Tracing the American State of Exception from the George W. Bush, Barack Obama, and Donald Trump Presidencies

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Abstract
The state of exception has come to weaken the rule of law; that is, it has enabled the sovereign to not only increase its political power but to suspend the law itself. This investigation demonstrates how the post–9/11 state of exception (or of emergency, necessity, or martial law) is increasingly used as the basis of contemporary American governance. This form of governance has been intensified since 9/11 by suspending normal rules and procedures and replacing them with extrajudicial measures that unduly jeopardize fundamental freedoms. The first section develops a framework for the state of exception that draws from Giorgio Agamben. It establishes the existence of the state of exception today and describes how the exception is a liminal space devoid of all law. The following section provides evidence as to how the state of exception has entered a self-reinforcing process in the United States since 9/11. It adapts the tendencies of path dependency from Paul Pierson’s increasing returns framework and applies them to the continuation of the state of exception from three presidencies since 9/11 (from Bush to Obama to Trump) to demonstrate how self-reinforcing processes end up prolonging states of emergency that are supposed to be temporary.

Keywords
State of exception, post 9/11, terrorism, fundamental freedoms, American law
The normal sources of governance in a democratic system are the general rules and laws that may be elaborated from a constitutional and statutory command. In times of war, the general rule of law is traditionally suspended and executive power is temporarily accorded to a strong authority that attempts to resolve the crisis. This temporary moment of personal rule, as Aristotle states in his Politics, should “be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.” The state of exception (or state of emergency, necessity, or martial law) is the legal instrument that allows for the sovereign leader to transcend the rule of law for a short period of time under a personal discretion to do justice for the public good. Today’s recurrent threats of terrorism (including non-state actors in the Middle East and North Africa, radicalized individuals who are on the verge of committing acts of “violent jihadism,” and “radical Islamic violence” itself) often serve as abstractions that justify exceptional security measures. This contemporary form of governance reveals a disturbing trend about the changing political-legal culture in the Western world: executive and police powers used during states of exception are likely to become integrated into normal law after a crisis is over.

The aim of this investigation is to demonstrate how the post–9/11 state of exception is increasingly used as the basis of contemporary American governance. This form of governance has been intensified since 9/11 by suspending normal rules and procedures and replacing them with extrajudicial measures that threaten fundamental freedoms. The first section develops a framework for the state of exception which draws from Giorgio Agamben. It establishes the existence of the state of exception today and describes how the exception is a liminal space devoid of all law. The following section...

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2 Ibid at 1182.
describes how the state of exception has continued in practice from George W. Bush’s administration, to Barack Obama’s and Donald Trump’s administrations. This analysis adapts Paul Pierson’s framework of *increasing returns*, which is understood as a path-dependent process typically used in economics, to demonstrate how self-reinforcing processes end up encouraging the prolonging of states of exception that are supposed to be temporary.\(^3\) The methodological decision to employ *increasing returns* theory for examining the state of exception literature has been made to further the empirical argument that a state of exception is emerging in the United States and that there exist identifiable mechanisms that provide evidence for this proposition.

I. DEFINING THE STATE OF EXCEPTION

Historically, the concept of sovereignty is based on what Schmitt has called the “*nomos* of earth,” or the “general rule of law” that was practiced within the political and spatial epoch of the Westphalian international order.\(^4\) Agamben’s work, *State of Exception*, questions the notion that the sovereign state is based on the “general rule of law.” Agamben asserts the paradoxical position that the state of exception no longer resembles the exception to the rule in contemporary governance; rather, the exception increasingly resembles the rule itself.\(^5\) This encroaching process is the “preliminary condition for any definition of the relation that binds and at the same time abandons the living being to law.”\(^6\)

Agamben outlines two schools of thought on the legal basis of the state of exception. The first view, which is codified in international law as derogation, understands the legality of the exception as “an integral part of positive law because the necessity that grounds it is an autonomous source of law.”\(^7\) In this view, human rights conventions and treaties permit states to suspend the protection of basic human rights

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\(^4\) Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, translated by GL Ulmen (New York: Telos Press, 2003). Schmitt further argues that the Westphalian spatial order has collapsed, calling attention to the emergence of an imperial United States hegemony, the general transformation of war and terrorism, the presence of liberal internationalism, and the weakening of the state itself. The genesis of the modern state system has its roots in the Peace of Westphalia (1648), but the notion of sovereignty dates back further to the ancient Greeks. See also J Peter Burgess, “The Evolution of European Union Law and Carl Schmitt's Theory of the Nomos of Europe” in Louiza Odysseos & Fabio Petito, eds, *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (New York: Routledge, 2007) 185 at 187. As Burgess explains, ‘nomos’ can be defined in ancient Greek as “that which is in habitual practice, use or possession. It is thus variously translated as ‘law’ in general as well as ‘ordinance,’ ‘custom,’ derived from customary behaviour, from the law of God, from the authority of established deities, or simple public ordinance.”


\(^6\) *Ibid* at 1.

\(^7\) *Ibid* at 23. For this school of thought, Agamben refers to the jurists Santi Romano, Hauriou, and Mortati.
when faced with an emergency that “threatens the life of the nation.”

The second approach describes the state of exception as extrajudicial, whereby a legal space is opened that allows for unrestricted state action, although only for the short period of time that it takes to restore constitutional order. Agamben ultimately rejects these views and argues that “the state of exception is neither internal nor external to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with one another.”

Agamben uses the term *iustitium*, meaning a “suspension of the law,” to describe this emptiness, which characterizes the contemporary state of exception. Agamben explains that in the Roman Republic, a *senatus consultum ultimum* (final decree of the Senate) would be enacted to declare a state of emergency, which called on “the consuls, the tribunes of the people, and even, in extreme cases, all citizens, to take whatever measures they considered necessary for the salvation of the republic.” On this decree, it is impossible to clearly define the legal consequences of the acts that had been committed during *iustitium* with the aim of saving the republic. Even if we wanted to judge actions taken under such conditions, the person that acts under *iustitium* “neither executes nor transgresses the law, but inexecutes it.” Actions are merely facts and the judgement of those actions once *iustitium* expires will depend on the circumstances. As long as *iustitium* lasts, these actions will be undecidable and the definition of whether they were correct will be beyond the sphere of law. This emptiness or standstill of law, for Agamben, tends to appear increasingly in contemporary politics. As demonstrated below, the use of extra-legal security measures is indicative of this claim.

Agamben’s critique builds on the contiguity between the state of exception and sovereignty that Carl Schmitt has established as decisionism: “[the] Sovereign is he who decides on the exception.” The sovereign creates a central paradox where the abandonment of law, or the norm, is declared at the same time as the condition that

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9 Humphreys, *supra* note 8 at 678–679.

10 *Supra* note 5 at 27.

11 *Supra* note 5 at 41.

12 Ibid at 50.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid at 2.

17 Ibid at 1.
guarantees its anchorage to the juridical order." There is a relationship between the theory of “securitization” as developed by the Copenhagen School and Schmitt’s concept of sovereignty that helps to describe how sovereign leaders justify the use of exceptional measures to be used in the name of security. Ole Wæver defines security as a speech act by state actors who “securitize” issues by successfully representing them as a security situation. Michael Williams argues that this definition of security is underpinned by Schmitt’s decisionist theory of sovereignty where the sovereign has the authority to decide when an issue has reached a point where it constitutes an emergency and requires the necessary suspension of the normal legal order so that the state can be preserved. “Securitization” represents a political speech act (a decision) that presents issues like terrorism or, for instance “radical Islam,” as existential threats to the nation. The Schmittian influence on “securitization” theory can be illustrated by the concept of societal security, one of the Copenhagen School’s most controversial aspects of security relations. The identity of society is the referent object that is being threatened in this scenario. Through a speech act (an authoritative decision that defines the existential threat), the Schmittian logic of friends versus enemies is invoked.

The existential threat of losing one’s way of life is exemplified by George W. Bush’s argument that the United States was in a “new kind of war” (i.e., a “war on terror”) after 9/11 with terrorist groups in the Middle East. The Bush administration furthered the main elements of a liberal internationalist agenda by using military power to pursue regime change against its illiberal enemies and to defend and promote democracy. The administration’s insistence on democracy promotion, which was backed by massive increases in defence spending, aimed to cultivate a public sense of heroism or a Straussian type of “elevated patriotism.” As William Kristol and Robert Kagan argue, “the responsibility for the peace and security of the international order

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18 Louise Amoore, "Consulting, Culture, the Camp: On the economies of the exception" in Louise Amoore & Marieke de Goede, eds, Risk and the War on Terror (Oxon: Routledge, 2008) 112 at 114.  
21 Ibid at 518-19. See also Bill McSweeney, "Durkheim and the Copenhagen school: a response to Buzan and Waever" (1998) 24:1 Rev of Intl Studies 137-40. In a forceful critique, Bill McSweeney argues that “societal security” ends up reifying ‘society’ and ‘identity’ and this concept defines society as having a single identity, which risks supporting exclusionary identities. However, Williams argues that “it is precisely under the conditions of attempted securitizations that a reified, monolithic form of identity is declared. It is when identities are securitized that their negotiability and flexibility are challenged, denied, or suppressed” (ibid at 519).  
22 Williams, supra note 21 at 518-19.  
rests so heavily on America’s shoulders” and that it would be “in practice a policy of cowardice and dishonor” to do otherwise.24

This liberal internationalism approach does not stem from a Kantian reading of liberalism.25 Instead, Bush’s approach came from a fear that without some sort of purpose to unite the American people in the wake of 9/11, some sort of anomic or nihilistic chaos will ensue, and the country will thereby be unable to assert itself in an anarchic system that is always characterized by power competition.26 In this respect, democracy promotion under the Bush administration, in contrast to what the public was told, was motivated by neoconservative goals: namely, to provide a sense of unity by producing a “heroic conception of national identity.”27 While neoconservatism embraces the democracy promotion feature of the liberal internationalist agenda (and of democratic peace theory itself), it also offers a Schmittian critique of liberal internationalism.28 This critique emphasizes the superficiality of a global international society because the “concrete bonds” that encourage action in defence of liberal values are lacking, and it argues that sovereignty ultimately lies within the state.29 Indeed, this critique reasserts the indispensability of American exceptionalism during a time when the United States’ closest allies are moving towards the “brave new judicial world” of global governance.30 Through the process of dividing “us” (the United States) and “them” (e.g., abstractions such as terrorism, or the Arab and Islamic worlds), Bush projected the securitization of national identity through the logic of friends versus enemies. This securitization process mirrors the Schmittian conception of sovereignty through the leader’s determination of friends and enemies, and the determination that terrorism is a threat that requires exceptional measures.

24 William Kristol & Robert Kagan, “Towards a Neo-Reaganite Foreign Policy” (1996) 75 Foreign Affairs 18 at 31. The notion that national ‘myths’ of this type may inspire a ‘corrupted citizenry’ can be traced to the philosophy of Leo Strauss and is found in Kristol and Kagan’s “Towards a Neo-Reaganite Foreign Policy.” Defence spending (e.g., material superiority) serves the purpose of “preparing and inspiring the nation to embrace the role of global leadership.” See also Shadia B Drury, Leo Strauss and the American Right (London: Macmillan Press, 1999) at 11–19.
25 Beate Jahn, “Kant, Mill and Illiberal Legacies in International Affairs” (2005) 59:1 Intl Organization 177. Kantian is referred to in the sense that peace is possible and desirable, and politics and war must be limited by universally and equally applicable norms. This is to be achieved through democracy promotion, adhering to international law, and working through international institutions to resolve conflict. See also Immanuel Kant, Perpetual Peace: A Philosophical Essay, translated by Campbell Smith (London: George Allen and Unwin, 1915) at 115.
27 Ibid.
28 Ibid at 10.
29 Ibid.
30 Ibid at 11. See Anne-Marie Slaughter, “A Brave New Judicial World” in Michael Ignatieff, ed, American Exceptionalism and Human Rights (Princeton: Princeton University Press, 2009) 277. This is not to be confused with the “state of exception” in America. These are distinct concepts.
II. INCREASING RETURNS ARGUMENTS FOR THE STATE OF EXCEPTION

At the time of writing, it has been more than fifteen years since 9/11 and the subsequent enactment of a set of laws across the globe that effectively declared a contemporary state of exception. Liberal democratic states have unleashed considerable levels of violence under these laws and still legislate sets of coercive tools to counter the threat of terrorism. For instance, a state of emergency had been extended six times in France since the November 2015 Paris attacks. After the state of emergency expired in November 2017, the Macron government normalized several emergency measures through its new counterterrorism bill, including the following measures: the designation of public spaces as “security zones,” closing places of worship suspected of spreading “extremist views,” and granting police access to search private property without oversight from a judge. Belgium’s parliament also enacted new counterterrorism laws in response to the March 2016 attacks at Brussels Airport, which allow the government to place terrorist suspects in pretrial detention, deport legal residents on the suspicion of engagement in terrorist activities, and criminalize incitement of terrorism.

Moreover, the capacities of the “five eyes” (FVEY) intelligence alliance (comprising the United States, Canada, the United Kingdom, Australia, and New Zealand) have grown substantially after 9/11 with the aim of countering terrorism, and the alliance seems to have been the main instrument through which the National Security Agency (NSA) extended its global operations. Edward Snowden has described FVEY as a “supranational intelligence organization that does not answer to

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32 Reuters Staff, “As France emergency rule ends, Macron defends new anti-terrorism law”, Reuters (October 31, 2017), <www.reuters.com/article/us-eu-france-macron/as-france-emergency-rule-ends-macron-defends-new-anti-terrorism-law-idUSKBN1D02DR>. See Michel Foucault, Discipline & punish: The birth of the prison, translated by Alan Sheridan (New York: Vintage, 2012). For Foucault, ‘normalization’ (i.e., discipline that occurs though the imposition of precise norms) is a primary technique of control in a modern disciplinary society. See also Dianna Taylor, “Normativity and Normalization” (2009) 7 Foucault Studies 45 at 47. The tendency for extra-legal security practices to become normal law and function as an instrument of rule do indeed resemble this process. For instance, Dianna Taylor explains that normalizing norms “become embedded to the point where they are perceived not as a particular set of prevailing norms, but instead simply as ‘normal,’” inevitable, and therefore immune to critical analysis. Normalizing norms thus hinder not only critical analysis itself but also, to the extent that they become naturalized, the recognition that such engagement is needed or possible at all.”
the laws of its own countries.”

Given the tendency of exceptional powers to transform into normal law and practice, this section provides evidence about how the state of exception has entered a self-reinforcing process in the United States since 9/11. It adapts the tendencies of path dependency from Pierson’s *increasing returns* framework and applies them to the continuation of the state of exception from three presidencies since 9/11 (from Bush to Obama to Trump) to demonstrate how self-reinforcing processes end up encouraging the prolonging of supposedly temporary states of exception. These processes are as follows: (1) the role of *collective action* has authorized the use of military force against those linked to the 9/11 attacks; (2) the exercise of *political authority* has initiated the use, and maintained the legitimacy, of extra-juridical measures, such as indefinite detention at the facilities in Guantánamo Bay and the prosecution of terrorists in the military commission system; and (3) the *high density of institutions* (for e.g., intelligence and security agencies) have a central role in interpreting the threat of terrorism and have increasingly institutionalized counterterrorism as a policy activity since 9/11.

**Collective Action**

For the *increasing returns* perspective, the attacks on 9/11 and the collective response to these events are significant in two ways: (1) in the contingency of critical junctures (understood as a structural element of instability driving post–9/11 security practices), and (2) the important role of the sequencing of events. The 9/11 attacks represented a contingent event for American foreign policy, and the collective reaction to these events helps to explain why this historical juncture has had lasting consequences. The first instances of collective action as a response to these attacks were the Authorization to Use Military Force (AUMF) of 14 September 2001, and the Military Order of 13 November 2001, determining that the 9/11 attacks had ushered in a situation of exceptional insecurity and that the United States was in a state of armed conflict with al Qaeda. Congressional support for the AUMF was almost unanimous: only one out of 519 members of Congress voted against AUMF because the member was concerned that it granted the President a “blank cheque” to use military force.

The 9/11 attacks called for measures of increasing state power for a limited time, yet the collective response changed the way the United States engages in warfare in

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tangible ways. Notably, the 9/11 AUMF authorizes a new type of asymmetric warfare that characterizes military conflict in the “global war on terror,” wherein the battlefield extends globally in scope and military capabilities are widely disparate in scope. Unlike most major legislation authorizing the use of military force by the president, the AUMF authorizes military force against “organizations or persons” linked to the 9/11 attacks. Congress has allowed for military action against unnamed nations within specific regions of the world in its past authorizations to use military force but has never authorized force against “organizations or persons.”

The Bush administration consistently argued that al Qaeda was a legitimate armed group and that its violent acts met the threshold for armed conflict. For instance, John Yoo, the Deputy Assistant Attorney General in the Bush Administration, questioned why the status of al Qaeda as a non-state actor should make any difference to whether the U.S. was at war. Instead, Yoo justified armed conflict by asserting that al Qaeda is different from criminal enterprises like the mafia because the organization is intensely political and had “killed more people than the Japanese at Pearl Harbor.” Many critics of this position, such as Anne-Marie Slaughter, have argued that the members of al Qaeda involved in the 9/11 attacks could easily have been defined as hijackers and murderers, which fall in the criminal jurisdiction of United States federal courts. Another critic, Mary Ellen O’Connor, asserts that “al Qaeda’s action and our [the US] responses have been too sporadic and low-intensity to qualify as armed conflict.” The “war on terror,” she concludes, did “not meet the legal definition of war.” In other words, the 9/11 attacks, although they were shocking, were not an exceptional event that required a state of armed conflict. Yet, fifteen years after 9/11, the United States still insists that it is in a state of armed conflict with al Qaeda (and

38 Rod Thornton, Asymmetric Warfare: Threat and Response in the 21st Century (Cambridge: Polity, 2007) at 1–2. The term ‘asymmetric warfare’ refers to an armed conflict usually between a state and non-state actor who have widely disparate capabilities. Rod Thornton defines this type of conflict as “violent action undertaken by the ‘have-nots’ against the ‘haves’ whereby the have-nots, be they state or sub-state actors, seek to generate profound effects—at all levels of warfare (however defined), from the tactical to the strategic—by employing their own specific relative advantages against the vulnerabilities of much stronger opponents. Often this will mean that the weak will use methods that lie outside the ‘norms’ of warfare, methods that are radically different.”


40 Ibid.

41 Ralph, supra note 27 at 26.

42 John Yoo, War by Other Means: An Insider’s Account of the War on Terror (New York: Atlantic Monthly Press, 2006) [Yoo, “War by Other Means”].

43 Ibid at 3–4.

44 Anne-Marie Slaughter, "A defining moment in the parsing of war", Washington Post (16 September 2001), B04.


46 Ibid at 535.
now ISIS). The 9/11 AUMF has underpinned warfare in both the Bush and Obama administrations. Both consistently cited the AUMF to explain the legal foundation for practices such as prolonged detention and extrajudicial killings in asymmetric warfare.\footnote{Ralph, \textit{supra} note 27 at 24. See also Mark David Maxwell, “Targeted Killing, the Law, and Terrorists: Feeling Safe?” (2012) 64 Joint Force Q 123 (a brief history of the legal authority of extrajudicial (or targeted) killings before 9/11).}

The second feature of the collective action to the 9/11 attacks is the very critical role of timing and sequencing. In an \textit{increasing returns} process, the timing of an event is critical in distinguishing formative moments from periods that reinforce divergent paths.\footnote{Pierson, \textit{supra} note 3 at 251.} Moreover, the path dependence in policy changes makes the reversal of course increasingly unattractive over time, and the probability of further steps along the same path increases with each move down that path.\footnote{\textit{Ibid} at 252.} This path dependence is evidenced by one of the main continuities between the Bush, Obama and Trump administrations. The Obama administration reiterated the Bush administration’s argument that the attacks on 9/11 had brought in a state of exceptional insecurity and that the United States was at war against al Qaeda (and later, applied this argument to ISIS).\footnote{Ralph, \textit{supra} note 27 at 84–85.} This reiteration shows that the Obama administration accepted the assertion that non-state terrorist organizations are part of a broader network of terror that pose an existential threat to the United States. The Obama administration stated that the United States will “prioritize collective action to meet the persistent threat posed by terrorism today, especially from al-Qa’ida, ISIL, and their affiliates.”\footnote{US, \textit{National Security Strategy} (Washington DC: The White House, February 2015) at 7, online: <www.obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy.pdf>.} Similarly, Trump has emphasized his administration’s foreign policy priority of eradicating ISIS.\footnote{Donald J Trump, “Trump on Foreign Policy” (speech delivered at The Center for The National Interest, Washington, DC, 27 April 2016), online: <www.nationalinterest.org/feature/trump-foreign-policy-15960>.}

Obama’s preferred way of waging war, moving away from the Bush administration’s approach of committing American ground troops, was to rely on surrogates to externalize the strategic, operational, and tactical burden of warfare.\footnote{Andreas Krieg, “Externalizing the burden of war: the Obama Doctrine and US foreign policy in the Middle East” International Affairs (2016) 92:1 Oxford U Press 97 at 98–99. Krieg argues that surrogate warfare “is a wider concept that incorporates aspects of compound and proxy warfare but extends further in drawing on the idea of an RMA (‘revolution in military affairs’). Essentially, surrogate warfare describes a patron’s externalization, partially or wholly, of the strategic, operational and tactical burden of warfare to a human or technological surrogate with the principal intent of minimizing the burden of warfare for its own taxpayers, policy-makers and military.”} This approach includes, for example, training and equipping Kurdish \textit{peshmerga} forces to
fight as surrogates against ISIS militants in Iraq.\textsuperscript{54} One of the most important instances that is indicative of this strategy was the Obama administration’s massive extension of the armed drone program.\textsuperscript{55} This was not simply due to improvements in drone technology, but rather a direct military strategy by the Obama administration. His administration justified the legality of extrajudicial drone killings by citing AUMF and arguing that enemy leaders were legitimate targets because they were belligerent members of an enemy group.\textsuperscript{56} The US Department of State’s argument was that because the country was engaged in armed conflict, it was not required “to provide targets with legal process before the state may use lethal force.”\textsuperscript{57} This justification was later reiterated by Obama’s chief counterterrorism advisor, John Brennan, who stated, “[a]s the President has said many times, we are at war with al Qaeda. … Our ongoing armed conflict with al Qaeda stems from our right—recognized under international law—to self-defence.”\textsuperscript{58} Moreover, Attorney General Eric Holder stated that “it is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces.”\textsuperscript{59} The authority to use force against these targets through extrajudicial drone strikes was thereby justified under its ongoing armed conflict with al Qaeda. Trump is likely to continue this practice. Trump has stated, “drone strikes will remain part of our strategy”\textsuperscript{60} and “when you get these terrorists, you have to take out their families.”\textsuperscript{61}

There are also indications that Trump’s framing of counterterrorism operates within an unlimited spatial and temporal armed conflict, as it did with the two previous administrations. Obama had moved away from using the specific phrase “war on terror,” which was characteristic of the Bush administration, instead preferring terms like “overseas contingency operation.”\textsuperscript{62} Trump also avoids this term. However, this

\begin{footnotesize}

\begin{enumerate}
\item Ibid at 107.
\item Ibid.
\item Ralph, supra note 27 at 58.
\item Harold Hongju Koh, “The Obama Administration and International Law” (Speech delivered at the Annual Meeting of the American Society of International Law, 25 March 2010), online: <www.state.gov/documents/organization/179305.pdf>.
\item Eric Holder, Address (delivered at Northwestern University School of Law, Chicago, IL, 5 March 2012), online: <www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.
\item Ralph, supra note 27 at 46.
\end{enumerate}
\end{footnotesize}
shift lacks significance because the nature of the conflict is the same. When Trump was asked by Fox News if he would seek a declaration of war from Congress on ISIS, he stated that “[t]his is war. If you look at it, this is war.”63 Trump has repeatedly characterized this war as a war against radical Islam.64 Trump clearly plans to “aggressively pursue joint and coalition military operations to crush and destroy ISIS” and “decimate al Qaeda.”65 The Trump administration’s treatment of al Qaeda and ISIS terrorists is therefore likely to follow the Bush and Obama approaches; that is, terrorists will continue to be characterized as “unlawful enemy combatants” in an ongoing armed conflict. For instance, Attorney General Jeff Sessions visited Guantánamo in a gesture to support the continued detention of terrorism suspects and called the prison “a very fine place” to interrogate, hold and prosecute these individuals.66 Whatever the terrorist organization is, 9/11 served as a contingent event that set the stage for an armed conflict that has continued from Bush to Obama to Trump.

**Political Authority**

The exercise of political authority is also an important feature of *increasing returns*. As Pierson explains, leaders may use political authority to generate changes in the rules of the game designed to enhance their power.67 In this sense, the accumulation of power can also be self-reinforcing. However, the allocation of political authority to particular actors is an important source of this kind of positive feedback.68 In this respect, executive authority has been significant in initiating the extra-juridical treatment of “unlawful enemy combatants” in the Bush administration’s “war on terror.” Moreover, congressional opposition to the Obama administration’s plan to end features of this treatment limited the administration’s initial goal of closing the facilities at Guantánamo Bay and ending the military commission system for prosecuting terrorists.

In 2002, President Bush interpreted the Geneva Conventions as not applicable to members of al Qaeda and the Taliban because the United States was in “a new kind of war.”69 The administration’s rationale was that a terrorist organization is not a nation state, and it therefore could not and did not sign the Geneva Conventions.70 Yoo has

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63 Mark Thompson, “How Trump's Call to Declare War on ISIS Would Be Different” *Time* (15 July 2016), online: <time.com/4407886/donald-trump-declaration-war-isis-islamic-state/>.  
64 Supra note 53.  
65 White, supra note 61.  
67 Supra note 3 at 259.  
68 Ibid.  
69 Ralph, supra note 27 at 3.  
70 Yoo, “War and Peace”, supra note 24 at 212.
accurately pointed out that the president enjoys the power to interpret treaties such as the Geneva Conventions relating to enemy combatants. This presidential power has had a significant impact since the enemies of the “war on terror” were deemed to be “unlawful enemy combatants” and were subject to the unlimited presidential authority to criminalize those combatants, including American citizens. Unlawful enemy combatants were recognized as heavily politicized actors who were supposedly capable of delivering “state-like levels of violence” and were thereby classified as “combatants.” Members of those terrorist organizations could be prosecuted in a military commission or detained for the duration of the conflict and the Geneva Convention’s limitations on interrogation techniques did not apply.

With the election of President Obama, there was an expectation that these extra-juridical practices—and the “war on terror” itself—would come to an end and that American foreign policy would return to normalcy. Of course, these expectations were not met. Initially, Obama’s promise to close the facilities at Guantanamo was an important foreign policy goal. However, the Obama administration instead reiterated the previous administration’s argument that the Geneva Conventions relating to enemy combatants as prisoners of war did not apply to the capture and detention of enemy combatants, as stated in response to the Inter-American Commission on Human Rights. The facilities at Guantanamo remained open long after President Obama promised to close them, and his administration continued to frame the conflict with al Qaeda as a war to legitimize preventive detention. These enemies were, as President Obama stated in his 2009 National Security Archives speech, “people who were, in effect, at war with the United States” and “must be prevented from attacking us again.”

As international relations scholar Jason Ralph argues, Guantanamo remained

71 Ibid at 191–92. According to Yoo, “As a textual matter, the Constitution does not speak directly to the issue of treaty interpretation. As a foreign affairs power, therefore, the structure of the Constitution’s allocation of the executive power and Article II’s Vesting Clause would reserve it to the president. … Presidential swiftness and secrecy in foreign affairs, one of the primary benefits of a unitary executive in the eyes of the writers of The Federalist Papers, would encounter difficulties if presidents had to constantly confer with the Senate or Congress every time they sought to interpret a treaty while dealing with a foreign nation.”
73 Yoo, “War by Other Means”, supra note 43 at 4.
74 Ralph, supra note 27 at 4.
75 Ibid at 138.
76 Ibid at 18.
77 Ibid at 19.
78 Ibid at 112.
open due to congressional opposition (i.e., Congress’s refusal to fund the closure of the
prison). This was also the reason for Obama’s failure to end the military commission
system for prosecuting terrorists. For instance, Khaled Sheikh Mohammed, the principal
architect of the 9/11 attacks, was returned to the military commission system due to a
public backlash. These failures show how the Obama administration’s attempts to
move away from the war-based approach were kept in check by political
considerations. The administration was, however, successful in drastically reducing
the number of detainees at Guantánamo. There were 242 detainees at the start of 2009,
and 197 of them were transferred, repatriated, or resettled under the administration.
For the increasing returns perspective, the congressional opposition that led to Obama’s
failure to close Guantánamo Bay and end the military commission system for
prosecuting terrorists is evidence of path dependence on the policies and practices of the
Bush administration’s “war on terror.”

A path-dependent effect that Obama faced (which is, as Pierson explains,
particularly intense in politics) was the strong status quo bias associated with most
political institutions, such as Congress. Public policies and formal institutions are
designed to be change resistant because those who design policies usually want to bind
their successor. During Obama’s first term the Republicans used scare tactics that had
become so successful that even many Democrats disagreed with Obama’s plan to close
Guantánamo, especially if it entailed transferring detainees to the United States. Any
hopes of closing Guantánamo ended when Republicans won a (242–193) majority in the
House after the 2010 mid-term congressional elections. The consistencies between
Bush and Obama’s invocation of the war paradigm (in the treatment of unlawful enemy
combatants) may thereby amount to what Daniel Klaidman, in his book Kill or Capture,
has called the “hybrid” character of the “Obama doctrine” on counterterrorism and
asymmetric war. Klaidman writes: “Sometimes a military model made sense. Other
times a law-enforcement model was the way to go.” As Ralph argues, this
development might be interpreted as further evidence that the post–9/11 American state
of exception is indeed permanent.

80 Supra note 27 at 144.
81 Ibid.
82 Ibid at 145.
83 Human Rights First, “Guantanamo by the Numbers” (23 March 2017) Human Rights First, online:
84 Supra note 3 at 261.
85 Ibid at 262.
86 David Frakt, “Prisoners of Congress: The Constitutional and Political Clash Over Detainees and
87 Ibid at 201.
88 Daniel Klaidman, Kill or Capture: The War on Terror and the Soul of the Obama Presidency
89 Supra note 27 at 112.
The Trump administration plans to continue the practice of preventative detention at Guantánamo. Trump has said that “there should be no further releases” of detainees from Guantánamo and that those detainees are “extremely dangerous people and should not be allowed back onto the battlefield.”

His administration plans to keep the facilities open “and place a renewed emphasis on human intelligence.” Trump’s recent comments on reinstating techniques such as waterboarding point to a divergence from the Obama administration’s treatment of detainees at Guantánamo. When asked whether he would allow for the use of waterboarding, Trump said, “I have spoken … with people at the highest level of intelligence, and I asked them the question. Does it work? Does torture work? And the answer was: Yes, absolutely.”

This approach resonates with the Bush administration’s argument that the use of “enhanced interrogation techniques” (EITs), such as waterboarding, provided information that helped to stop terrorist attacks; however, this claim has been strongly contested. Intelligence gathered from EITs is often flawed due to false confessions. For example, Ibn al-Shaykh al-Libi, a Libyan paramilitary trainer for al Qaeda, confessed to knowledge of weapons of mass destruction in Iraq despite later findings that the country did not have such capabilities.

President Obama rejected the use of EITs on the grounds that they were neither necessary nor effective and, in fact, acted as a recruitment tool for America’s enemies. In explaining his approach, Obama drew on the traditional concept of American exceptionalism, where he saw a conflict between EITs and American values. The United States was exceptional precisely because, as Obama said, “we are willing to uphold our values and our ideals … when we are afraid and under threat, not just when it is expedient to do so.” Not only does the free world depend on the United States for its security they expect the Unites States to exemplify liberal values while pursuing that role. As the 2015 National Security Strategy states, “For the sake of our security and our leadership in the world, it is essential we hold ourselves to the highest possible standard, even as we do what is necessary to secure our people. To that end, we

91 White, supra note 61.
93 Ralph, supra note 27 at 21.
95 Ralph, supra note 27 at 21.
96 Ibid at 129.
97 Ibid.
98 Ibid.
strengthened our commitment against torture and have prohibited so-called enhanced interrogation techniques that were contrary to American values…” Trump’s conception of American exceptionalism shifts away from Obama’s approach, under which liberal realists sought to eliminate the hypocrisy that might act as a recruitment tool for terrorist groups. This represents a shift back to conservative realists like George W. Bush and Dick Cheney, who have tended to see EITs as necessary to defeat the enemy and who would not be concerned about avoiding potential double standards when confronting enemies.

Through the perspective of increasing returns, presidential power has been significant in initiating the extralegal treatment of unlawful enemy combatants in the Bush administration’s “war on terror.” Congressional opposition towards Obama’s goals of closing Guantánamo Bay and ending the prosecution of terrorists through the military commission system is significant in explaining why there is a considerable amount of stability in these extra-legal practices. Trump’s support of the extra-legal treatment of terrorists further exemplifies the path dependence of these policies, which may be traced back to the Bush administration’s approach. Despite the Obama administration’s rejection of EITs, the underlying choices made by the Bush administration have enabled the Trump administration to revert to justifying the use of EITs by invoking the status of “unlawful enemy combatant.”

**Institutional Density of Politics**

The final increasing returns argument that helps explain why exceptional anti-terrorism measures introduced after 9/11 have proved to be so tenacious is in the way these extra-legal practices are incorporated within the highly dense field of formal organizations and institutions (specifically, in the security and intelligence field).

As Pierson explains, institutions are prone to self-reinforcing processes that make reversals of course increasingly unattractive over time. Actors within organizations and institutional arrangements make commitments based on existing institutions and policies, and the cost of deviating from established arrangements generally rises

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99 US, supra note 52 at 19.
100 Ralph, supra note 27 at 131.
101 Pierson, supra note 3 at 255. “Institutional density” refers to the high number of organizations and bureaucracies, whether they be public or private, with similar mandates and activities that coordinate themselves in the pursuit of efficiency. Pierson emphasizes that “institutional arrangements induce complementary organizational forms, which in turn may generate new complementary institutions.” See also Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).
102 Supra note 3 at 259. Pierson notes that “path dependent processes will often be most powerful not at the level of individual organizations or institutions but at a more macro level that involves complementary configurations of organizations and institutions.”
The institutional density that supports the continuing use of extra-legal practices is evidenced through what Laurent Bonelli calls the “complex dealings between governments, intelligence agencies and clandestine groups, each striving to further their own political or organizational interests and impose their own version of the ‘truth.’”

What occurs is a repeated legitimization of the terrorist threat within certain parts of the state apparatus (e.g., in the NSA, FBI, CIA, and Department of Homeland Security). Bonelli explains that “[i]ntelligence is to some extent an autonomous field, which entails the possession of a very specific kind of capital consisting of know-how, techniques and a set of beliefs.”

Moreover, Barbara Hinckley finds that presidents are active in one way in making intelligence policy (e.g., by taking clear stands to protect the agencies against congressional restrictions), but this activity has resulted in giving the agencies freer rein to choose and oversee their own operations. This capital monopolizes the interpretation of the threat and gives a central role to intelligence agencies.

The interpretations and decisions performed by intelligence agencies become so embedded in these routines that their coercive actions are never presented as an exception; on the contrary, these actions are expressed as a continuation of normal routines. This mechanization of exceptional authority tends to legitimize profoundly illiberal, and barely contested, practices in an institutional context.

Similarly, Javier Argomaniz finds evidence that exogenous factors such as 9/11 are the most significant when accounting for how counterterrorism has emerged as a distinctive policy area in Europe; specifically, in the Police and Judicial Co-operation in Criminal Matters [PJCC] institutional space within the European Union. The transnational nature of the renewed terrorist threat after 9/11, combined with the 2004 Madrid train bombings and the 2005 London bombings, have justified the perceived need to increase the existing institutional coordination, legislation, and operational gaps

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103 Ibid.


105 Ibid at 107.


107 Bonelli, supra note 105 at 107.

108 Ibid at 108.

109 Ibid at 117.

across Europe.\textsuperscript{111} For example, intelligence exchange in counterterrorism between the PJCC and Europol has significantly increased, which is relevant considering that Europol did not identify terrorism among its priority activities prior to 9/11.\textsuperscript{112}

The United States now also asks its intelligence agencies to undertake greater cooperation with other countries (e.g., in the FVEY alliance).\textsuperscript{113} Argomaniz’s analysis points to the fact that counterterrorism has been increasingly institutionalized in organizational mandates and operations in the European Union and the United States after 9/11. How these new anti-terror mandates and practices become resistant to change may be conceptualized by what Graham Allison has called the “organizational process model,” where governmental behaviour is not reduced to a monolithic nation; rather, the relevant actors in the intelligence community represent “a constellation of loosely allied organizations on top of which government leaders sit.”\textsuperscript{114}

Organizational process is important for the increasing returns perspective because the constellation of these security organizations perform according to standard operating procedures, and since procedures are standard, they do not change easily or quickly.\textsuperscript{115} In this respect, exogenous shocks such as 9/11 and the subsequent collective action by governmental leaders have triggered a new set of organizational routines in the broader security and intelligence community that aim to counter the terrorist threat.

Further, an organization’s activities are often enhanced if they are coordinated or fit with the activities of other actors or organizations.\textsuperscript{116} This coordination in intelligence exchange creates a positive feedback process where various activities (e.g., in information technology) of one organization becomes complementary to related activities in other organizations.\textsuperscript{117} Combining organizational capacities (e.g., from

\begin{itemize}
\item[111] Ibid at 165.
\item[112] Ibid at 158.
\item[114] Graham T Allison, “Conceptual Models and the Cuban Missile Crisis,” in Gilford J Ikenberry & Peter L Turbowitz, eds, American Foreign Policy: Theoretical Approaches (Oxford: Oxford University Press, 2015) 403 at 413. My emphasis of institutional density and organizational process does not imply that organizations and bureaucracies undermine the role that state leaders have in decision making and influencing bureaucratic interests. See Stephen D Krasner, “Are Bureaucracies Important? (Or Allison Wonderland)” in G John Ikenberry & Peter L Turbowitz, eds, American Foreign Policy: Theoretical Approaches (Oxford: Oxford University Press, 2015) 439 at 439. In a forceful critique, Stephen Krasner has noted that Allison’s organizational and bureaucratic process model “is misleading, dangerous, and compelling: misleading because it obscures the power of the president; dangerous because it undermines the assumptions of democratic politics by relieving high officials of responsibility; and compelling because it offers leaders an excuse of their failures and scholars and opportunity for innumerable reinterpretations.”
\item[115] Allison, supra note 115 at 414.
\item[116] Pierson, supra note 3 at 254.
\item[117] Ibid at 255. Pierson terms this increasing returns process as the importance of complementarities. As Pierson explains, “Improvements in a core activity can spill over by improving related parts of the economy (lowering costs or increasing productivity). These improvements in turn may increase the attractiveness of the core activity.”
\end{itemize}
domestic agencies like the NSA and FBI to supra-national organizations such as Europol or Interpol) creates a greater depth and breadth of information that was previously unavailable. Once these *increasing returns* processes of information exchange are established, the positive feedback can lead to an institutional inertia that will be resistant to change.118

An additional positive feedback process within intelligence and security arrangements is what Louise Amoore has depicted as an emerging economy of exception. Amoore connects today’s consulting (*consulto*), meaning to ask the advice of, and *consultum*, meaning to decree (having taken the advice), in the argument that consulting as a business practice is now prevalent in the “war on terror.”119 Amoore is not arguing that today’s consultants are the modern-day consuls in a contemporary *iustitium*, but the roles of the *consuls* do illuminate features in the national security enterprise (e.g., in risk management, biometrics, and surveillance technologies).120 The *Patriot Act* may appear to be analogous to the *senatus consultum ultimum* that illustrates the liminal space that Agamben describes.121 As Agamben writes, the *Patriot Act* “radically erases any legal status of the individual, thus producing a legally unnameable and unclassifiable being.”122 Legislation such as the *Patriot Act* (and its modified replacement, the *USA Freedom Act*) have made new tools and practices available to surreptitiously establish a state of exception in the post–9/11 era.123 Amoore argues that the *Patriot Act* creates possibilities for multiple authorities to decide the nature and limits of exception, laying out rights of access to biometric data and creating new organs of surveillance both at the political and technological levels.124 In fact, the opening up of this liminal space “is swiftly colonized by consultants, IT companies, immigration authorities, vehicle licensing agencies, passengers, tourists, workers, citizens and so on.”125 The *Patriot Act* potentially authorizes people to act without fear of reprisals—in the very inexecution of law, as Agamben would have it—that actively blurs the distinction between public and private authority.126 The institutional density and self-reinforcing processes involved in claims for greater security contain incentives such as institutional coordination and data collection by the government and private

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118 *Ibid* at 264.
119 *Supra* note 19 at 117. Amoore also provides the following examples on this proliferating practice: “Accenture has the major US borders contract; IBM Consulting is leading the UK’s e-borders trials; BearingPoint lead the UK’s identity/security programmes; Deloitte lead many of the ‘smart chip’ security technologies.”
120 *Ibid* at 118.
122 *Supra* note 5 at 3.
124 *Supra* note 19 at 120.
125 *Ibid* at 121.
126 *Ibid* at 122.
corporations that prolong exceptional increases of power and authority.

CONCLUSION

This investigation has aimed to show how the post–9/11 state of exception is increasingly used as the basis of contemporary American governance. This form of governance has intensified after 9/11 such that executive power is freeing itself from the general rule of law. The United States has witnessed the legitimation of extra-legal measures in the name of security that pose a great threat to freedom and autonomy. This analysis has employed increasing returns theory to demonstrate that a state of exception is emerging in the United States (becoming apparent in the Bush administration and continuing through the Obama and Trump administrations) and identifies the mechanisms which provide evidence indicative of this situation. Over fifteen years after 9/11, the state of exception no longer resembles the exception to the rule but increasingly resembles the rule itself.