Introduction

After Exception

In one of the scenes in Steven Spielberg's 2012 film *Lincoln*, Daniel Day-Lewis as Abraham Lincoln explains to his puzzled cabinet the urgency in passing the abolition amendment now, in winter 1865, before the end of the war. It all has to do with his war powers, or, more specifically, with the unclear legal status of his war powers. Two years earlier, under his powers as commander in chief, he proclaimed the emancipation of all slaves in the rebel states. That was what the war demanded, he says, and he hopes it was legal. But he isn't sure. After the war is won, he explains, there is a danger that the courts would find his wartime proclamations unconstitutional and overrule them, which would be a terrible outcome for reconstruction efforts. To avoid that outcome, abolition must be amended in the House before peace is restored. Lincoln, therefore, delays the end of the war – an end that is quite possible to achieve immediately – in order to change the constitutional conditions of peacetime. Clearly, the war in this image of constitutional activism is not the reason for urgent legislation; instead, its ongoing state is an opportunity to influence the legal reality of peacetime. The urgency is in the moral image of that forthcoming reality and in the practical need to legally entrench that image before the war inconveniently ends.

Compare this historical image with another that obviously stands in the minds of the audience of the movie – the Bush administration's lawmaking frantic in the wake of the war on terror. In the twenty-first century the president, his rhetoric of the unitary executive's supremacy in war and emergencies notwithstanding, was not very confident about the extent of his actual war powers. As a consequence, he urgently sought legislative assurances from Congress (as well as what Jack Goldsmith called "get out of jail cards"[1] from his own legal advisers) about the legality of radical new policies such as mass

[1] Jack Goldsmith, *The Terror Presidency* (NY: Norton, 2009), p. 97.

preventive detentions within the United States and abroad, extreme interrogation methods, and an unprecedented surveillance program. The aim of this extensive legal politics was to influence the shape of the forthcoming legal reality, not only in order to safeguard solid criminal defense for officials engaged in such practices, but, more importantly, in order to influence and shape the expected course of the war into the future – that is, to influence the scope of allowed methods in handling threats in the perpetual "war on terror." Here, too, the terrorist threat is not directly the reason for urgent action, but it serves as an opportunity to shape the legal and political horizon of peacetime – or, more precisely, the legal trajectory of the announced never-ending war.

Now compare these two historical images with the traditional theory about emergency and war powers. Under this theory, emergencies are unexpected and exceptional events, with consequences that existentially threaten the regular order. Emergency powers are authorized deviations from legal norms to handle – temporarily – such threatening conditions of special urgency. This theory may tell us that both presidents were exercising broad powers to act against the law in the context of the exceptional reality of civil war for Lincoln and a major terrorist attack for Bush. The question of whether they abused their powers is rather a political matter and depends on one's political inclination toward abolition or aggressive national security measures.

But this master theory does not apply in any meaningful way to the above stated historical images. First, the two presidents were not so much engaging in deviations from legal norms for the sake of handling a reality of wartime necessity; they were, in fact, frantically invested in lawmaking for the sake of shaping a future reality of normal or peacetime order. Second, for both presidents, the conditions requiring urgent action were not the emergency itself but the pressure of its pending conclusion and the resulting, changed landscape. What is urgent and calls for prompt action is the successful achievement of a normal legal reality while the crisis is ongoing. Third, both presidents were largely motivated not by a sense of broad and flexible war powers but instead by a sense of insecurity regarding the extent and stability of such powers. Both presidents expected that other branches and other actors would criticize and challenge the extent of their powers – if not immediately, then as soon as the legal condition of wartime was over. They clearly didn't act as all-powerful dictators, but as leaders proactively negotiating their power relations with other actors. Fourth, the way time limits figure in the decisions of both leaders is far from clear-cut. The urgency experienced by both leaders came not from the necessities of wartime but from the threat that the war would end before they had managed to entrench their policies. These policies were designed not for

the time-limited war, but for the extended horizon of the future. The temporal structure of limited wartime or emergency time was simply the means to shape and influence that horizon.

Of course, this is hardly new. We know that emergency powers are extendable, expandable, and abused. This knowledge is so deeply ingrained that it greatly influences the decisions of the actors exercising them; for example, it provides reason for both Bush and Lincoln to doubt the extent and scope of their war powers. The traditional narrative of emergency powers as exceptional powers is deeply entrenched and strongly influences the way emergency measures are exercised, debated, and criticized. Emergencies are exceptional events and emergency powers are exceptions to the regular legal order. The rest is politics, including the fact that presidents' legal decisions in emergencies change the course of history for their countries, which is, we are so easily convinced, the inevitable trajectory of emergencies.

This book directly challenges the traditional narrative of emergencies as exceptions. It claims that this narrative is descriptively too limited and restrictive, blocking us from seeing that the field of emergencies in public law operates as a contested field and that it generates genuine alternate choices that present themselves to inside actors. These actors and the paths that they take (and those that they abandon) provide feedback to shape the field and to broaden or narrow the choices that are available in it. But what is the dynamic of this field? What are its special characteristics, its specific tensions, its trajectories?

The narrative of exception generates tensions in debates about its theory and operation. Once we allow necessary broad powers for handling unexpected threatening events, how can we control and limit them? Can law constrain officials' response to such exceptional events? Should it? Can we improve constraint by institutional design? Can we trust political imperatives for constraint? How can we ensure, given the uncertainty of their subject matter, that exceptional powers are exercised only in exceptional circumstances, that is, only when they are really necessary? When does the exercise of exceptional powers end? Can we ensure that it ends at all? What if our regularly functioning norms and institutions are already changed because of the regular use of exceptional powers?

These questions have generated massive amount of literature in recent years – not only literature that is intended to improve the operation of this tension-filled practice area but also literature that challenges its underlying narrative, that emergencies are exceptional and require an exceptional response. Many scholars seem unsatisfied with the descriptive and explanatory power of the traditional narrative of exception and challenge its distinctions. Some

attack the distinction between *normal times* and special *emergency times*. They claim, as Mark Neocleus and Jean-Claude Paye do, that we are already living in "a permanent state of emergency" in which no such distinction is meaningful.[2] Some, such as Bruce Ackerman, lament this situation and announce it as a constitutional failure.[3] Others – for example, Eric Posner and Adrian Vermeule – simply acknowledge it as a fact of modern times, suggesting that our era is characterized by fast and dynamic threats and crises that require permanent emergency government.[4]

Still other scholars criticize the distinction between *special powers* and *normal powers*. Oren Gross, for example, critiques "models of accommodation" that pretend to adjust power structures to flexible necessities but actually create seepage of extraordinary law into normal law.[5] In contrast but in a critique on the same distinction, Kent Roach contests the exceptional law paradigm and places emergency powers under a regulatory model.[6]

Some scholars contest the distinction between high, *exceptional politics* and low, *quotidian politics*. They point either to the impact of "small emergencies" on the constitution[7] or to the bearing of regular doctrines of exception such as necessity on our understanding of national or existential emergencies.[8] Or they unravel the possibility of an alternative, more democratic politics of exception.[9]

But most of these theoretical endeavors are still very much tied to an underlying distinction between normal and exceptional. The worry is that special laws will contaminate normal law; that the powers necessary to handle threats cannot be effectively limited; that normal times have been replaced by a constant state of exception. The dichotomy is continuously replicated in the theory of a field in which practices have long ago transcended traditional separations.

[2] Mark Neocleous, *Critique of Security* (Montreal: McGill University Press, 2008), p. 67; Jean Claude Paye, "A Permanent State of Emergency," *Monthly Review* (November 1, 2006).
[3] Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010).
[4] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010).
[5] Oren Gross, and Fionnualla Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).
[6] Kent Roach, "Ordinary Laws for Emergencies and Democratic Derogations from Rights," in Victor Ramraj, ed., *Emergencies and the Limits of Law* (New York: Cambridge University Press, 2008), p. 229.
[7] Kim Lane Scheppele, "Small Emergencies," *Georgia Legal Review* 40 (2006): 835.
[8] Leonard Feldman, "The Banality of Emergency: On the Time and Space of 'Political Necessity,'" in Austin Sarat, ed., *Sovereignty, Emergency, Legality* (New York: Cambridge University Press, 2010), p. 136.
[9] Bonnie Honig, *Emergency Politics* (Princeton, NJ: Princeton University Press, 2009).

Emergency law, its practices and doctrines, and the institutions that regularly deal with threats are constantly developing in every jurisdiction as well as in international and transnational legal complexes. But the theory that critiques emergency law and evaluates its consequences perpetuates a static dichotomy that it cannot and does not sustain.

SHIFTING THE QUESTION

This book frames the field of emergency powers beyond the dichotomy. It methodologically assumes that to frame a field implies, first and foremost, to define the space within which the practices of the field occur.[10] The practices of emergency management do not respond to the dichotomy between normal and exceptional but to theoretical and practical problems, questions, and tensions. In order to define the field, then, this book traces its recurrent problems: the theoretical problem of containment of threats and responses to threats within a given legal and political order and the practical problems of definitions, authorization, jurisdiction, and temporality. Each of these problems, or *problem areas*, typically has a certain formulation informed by the theory of exception, and with it a set of assumptions on how it is expected to be solved. Using case analyses that display real experiences of engagement with each set of problem areas, the book distinguishes emergencies not by legal limits and political decision but by dynamic engagement, norm productivity, and contestations over the terms of response to threatening events.

Moving from the theories of emergency government in Part I to its practical questions in Part II and its consequences in Part III, the book unravels and illustrates a field that is antithetical to its common framing and traditional anxieties, that is growing in scope and vast in subject matter, that is relevant beyond jurisdictional divides, that is important to everyday life in most liberal and many illiberal societies. It provides a missing link between the traditional and still dominant idea of exception with its strict dichotomies and a new and appealing way to talk about emergencies – that is, as processes rather than momentary events; as involving a plurality of response agents rather than one centralized executive; as opportunities for norm production and legal and institutional mobilization, rather than occasions for the suspension of law and legality.

This new way of talking about emergencies has important implications for the study of emergency powers in public law. As a special type or form

[10] Christopher Tomlins, "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative," *Law & Society Review* 34:4 (2000): 911.

of governance, regular rather than exceptional, legal emergencies should be studied not merely as manifestations of constrained or unconstrained conduct, but also as policies and practices of response to new problems and risks. Such responses tend to create new knowledge and often result in the development of new norms and institutions. Far from being a space of political exception and legal vacuum, emergency law should be studied as a dynamic field of legal and political mobilization that demands and must be open to an ongoing elaboration and reflection in the practice of governing.

OVERVIEW

The book is organized around six problem areas of emergency law's dynamism. The first and third parts deal with the two theoretical questions – the background question of containment of threat within a legal and political order (Chapters 1 and 2) and the constitutional history question of change in exigency (Chapters 7 and 8). The central part of the book tracks four sets of practical questions: questions of *definitions* (Chapter 3), *authorization* (Chapter 4), *jurisdiction* (Chapter 5), and *temporality* (Chapter 6).

PART I THEORIES OF CONTAINMENT

The first part presents the problem that is at the center of traditional debates about emergency powers: the problem of the containment of unexpected threatening events within a given legal and political order. It lays out the paradigmatic reactions to this problem, both justificatory reactions: in the three traditional philosophical models justifying emergency government, and operational reactions: in the *emergency paradigm* – the doctrine that underlies historical mechanisms of emergency management. A common feature of both the philosophical justifications and the doctrinal structure is that they stand for a strong commitment in the liberal tradition to designing sophisticated legal and political, theoretical and operational frameworks, for solving the problem of containment. The theoretical heritage of the field of emergency in public law is not the justification of exceptions but the persistent attempts to manage and contain exigency.

Chapter 1 presents the background theoretical problem: whether law can and whether it should constrain officials in their response to emergencies. It makes the claim that the paradigmatic theoretical models that answer this question in the liberal political tradition – the Lockean extralegal model of prerogative; the Machiavellian Neo-Roman model of dictatorship; and the rule-of-law model of legality – have an important but overlooked common

feature. They are all deeply motivated attempts to engineer sophisticated solutions to the problem of containment of threats within a particular legal and political order. Rather than calling for a strong sovereign who can handle all threats, they express sensitivity to the connection between the continuity of political order and the specific ways in which its threats are managed: by a pre-legal social power that sets aside the law for the good of the people (the extralegal model), by institutional mechanisms that enable the move from regular to exceptional realities and governments – and back (the dictatorship model), or by a legal distinction that is always forcefully available in a rule-of-law state (the legality model).

This commonality of purpose is also why, as shown in Chapter 2, all of the historical classic mechanisms of emergency powers – from the Roman dictatorship to common law's martial law and habeas corpus suspension acts, from the French state of siege to the German tradition of state of exception – are justified by a confusing mix of the different models. The Roman dictatorship, for example, was not only a conservative mechanism for the movement between regular and irregular reality and government (which makes it apt for the neo-Roman model); it was also and importantly legally entrenched and at the same time free of constraint. These features conform to the other two models.

What the historical mechanisms do share in a differentiated manner, and here I follow Bernard Manin's analysis, is a four-featured legal doctrine termed "the emergency paradigm": particularly defined conditions (feature number 1), allow for authorized deviations from norms (feature number 2); of a given jurisdiction (feature number 3) for a limited period of time (feature number 4).[11] Manin contends not only that each of these features appear differently in all historic mechanisms (different definitions of circumstances that allow authorization, different types and sources of authorizations, different time limits, and so on), but also that the specific emphasis of the doctrine's features in each historical mechanism, expresses deep tensions and contestations of the constitutional order which the emergency mechanism is supposed to preserve. Once more, if we take the Roman dictatorship as an example, Manin shows that the time limit of six months for the dictator's authority, does not express, as in the liberal mechanisms – a worry that the dictator will deny the liberty of the citizens forever, but the anxiety of the Republic being too close to a

[11] Bernard Manin, "The Emergency Paradigm and the New Terrorism: What If the End of Terrorism Was Not in Sight?" in Sandrine Baume, Biancamaria Fontana (dir. de), *Les usages de la séparation des pouvoirs* (Paris: Michel Houdiard, 2008), pp. 136–171 (also available at http://as.nyu.edu/docs/IO/2792/emerg.pdf).

monarchy.[12] The Roman Republic's specific political anxieties are expressed in the specific legal framework of the institution that is created to protect it against threats.

PART II PRACTICES OF CONTAINMENT

This insight into the politically differentiated significance of the legal doctrine of emergency instructs the analysis in the second part of the book – as we move from the background theoretical problem of containment and constraint to the more practical problems that constitute day-to-day practice in the field.

Here, in four chapters, I use a series of case studies to show how each aspect of the emergency doctrine – definitions, authorizations, jurisdiction, and temporality – is also a particular tension area that generates much productive, normative, and institutional mobilization in specific cases of legally managing threats. Each of these tension areas has been problematized in the history of emergency jurisprudence in a way that strongly adheres to the master narrative of exceptional deviations for exceptional circumstances. Those problematics are: (1) that emergencies are particularly and inherently hard to define; (Chapter 3, on the problem of definitions); (2) that emergencies require the construction of "unlimited power" that must also be "constrained" (Chapter 4, on the problem of authorization); (3) that emergencies are handled by sovereigns who decide whether the situation is an emergency and what to do about it within their separate jurisdictions (Chapter 5, on the problem of jurisdiction); and (4) that emergencies require an immediate, ad hoc response that must also be limited in time (Chapter 6, on the problem of time and temporality).

All of the cases analyzed in the central part of the book show that, despite the dominance of these assumptions in positive law and in common attitudes across jurisdictions, alternative formulations of the problems and alternative solutions resist their pull, opening up alternative politics that may have critical long-term implications in the form of norm production, institution making, and construction of political legitimacy.

Definitions

Chapter 3 uses a famous post-9/11 derogation case in the United Kingdom's House of Lords, the *Belmarsh* case, to show the limited prism that

[12] "While the dictator would hold twice as much power as each consul thus getting perilously close to monarchy, he would be kept within republican limits by holding such power for only half of the consuls' term." Ibid., p. 6.

emergency jurisprudence allows over the question of how to define and identify emergencies. The majority in this case maintained a distinction in Article 15 of the European Convention on Human Rights (derogation clause) between identifying "a public emergency" on which deference to government is required, and identifying "the measures strictly required to handle it," which calls for broad scrutiny. This distinction corresponds to the traditional framing of emergencies as inherently difficult to define. The court may intervene on the legality of the measures as long as it remains purely deferential on the question of defining and identifying the emergency. But this solution exposes a gap in the decision as the judges failed to confront the government's claim that both questions are so speculative and exceptional that they must both be left to government's discretion. The case shows that this gap is not only perpetuated into positive law but, more importantly, that it overshadows a range of questions and critiques that become available when we move away from the idea that emergencies are indefinable – questions about what should count as a public emergency, about the methods and procedures of defining and identifying threats, about the standards of evidence required, and about the importance of improving conditions for contestation over the government's claim that an emergency exists.

There are crucial practical reasons for us to acknowledge this broad and rich complex of definition questions because if we allow claims that there is an emergency without check, we not only allow abuse but risk that mistakes of identification continue into the horizon of future responses disguised as positive legal doctrines.

Authorization

Chapter 4 expands our narrow understanding of authorization problems in responding to emergencies by using a micro institutional comparison between two domestic systems with different structures of authorized response: the U.S. centralized and the U.K. decentralized constitutional systems.

Traditional emergency powers theory rigidly distinguishes between powers and constraints. The question of authorization under this distinction is how to construct both unlimited powers and mechanisms to constrain them (constitutionally, legally, culturally, or politically). This emphasis conceals a reality in which response practices are always situated in complex institutional environments. When governments attempt to solve the problem of authorization framed as the problem of how to restrict necessarily unlimited powers, they construct complex constitutional and institutional power relations while ignoring the effects that these relations have on actual response environments.

To highlight such effects and thus broaden our understanding of authorization problems beyond the drama of powers vs. constraints, Chapter 4 compares the post-9/11 role of two small but influential legal agencies, situated at the center of two very different constitutional authorization structures: the Office of Legal Counsel (OLC) within the U.S. centralized response environment and the Joint Committee on Human Rights (JCHR) within the U.K. decentralized response environment. The pervasive *functional, professional, and ideological* traits of these agencies, their very understanding of law and legality, were implicated not by a dichotomy between powers and constraints but by their place within the distribution-of-power structures that they are part of. In turn, these traits crucially affected their ability to contribute to their countries' successful response to 9/11 and to future emergencies. When asking who decides whether an emergency exists and what to do about it, the complex institutional context in which response decisions are made must not be overshadowed by out-dated fantasies of unlimited powers.

Jurisdiction

Chapter 5 moves from actors within one jurisdiction to the international realm to expose the limit of the exceptional perspective over problems of jurisdiction beyond the state. The story of Cyclone Nargis, a devastating natural disaster that struck Myanmar in 2008, illustrates a classic jurisdictional problem – the problem of access of aid to disaster-affected areas. Myanmar's ruling junta initially applied exclusive sovereign jurisdiction over the emergency, yet its apparent failure to solve the problem of access encouraged different outside and inside actors to express their unique and more successful solutions. While international aid organizations suggested the worth of their professional expertise as an easy conservative basis for legitimate access, Western officials and commentators invoked the principle of the responsibility to protect as a more radical legalized solution, and local community volunteers and survivors effectively expressed local capabilities and local knowledge as a key to successful intervention. In this discursive context, the regional organization, the Association of South East Asian Nations (ASEAN), broke the impasse, expressing unique regional sensitivities. To understand why ASEAN was successful in solving the problem of access, one must move away from the sovereign-focused theory of emergency and acknowledge how problems of jurisdiction in emergencies provide opportunities for different actors, inside and outside sovereign jurisdiction to effectively and legitimately solve them while developing their unique response capabilities.