Norms of Exception? Intelligence Agencies, Human Rights, and the Rule of Law

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Abstract: The post 9/11 move by democracies to enact security measures which challenge both domestic constitutional and international legal human rights norms, such as the creation of the Guantánamo Bay prison camp, the practice of extraordinary rendition, and the use of torture in interrogations has resulted in growing scholarly concern with the problem of states of exception. These measures, whether considered justified or not, are conceptualized by some theorists as belonging to a temporal condition associated with war time emergency. Other more critical scholars, in contrast, examine exceptions in their relation to the constitution of sovereign power. In exploring these contending analytical perspectives, my paper aims to better understand the character of contemporary exceptionalism. Using American intelligence agencies in both the pre and post 9/11 period as a case study, I explore the extent to which covert and clandestine state security practices have ever been constrained by a substantive conception of the rule of law and human rights. I ask how exceptional the current state of exception really is. In doing so, I find that norms of exception are a part of ordinary state security practice, but that an excessive focus on sovereign decision and legal black holes obscures the ambiguities of Bush administration policy. Despite the extremely troubling nature of the war on terror, I conclude there is hope for societal contestation and the rule of law as checks on human rights abuses.

In the wake of the 9/11 terrorists attacks on New York, the United States moved quickly to adopt new security measures. Among the more controversial policies enacted were permissive regulations regarding the use of harsh interrogation techniques on suspected terrorists, the practice of extraordinary rendition whereby prisoners are transferred to third countries for torture, the creation of the Guantánamo Bay prison camp to hold so called enemy combatants indefinitely, the creation of new Military Commissions designed to try these inmates, and the growth of widespread domestic and sometimes warrantless surveillance under the provisions of the Patriot Act and the Terrorist Surveillance Program.

What makes these developments notable is their stark non-conformity with both international and American law and human rights standards. In so far as the rule of law expectation of due process, of habeas corpus, of freedom from cruel and unusual punishment, and of freedom from unreasonable search and seizure are the norm, post 9/ll counter-terrorism policy represents an exception. The Bush administration and its supporters have defended their approach as essential for dealing with the new terrorist threat. To preserve rights and freedoms in the long run, they argue, extraordinary measures are required to defeat the enemy. Critics on the other hand suggest that this exceptionalism does not improve security. They moreover contend that rights are universal and inviolable regardless of the circumstances. Actions taken in an emergency context can too easily become institutionalized rules, making exceptions permanent.

Despite their opposing conclusions regarding the efficacy and legitimacy of these security practices, many supporters and critics alike share a temporal concept of the state of exception. It has become common sense wisdom that 9/11 brought sweeping transformations, that it changed everything in regards to the conduct of state security. This view has been challenged by critical scholars who argue exceptionalism is not only long standing in practice, but part of the constitutive character of modern legal order. This paper aims to navigate these poles by suggesting American intelligence agencies have always operated in the realm of exception. But this exceptionalism must be examined in its historically specific character. In doing so it becomes apparent that while infringements on rights and freedoms in the name of intelligence are hardly novel, neither do we live in a state of exception in which law is synonymous with sovereign power.

Contrary to arguments that assume a linear retreat from law and the ascendancy of legal black holes, the post 9/11 era has been characterized by a new legalism that fosters grey holes in the rule of law. These grey zones if allowed to persist fundamentally weaken the ability of law to protect human rights. They risk altering the norm to erase the exception. However, I will suggest, they also open up new spaces for contesting state security practices by sparking debate on what the rule of law means and the role of law in the war on terror.

The Nature of the Exception: Emergency Necessity or Routine Normality?

Both international and American laws contain numerous provisions that protect the human rights of combatants and civilians and constrain states' war powers. The Charter of the United Nations protects state sovereignty and restricts legitimate military action to self-defense and Security Council authorized intervention. The 1948 Universal Declaration of Human Rights lays out a customary framework for the concept of human

equality and dignity. The 1907 Hague Conventions and 1949 Geneva Conventions (ratified by the US in 1955) and their subsequent Additional Protocols create binding standards for the conduct of war, including protections for prisoners of war and detained civilians. The 1976 International Covenant on Civil and Political Rights (ratified by the US in 1992 with extensive reservations) creates non-derogable protections from "torture" and "cruel, inhuman or degrading treatment or punishment", slavery, genocide, and infringements on freedom of religion, thought, and conscience. The 1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by the US in 1994, again with extensive reservations) prohibits "any act by which severe pain or suffering, whether physical or mental" for the purposes of extracting confessions or coercion. It further prohibits deportation to countries when there is risk of torture.

US law provides additional protections. The Uniform Code of Military Justice creates standard rules of conduct for American soldiers. The 1996 War Crimes Act allows prosecution of US nationals for violations of the Geneva Conventions committed inside or outside the US, including violations of common Article 3 which prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; …outrages upon personal dignity, in particular humiliating and degrading treatment" (Human Rights Watch, 2004). The 1994 federal anti-torture statute further allows prosecution of US nationals or non-nationals in the US for the crime of torture. The US constitution protects Americans from unreasonable search and seizure, from cruel and unusual punishment, and guarantees due process and the right to a fair trial. In both war and peace, both citizens and non-citizens are governed by a well developed domestic and international human rights regime.

As such, when the United States detains prisoners indefinitely, waterboards suspects, renders captives to the torture dungeons of Egypt and Syria, or authorizes the National Security Agency to spy on its citizens, it is fair to label such practices exceptional. These practices have been well documented by journalists and human rights organizations. The United States failed to grant prisoner of war status to captured Afghan fighters, holding them instead as "enemy combatants" without substantive rights at Guantánamo Bay (Margulies, 2006). A series of leaked "torture memos" has revealed executive authorization for interrogation tactics amounting to torture, or at least inhuman and degrading treatment (Danner, 2004; Greenberg, 2005). The infamous abuses at Abu Ghraib prison highlighted the extent of this permissiveness despite unconvincing attempts by the administration to pass the perpetrators off as a few "bad apples" (Hersh, 2005). CIA black flights have illegally transported kidnapped prisoners to US allies in the Middle East (Ganser, 2006; Grey, 2006). On the home front, intelligence agencies and commercial telecom companies have conspired to monitor communications outside of traditional legal safeguards (Risen, 2006).

There are two major perspectives from which to understand these developments. The first links exception with a situation of emergency necessity in which an objective crisis requires consideration of extraordinary security measures. A pre and post 9/ll conceptual distinction has come to dominate this framework, defining the parameters of normal and exceptional. As former chief of the CIA's Counterterrorism Center put it, "All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves

come off" (Black, 2002). There is no shortage of declarations from the administration defending the necessity of their new aggressive approach. "In a sense, 9/11 changed everything for us. 9/11 forced us to think in new ways about threats to the United States, about our vulnerabilities, about who our enemies were, about what kind of military strategy we needed in order to defend ourselves" explained Vice President Cheney (2003). As summarized by President Bush (2006):

> We had to wage an unprecedented war against an enemy unlike any we had fought before... the terrorists have not succeeded...because our government has changed its policies -- and given our military, intelligence, and law enforcement personnel the tools they need to fight this enemy and protect our people and preserve our freedoms... Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway. This intelligence -- this is intelligence that cannot be found any other place. And our security depends on getting this kind of information. To win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world.

Further justifying the CIA's secret interrogation program that included simulated drowning of several high value captives, the administration argued that "The CIA Program Has Been, And Remains, One Of The Most Vital Tools In Our War Against The Terrorists. Questioning of detainees in the program has given us information that has saved innocent lives by helping us to stop new attacks in America and abroad" (White House, 2006).

The administration has been joined by public intellectuals who have similarly embraced the logic of emergency necessity. Alan Dershowitz (2002) has famously advocated for the advent of "torture warrants" to extract information from terrorists. "An application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it" he argues. David Luban (2005) sums up this liberal torture argument:

> The liberal ideology insists that the sole purpose of torture must be intelligence gathering to prevent a catastrophe; that torture is necessary to prevent the catastrophe; that torturing is the exception, not the rule, so that is has nothing to do with state tyranny; that those who inflict the torture are motivated solely by looming catastrophe, with no tincture of cruelty; that torture in such circumstances is, in fact, little more than self-defense, because of associations of torture with the horrors of yesteryear, perhaps one should not even call hash interrogation "torture". (pp. 1439-1440)

The "ticking bomb" scenario has been popularized through television shows such as Fox's *24* and become standard fare in policy wonk torture debates, contributing to its entrenchment in American discourse.

While disavowing the more extreme dimensions of counter-terror policy such as torture, arguments for limited exceptionalism have been made by other liberally minded legal and political scholars under the framework of the "lesser evil." Michael Ignatieff (2004) suggests that some suspensions of civil liberties may be acceptable as long as they are temporary, publicly justified and debated, and clearly necessary to protect the right of

the majority to safety. He further concedes that "conscientious people may disagree as to whether torture might be admissible in cases of necessity" and that "the problem lies in identifying the justifying exceptions and defining what forms of duress stop short of absolute degradation of an interrogation subject" (p. 141). To this end he suggests deprivation and stress may be allowed, but not physical violence or withholding of food or water. Philip Heymann (2003) suggests we must resist domestic infringements on liberties, but that covert operations abroad are clearly acceptable (p. 145). Heymann and Kayyem (2005) argue extraordinary measures such as targeted assassination outside a combat zone (p. 65) and security/liberty tradeoffs are essential in the wake of 9/11, but must periodically be reviewed by Congress for their effectiveness and necessity (p. 111). Bruce Ackerman (2006) advocates for an "emergency constitution" that would maintain checks and balances and be temporally limited, but allow short term exceptional measures such as suspension of normal due process standards in the immediate wake of an attack (p. 113). Gross and Ní Aoláin (2006) recognize the difficulty of clearly defining an exceptional case and thus prefer an "extra-legal measures" model whereby public officials are left to violate rules and norms in cases of necessity, decisions which are then subject to popular ex post facto ratification or rejection (p. 11). While often strongly critical of the Bush administration and genuinely concerned with the future of human rights, these authors agree that the post 9/ll environment may demand exceptional measures be taken in the name of national security.

Both the policies of the Bush administration and the alternative prescriptions of lesser evilists have drawn the ire of human rights lawyers and advocates. For them, rights are absolute and inviolable. The rule of law is precisely valuable in times of crisis they argue. Despite their critiques however, their oppositional discourse frequently reinforces the pre and post 9/11 narrative of emergency. While acknowledging the US has a mixed historical record, Ken Roth (2005) of Human Rights Watch calls for a reversal of Bush administration policy and a *reaffirmation* of Washington's pre 9/11 role as a credible proponent of human rights (p. 201). The American Civil Liberties Union passionately declares:

> For sixty years, the United States has led the fight against torture around the world. The U.S. not only signed but helped to draft the international treaties and laws that banned torture after the atrocities of WWII. The U.S. spoke out against inhumane treatment of prisoners and offered refuge to victims of atrocities perpetrated by other governments. Now, betraying a long, proud tradition of humane detention and interrogation practices, the U.S. is using torture.

As Horton (2007) opines, "A radical rupture has occurred; American legal tradition has been swept aside and, with it, long-established precedents for dealing with adversaries in wartime—even those accused of heinous crimes". Bemoaning the slide towards "American fascism" Naomi Wolf (2007) patriotically proclaims "The United States has stood for the rule of law in the past: We set a standard for other leaders, and set a point of aspiration for other citizens. If we lose that, what force on earth will stem any barbarism that any despot wishes to impose on his people?" (p. 151). Thus while abhorring the growth of exceptionalism, many human rights campaigners reinforce the 9/ll fetishism of the administration with their dichotomous framing of a virtuous rights respecting past and the troubled extraordinary present. The effect of the excessive focus

on 9/ll has been the entrenchment of the common sense notion that if exceptions do occur, whether justified or not, they are responses to an objective security problem.

As Robert Cox (1986) has suggested, problem solving theory takes the world as it finds it while critical theory "stands apart from the prevailing order of the world and asks how that order came about" (p. 208). In contrast to the policy debates of the first approach, the second framework for understanding exception adopts the latter perspective. This much more abstract school of scholarship has attempted to theorize the meaning of the state of exception in terms of the constitutive relationship between law and its suspension. Rather than examine exceptions in relation to emergency, exceptions are cast as derivative of power. The foremost protagonist of this theoretical development has been Giorgio Agamben and his reflections on the work of Carl Schmitt and Walter Benjamin. Schmitt, a leading jurist of the Third Reich, famously declared in *Political Theology* (2005) that "sovereign is he who decides on the exception" (p. 5). In other words, it is ultimately a power beyond the law that identifies and acts on the state of exception. True exceptions can't be derived from a norm or preformed law (p. 6). Rather, "what characterizes the exception is principally unlimited authority, which means the suspension of the entire existing order. In such situations it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind" (p. 12). This reveals the nature of sovereign power which is fundamentally the "monopoly to decide" (p. 13). It can produce law, a new constitutional order, without being based on law (p. 13). In this way "the exception in jurisprudence is analogous to the miracle in theology" (p. 36). It is the exception, not the rule which unmasks the true basis of the legal order. The prime task of sovereign dictatorship in the state of exception, argues Schmitt, is to distinguish friend from enemy, the ultimate categories of the "political".

Agamben (2005), drawing on Walter Benjamin and Foucault's biopolitics, argues that the state of exception has in fact become the rule and "reached its maximum worldwide deployment" having developed from WWI through Fascism through to the current era (p. 87). The state of exception is the "dominant paradigm of government in contemporary politics" (p. 2), the primary "technique of government" and the "constitutive paradigm of the juridical order" (pp. 6-7). Law has become sovereign force bereft of substantive protection. The result is a reduction of people to *homo sacer* or "bare life"; to unnamable and unclassifiable beings, to life that lacks value and is constantly subject to violence. For Agamben (1998) the Jews in Nazi concentration camps were the ultimate victims of this condition. Following Arendt, the camp is the place where "everything is possible", a space of stable normalized exception where "the sovereign no longer limits himself...to deciding on the exception on the basis of recognizing a given factual situation (danger to public safety): laying bare the inner structure of the ban that characterizes his power, he now de facto produces the situation as a consequence of his decision on the exception" (p. 170). The camp collapses inside/outside, exception/rule, licit/illicit and makes the concept of juridical protection meaningless (p. 170). According to Agamben (2005), America's post 9/11 policy, particularly detainment at Guantánamo, can only possibly be compared to the Nazi *lager* (p. 4). More sweepingly, the condition of modernity itself is comparable to the camp.

Judith Butler (2004) in a similar vein has reflected on the relevance of sovereignty in an age of Foucauldian governmentality. Sovereignty is exercised in the suspension of law and executive prerogative while governmentality uses law in its everyday "tactical operations" of discipline and regulation (p. 55). Rather than the single dominant Schmittian sovereign, "Petty sovereigns abound, reigning in the midst of bureaucratic army institutions mobilized by aims and tactics of power they do not inaugurate or fully control" (p. 56). This power is manifested in the act of deeming threats and targets. The prisoner becomes, literally and theoretically, a Person Under Control (PUC) (Danchev, 2007, p. 98). This power to deem has been taken up by multiple theorists. Following Benjamin's (1968) adage that "The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule" (p. 259), a variety of scholars have traced the continuity of exceptionalism in regards to colonialism, racism, and prison populations.

The laws of war themselves were constructed on a colonial edifice that posited a constitutive other, the uncivilized barbarian not subject to protection, argues Mégret (2005). Indeed humanitarian law emerged in Europe at the apex of colonization (p. 3). Increasingly violent and vicious measures were used against natives in the pursuit of empire, creating extreme double standards whereby weapons such as dum dum bullets (infected with smallpox) were permitted against "savages" but not civilized armies (p. 12). The deep structuring concepts of civilized/uncivilized remained, suggests Mégret, even when surface attitudes evolved. The laws of war continue to be premised on Western concepts of stateness as the basis for legitimacy and participation in agreements (p. 14) and a tacit anthropology of cruel and stupid natives who are incapable of reciprocating civilizational standards (p. 20). Despite the post WWII extension of laws to all humanity (p. 22), the pronouncements of the Bush administration and the denial of status to Al Qaeda fighters reveals and revives the original exclusion at the heart of the law (p. 25).

Guantánamo Bay, the most cited site of the new exceptionalism, has long been enmeshed in the colonial legal order. Originally used by the Spanish to intern rebellious peasants, it was permanently leased to the US in 1903, giving it complete jurisdiction and actual control, while officially maintaining Cuban sovereignty. The base's ambiguous legal status has consistently been used to deny rights people would enjoy on American soil and international protections applicable abroad (Gregory, 2006, p. 412). From 1991-94, Guantánamo became a detention camp for 36,000 Haitian refugees excluded from normal refugee procedures and in 1994-95, to detain 21,000 Cuban asylum seekers. The inmates of this "anomalous zone" were deemed non-admittable threats and carriers of AIDS (Neuman, 1996, p. 1231). Guantánamo's position as a colonial outpost reflecting America's imperial relationship with Cuba and the Caribbean continues today. Seen in this light, Camp X Ray and Camp Delta are fully consistent with its historical role. Despite legal challenges, Guantánamo's intentionally vague standing has been reaffirmed by Supreme Court rulings, maintaining imperial flexibility to deem and decide (Kaplan, 2005).

The process of deeming the excluded other has also been noted in the domestic setting. Chappell (2006) argues that racialized urban minorities have long been subject to exceptional "threat governmentality" including constant surveillance and harassment, a presumption of guilt, and high levels of police violence. The discourses which deem

individuals as threats by virtue of the social categories to which they are assumed to belong – gangster, criminal, terrorist - and the "inversion of the presumption of innocence" are modes of sovereign domination that run through inner city policing to post 9/11 security policy (p. 13). Surveillance, biometrics, databases, profiling, and monitoring pre-date 9/11 and are part of the normal govermentality of border control and deviance argues Bigo (2006, p. 63). There is a long history of protecting "our" security while sacrificing "their' liberty. The "enemy alien" is a recurrent victim of American security strategy. The practice of "selectively sacrificing noncitizens' fundamental rights" runs from the Palmer raids of 1919-20 to Japanese internment in WWII to McCarthy's red scare witch hunts to the covert attacks on the civil rights movement to today's anti-terrorism (Cole, 2005, pp. 85-86).

Finally, prison populations have long been subject to "cruel and unusual" exceptions to the rule of law (Dayan 2007). "Torture, humiliation, degradation, sexual assault, assault with weapons and dogs, extortion, blood sport always have been part of US prison culture and behavior...The utter normality of exceptional brutality" and "racialized sadism" has a "history coextensive with the history of imprisonment in the US, which is itself coextensive with the nation's history" argues Gordon (2006, p. 48). In particular America's super-max prisons completely violate international standards. Prisoners deemed by their nature high risk are placed in administrative segregation and isolation, often on a semi-permanent basis (p. 51). The strategy of permanent slavery has been supplanted by permanent imprisonment Gordon suggests (p. 52). Hence an explanation for the Taguba Reports' extraordinary finding that Abu Ghraib guards didn't notice anything abnormal - many of them had worked in the American penal system.

The contemporary literature has thus left us with two distinct lenses through which to contemplate the state of exception. On the one hand exceptional measures are treated as a response to a crisis – 9/11, with pundits debating the merits of various public policy options. On the other, exception is conceptualized as a theoretical problem that speaks to the constitutive order of modern politics. To more fully explore the relation between exception and necessity as posited by the former and how exceptions become the norm as suggested by the latter, the nature of exception must be examined with a longer historical memory than 9/11 centric approaches and with more historical specificity than highly theoretical critiques. With this in mind, the following section explores the development of American intelligence with the aim of further explicating the character of exceptional politics.

American Intelligence and Exceptional Politics

Intelligence is perhaps the most under-theorized dimension of state security practice (Scott & Jackson, 2004). The majority of intelligence literature is historical and descriptive or policy oriented and prescriptive. The analytic studies that do exist tend to be preoccupied with questions of intelligence failure and are located squarely within nationalist security studies. While popular leftist literature and journalism has taken the intelligence establishment to task for its controversial practices, it remains poorly integrated into contemporary debates over human rights and legal order. This neglect of intelligence as a distinct field of power with institutional continuity is remarkable considering that almost all of the post 9/ll practices in question from interrogation to

surveillance are developed for and justified by intelligence purposes. Indeed intelligence has become the prime weapon in the war on terror. As such, intelligence constitutes a major case for the historical examination of exceptions. I will suggest the following case study of American intelligence, the lead intelligence power in the world, helps highlight the strengths and weaknesses of both analytical frameworks proposed above.

Up until the Second World War, American intelligence was haphazardly organized and generally frowned on. "Gentleman do not read each other's mail" famously remarked Secretary of State Henry Stimson. The important role played by cryptanalytic intelligence in breaking Japanese naval codes and the success of the Office of Strategic Services in running secret agents during WWII bolstered its prestige however. Post war security planners moved to create a peace time foreign intelligence establishment. The 1947 National Security Act created the Central Intelligence Agency, but left its mandate vague. In addition to assisting in the collection and dissemination of intelligence, the Agency was authorized to "perform such other functions and duties related to intelligence affecting national security as the National Security Council may from time to time direct". In the ideologically charged atmosphere of the early Cold War, the CIA was directed to commit extensive violations of the rule of law under the rubric of these other functions and duties. As the 1954 *Special Study Group on the Covert Activities of the Central Intelligence Agency* or Doolittle Report stated:

> It is now clear that we face an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Hitherto acceptable norms of conduct do not apply. If the United States is to survive, longstanding American concepts of fair play must be reconsidered. We must develop effective espionage and counter-espionage services and must learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated and more effective methods than those used against us. (Olson, 2008, p. 39)

The extent of CIA and sister intelligence agency (National Security Agency, Defense Intelligence Agency) violation of international, American, and foreign national law for the first several decades of the Cold War is remarkable, although not entirely surprising. At the level of intelligence data collection, spying inherently involves law breaking. Human intelligence requires creating false identities, false documents, blackmail, bribes, and general deceitfulness which violates most countries' domestic laws. Signals intelligence involves surreptitious eavesdropping, wiretapping, and satellite reconnaissance which violate both personal privacy and national sovereignty. The idea of peace time intelligence, even in its benign forms and even when pursued by highly ethical individuals, is thus by definition somewhat exceptional.

The most blatant exceptions emerged, however, in the 1950s when the undefined task of other special functions and duties were pursued with fervor by CIA director Allen Dulles and his vision of covert operations. Working under the doctrine of "plausible deniability" (Treverton, 1988) the CIA and its executive masters broke laws with impunity for the next several decades. The CIA waged a clandestine propaganda war against Communists in Europe. It cooperated with its English counterparts in the 1953 coup against Iranian President Mossadeq, replacing him with the Shah. In 1954 the CIA colluded to overthrow the Arbenz regime in Guatemala, bringing on years of brutal dictatorship. In 1961 it lead a failed attempt to overthrow Castro at the Bay of Pigs. It

persisted in efforts to assassinate him and conspired in murder plots against President Lumumba of the Congo. During the Vietnam War, it ran the Phoenix Program which tortured and assassinated thousands of suspected communists. It supported the Colonel's junta in Greece. In 1973 it aided General Pinochet's coup in Chile. These activities undermined the sovereignty of target states. Moreover, through collusion with thugs and dictators, the CIA actively promoted human rights abuses. Its allies frequently tortured captives and massacred civilians. Americans not only turned a blind eye, but often trained their proxies in these illegal practices.

Historians have well documented the place of torture in American intelligence practice. Marks (1991) examines MKULTRA, the CIA's mind control experiments run by Sidney Gottlieb. Alfred McCoy (2006) traces the CIA's focus on psychological torture, sensory deprivation, and psychotropic programs. Rejali (2007) confirms democracies have pioneered the evolution of "clean" torture that does not result in obvious physical brutality (stealth torture) (p. 569). Not all torture has been clean however. Americans learned from French counter-insurgency experience, applying these brutal lessons in their pacification of Vietnam and in training their allies in Latin America (Robin, 2005). The Overseas Internal Security Program, later called the Office of Public Safety under USAID, trained secret police and paramilitaries from across Latin America in the 1950s and 1960s (Doyle, 2007). Officers from the region's dictatorships moreover filtered through the School of the Americas at Fort Benning Georgia (Blakely, 2006). The infamous 1963 *KUBARK Counterintelligence Interrogation* and 1983 *Human Resource Exploitation Training Manual*, along with similar instructional material, became key guides for the use of torture in interrogation.

On the home front, a massive campaign of domestic intelligence was underway. The FBI's COINTELPRO operation waged covert war on peace, civil rights, and new left organizations. Over 500,000 domestic intelligence files and a list of 26,000 people ranging from Dr. Martin Luther King to Norman Mailer to be rounded up in an emergency were created. The NSA obtained copies of every international cable sent from individuals and citizens in the US from 1947-1975. The Army investigated 100,000 Americans for political reasons throughout the 1960s and early 1970s. In direct violation of its statutory powers, the CIA's illegal domestic mail opening created a data base of 1.5 million people (Schwarz, 2007, p. 281).

Until the 1970s, intelligence agencies where given a virtual carte blanche. They escaped any substantive legislative oversight save occasional reporting to friendly politicians. By the mid 1970s however, intelligence agency abuses entered the public spotlight. Spurred by scandalous revelations regarding the Watergate break in, the era of unquestioned latitude for intelligence activities came to an end. In 1975-1976 the *United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, better known as the Church Committee, produced thousands of pages of reports condemning intelligence abuses abroad and domestically. As a result, permanent Congressional oversight in the form of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence was created, requiring periodic reporting and greater justification covert action. The Foreign Intelligence Surveillance Act (1978) reinforced the prohibition on domestic spying without a warrant. Executive Order 12,333 (1981) reiterated a proscription on

assassination. Throughout the early 1980s, the Boland Amendments outlawed US aid to the Nicaraguan Contra effort to overthrow the Sandinista government.

Yet despite the newly established regulatory structure, intelligence remained squarely within the realm of executive prerogative. With the exception of budgetary control, Congress had little power. Oversight meant review, not decision. Covert action required "presidential findings", not legislative authorization. Multiple limitations on reporting to Congress and flexible application of rules were permitted (Boraz, 2007). As such, the growth of legal control enhanced procedural lawfulness without representing a major advance in rule of law governance of intelligence. The US has arguably never fully accepted that the human rights regime (domestic or international) applies to foreign intelligence practices.

From the late 1970s to the 1990s, intelligence agencies ceased most of their controversial practices domestically, but not internationally. Aid was given to the Contras, although the Iran Contra scandal did result in rare prosecutions. However, when the International Court of Justice ruled in 1986 that American Contra support and mining of Nicaraguan ports was illegal, the US simply rejected its jurisdiction. The CIA waged an extensive proxy war in Afghanistan alongside their Pakistani allies. Both Reagan and Clinton ordered assassinations, against Libya's Qaddafi and suspected terrorists respectively. Intelligence cooperation with repressive South and Central American dictators persisted (Harbury, 2005). While the end of the Cold War reduced international tensions and lead to extensive intelligence budget cuts, the CIA and other intelligence agencies simply moved on to new areas of interest. For instance, allegations of extensive economic espionage against European firms were made by the European Parliament throughout the 1990s. Spying adapted to globalization, privatization, and corporatization (Maxwell, 1998).

This well known story helps shed light on the problem of exception. Contrary to frameworks which posit a golden past of American legal virtue, I have tried to demonstrate from an empirical standpoint that when it comes to American intelligence, exception has long been the rule. The victims of exception are not just Al Qaeda. In addition to the colonial, the racial minority, the immigrant, the prisoner, a focus on intelligence adds the communist, the subversive, the spy, the terrorist, and any deemed threat to national security to the list of those potentially subject to exception. This exceptionism is not a product of necessity or crisis. For such concepts can only have meaning relative to a state of normality and non-crisis. As these exceptional practices have been so consistently applied, it makes little sense to consider them as temporally bound to emergency. Even if one could make a principled case for post 9/11 necessity, it is a misleading framework from which to understand the actual workings of intelligence. The history of American intelligence moreover suggests that exceptions are linked not just to public policy and official legislation, but more deeply to enactments of sovereign power. Throughout the early Cold War, intelligence operated at the pleasure of the sovereign. The threat of Soviet expansion into the third world was used to justify the gaping black hole in the rule of law in which America's intelligence agencies worked. Despite subsequent efforts to better control and regulate intelligence, the substantive impact was limited as the executive maintained primary control and discretion, via the institutional design of oversight, and often in spite of it.

With this narrative in mind, the developments of the post 9/11 era seem increasingly unremarkable. The United States may indeed have a history of publicly championing human rights and international law, but its practical track record in regards to intelligence activities is poor. The 9/ll centricism that has dominated recent debate risks masking this history. For the problem at hand is not simply what to do about terrorism. Rather, it's what is permitted in the name of intelligence. Where intelligence goes, exceptions seem to follow. To understand how this is possible, *norms of exception*, the interests, institutional structures, discourses, and practices that comprise intelligence as a field of security demand further study.

Law and the Character of Contemporary Exceptionalism

The above discussion has suggested the critical theoretical emphasis on the continuity of exception is valid. The history of American intelligence has been characterized by habitual law breaking and human rights abuses, especially in the third world. But does this confirm the critical thesis that that state of exception is the dominant paradigm of contemporary politics? I believe the answer is no – or at least not quite. If anything, pre 9/ll intelligence practice came closer to being truly exceptional. Whereas plausible denial and utter impunity governed past practice, open justification of and attempts at publicly legitimating exception abound today.

The Bush administration's conception of "lawfare" has identified lawyers and human rights organizations as enemies in the war on terror. As stated in the March 2005 *National Defense Strategy of the United States of America*: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism" (Horton, 2007). Lead neo-con Douglas Feith identifies "legal lines of attack" as features of "asymmetric warfare" (Bartholomew, 2006, p. 161). Notwithstanding the absurdity of equating international human rights lawyers with terrorists, there is truth to the idea that the war on terror has been the target of extensive critique from such circles. But despite the Schmittian language in which the administration often speaks – "I'm the Decider"- it has responded to the lawfare challenge with more than a simple disavowal of the rule of law. Rather, spearheaded by the lawyers at the Office of Legal Counsel (OLC), the administration has engaged in a highly legalistic politics.

There have been two prongs to administration strategy. Firstly, it has aggressively pursued Congressional legislation. The 2001 Patriot Act and its subsequent reauthorizations greatly expanded domestic surveillance powers. The 2006 Military Commissions Act validated the concept of "enemy combatant", forbid the invocation of Geneva Convention rights and denied access to American courts for such prisoners, and approved the use of military tribunals. The 2007 Protect America Act approved NSA domestic surveillance and expanded untargeted and warrantless "data mining". In achieving these outcomes, the executive has not ruled by dictatorial fiat or suspended the constitution. Rather, it has compelled Congress to adopt its prescriptions. This has not always been successful however. In March 2008, the President vetoed the Intelligence Authorization Act for Fiscal Year 2008 because it had limited the CIA to the 19 interrogation tactics approved by the US Army Field Manual.

The other dimension of administration strategy has been heavy reliance on the opinions of former Attorneys General Ashcroft and Gonzales and their team at the OLC. Their numerous advisory analyses, most infamously the 2002 "torture memos", that argued torture "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death", have guided counter-terror policy. The prime argument of these attorneys, notably John Yoo, is that Presidential war powers provide extensive executive discretion. "The United States can employ its war powers to kill enemy operatives and their leaders, detain them without trial until the end of the conflict, interrogate them without lawyers or Miranda protections, and try them without civilian juries" (Yoo, 2006, p. 3). According to this view, positive law is, with some revision, compatible with the war on terror.

Critics have argued these legislative and advisory guidelines are simply wrong and violate both constitutional protections and international law. They are probably correct. But this situation is not one of total lawlessness as many analysts suggest. For "the law is not outside violence...the "war on terror" twists their embrace into ever more frenzied and furtive coupling" (Gregory, 2006, p. 420). As Butler (2004) argues, "Sovereignty consists now in the variable application, contortion, and suspension of the law; it is, in its current form, a relation to law: exploitative, instrumental, disdainful, preemptory, arbitrary" (p. 83). Neither, however, have laws and norms simply collapsed into sovereign power. Whereas Schmitt's sovereign suspends and remakes law without reference to norms or prior rules, White House advisors do not operate beyond law, but explicitly justify their policies based on constitutional responsibilities and legal precedent. Whereas Agamben's "bare life" is subject to unmitigated sovereign violence, American violence is highly constrained, ordered, and regulated.

Mégret (2005) notes that in denying prisoner of war status, "the US authorities' case is often not a case to simply violate or do away with the law, as much as it is a characteristically strict, *almost legalistic* interpretation of the law" (p. 27). Similarly Johns (2005) argues that Guantánamo is "less an outcome of law's suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps at Guantánamo are above all works of legal representation and classification. They are spaces where law and legal institutionalism speak and operate *in excess*" (p. 614). From the Combatant Status Review Tribunal to Military Commissions and the Administrative Review Board to the multiple legal memorandums, Guantánamo is a highly regulated, procedural space (p. 618).

Instead of pure "black holes" (Steyn, 2003) in the rule of law (although black holes arguably persist in regards to practices such as extraordinary rendition), the legalism of the administration has created a series of grey holes. In these grey holes, people are no doubt subject to terrible abuses, but not "anything is possible". What is possible, in the interrogation chamber for instance, is listed in detail, described in minutiae and rationalized in reference to law. How long a prisoner can be left standing, deprived of sleep, denied food, etc...are painstakingly defined. Accordingly, the success of legalism as a framework for legitimation does not necessarily mean a substantive advance in the rule of law and can have perverse effects. As Rejali (2007) suggests, growing state concern for public image may result in the transformation rather than the elimination of practices such as torture (p. 578). That is not to say these grey holes are an

improvement. Indeed they can be "in effect worse because they give to official lawlessness the facade of legality" (Dyzenhaus, 2006, p. 207).

Nor is a single exceptional decision about the law synonymous with what practices are actually employed. The abuses at Abu Ghraib were doubtlessly illegal, and were prosecuted as such, but they were not independent of administration policy. In this sense, focusing on the Schmittian exception as a temporal cut, as a momentary existential decision doesn't tell us much about "how these exceptions are in fact made, how they come to seem legitimate, and how they manage to destroy liberties they are supposed to secure" notes Walker (2007). Excessive focus on the exception neglects a specific account of how "limits, borders, citizens, aliens, administrative procedures, legal protocols, military deployments, policing, surveillance, classification and cultural valorization" are generated and in turn shape "identities, agencies, and institutions" (pp. 78-79). Torture for instance is not an ad hoc one off decision, but a practice that becomes habitual and institutionalized (Luban, 2005, p. 1445). Exceptional outcomes often result from decentred and diffuse processes, emerging from a long series of political choices and exclusions before any official decision is enacted (Doty, 2007, p.116). Rather than posit the lager as the matrix of modernity, we need to look more specifically at the concrete ways in which exceptionalism creeps into politics, the slow institutionalization of practices, the incremental change in security that exclude, marginalize and control along a gradation (Huysmans, 2004, p. 1337). This is important, argues Huysmans (2008), as the "jargon" of exception has served to dehistoricize and depoliticize theoretical analysis by excluding the social - the various mediations of class, technology, property, knowledge, institutions, and law which make up the political world (p. 177).

So where does this leave law? Critical theorists of the state of exception view law as fundamentally bound to sovereign power. For Agamben (2005) this necessitates abandonment of the concept of law as a tool of emancipation in favor of Benjamin's "pure violence" where justice is severed from the juridical (p. 64) and politics is severed from law (pp. 87-88). In addition to the utter abstractness and non-tangibility of what this actually means, there is reason to reject this move to purity. As Kohn (2007) notes "the belief in justice unmediated by law was one of the characteristics of totalitarianism" (p. 11). "The first essential step on the road to total domination is to kill the juridical person in man" warned Arendt (1973, p. 447). Finally, in positing a stark distinction between sovereign power and pure violence, little room is left in between. This fails to capture the reality that law and its meaning remains highly contested. As long as this is the case, exception is not the inevitable political space of modernity (Gregory, 2006, p. 421).

There is no doubt that law is part of and shaped by power. But there is a reason the Bush administration is disdainful of law. There is a potential for an anti-imperialist egalitarianism within international law that should be pursued, not rejected. Law can be a weapon of the weak (Bartholomew, 2006, p. 178). While recognizing the unilateral violence of "empire's law" that is "derivative of its own will as the global sovereign" (p. 162) we should also remain committed to Dworkin's "law's empire", where human rights and international law regimes forge a democratic cosmopolitan order (p. 164). The aspirational view of law, devoted to a substantive rule of law as opposed to lawless legal black holes and procedural positivistic legality or rule by law, suggests there are "moral resources" in the law available to deal with crises without producing exceptions (Dyzenhaus, 2007). Finally, it should be noted that unlike domestic law, the absence of a

unified international sovereign negates the possibility of pure sovereign suspension. Breaches of international law are just that – they break rather than remake the law.

This is not to say the law alone provides some sort of antidote to the abuses of the powerful. In this sense international human rights campaigners would do well to examine the debates over the role of law in achieving minority rights in the domestic context. For instance Stuart Scheingold (2004) has argued that the "myth of rights" should be supplanted with a "politics of rights" in which "rights are treated as contingent resources which impact on public policy indirectly-in the measure, that is, that they can aid the altering balance of the political forces" (p. 148). In this view, law is a resource in a larger political struggle that takes place not only in the courts, but through various channels of social action. In acknowledging the role of power relations in shaping law, the excluded should not be obliged to renounce the possibility of rights. Instead, oppressed people can contribute to the generation of new norms that reflect their experience. As Matsuda (1987) asks "How could anyone believe both of the following statements? (1) I have a right to participate equally in society with any other person. (2) Rights are whatever people in power say they are...the experience of the bottom is that one can believe in both of those statements simultaneously, and that it may well be necessary to do so" (p. 138). Rather than painting a black and white portrait, the ambiguities and contingencies inherent in the relationship between law and power demand examination and engagement in their historically specific configurations.

To sum up, I have identified two dominant frameworks for understanding contemporary exceptionalism. One focuses on exceptionalism as a response to necessity and debates the legitimacy of various policy measures. The other treats exceptionalism as a constitutive component of sovereign power and a normalized feature of modern politics. I have suggested they are both problematic. The former pays insufficient attention to history and power, often legitimizing the Bush administration's 9/11 fetishism. The latter pays insufficient attention to the specific enactments and contestations of exception. In positing a stark distinction between law and power which may or may not need to be suspended in emergency on the one hand and the complete collapse of law into power on the other, both frameworks gloss over the messy centre where law and power coexist. As Huysmans (2008) has recently suggested, "contestation of the demands for renegotiating balances between liberty and security are neither simply to be taken at face value as a matter of the necessity of balancing and rebalancing nor to be seen as the endgame of the validity of legal mediations of politics and life" (p. 179).

In conclusion, the practical implications of my argument for human rights lawyers and campaigners are that rather than compare the lawlessness of the present with a noble legalistic past, critics need to acknowledge the continuity of exceptional politics. I have suggested intelligence practices are an important site of norms of exception, the role and power of which needs to be examined and debated, not just in terms of post 9/ll policy, but as an institutional component of state security. Moreover, rather than dichotomize law and lawlessness, the ways in which exceptionalism can operate within the law demands attention. To challenge the administrations' legalism, critics must contrast substantive notions of rule of law with the administration's shallow positivistic arguments of rule by law.

The theoretical implications for scholarly analysis are that contrasting ways of conceptualizing exception have important implication for understanding contemporary

order. The critical approach improves on the 9/11 centricism of the policy approach by recognizing the continuity of exceptionalism and its relationship to power. Neither Schmitt nor Agamben, however, pay sufficient attention to the intermediate space between law and sovereignty, thus creating an overly stark dichotomy between norms and their absence. Theorists need to examine the specific historical manifestations of exceptionalism and the ongoing societal and legal contestation over the validity of exceptional measures. While remaining wary of the relationship between law and power, emancipatory theory should not dismiss the efficacy of law. We may never be able to banish the exception from the constitutive character of sovereign power, but we can learn to recognize it, contest it, and perhaps even control it.

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