THE HARBINGER THEORY

How the Post-9/11 Emergency Became Permanent and the Case for Reform

ROBERT DIAB

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For Wes Pue

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Introduction

SINCE THE TERRORIST attacks on the United States in September 2001, North American law has been transformed in ways previously unimaginable. Measures that had once seemed extraordinary or even unthinkable in sophisticated Western democracies have now become permanently ensconced in our legal systems. Laws now authorize, and courts have affirmed the constitutionality of, indefinite detention without charge on secret evidence, mass secret surveillance, and a vastly expanded scope for the assertion of state privilege. The U.S. Congress has acquiesced in the President's claim of authority to carry out targeted killing of American citizens. Perhaps more strikingly, from a pre-9/11 perspective, large portions of the U.S. and Canadian public support many of these measures.

What seems just as striking as the nature of the shift is the sense of its possible permanence. Acting on powers conferred by Congress days after 9/11, the President continues to hold 149 detainees at Guantanamo on secret evidence, with an intention to imprison 48 "high value" detainees indefinitely and without charge.[1] Revelations of mass secret surveillance of telephone and Internet communications of unsuspecting civilians on an unprecedented scale are met with assurances by security officials of the legality and propriety of the measures, and acquiescence by a larger public.[2] The President continues every month to authorize scores of drone strikes of persons he alone deems to pose an imminent danger to the United States, asserting the power to target U.S. citizens without charge or judicial oversight, and to do so,

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[1] Charlie Savage, *The Future of Guantanamo*, N.Y. TIMES, Aug. 31, 2014, and *US Government Releases Names of Indefinite Guantanamo Detainees*, jurist.org, June 19, 2013.

[2] *See* discussion of sources in Chapter 3.

if necessary, on American soil.[3] Canada has seen a similar entrenchment of powers to detain indefinitely without charge, to assert greater state secrecy, and to conduct new forms of secret surveillance.[4] Attempts to hold officials in both nations accountable for involvement in torture, rendition, or other violations of core human rights continue to be hindered by assertions of state privilege, with no change likely in the foreseeable future.[5]

How did this transformation occur? Was it simply an extension of an increasing "culture of control" or a trend toward greater "securitization" in North America that began two or three decades before 9/11?[6] Or has the embrace of extraordinary measures since 2001 been marked by the prevalence of a new and unique form of reasoning about law and security? And how will it end?

This book seeks to shift perspective in debates about counterterrorism measures in the post-9/11 period by revisiting the conceptual framework by which many extraordinary measures were initially justified and have now come to be entrenched. The book argues that we cannot begin to undo the many facets of the permanent emergency until this framework is better understood and arguments for reform are crafted to address it more effectively.

The central contention of this book is that in the wake of 9/11, a range of extraordinary measures have come to be entrenched in North American law largely as a consequence of a wider cultural and political embrace of what can be called the harbinger theory.[7] At the core of the theory is the assumption that 9/11 was not a profoundly anomalous event in the history of terror but the harbinger of a new order of terror—giving rise to the belief that at some point in the near future, an attack might occur in a large North American city on a scale similar to or greater than 9/11. More specifically, the theory assumes the form of a belief that al Qaeda, or an affiliated or analogous group, may soon make use of a weapon of mass destruction (WMD), with cataclysmic or possibly "existential" consequences for the state, or that terrorists without WMDs may soon carry out an attack on the scale of 9/11 or greater. Either form of attack would entail thousands or more casualties rather than tens or hundreds, as in earlier events (the Air India bombing, Oklahoma City), lending the prospect of terrorism a qualitatively different character from crime. Further terror on this scale is assumed to be likely either because WMDs are—so is the common refrain—"only

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[3] Details of the President's practice of targeted killing are explored in Chapter 2.

[4] Chapter 2 provides a brief overview of the "security certificate" regime in Canada's Immigration and Refugee Protection Act, S.C. 2001, c. 27 and new powers of law enforcement, intelligence, and state secrecy in the Anti-terrorism Act, S.C. 2001, c. 41 and other legislation.

[5] *See* the discussion in Chapter 2 of El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); Mohamed v. Jeppesen Dataplan, No. 08-15693 (9th Cir., Sept. 8, 2010); and Arar v. Ashcroft, No. 06-4216 (2d Cir., June 30, 2008).

[6] David Garland, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (Chicago: University of Chicago Press, 2001); Lucia Zedner, *Seeking Security by Eroding Rights: The Side-stepping of Due Process*, in Benjamin J. Goold & Liora Lazarus, eds., SECURITY AND HUMAN RIGHTS (Oxford: Hart Publishing, 2007); Jonathan Simon, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (Oxford: Oxford University Press, 2007).

[7] For the use of the term "harbinger," I acknowledge a debt to John Mueller who analyzed early perceptions of 9/11 in *Harbinger or Aberration? A 9/11 Provocation,* NAT'L INTEREST, Fall 2002, at 45.

becoming more accessible and diffuse" or because today's terrorists are more skilled and ambitious, and 9/11 itself has demonstrated how readily and *easily* non-state actors can carry out an attack on that order. What is therefore at stake in the possibility of another attack is much more than the safety of a small number of civilians, but a much greater and more catastrophic disruption of both society and the state. These beliefs commonly form the basis of a larger claim, made in several contexts, that given the magnitude of the outstanding threat, more invasive measures have become necessary for the foreseeable future.

A key context is government itself. In numerous pronouncements and policy statements since 2001, and often at crucial moments, such as legislative debates around the passage of controversial measures, members of the executive and prominent security officials in both nations have defended the necessity of authoritarian measures continuously and at times exclusively by invoking the prospect of terror involving WMD or another attack on the scale of 9/11. For example, in his "National Security Strategy" of 2010, President Barack Obama affirmed a set of initiatives that include targeted killing and indefinite detention without charge in light of the prefatory comment that "[t]he American people face no greater or more urgent danger than a terrorist attack with a nuclear weapon..."[8] His 2011 "National Strategy for Counterterrorism,"[9] published after Osama bin Laden's death, reiterated that the "danger of nuclear terrorism is the greatest threat to national security." Terror groups including al Qaida, we were told, "have engaged in efforts to develop and acquire weapons of mass destruction—and if successful, they are likely to use them."[10] In March 2013, in a widely reported exchange with Senator Rand Paul, Attorney General Eric Holder rendered the opinion that the President maintains the authority to carry out targeted killing of U.S. citizens without charge on U.S. soil and defended such power as "necessary and appropriate" in the event of "a catastrophic attack like the ones suffered on December 7, 1941, and September 11, 2001."[11] In a speech in January 2014 in response to the report of the President's Review Group on Intelligence and Communications Technologies and following the Edward Snowden revelations, President Obama defended the use of mass secret surveillance by making several references to the prospect of another 9/11 or an attack involving WMDs. He claimed, for example, that "emerging threats from terror groups and the proliferation of weapons of mass destruction place new, and in some ways, more complicated demands on our intelligence agencies"; and "[t]he men and women at the NSA know that if another 9/11 or massive cyberattack occurs, they will be asked by Congress and

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[8] *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, May 2010), at 23.

[9] *National Strategy for Counterterrorism* (Washington, D.C.: The White House, June 2011).

[10] Ibid. at 8.

[11] Holder set out this position in a letter in response to a query from Senator Paul Rand: http://www.paul.senate.gov/files/documents/BrennanHolderResponse.pdf. *See also* Charlie Savage, *Senators Press Holder on Use of Military Force on U.S. Soil*, N.Y. Times, Mar. 6, 2013.

the media why they failed to connect the dots..."[12] Similarly, in Canada, a host of policy statements and reports since 9/11, from the Ministry of Public Safety to the Canadian Security and Intelligence Service, have invoked the prospect of large-scale terror, and the possible use of WMDs.[13]

In addition to its role in political rhetoric, scholars and authorities in a number of fields have invoked the harbinger theory in work on terror threats of a specific nature (nuclear, biological, radiological), the history of terrorism, and other facets of security, including cyberterror.[14] A host of prominent public intellectuals and high-profile commentators, including Richard Posner, Alan Dershowitz, and John Yoo, have also sought to make the case for extreme measures on the basis of often vivid and stirring hypothetical scenarios consistent with the notion of 9/11 as a harbinger of the scale of future terror.[15]

The harbinger theory has thus been invoked with a prevalence and consistency in political and juridical defenses of extreme measures that places it at the center of political and public discourse on national security in North America. For this reason, it can be distinguished from other grounds of public support for extraordinary measures. Some have argued, for example, that to a significant extent popular support for the measures reflects a set of racist, imperialist, or jingoistic assumptions and beliefs about the nature

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[12] Barack Obama, *Remarks by the President on Review of Signals Intelligence*, (Washington D.C.: Dep't of Justice, Jan. 17, 2014): http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence. Further examples are explored in Chapter 3.

[13] Ministry of Public Safety, Canada, *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* (Ottawa: Ministry of Public Safety, 2012); Canadian Security and Intelligence Service, *2008–2009 Public Report* (Ottawa: CSIS, 2008). References to mass terror are explored in Chapter 3.

[14] Walter Laqueur, THE 9/11 NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION (Oxford: Oxford University Press, 1998); NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY (New York: Continuum, 2004); Philip Bobbitt, TERROR AND CONSENT: THE WARS FOR THE TWENTY FIRST-CENTURY (New York: Knopf, 2008). On nuclear terror, see Graham Allison, NUCLEAR TERROR: THE ULTIMATE PREVENTABLE CATASTROPHE (New York: Henry Holt, 2005), Charles D. Ferguson and William C. Potter, THE FOUR FACES OF NUCLEAR TERRORISM (London: Routledge, 2005), Matthew Bunn, *Securing the Bomb 2010: Securing All Nuclear Materials in Four Years*, (Cambridge, Mass. and Washington, D.C.: Project on Managing the Atom, Belfer Center for Science and International Affairs, Harvard Kennedy School and Nuclear Threat Initiative, April 2010): www.nti.org/e_research/Securing_The_Bomb_2010.pdf. On biological terror, see Barry Kellman, BIOVIOLENCE: PREVENTING BIOLOGICAL TERROR AND CRIME (Cambridge: Cambridge University Press, 2007); Jim A. Davis, *A Biological Warfare Wake-Up Call: Prevalent Myths and Likely Scenarios*, in Jim A. Davis and Barry R. Schneider, eds., THE GATHERING BIOLOGICAL WARFARE STORM (Westport, CT: Praeger, 2004); and Frank Barnaby, HOW TO BUILD A NUCLEAR BOMB AND OTHER WEAPONS OF MASS DESTRUCTION (London: Granta Books, 2004). On cyberterror, see Sam Powers, *The Threat of Cyberterrorism to Critical Infrastructure*, E-International Relations, September 2013, *available at* http://www.e-ir.info/2013/09/02/the-threat-of-cyberterrorism-to-critical-infrastructure/; and Marie-Helen Maras, COMPUTER FORENSICS: CYBERCRIMINALS, LAWS, AND EVIDENCE (Sudbury, MA: Jones and Bartlett, 2012).

[15] See, e.g., Alan Dershowitz, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (New York: Norton, 2006); Richard Posner, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (Oxford: Oxford University Press, 2006); and John Yoo, WAR BY OTHER MEANS: AN INSIDERS ACCOUNT OF THE WAR ON TERROR (New York: Atlantic Monthly Press, 2006).

of terrorism or national security.[16] Or, as noted above, support may be grounded in earlier cultural trends toward greater control, risk management, and security.[17] The intent here is not to deny the presence of other grounds for support, but, rather, to highlight the degree to which the measures have been defended in official pronouncements by a wide range of institutional actors in the post-9/11 period consistently and almost exclusively in terms of a single articulable theory. A variety of motivations may or may not inform the politics of security, but members of the executive and key security officials in both nations have rarely if ever sought to justify the measures in terms other than a variation on the harbinger theory.

The theory has also characterized the prevailing public imagination of the threat of terror and beliefs about appropriate responses to it. For much of the post-2001 period, the prospect of further terror on the scale of 9/11 has been continuously affirmed for a wider public in various works of popular culture—from countless films and books to TV series, including *24*, *Zero Dark Thirty*, and *Homeland*—which often depicted terror plots involving WMDs or contemplated the imminent possibility of attack resulting in thousands of casualties rather than tens or hundreds. Many of these works have also endorsed a more aggressive and preemptive approach to national security by depicting the use of torture, rendition, or targeted killing as necessary, effective, and proportionate responses to the threat of terror.

Public opinion surveys over the course of the post-9/11 period in Canada and the United States suggest that large portions of the North American public have adopted beliefs consistent with the harbinger theory and its corollary assumptions about security. More recent polls confirm the currency of these beliefs, indicating that a large portion of the U.S. public continues to fear the future possibility of an attack on the scale of 9/11 or greater.[18] Recent polls also suggest that sizeable numbers still support a range of authoritarian measures including targeted killing, indefinite detention without charge, and mass secret surveillance. Poll data in Canada are less clear on the extent to which Canadians fear large-scale terror, but confirm the currency of such fears along with significant support for more invasive measures. Opinion data thus support the role of the harbinger theory as a social and cultural foundation for extreme measures.

Earlier approaches to post-9/11 policies and practices have therefore erred in assuming a continuity with an older rise of securitization. These approaches overlook the important question of what the security landscape would have been like had 9/11 not occurred, and what particular forms of reasoning about security 9/11 had made possible. Put otherwise, if 9/11 had not occurred, an increase in forms of security may have been likely, but not the

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[16] *See*, e.g., Sherene Razack, CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS (Toronto: University of Toronto Press, 2008); Judith Butler, PRECARIOUS LIFE: POWERS OF MOURNING AND LIFE (London: Verso, 2004) and FRAMES OF WAR: WHEN IS LIFE GRIEVABLE? (London: Verso, 2010).

[17] *See* Garland, Simon, and Zedner, *supra* note 6.

[18] Examples are explored in Chapter 3.

extraordinary measures that have in fact come about. And while fear and overreaction to the spectacle of 9/11 explain much, they do not explain the primary mode of argument by which the executive, courts, and prominent voices in public debate have justified authoritarian measures, or the basis on which a wider public has come to accept them.

There is of course nothing new in the claim that North Americans have embraced more invasive measures on the basis of growing fears about terrorism. But by probing this claim in more depth, this book will demonstrate that support for the measures has rested on a more specific and recurring logic that played an indispensable role in shaping law and policy precisely as a result of the absence of any prominent public critique of it. Seeking to address this gap, the book will explore expert opinion and evidence to advance arguments that may be used in law and policy debates to call the harbinger theory into question.

But before expanding upon this, the book also advances a further primary claim. I will argue that the impact of the harbinger theory has gone beyond shaping security law and policy to affect a deeper transformation in cultural perceptions of law itself. Understanding this shift is essential to the project of reform in large part because authoritarian measures are not seen to be emergency measures, but part of the fabric of a new and evolving idea of law—one in which vastly expanded state secrecy, indefinite detention, mass surveillance, and extra-judicial killing are consistent with law. These practices have become consistent with law, and not merely temporary exceptions, on the basis that the much greater threat that terrorism poses is permanent. And this logic can be discerned on both sides of the border.

The salient feature of the Bush administration's legal response to 9/11, a feature retained under Obama, was to frame the event as an act of war, conferring upon the President warlike powers. The legal centerpiece of the war on terror in this regard is the "Authorization to Use Military Force" (AUMF), a joint resolution of Congress passed on September 14, 2001.[19] Containing no explicit time limit, the AUMF states that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons... in order to prevent any future acts of international terrorism against the United States." Given its broad sweep, the AUMF has served as a continuous reference point for the President's legal authority to carry out a range of extraordinary measures, including indefinite detention without charge at Guantanamo, targeted killing, and certain forms of mass surveillance.

But, notably, the AUMF, and the larger framing of the threat of terror as tantamount to war, is premised on the harbinger theory and would be implausible without it. The preamble to the AUMF makes this explicit: "on September 11, 2001, acts of treacherous violence were committed against the United States... and such acts continue to pose an

[19] Authorization to Use Military Force, Pub. L. No. 107–40, 50 U.S.C. §1541 (2001).

unusual and extraordinary threat to the national security and foreign policy of the United States." To assert that al Qaida poses a continuing and extraordinary threat is to view 9/11 not as an anomalous and highly improbable event but as one that may be repeated at some point in the near future. It was also an open-ended threat, giving rise to a war of indefinite duration—or at least as long as the harbinger theory seemed plausible. When Congress reaffirmed the validity of the AUMF in 2012—effectively renewing it—it also reaffirmed its belief in the currency of the harbinger theory.[20]

For much of the post-9/11 period, as these legal developments have emerged, U.S. jurists, legal scholars, and rights advocates have been concerned primarily with debating the constitutionality of the war on terror or its consistency with the rule of law and the principles of human rights. Part of the problem is that the conduct of the war has not easily fit within the older paradigm of a liberal or humane law of war against a conventional territorial enemy. And yet core elements of the new preemptive regime have found a place in law, forcing an ever-expanding set of subtle but significant alterations, amendments, and qualifications to primary doctrines and principles of law. To take a notorious example, the Bush administration sought initially to deny detainees at Guantanamo the protections of the Geneva Conventions—including the duty to refrain from interrogation—preferring to subject these "enemy combatants" to coercive or "enhanced" interrogations. The Supreme Court then ruled otherwise in what appeared to be a victory for human rights; but it conceded that the President had the authority to detain terror suspects for the "duration of hostilities" in the war on terror, however long that might be.[21] It also allowed for a more restricted form of habeas corpus and the use of secret evidence in reviewing the detentions.[22] Later, the administration would insist on the legality of coercive interrogation bordering on torture, and the practice of "extraordinary rendition."[23] In response to revelations in 2005 of a secret National Security Agency mass surveillance program, Congress would amend the Foreign Intelligence Surveillance Act in 2008 to allow many of the same powers with limited judicial oversight or public accountability.[24] At a further extreme, the President claimed in 2013 the constitutional authority to carry out targeted killing of U.S. citizens either abroad or *in* the United States on the basis that although it may involve a deprivation of life without "judicial process," it does not deny a form of due process.[25] These various controversial measures may not easily fit into either conventional criminal law or law of war frameworks, but are now entrenched to a significant extent in law.

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[20] *See* discussion in Chapter 2 of the National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011).

[21] Hamdi et al. v. Rumsfeld et al., 542 U.S. 507 (2004).

[22] Boumediene v. Bush, 476 F.3d. 981 (2008).

[23] *See* discussion of these measures in Chapter 2.

[24] Foreign Surveillance Intelligence Act, Pub. L. 95–511, 92 Stat. 1783 (1978); Foreign Surveillance Intelligence Act of 1978 Amendments Act of 2008, Pub. L. 110–261, 122 Stat. 2436 (2008).

[25] Charlie Savage, *Senators Press Holder on Use of Military Force on U.S. Soil*, N.Y. TIMES, Mar. 6, 2013.

Canada, by contrast, is not engaged in a war on terror, and in many respects its legal response to 9/11 has been more restrained than that of the United States. Canada's Anti-terrorism Act, passed in December of 2001, added new terror-related offenses to the Criminal Code, and powers for preventive detention and judicial interrogation.[26] But the new offenses did not contain mandatory minimum sentences, and the new detention and interrogation powers include significant procedural limits. And although the government preferred the use of immigration detention powers over criminal prosecution as a counterterrorism measure in the early years after 9/11, it soon shifted emphasis back to prosecutions, demonstrating a measured use of that tool as well. Moreover, while Canada's immigration law allows for a form of indefinite detention without charge on secret evidence, the "security certificate" regime is fundamentally different from detention at Guantanamo by virtue of the fact that its primary purpose is to facilitate a detainee's secure deportation rather than indefinite detention per se. Canada has also demonstrated a significant measure of accountability for rights violations by holding two high-profile inquiries into the involvement of state officials in the deportation and torture of one of its citizens, Maher Arar, and in the torture of three other Canadians in Syria and Egypt.[27] The government also compensated Arar with $10.5 million and made an official apology.

Yet, in many respects, Canada's response to 9/11 raises similar questions about the nature and limits of the concept of legality at work in much of its security law after 2001. Terrorism offenses may contain important limits on their scope, but changes to the law of evidence allow the government to prosecute these offences with greater secrecy, or to limit accountability for its complicity in torture or other rights violations through significantly expanded forms of public interest privilege.[28] Though much of the information the government sought to redact from final reports of the Arar and Iacobucci inquiries noted above was ordered to be released, much of the evidence in both cases and significant portions of the final reports were still concealed from the public. The Supreme Court of Canada has also held that in extraordinary circumstances, the government may deport an immigration detainee despite a clear risk of torture in their state of origin—*without violating* the protection of "life, liberty, and security of the person" in the Charter of Rights and Freedoms.[29] The Court has also affirmed the constitutional validity of immigration law allowing for a prolonged detention without charge on secret evidence, despite the fact that the cause of the delay is a difficulty in carrying out the deportation.[30] Relying on these powers, Canada held five non-citizens suspected of involvement in terrorism without charge for periods ranging from two to seven years.

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[26] Anti-terrorism Act, S.C. 2001, ch. 41; Criminal Code, R.S.C. ch. C-46, §§83.3(2), (6) and (7) and §83.28.

[27] The Arar and Iacobucci inquiries are discussed at greater length in Chapter 2.

[28] *See* discussion in Chapter 2 of litigation involving Abousfian Abdelrazik.

[29] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, citing the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[30] Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9; Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37.

The prevailing response to these measures among law scholars in both Canada and the United States has been to frame them as facets of emergency government, or of moments of non- or extra-legality with debatable legitimacy.[31] A fascinating discussion centered upon the work of Italian philosopher Giorgio Agamben and the German legal theorist Carl Schmitt has sought to complicate the question of the legality of extreme measures by positing the indeterminate character of the state of emergency or exception on which they are premised. On this view, measures imposed pursuant to an exceptional instrument such as the AUMF are neither within nor beyond law, but blur the boundaries between law and sovereign power, or expose the irreducible indeterminacy of their borders.[32] This book argues, by contrast, that all such approaches that emphasize a non- or extra-legal aspect of the measures overlook one of the salient characteristics of a wide range of extraordinary counterterrorism law and policy after 9/11—from legislation authorizing targeted killing, to court decisions confirming the constitutionality of indefinite detention, to the torture memos: the prevalence of an insistence on legality.

By virtue of a common insistence on the part of government that various measures are legal, and a broad acceptance on the part of the public and the judiciary (with some qualifications), the measures can be understood collectively as marking a shift in the cultural currency of liberal legality to what can be called authoritarian legality—effecting a shift of a deeper, more pervasive character. This new concept of law can be understood in terms of its basic features, including a repudiation of absolute or "non-derogable" human rights (against torture or indefinite detention without charge); the expansion of seemingly unfettered state secrecy and surveillance; broad judicial deference to executive discretion; and a reluctance to remedy serious rights violations or to be held accountable for them.

In May 2013, President Obama gave a speech that signaled an intention to bring the war on terror to an end. But his vision for a postwar security policy offered evidence of how deeply rooted some of the hallmarks of authoritarian legality have become and how much longer they may remain. Obama said he would work with Congress to "refine and ultimately repeal" the AUMF, and the United States would eventually have to close Guantanamo. But it would continue to hold a number of high-value detainees without charge in supermax American prisons. The limits and rules around mass warrantless surveillance of phone and Internet data should be debated, and certain limits imposed, but the general practice would continue.[33] Targeted killing should be subject to greater accountability and perhaps some form of judicial oversight, but the power and practice

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[31] *See*, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1011 (2003) and Kent Roach, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM (Cambridge: Cambridge University Press, 2011).

[32] Giorgio Agamben, STATE OF EXCEPTION, Kevin Attell (trans.) (Chicago: University of Chicago Press, 2004); Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY, George Schwab (trans.), (Chicago: University of Chicago Press, 2005). Both works are discussed further in Chapter 2.

[33] Obama confirmed this intention in his speech of Jan. 17, 2014, *supra* note 12.