The Temporalities of Exception
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“I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation.”

Abraham Lincoln

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

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

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

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

1. The Temporal Argument

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

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

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

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


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

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

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

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

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

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7 Abraham Lincoln, 1st Inaugural Address, March 4, 1861, online: http://avalon.law.yale.edu/19th_century/lincoln1.asp (10.11.2016).
against the Rebellion, that is not constitutional. Only inaction can be unconstitutional.\(^8\) This might seem as an extreme view, voiced by a single politician in a time of deep crisis. However, this was also the official position of the government in a Supreme Court case after the war had ended.\(^9\) Explaining why the Lincoln administration\(^10\) had deliberately suspended and actively ignored several constitutional protections of imprisoned civilians, officials claimed that these protections ‘in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, are silent amidst arms, and then the safety of the people becomes the supreme law’.\(^11\) Clearly, in this interpretation, the rule of law is something nice to have around in peaceful times, but unreliable in an emergency and not fit for the tasks of wartime.\(^12\) Bear in mind, with this statement, these officials defended the Republican government which vowed to defend and preserve the constitution.

2. The Long Shadow of Emergency Measures

2.1 Setting Precedents

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

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

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

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\(^8\) 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.
it was not, as the afterlife of another Supreme Court case demonstrates. The Prize cases dealt, among others, with the question of when the Union legally entered a state of war with the Confederacy. Again, this went back to the first weeks of Lincoln’s presidency when he established a blockade of Southern ports. To some, this meant Lincoln had initiated acts of war before Congress had assembled and thus before the latter had had any chance to formally declare a state of war, which is Congress’ prerogative. Thus, it is actually not clear whether the War of the Rebellion started – in a legal sense – in April or on July, 13th, when Congress recognized the state of war.

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

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

\(^{14}\) Prize at 670, emphasis in original, cited in Hartz 2013, p. 39.

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

\textbf{2.2. The End of the War and Reconstruction}

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

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\(^{16}\) Hamdan, Brief for Respondents at 24, cited in Hartz 2013, p. 39.  
\(^{17}\) Hamdi at 588, Thomas dissenting, cited in Hartz 2013.
begun to be disbanded, the last battle of the war took place on May 13th, 1865, and was won by the Confederate participants. And the Captain of the CSS Shenandoah only learnt of the Confederacy’s complete collapse on August 2nd, 1865, having captured several Union vessels since May 9th. Afraid of persecution for war crimes, the ship sailed to the United Kingdom to surrender on November 6th, 1865.

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

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

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

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

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

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

**Analysing the temporalities of exception**: Generally, I claim that it is well worth studying the timeframes of states of emergency more closely. The considerable friction between the theoretical temporal
argument and the reality of the state of exception is in itself not an
exception, I would argue, but the rule. Analysing the complex
temporal structure of different states of emergencies can highlight the
unintended long-term consequences that can accompany the most
careful and well-intentioned steps taken during an emergency. It also
calls for more attention to the nuances of periodization and the
question how different states of exception may relate to each other –
the actual fighting to the legal state of war to states of exceptions that
are closely related to the war, but take place afterwards. Maybe most
importantly, it can reveal how hard it is to make good on the promise
that all exceptional measures will betemporary, even in
democracies.
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