception

The state of exception is the temporary suspension of constitutional law or legal norms for the sake of additional flexibility in a time of crisis. The practice of exceptional authority elicits a paradox: as the state of exception suspends law via executive mandate, it also grants the force of law to the very body that has suspended it (Agamben, 2005). Not only is the state of exception a suspension of the legal order, it is also the creation of a force of law outside of the legislative and judicial branches of government. Agamben explains that this results in “the provisional abolition of the distinction among legislative, executive, and judicial powers,” because the state of exception “conflict(s) with the fundamental hierarchy of law and regulation in democratic constitutions and delegates to the executive a legislative power that should rest exclusively with Parliament,” or Congress as is the case in America (Agamben, 2005).

Many European democracies, such as England, Switzerland and Germany, have attempted to create laws directly addressing the state of exception within their constitution in order to regulate this imbalance between the executive and the other branches of government (Agamben, 2005). The United States makes no direct reference to how a state of emergency should be handled in the Constitution, but has tried to govern exceptional authority. This can be seen in Article I, which states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (The Constitution of the United States of America, 1787). The provision’s location in Article I and Congress’ power to declare war and to raise and support the army suggest that Congress holds this power, but the executive’s role as the “Commander in Chief of the Army and Navy,” has led to a lengthy debate over this power (The Constitution of the United States of America, 1787). Thus it remains unclear which branch has the final say on “Cases of Rebellion or Invasion,” and the suspension of habeas corpus, a term that refers to the government’s requirement to legally review the detainment of any individual accused of a crime.

This confusion culminated with the War Powers Act of 1973, a result of the Korean and Vietnam wars wherein the United States was involved in armed conflict without a declaration of war from Congress. This act was a joint resolution from the President and Congress that delineated the correct legal pathways for initiating armed conflict and which was meant to resolve any future controversy surrounding the allotment of war powers. Agamben notes that states of exception generally function to fill a “lacuna” in the legal order in response to novel challenges (Agamben, 2005). Agamben does not discuss the War Powers Act of

1973 directly, but it was clearly an attempt to legally address such a lacuna in the designation of executive and legislative war-time authority. Similar to how other democracies had legally incorporated the state of exception through laws demarcating when an extralegal response to a crisis was necessary (Agamben, 2005), the War Powers Act grounded the use of the military in “the circumstances *necessitating* the introduction of the United States Armed Forces” (The War Powers Act, 1973). Agamben clarifies this relationship between necessity and the state of exception, explaining that “the state of exception is wholly reduced to the theory of the *status necessitates*, so that a judgement concerning the existence of the latter resolves the question concerning the legitimacy of the former” (Agamben, 2005).

The question then arises, who has the authority to decide when exceptional authority is *necessary*? Necessity is introduced when the safety of the state or its people are “at risk.” However, stating the country is “at risk” is fundamentally a subjective analysis of a scenario rather than an objective application of a legal definition. Therefore, while some Western democracies have direct constitutional language on the state of exception, and while the War Powers Act sought to establish the “circumstances necessitating the introduction of United States Armed Forces” (The War Powers Act, 1973), the definition of the country or its people as “at risk,” and the circumstances that indicate “imminent involvement in hostilities” are politically subjective. Consequently any decision on the state of exception is reduced to a political, and not a legal, decision. This characteristic of the state of exception reflects the very nature of crises: they are not a tangible or definable object that would lend itself to legal incorporation; they are instead the result of a society’s consensus regarding the magnitude, and requirements, of an immediate challenge.

In light of the political nature of security decisions and the seriousness of crisis scenarios one must wonder how a state with popular sovereignty is able to settle on what measures are sufficient to deal with crises. Furthermore, how do democratic government officials, who must by nature be concerned with the sentiment of their constituents, gain the popular support for exceptional security decisions? While Agamben discusses the characteristics and history of the state of exception, he does not consider how popular opinion and media coverage affect such policies within a constitutional democracy. Ole Wæver’s theory of securitization provides insight into just how the state of exception can be “sold” to the public, and consequently depoliticized.

Securitization

Wæver invokes Hobbes’ *Leviathan* to show that the

power of securitization rests with “whatsoever Man, or Assembly that hath the Sovereignty, to be Judge both of the meanes of Peace and Defense; and also of the hinderances, and disturbances of the same” (Waever, 1995 citing Hobbes, 1651). Waever adjudicates the power to define security issues to the sovereign similarly to how Agamben and Schmitt define the sovereign as “he who decides on the exception” (Schmitt, 1985). In Waever’s words:

“...security is not of interest as a sign that refers to something more real; the utterance itself is the act. By saying it, something is done... By uttering “security,” a state-representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it.” (Waever, 1995)

Once an issue has been securitized, the government gains the right to use “whatever means are necessary” to resolve the issue. Hence the securitization of an issue is synonymous with the entrance into the state of exception.

But overlooked by this understanding of the state of exception and crisis authority thus far is the public’s acceptance of such terms. If all a state-representative must do is utter the word “security” in relation to a certain issue to gain unprecedented control over that issue then this raises the question: why do government leaders not securitize multiple issues if all that is required is a persuasive speech act? Agamben very occasionally refers to a “presidential political vocabulary” used in invoking the state of exception, but he overlooks the need of this vocabulary to persuade its target audience, the citizens, within popular sovereignty (Agamben, 2005). Michael Williams offers two points to clarify the exact workings of securitization in a democratic state: the persuasiveness of a speech act and the role of the media. As Williams explains,

“Casting securitization as a speech-act places that act within a framework of communicative action... [which] involves a process of argument, the provision of reasons, presentation of evidence, and commitment to convincing others of the validity of one’s position. Communicative action (speech-acts) are thus not just given social practices, they are implicated in a process of justification.” (Williams, 2003)

Furthermore, Williams stresses that “political communication is increasingly bound with images...” and, therefore, “the speech-act of securitization... is a broader performative act which draws upon a variety of contextual, institutional, and symbolic resources for its effectiveness”

(Williams, 2003). This critique of Waever’s theory argues that there is an audience at which the speech-act is directed, that all media of communication may contribute to the debate, and that the audience must be convinced in order for the securitization to stick. Thus, all images, media coverage, political messages and relevant resources have the potential to contribute to a successful, or unsuccessful, securitization speech-act.

While the securitizing move allows for the temporary use of exceptional, sometimes covert, measures, it does not suspend the popular and political discourse on how best to handle the crisis, and this conversation can sometimes lead to its desecuritization (Waever, 1995). In conventional warfare, the desecuritization of the crisis almost invariably occurs with a cease-fire or surrender from one of the warring parties. When crises take on less concrete forms such as financial crises or security crises that lack a definable conclusion, their desecuritization is less concrete as well. Waever argues that the East-West relationship in Europe during the 1970’s and 1980’s was a security issue that did not confer a precise conclusion, and that this characteristic allowed the persistent popular and political discourse to lead to the desecuritization of the issue:

“A great deal of the East-West dialogue of the 1970s and 1980s, especially that on “non-military aspects of security,” human rights, and the whole Third basket of the Helsinki Accords, could be regarded as a discussion of where to place boundaries on a concept of security: To what degree were Eastern regimes “permitted” to use extraordinary instruments to limit societal East-West exchange and interaction?” (Waever, 1995)

Waever explains that “negotiated desecuritization and limitation of the use of the security speech act,” led to a “speech act failure,” and the subsequent desecuritization of the relationship between Eastern and Western Europe (Waever, 1995).

When an issue is securitized executive authorities are granted significant decision-making authority, but the conversation among the media, academics and government elites over the issue continues, and as Waever points out this dialogue can shift the consensus to reject the state of exception, or, in other words, cause desecuritization. The desecuritization of an issue means that it is now subject to political and legal analysis and is no longer sheltered by the security frame. This creates the potential for the polity’s legal recovery as obligations to transparency, the constitution and checks and balances are reinstated. A full recovery would require a return to the status quo in relation to constitutional laws and balances of powers and international treaties and

norms prior to the crisis. However, if the exceptional policies invoked in the crisis are legitimized by the other branches of government, a new precedent is set for future executives facing a crisis scenario.

Combining Williams, Waeber, and Agamben, I propose that the sovereign may enter into the state of exception only when it can successfully securitize the issue at hand through persuasive speech-acts targeted at its citizens that can be enhanced by relation to dramatic or alarming media coverage or images available to the population. Once an issue has been securitized, the government is exempt from normal obligations to transparency, relevant constitutional and international laws and the balance of powers among the branches of government. Desecuritization occurs either through a concrete end to the crisis, or through a change in popular sentiment that leads to the failure of the securitizing speech-act. Once the issue has been desecuritized the normal mechanisms of government are restored and the polity may begin a process of legal recovery.

The following analysis will review the processes of securitization, acceptance, desecuritization and legal recovery within the context of the War on Terror. My goal will be to demonstrate a relationship between popular opinion, media coverage and the acceptance of the securitization speech act, as well as to raise questions concerning Agamben's predictions of executive dominance by reviewing the legal recovery brought about by desecuritization.

Case Analysis: The War on Terror

Prior to September 11th, the greatest national security risk was believed to be invasion by foreign militaries. Following the attacks on the Pentagon and the World Trade Centers, however, a new threat emerged in the form of international terrorists. As previous administrations had handled crime and drug trafficking policy, Bush's administration reacted to the new terrorist threat with the rhetoric of war. President Bush, in his addresses to the nation following September 11th, invoked the necessity to protect American life as the primary reason for initiating the controversial policies that compose the War on Terror (Bush, 2001). But the terrorist threat did not presuppose the use of war rhetoric or state of exception powers. The Bush administration could have argued for criminal prosecutions of the terrorists and for policies crafted through the normal mechanisms of the government. In this section I will show that, instead, the administration's portrayal of terrorism and the media's reaction to September 11th securitized the War on Terror and gave rise to a state of exception, which then allowed the executive to unilaterally enact extralegal policies, such as violations of Congressional authority, domestic surveillance laws and international laws

regarding armed combat. I will show that, coupled with the lack of concrete victory conditions in the War on Terror, media, academic and dissenting government officials' criticism of the administration's policies shifted public sentiment towards desecuritization. I will then assess the current legal recovery to show that there are positive trends which suggest that Agamben's labeling of the American government as "pure de-facto rule" may be premature.

If the Bush administration had argued that terrorism was a crime and not an act of war, then the exception would not have occurred. Instead, "The Bush administration has used war rhetoric precisely to give itself the extraordinary powers enjoyed by a wartime government" (Roth, 2004). The question that arises is what the administration's policies would have been like if it chose not to securitize terrorism. The debate between Kenneth Roth, who supports criminalizing terrorism, and Ruth Wedgwood, who favors the administration's militant reaction, demonstrates not only what a non-securitized response to terrorism would have looked like, but also the arguments in favor of a state of exception.

Critics of the application of criminal law argue that there is "little existing law that is directly applicable to the war on terror" (Bradley, 2008), that "criminal law is too weak a weapon" (Wedgwood, 2004), for the fight against terrorism, and that the transparency involved in criminal trials "may prevent intercepting telltale signs of future attacks" (Wedgwood, 2004). Wedgwood invokes the case of Jose Padilla, an American citizen who allegedly traveled to Afghanistan to receive explosives training from al Qaeda, to show the complications of criminally prosecuting terrorists. She argues that, because Padilla would not have to testify against himself because of his Fifth Amendment rights, and because the lead witness against him, Abu Zubaydah, was in custody outside the country, that the single only alternative would have been to let him go free under criminal law (Wedgwood, 2004).

Conversely, Kenneth Roth disputes this logic, arguing that the U.S. government's detainment of Padilla based on the account of one suspect "held incommunicado and under 'stress and duress' interrogation," is illegitimate in the first place, as "Such 'evidence' would never be admitted in a U.S. court of law, let alone establish guilt beyond a reasonable doubt" (Roth, 2004). Roth stresses that "the problem lies... in the designation of non-battlefield suspects as enemy combatants" (Roth, 2004). He argues that the application of the rules of war to non-conventional battlefields, such as in the War on Terror, could become a dangerous precedent that would allow the U.S. government to nullify Constitutional and human rights in response to novel threats in the future (Roth, 2004). Instead, Roth developed a three part test to

determine if a suspect should be tried under martial law or if criminal prosecution would be sufficient. His three “triggers” for war rules are: when an organized group is directing repeated acts of violence with sufficient intensity to describe it as armed conflict, when the suspect is actively engaged in that conflict and when law enforcement means are unavailable (Roth, 2004). Such a test would distinguish true enemy combatants who are an imminent threat to the country’s safety from individuals who are simply suspects or have terrorist ties but have not committed any other crime.

Paramount to this debate are the exact mechanisms that would be used to try terrorist suspects. Roth argues that the evidence used to identify terrorist suspects is sufficient to prosecute them under charges of conspiracy. He also disputes the detrimental effect criminal prosecution would have on intelligence for preventing future attacks, as “the Constitution only prohibits prosecutors from using the information derived from the flawed interrogation at trial; it does not forbid other investigators, such as those trying to prevent future terrorist acts, from questioning the suspect without a lawyer present, so long as these investigators do not relay his or her words... to the prosecution team” (Roth, 2008). Roth admits that this division of labor would be inefficient, but is favorable over indefinite and legally problematic detentions. Intelligence gathering methods can also remain covert in Roth’s view while simultaneously allowing for criminal trials. Roth cites the Classified Information Procedures Act of 1980, which outlines how to allow a defendant their right to confront all of the evidence against them while keeping sensitive secrets restricted to a number of legal personnel. Furthermore, there is empirical evidence to support Roth’s argument for criminal law: Europe has effectively combined national security concerns with criminal prosecutions of terrorists for decades (Ratner, 2008) and Saudi Arabia has established a system of incarcerated terrorist reform that uses familial, societal and religious pressures to convince terrorists that their ideology is ineffective and unethical (Henry, 2007).

Securitization

Despite the potential of criminal prosecutions, this was not the course of action that the Bush administration pursued. Instead, terrorism was securitized: on September 16th, 2001, President George W. Bush said, “I gave our military the orders necessary to protect Americans, do whatever it would take to protect Americans... We’re a nation of law, a nation of civil rights. We’re also a nation under attack” (Bush, 2001). Bush’s response to terrorism immediately constructed it as a national security threat and not a crime. Indeed, Bush spoke passionately, declaring that “freedom itself is under attack”

while selling his agenda (Bush, 2001).

But the sentiment within the country and the media’s reaction to September 11th were what laid the basis for the administration’s successful securitization. The predominance of assenting views to the administration’s policies immediately following September 11th can be seen by their acceptance by political rivals. Even Liberals were condoning the use of torture and other extreme policies at the onset of the War on Terror. Jonathan Alter wrote in *Newsweek* in November 2001 that “In this autumn of anger, even a liberal can find his thoughts turning to... torture,” and “Some people still argue that we needn’t rethink any of our old assumptions about law enforcement, but they’re hopelessly “Sept. 10”--living in a country that no longer exists” (Alter, 2001). Legal scholar Alan Dershowitz argued for the legalization of torture warrants (Dershowitz, 2002). Polling in the months following September 11th showed that 88% of Americans approved of the current military actions against terrorism, 64% thought it would be all right for the president to bypass the normal judicial system and ask for military trials for suspected terrorists and 87% said they approved of President Bush’s overall handling of the War on Terror (Polling Report Inc.). The sentiment of the country was in line with the President’s vision of the War on Terror, and this assisted the administration’s securitization of terrorism and allowed it to engage the state of exception with little to no dissent. The resulting policies were violations of domestic surveillance laws and international laws governing the treatment of enemies in combat.

The State of Exception

The media uncovered the administration’s warrantless surveillance program in 2005, a program which violated not only the 1978 Foreign Intelligence Surveillance Act but also the balance of powers expressed in the Constitution as “Even if one concludes... that the executive branch had good reason for its surveillance program, this does not excuse its failure to seek authorization for it from Congress...” (Bradley, 2008). Even if the surveillance program helped the administration respond to potential security threats, established processes of Congressional oversight of executive policies were ignored. Such an action gives weight to Agamben’s argument, as it shows clear evidence of the distortion of checks and balances in favor of the executive. Additionally, no immediate or post-hoc action was taken against the administration, further reinforcing Agamben’s view.

Equally significant was the administration’s treatment of international laws regarding the treatment of enemy belligerents. At the center of the Bush administration’s policies for the treatment of detainees were the legal

memoranda issued by the Justice Department that explained the inapplicability of the Geneva Conventions to these individuals (Yoo and Delahunty, 2002). Through their legal analysis of the Geneva Conventions, the Bush administration recycled an entity in armed conflict that had been used previously by the French in Algeria: the enemy combatant. An enemy combatant is an individual who does not fit the description of an armed combatant according to the Administration's reading of the Conventions, and therefore is subject to any treatment the President deems necessary. What became increasingly clear as the war progressed, however, was that the administration meant to use these individuals as their primary source of information to prevent future attacks. When suspected terrorists were captured on the battlefield in Afghanistan or Iraq, they were sent to Guantánamo Bay, Cuba, a tract of land that constitutes an anomie between American, U.S. military and Cuban legal jurisdiction. This placed detainees within a threshold of legal indistinction that concerned not only the criminal or legal status of the individuals themselves but even the very land they were detained on. These complications have made the process of legal recovery concerning these individuals ambiguous and uncertain.

Much that occurred at Guantánamo Bay was shrouded in secrecy throughout Bush's presidency, but it is now known that CIA interrogators used coercive tactics such as water boarding, sensory deprivation, denial of food and sleep, and the slamming of detainees against walls (Mazzetti and Shane, 2009). Furthermore, the administration reportedly practiced extraordinary rendition, which "violates numerous international human rights standards, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention and Protocol Relating to the Status of Refugees, the Convention against Torture, the Vienna Convention on Consular Relations and the Geneva Conventions" (Weissbrodt and Bergquist, 2006). Of these standards, the Geneva Conventions have been the most specific target of the administration's legal review.

The Geneva Conventions were a reaction to World War II and World War I, and therefore represent rules of armed conflict as they were understood in the year 1949. The threat of international terrorism had not come to the world's attention as of yet, and the distinctions that the Bush administration focuses on to argue the inapplicability of the Geneva Conventions to the Taliban and al Qaeda were "very specific—and minor—details" (Ratner, 2008). The Bush administration's treatment of al Qaeda was based solely on the fact that the organization is not a state and cannot be a signatory to the Conventions, and so the President need

not extend prisoner of war protections to its members. However, such an argument ignores the text and purpose of the conventions, which "contain one section—Article 3—that protects all persons regardless of their status, whether spy, mercenary, or terrorist, and regardless of the type of war in which they are fighting" (Ratner, 2008).

The basis for the inapplicability of the Conventions to the Taliban is similarly tenuous: Deputy Attorney General John Yoo wrote that "Afghanistan's status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions" (Yoo, 2002). Yoo's legal argument is problematic. He suggests that a failed state, even if it was a signatory to the Conventions, is no longer guaranteed prisoner of war rights. Yoo assumes that if international consensus defines a State as a "failed state" then it "was without the attributes of statehood necessary to continue as a party to the Geneva Conventions" (Yoo, 2002). However, the Geneva Conventions have no language on failed states and are meant to extend protections to all signatories, regardless of their wealth or stability. Yoo stresses that the Convention's focus on wars between states further suggests their irrelevance. However, the Conventions overwhelming concern with wars between states should be regarded as a lack of foresight rather than a purposive omission. The Geneva Conventions, when they were signed, were regarded as inclusive of all individuals affected by armed conflict in the present and future (Ratner, 2008).

Military commissions where the cases of Taliban and al Qaeda detainees are reviewed by a panel of military professionals constitute the administration's efforts to put the detainees to trial. But this policy is a violation of Article 10 of the Universal Declaration of Human Rights, and the manner which the administration has pursued these trials has violated a number of the provisions of the Geneva Conventions. The Geneva Conventions allow for military trials of "unlawful combatants," but they also guarantee the right to appeal to a civilian court (Article 106), "essential guarantees of independence and impartiality" (Article 84), the right to call witnesses (Article 105), and the right to confer with an attorney in private (Article 105) (The Geneva Conventions, 1949). Such guarantees have not been met by the United States military trials, and more closely resemble criminal rights. Giving the President the right to detain and put to trial anyone who fits the broad description of "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore" (Bush Nov. 13, 2001) makes the lack of these essential rights problematic for individuals who fit only a loose definition of aiding or abetting terrorism, or those who have been accused by other detainees.

Proponents of the administration's treatment of the Geneva Conventions argue that adhering to the Conventions would prevent potentially useful interrogations of terrorists (Ratner, 2008) and force the administration to use criminal proceedings to try detainees, which would require "cumbersome standards of proof" (Wedgwood, 2004). However, "Many interrogation tactics are clearly allowed, including good cop-bad cop scenarios, repetitive or rapid questioning, silent periods, and playing to a detainee's ego" (Ratner, 2008). Supporters of the use of harsh interrogation practices argue that "Different priorities come to the fore when an international foe embarks on a campaign to kill or wound thousands of people," and that "the stakes in this war are higher than in many others" (Wedgwood 2004). However, some CIA and security officials have disputed the usefulness of harsh interrogations. Ali Soufan, a CIA agent, spoke out against the interrogations, calling them "wrong, ineffective and an affront to American values" (Isikoff, 2009) and was one voice among "a growing chorus of intelligence officials who say that such approaches are actually counterproductive to extracting quality information" (Ratner, 2008) Indeed, the administration's interrogation techniques led to some instances of wrongful imprisonment, such as the case of Mohammed Akhtiar who was imprisoned "on the basis of false information that local anti-government insurgents fed to U.S. troops," and "was one of dozens and perhaps hundreds of men whom the United States has wrongfully imprisoned in Afghanistan, Cuba and elsewhere on the basis of flimsy or fabricated evidence" (Lasseter, 2008). Philip Gordon goes as far as to suggest that restoring legally sound methods of prosecution should be viewed as contributing to winning the War on Terror as this would "reestablish (the United States') moral authority" and put a stop to policies that act as a "key source of the resentment that motivates many terrorists" (Gordon, 2007).

Desecuritization

Lacking was a clear definition of "what victory in the war on terror would actually look like" (Gordon, 2007). Bush outlined his victory conditions: "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated" (Bush, 2001). The classification of "terrorism" encompasses a broad array of combative, violent and disruptive activities, and has been applied to numerous organizations scattered across the globe. The War on Terror would not end with these goals in mind because there will seemingly always be a terrorist threat, and as long as the War on Terror continues, so does the state of exception and the corresponding legal authority of the executive. Agamben

refers to this immortality of the exception as "pure de facto rule" (Agamben, 2005).

But what Agamben has potentially overlooked is the conversation between the government, public and media concerning the state of exception. Waever's desecuritization theory tells us that it is possible for continued debate and media coverage to desecuritize a threat in whole or in part (Waever, 1995). As the War on Terror progressed, more academics and government officials began to speak out against the usefulness of interrogations, the reality of the terrorist threat and the morality of the administration's policies. Some critics suggested that the terrorist threat was not as imminent as the Administration made it appear, and that "...fears of the omnipotent terrorist...may have been overblown, the threat presented within the United States by al Qaeda greatly exaggerated" (Mueller, 2006). Indeed, as Mueller points out, there have been no terrorist attacks in the United States five years prior and five years after September 11th. The resignation of administration officials, such as Jack Goldsmith, who, it was later learned, sparred with the administration over Yoo's torture memos, their wiretapping program and their trial of suspected terrorists also contributed to this shift in sentiment (Rosen, 2007). The use of the terms "torture," and "prisoner abuse," that began to surface in critical media coverage of the War on Terror framed policies as immoral. As the public gradually learned more from media coverage, academic discourse, and protests from government officials, the administration and its policies saw plummeting popularity in the polls. Two-thirds of the country did not approve of Bush's handling of the War on Terror by the end of his presidency (Harris Poll) and as of February 2009 two-thirds of the country wanted some form of investigation into torture and wiretapping policies (USA Today Poll, 2009).

In November 2008 a Democratic President was elected and Democrats gained substantial ground in Congress partly on promises of changing the policies in the War on Terror. Republican presidential nominees, such as Mitt Romney, who argued for the continuance of many of the Bush administration's policies in the War on Terror, did not see success at the polls. Indeed, this could be regarded as Waever's "speech-act failure" which constitutes the moment of desecuritization (Waever, 1995). In this sense, Agamben's warning of "pure de-facto rule" in the War on Terror rings hollow because of one single important fact: the Bush administration peacefully transferred power to their political rivals after the 2008 elections. The terrorist threat still lingers in the far reaches of the globe, and a strictly Agamben-centric analysis would suggest that the persistence of this threat would allow for the continuance of the state of exception. If Agamben was correct that the United States was under

“pure de-facto rule” then arguably its rulers could decide to stay in office and to use the military to protect their position. Instead, Bush and his administration left, suggesting that popular sovereignty remained intact.

Though the desecuritization of the War on Terror allowed for the beginnings of a legal recovery, Agamben’s warnings about the rise of executive dominance remain. A full recovery would reestablish traditional balances of power among the branches of government. Early Supreme Court cases on War on Terror policies showed little promise for legal reorientation as the majority of the Justices wrote opinions that deferred judgment to the President or Department of Defense. However, in a 2006 case, *Hamdan v. Rumsfeld*, the Supreme Court found the military trials promised by the administration to be unconstitutional. But this decision also revealed this branch of government’s weakness, as President Bush chose to continue the military trials rather than enforcing the Court’s decision. Congress attempted to overturn the administration’s policies on torture by passing legislation that would limit interrogation methods to what is allowed in the army field manual, but Bush vetoed the bill and Congress did not override that veto.

Since the election, the Obama administration has made steps to fulfill the democrats’ promise to change the direction of the war on terror: They released intelligence memos detailing the use of torture on enemy combatants, began the process to close Guantanamo, abandoned the title War on Terror for the counter-terrorism campaign and renamed it “overseas contingency operations,” abandoned the term “enemy combatants,” and even suggested naming terrorist attacks “man caused disasters” (Baker, 2009). President Obama has also reoriented America’s position to international laws of conduct to the status quo of September 10th, 2001, stating “Any program of detention and interrogation must comply with the Geneva Conventions, the Conventions on Torture, and the Constitution” (Mazzetti and Glaberson, 2009). While these changes appear to be steps in the right direction, has the abandonment of the Bush Administration’s more provocative terminology surrounding the War on Terror, the restoration of America’s stance to some international laws, steps toward the closure of Guantanamo, and the release of the torture memos reinstated balance in the legal order and proved Agamben wrong about the dire effects of the state of exception?

As Benjamin Wittes notes, the “presidential power model has failed,” and “Only Congress can ultimately write the law of this long war” (Wittes, 2008). The pursuit of terrorist policies through the exception has not resulted in clear, transparent and legally correct outcomes because the exception has been entirely controlled by “unilateral presidential actions” (Wittes, 2008). Instead, Congress “can

build comprehensive legal systems and do so *in the name of the political system as a whole*” (Wittes, 2008). What this would entail would be a “law of terrorism” that would “at once restrain and empower the executive branch” in its actions in the War on Terror (Wittes, 2008). Simply allowing the executive to continue to unilaterally decide the fate of suspected terrorists and anti-terrorism policy will prove Agamben correct: that the American system of checks on power has been replaced with the primacy of the executive. It should then be Congress’ goal to step forward and outline the exact legal policies in the War on Terror, allowing President Obama this role will only prolong the elements of the exception that Agamben has given such dire warnings about.

Conclusion

The state of exception has been the standard response to crises for American presidents and other world leaders since the emergence of constitutional law and democratic government. Its creation and longevity as a political and legal tool should not be surprising. Constitutional democracies were not and are not designed to have laws and rules governing every potential complication that the country could face. Instead, it has been consistently argued that exceptional times require exceptional measures. The use of these measures when the public is ready and willing to accept the securitizing speech-act almost invariably lead to breaches of the law, and in Agamben’s opinion the expansion of executive authority. The War on Terror has seemingly reinforced Agamben’s argument, as the breadth and magnitude of legal issues resulting from this war have made the legal recovery extremely complicated.

However, some scholars suggest that the War on Terror has actually undermined the ability of the sovereign to invoke the state of exception, stating that instead:

In so far as it pursues this end, the effect of such commentary is to compound efforts to curtail the experience of deciding on/in the exception – efforts that are already well under way at Guantánamo Bay. For notwithstanding all the liberal heartache that they provoke, the law and legal institutions of Guantánamo Bay are working to negate the exception (Johns, 2005).

Johns suggests that the policies of the War on Terror are leading towards a tendency to condemn the state of exception and crisis authority. Johns bases his argument in the abundance of legal scholarship calling for “a newly fashioned emergency regime” that would “rescue the concept [of emergency power] from fascist thinkers like

Carl Schmitt” (Johns, 2005). This logic would suggest that Agamben’s prediction is not coming true, that the executive will now be limited by what actions they can pursue during future crises and that the legal authority acquired by the executive during the War on Terror has been ceded back to its designated proprietors.

But for Johns to be proven right, it requires a change in long established habits. Citizens cannot expect the executive

to singularly react to any complication the country faces. Indeed, Agamben’s warnings and the results of the War on Terror suggest that doing so will continue to produce dissatisfying results at best, immoral quagmires at worst. For democracy and constitutional governance to survive, it is the responsibility of officials and citizens alike to adapt existing legal structures to novel threats, and to not rely on executive mandate alone.

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