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The Temporalities of Exception

State of Exception – An Overview

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2 The Temporalities of Exception

3 “I felt that measures otherwise unconstitutional might
4 become lawful by becoming indispensable to the
5 preservation of the Constitution through the
6 preservation of the nation.”

7

8

*Abraham Lincoln*¹

9

10 This well-known Lincoln quote embodies what one might call the
11 ‘emergency argument’. Lincoln, democratically elected president and
12 lawyer, used it in private correspondence to explain why he had
13 resorted to such extraordinary measures at the beginning of the
14 American Civil War, officially the *War of the Rebellion*. When looking
15 more closely at how the Lincoln administration legitimized the
16 contested decisions it took, one (almost) always finds one
17 characteristic: the temporal argument.²

18 What is the ‘temporal argument’? It is the assurance that emergency
19 laws are only enacted during the time of crisis, and will later be
20 revoked once the crisis is over. It is the idea that once the emergency
21 is over, everything will go back to how it was before. Isn’t the

¹ Letter of Lincoln to A. G. Hodges, Apr. 4, 1864, in Nicolay, Hay, Complete Works of Abraham Lincoln, II, p. 508.

² On politics and time, see for example Michael Howlett/Klaus H. Goetz, Introduction. Time, Temporality and Timescapes in Administration and Policy, in: International Review of Administrative Sciences 80 (2014), H. 3, S. 477–492; Kari Palonen, The Politics of Limited Times. The Rhetoric of Temporal Judgement in Parliamentary Democracies, Baden-Baden 2008; Juan J. Linz, Democracy’s Time Constraints, in: International Political Science Review / Revue internationale de science politique 19 (1998) 1, pp. 19–37; Robert E. Goodin, Keeping Political Time. The Rhythms of Democracy, in: International Political Science Review / Revue internationale de science politique 19 (1998) 1, pp. 39–54; Philippe C. Schmitter/Javier Santiso, Three Temporal Dimensions to the Consolidation of Democracy, in: International Political Science Review / Revue internationale de science politique 19 (1998) 1, S. 69–92; D. Lewis/J. M. Strine, What Time Is It? The Use of Power in Four Different Types of Presidential Time, in: Journal of Politics 58 (1986), pp. 682–707.

22 temporary nature of the state of emergency at the very heart of the
23 concept?³ The temporal argument strongly implies there is clear-cut
24 distinction between *Before* – *During* – and *After*. However, this is
25 hardly ever the case. In my paper, I will explore some of these
26 temporalities of exception. First, I will show in more detail how the
27 temporal argument was utilized during the American Civil War,
28 thereby constructing a rhetorical temporality of exception. I am sure
29 that many of you will be reminded of several other examples, both
30 historical and current ones. Second, I will use two case studies to
31 explore the many ways in which this clear-cut periodization fails to
32 reflect the practice of the emergency. It neither simply stops, nor
33 does everything just return to how it has been before. Thus, it is one
34 characteristic of the exception's temporalities that they can be much
35 more blurry and complicated than the emergency rhetoric as well as
36 the common understanding of the state of emergency implies.

37 I draw my observations from a very specific example: a mid-19th
38 century democracy at war with itself. This state of emergency is a
39 fairly typical case in the 19th century as it was a state of war, even
40 though it was – as a civil war – constitutionally a complicated one.
41 Thus, the emergency was tangible, obvious to most and generally
42 accepted actually to be an emergency. Even though the American
43 Civil War is a specific example, the rhetorical temporal strategies
44 observable in it as well as its long-term ramifications can easily be
45 found in many other cases, both in wars and other states of
46 emergency.

47 **1. The Temporal Argument**

48 Before I dive into the temporal rhetoric employed by the Lincoln
49 administration, let me first quickly summarize what kind of decisions
50 and actions it had to legitimize. (If this paper focuses on Republicans
51 during the Civil War, it is not for want of Democrats, and very

³ For example, it is listed as one of the four defining features of the state of emergency in Markus Holzinger/Stefan May/Wiebke Pohler, *Weltrisikogesellschaft als Ausnahmezustand*, Weilerswist 2010.

52 importantly, Secessionists having excessively used the same logic.)⁴
53 – When the Confederate side started hostilities at Fort Sumter on
54 April, 12th, 1861, the Union was caught at a bad time: Lincoln was
55 very new to the presidency and Congress was not in session. In the
56 following weeks, Lincoln quickly mobilised and financed troops,
57 initiated war operations and appointed generals. As commander-in-
58 chief, the latter two were his responsibility. However, this does not
59 extend to enlarging the army and finding the funds for the war, which
60 is the prerogative of Congress.⁵ Additionally, Lincoln famously
61 authorized to suspend the writ of habeas corpus anywhere
62 necessary between Washington and Philadelphia, imposed a
63 blockade on Southern ports and closed the U.S. mails to ‘disloyal’
64 publications. Later in the war, Lincoln authorized more widely
65 applicable suspensions of the writ of habeas corpus,⁶ destruction of
66 individual property (as in Sherman’s march through Georgia) and
67 civilians were tried by military tribunals.

68 So how did the Union administration explain these highly contentious
69 steps? One way was to distinguish between the perpetual and the
70 temporary, thereby aggressively playing down the significance of its
71 acts. Just take Lincoln’s first inaugural address, in which he stated

72 I hold that in contemplation of universal law and of the Constitution the
73 Union of these States is perpetual. Perpetuity is implied, if not

⁴ The following is based on Daniel A. Farber, *Lincoln’s Constitution*, Chicago 2003; David P. Currie, *The Constitution in the Supreme Court. Civil War and Reconstruction, 1865–1873*, in: *The University of Chicago Law Review* 51 (1984), pp. 131–186; Clinton L. Rossiter, *Constitutional Democracy. Crisis Government in the Modern Democracies*, Princeton 1948, esp. chapter XV; Clinton L. Rossiter, *The Supreme Court and the Commander in Chief*, Ithaca, NY, London 1976; Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War. The Origins and Limits of the Principle of Military Necessity*, in: *The American Journal of International Law* 92 (1998) 2, pp. 213–231; James F. Simon, *Lincoln and Chief Justice Taney. Slavery, Secession, and the President’s War Powers*, New York 2006; Brian McGinty, *Lincoln and the Court*, Cambridge, Mass. 2008; James M. McPherson, *Tried by War. Abraham Lincoln as Commander in Chief*, London 2009; John Fabian Witt, *Lincoln’s Code. The Laws of War in American History*, New York 2012.

⁵ Francis D. Wormuth et al., *To Chain the Dog of War. The War Power of Congress in History and Law*, Dallas (TX) 1986; Richard H. Fallon, *The Dynamic Constitution. An Introduction to American Constitutional Law*, Cambridge 2004, chapter 12; Clarence A Berdahl, *War Powers of the Executive in the United States*, in *University of Illinois Studies in the Social Sciences* IX, 1–2 (1920).

⁶ ‘[F]ederal courts can use the writ of habeas corpus to determine if a state’s detention of a prisoner is valid. A writ of habeas corpus is used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person’s imprisonment or detention is lawful.’ Legal Information Institute (Cornell Law School), https://www.law.cornell.edu/wex/habeas_corpus (01/11/2017).

74 expressed, in the fundamental law of all national governments. [...]
75 Continue to execute all the express provisions of our National
76 Constitution, and the Union will endure forever, it being impossible to
77 destroy it except by some action not provided for in the instrument
78 itself.⁷

79 Here, you can see how Lincoln created an opposition between the
80 perpetuity that is supposedly the fundamental law of all national
81 governments on the one hand, and the (obviously temporary)
82 rebellious transgressions, not thought of in the constitution, on the
83 other hand. Invoking perpetuity is a powerful rhetorical tool, closely
84 intertwined with a strong sense of history, progress and a religious
85 mission. Against the backdrop of perpetuity, a few selected,
86 supposedly short-lived emergency measures might pale in
87 comparison.

88 What is especially interesting about this is how the constitution is
89 portrayed in this instance. As you can see in the introductory quote,
90 to Lincoln, some things are more perpetual than others. To preserve
91 the constitution, he argued, you might have to act unconstitutional to
92 preserve the nation, which in turn would be the only way to preserve
93 the constitution. Of course, one could argue that this means he was
94 willing to use the nation in order to preserve the constitution, thus
95 making the preservation of the constitution the ultimate goal.
96 However, in practice, it meant that the nation was rhetorically
97 construed as perpetual, while the constitution became more
98 malleable, less stable – in short, less perpetual, and something that
99 could be temporarily circumvented or at least stretched considerably.

100 In all this, Lincoln was far from alone. Just take Charles Sumner, the
101 radical Republican, who made the following quite astonishing
102 statement about the constitution during wartime:

103 '*In war* there is no constitutional limit to the activity of the executive,
104 except the emergency. The safety of the people is the highest law.
105 There is no blow the President can strike; there is nothing he can do

⁷ Abraham Lincoln, 1st Inaugural Address, March 4, 1861, online:
http://avalon.law.yale.edu/19th_century/lincoln1.asp (10.11.2016).

106 against the Rebellion, that is not constitutional. Only inaction can be
107 unconstitutional.⁸ This might seem as an extreme view, voiced by a
108 single politician in a time of deep crisis. However, this was also the
109 official position of the government in a Supreme Court case after the
110 war had ended.⁹ Explaining why the Lincoln administration¹⁰ had
111 deliberately suspended and actively ignored several constitutional
112 protections of imprisoned civilians, officials claimed that these
113 protections ‘in truth, are all peace provisions of the Constitution and,
114 like all other conventional and legislative laws and enactments, *are*
115 *silent amidst arms*, and then the safety of the people becomes the
116 supreme law’.¹¹ Clearly, in this interpretation, the rule of law is
117 something nice to have around in peaceful times, but unreliable in an
118 emergency and not fit for the tasks of wartime.¹² Bear in mind, with
119 this statement, these officials defended the Republican government
120 which vowed to defend and preserve the constitution.

121 **2. The Long Shadow of Emergency Measures**

122 **2.1 Setting Precedents**

123 The administration’s line of defence perfectly embodied emergency
124 thinking and its temporal notion. Therefore, it cannot surprise that
125 when the Supreme Court judges decided against the administration,
126 they felt compelled to aggressively attack the underlying temporal
127 logic of the government’s actions:

128 The Constitution of the United States is a law for rulers and people,
129 *equally in war and in peace*, and covers with the shield of its protection
130 all classes of men, *at all times and under all circumstances*. No doctrine
131 involving more pernicious consequences was ever invented by the wit
132 of man than that any of its provisions can be *suspended during any of*
133 *the great exigencies of government*.¹³

134 Was this, then, the end for the temporal argument and emergency
135 thinking with regard to the US constitution? As you may well imagine,

⁸ Charles Sumner, speech in Boston, Oct. 6, 1862, Works of Charles Sumner, VII, p. 217.

⁹ Emily Hartz, From the American Civil War to the War on Terror. Three Models of Emergency Law in the United States Supreme Court, Heidelberg 2013, chapter 2.

¹⁰ By this time, Lincoln had already been assassinated.

¹¹ Brief for Respondent, Ex parte Milligan, 19–20, emphasis added, quoted in Hartz 2013, p. 17.

¹² Not Lincoln’s position.

¹³ Ex parte Milligan, 120, emphasis added, in Hartz 2013, p. 9.

136 it was not, as the afterlife of another Supreme Court case
137 demonstrates. The *Prize* cases dealt, among others, with the
138 question of when the Union legally entered a state of war with the
139 Confederacy. Again, this went back to the first weeks of Lincoln's
140 presidency when he established a blockade of Southern ports. To
141 some, this meant Lincoln had initiated acts of war before Congress
142 had assembled and thus before the latter had had any chance to
143 formally declare a state of war, which is Congress' prerogative. Thus,
144 it is actually not clear whether the War of the Rebellion started – in a
145 legal sense – in April or on July, 13th, when Congress recognized the
146 state of war.

147 Quite understandably, the court ruled that Lincoln's action had been
148 appropriate given the challenge at hand – that a war existed since
149 Confederate forces had initiated it even though Congress had not
150 had the time to call it a war. The judges aimed for a narrow
151 interpretation, strictly focusing on the Civil War, and in the majority
152 opinion conceded '[w]hether the President in fulfilling his duties, as
153 Commander in Chief, in suppressing an insurrection, has met with
154 such armed hostile resistance, and a civil war of such alarming
155 proportions as will compel him to accord to them the character of
156 belligerents, is a question to be decided *by him*, and this Court must
157 be governed by the decisions and acts of the political department of
158 the Government to which this power was entrusted'¹⁴. However, as
159 the minority opinion was quick to point out, this implicitly accepted
160 the initial lack of congressional authorization, which can be said to
161 include an implicit mandate to interpret and act upon perceived
162 threats and attacks.¹⁵

163 In certain circumstances, this implied mandate can come so close to
164 a declaration of war that the two seem indistinguishable. If the war on
165 terror comes to your mind, it is not a coincidence. The Bush
166 administration repeatedly used the argument cited above to defend

¹⁴ Prize at 670, emphasis in original, cited in Hartz 2013, p. 39.

¹⁵ Emily Hartz/Rasmus Ugilt, The Problem of Emergency in the American Supreme Court, in: Law and Critique 22 (2011), pp. 295–316.

167 the use of ad hoc military commissions to try so-called enemy aliens
168 for violations of the laws of war, declaring '[t]he Constitution vests in
169 the President the authority to determine whether a state of armed
170 conflict exists against an enemy to which the law of war applies'
171 (*Hamdan vs Rumsfeld* (2006)).¹⁶ A similar point was made by the
172 administration in *Hamdi vs Rumsfeld* (2004), a habeas corpus case
173 in which legality of detentions of alleged enemy combatants was
174 questioned. Granted, both cases were decided against the
175 government. However, in voicing the dissenting opinion, Judge
176 Thomas heavily relied on the *Prize* case to conclude that 'we [the
177 Court] are bound by the political branches' determination that the
178 United States is at war and that the detentions were legal'.¹⁷ Thus,
179 close to 150 years after the Civil War, the question of how and when
180 a war starts after being attacked is still highly contentious, and the
181 legal quagmire produced by the Civil War echoes in modern
182 Supreme Court case rulings regarding (alleged) emergency
183 measures. With the lines being blurred like this between peace and
184 war, between executive and legislative power, things did not return to
185 'normal'. After the war was not the same legal, constitutional,
186 presidential world as it had been before the war. In this sense, these
187 cases set precedents which could not have been undone – not due
188 to malice, bad intent or presidential overreach bordering on
189 dictatorship as some alleged, but due to the transforming effects of
190 managing an emergency, of living through exceptional times.

191 **2.2. The End of the War and Reconstruction**

192 So what about the time immediately after the war? Typically, the end
193 of the Civil War is dated to May 9th, 1865. But how can this
194 periodization be reconciled with the fact that President Andrew
195 Johnson only declared the state of war to be over on August 20th,
196 1866, more than a year later? A quick look at the time-line of the Civil
197 War shows how many different timeframes existed in 1865/66. While
198 large parts of the Confederate army had already surrendered and

¹⁶ Hamdan, Brief for Respondents at 24, cited in Hartz 2013, p. 39.

¹⁷ Hamdi at 588, Thomas dissenting, cited in Hartz 2013.

199 begun to be disbanded, the last battle of the war took place on May
200 13th, 1865, and was won by the Confederate participants. And the
201 Captain of the *CSS Shenandoah* only learnt of the Confederacy's
202 complete collapse on August 2nd, 1865, having captured several
203 Union vessels since May 9th. Afraid of persecution for war crimes,
204 the ship sailed to the United Kingdom to surrender on November 6th,
205 1865.

206 Much more importantly, there were actually several states in which
207 the rebellion had not really ended by May 13th, 1865. Thus, it was
208 only a month later, on June 13th, that Johnson proclaimed that
209 'insurrection in the State of Tennessee had been suppressed', and it
210 took until April 2nd, 1866, that the same could be said of the State of
211 Texas. Finally, on August 20th, 1866, Johnson declared 'that the said
212 insurrection is at an end and that peace, order, tranquillity, and civil
213 authority now exist in and throughout the whole of the United States
214 of America'.¹⁸ So in a way, the Civil War's legal state of war might
215 have started significantly later than the actual fighting, whereas the
216 war, for the most part, was (and is) considered to have been over
217 well before the state of war ceased to be in place.

218 In many ways, legal troubles, grey areas and unclear distinctions
219 between war and peace were defining feature of the years following
220 the Civil War. For the citizens of the seceded states, the legal limbo
221 had only just begun. In 1867, Congress subordinated the elected
222 governments of ten Southern states to military authority, making
223 black suffrage and the ratification of the Fourteenth Amendment the
224 pre-conditions for their representatives to be admitted to Congress.
225 Therefore, while the state of emergency might have been over, these
226 states certainly found themselves in a state of exception. In this
227 sense, the state of exception outlived the actual fighting by far. There
228 and then, it was hard, even impossible, to go back to how things
229 were before.

230

¹⁸ <http://www.presidency.ucsb.edu/ws/index.php?pid=71992>

231 So where does that leave us with regard to the temporalities of
232 exception?

233 *Perpetual vs temporary:* When legitimizing the state of emergency
234 and specific emergency measures, the Lincoln administration and
235 fellow Republicans stressed the temporary nature of the exception.
236 By contrasting the supposedly short-term changes in law and
237 behavior with perpetuity and eternity, they downplayed the
238 transgressions from the rule of law they thought necessary. Overall,
239 they implied that the exceptional measures they felt they had to take
240 were something that could and would be temporally contained,
241 insofar as there would be a clear distinction between *Before, During,*
242 *and After.*

243 *The blurred lines of time:* As I have shown, the beginning as well as
244 the end of the state of war were far from clearly defined and actually
245 part of an expanding legal grey zone. Not only the legal state of war's
246 duration was highly contested, so was the question which branch of
247 the government was allowed to define its temporal boundaries. At the
248 same time, the generally accepted periodization of the Civil War
249 dramatically conflicts with the legal duration of the state of war.

250 *Enduring exceptions:* Even after the war had ended, the exception
251 arguably did continue. After much of the fighting, and even after
252 peace was proclaimed, at least for many Southern states, the state of
253 exception continued or was reinstated by the military rule over
254 elected governments. Thus, the timeframe of the state of war
255 significantly differed from the more general state of exception
256 produced by the Secession crisis. Additionally, the precedents set by
257 Lincoln and his administration echoed through American history, the
258 arguments defending their bolder constitutional interpretations being
259 used in the 2000s to legitimize the violation of civil liberties.

260 *Analysing the temporalities of exception:* Generally, I claim that it is
261 well worth studying the timeframes of states of emergency more
262 closely. The considerable friction between the theoretical temporal

263 argument and the reality of the state of exception is in itself not an
264 exception, I would argue, but the rule. Analysing the complex
265 temporal structure of different states of emergencies can highlight the
266 unintended long-term consequences that can accompany the most
267 careful and well-intentioned steps taken during an emergency. It also
268 calls for more attention to the nuances of periodization and the
269 question how different states of exception may relate to each other –
270 the actual fighting to the legal state of war to states of exceptions that
271 are closely related to the war, but take place afterwards. Maybe most
272 importantly, it can reveal how hard it is to make good on the promise
273 that all exceptional measures will be temporary, even in
274 democracies.

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