

Exceptionalism and the Politics of Counter-Terrorism

Liberty, security and the War on Terror

Andrew W. Neal



Routledge Studies in Liberty and Security

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First published 2010

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

First issued in paperback 2011

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Typeset in Times New Roman by Taylor & Francis Books

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Neal, Andrew W., 1978-

Exceptionalism and the politics of counter-terrorism : liberty, security, and the War on Terror / Andrew W. Neal.

p. cm.

1. Liberty. 2. National security. 3. Terrorism – Prevention. 4. War on Terrorism, 2001-I. Title.

JC585.N39 2009

327.1'17 – dc22

2009016196

ISBN10: 0-415-45675-4 (hbk)

ISBN10: 0-415-66453-5 (pbk)

ISBN10: 0-203-86758-0 (ebk)

ISBN13: 978-0-415-45675-3 (hbk)

ISBN13: 978-0-415-66453-0 (pbk)

ISBN13: 978-0-203-86758-7 (ebk)

Exceptionalism and the Politics of Counter-Terrorism

This book is an analysis and critique of the concepts of 'exception' and 'exceptionalism' in the context of the politics of liberty and security in the so-called 'War on Terror'.

Since the destruction of the World Trade Centre on September 11th 2001, a notable transformation has occurred in political discourse and practice. Politicians and commentators have frequently made the argument that the rules of the game have changed, that this is a new kind of war, and that exceptional times require exceptional measures. Under this discourse of exceptionalism, an array of measures has been put into practice, such as detention without trial, 'extraordinary rendition', derogations from human rights law, sanction or connivance in torture, the curtailment of civil liberties, and aggressive war against international law.

Situating exceptionalism within the post-9/11 controversy about the relationship between liberty and security, this book argues that the problem of exceptionalism emerges from the limits and paradoxes of liberal democracy itself. It is a commentary on and critique of both contemporary practices of exceptionalism and the critical debate that has formed in response. Through a detailed assessment of the key theoretical contributions to the debate, this book develops exceptionalism as a critical tool. It also engages with the problem of exceptionalism as a discursive claim, as a strategy, as a concept, as a theoretical problem and as a practice.

This is the first book to capture the importance of the exceptionalism debate in a single volume, and will be of much interest to students of critical security studies, political philosophy, IR theory and sociology.

Andrew W. Neal is a Lecturer in International Relations at the University of Edinburgh. His PhD won the British International Studies Association best thesis prize in 2006.

Routledge Studies in Liberty and Security

Series editors

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Terror, Insecurity and Liberty

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Exceptionalism and the Politics of Counter-Terrorism

Liberty, Security and the War on Terror

Andrew W. Neal

**This book is dedicated to my late grandfathers and namesakes,
Andreas Phylactou and William George Neal.**

Acknowledgements

I could not have written this book without the help and support of some exceptional people. It was made financially possible by a bursary from the Centre for World Dialogue, Nicosia, Cyprus, for my first year at Keele; my appointment to a research assistant position with ELISE (European Liberty and Security), a project financed by the Fifth Framework Research Programme of the Directorate-General for Research of the European Commission; and to a research associate post with CHALLENGE (the Changing Landscape of European Liberty and Security), a project financed by the Sixth Framework Research Programme of the Directorate-General for Research of the European Commission.

An earlier version of Chapter 6 was first published by Sage in the journal *Security Dialogue* (vol. 37, no.1, 2006: 31–46) and in German as ‘Foucault in Guantánamo: Eine Archäologie des Ausnahmezustands’, in Krasmann and Martschukat (eds), *Rationalitäten der Gewalt* (Transcript: Bielefeld, 2007: 19–46).

Thanks must go to the many members of the ELISE and CHALLENGE projects for providing an encouraging and engaging research environment, to colleagues past and present at Keele University, the University of Birmingham, King’s College London and the University of Edinburgh, and to the researchers and staff at the journal *Cultures et Conflits* in Paris, with whom I spent a formative six months in 2004. Thanks also to my publisher at Routledge, Andrew Humphrys, and my very efficient copy-editor, Lisa Williams.

This work is the product of a long intellectual engagement with many inspiring peers and mentors. I would like to thank: the unnamed reading group, mostly held in the George pub behind the LSE, and its core members John Grant, Douglas Bulloch, Lina Dencik and Angharad Closs Stephens, with special thanks to Angharad for countless readings, debates, and conversations, but most of all for sharing the journey; Graham Smith, Jef Huysmans, Thomas Diez, Elspeth Guild, Didier Bigo, Philippe Bonditti, Vivienne Jabri, Seán Molloy, Peter Chambers, Halit Mustafa Tagma, Costas Constantinou, Mick Dillon, Julian Reid, Claudia Aradau, Christian Olson, Emmanuel-Pierre Guittet, Mustapha Pasha, Nick Vaughan-Williams, Luis Lobo-Guerrero,

x *Acknowledgements*

Debbie Lisle, Peter Burgess, Monica Mookherjee, Kimberly Hutchings and the many members of the c.a.s.e. collective. My greatest gratitude must go to my parents for their unqualified support, to Rob Walker for his exceptional financial, moral, political and intellectual support and guidance, and to my wife Rebecca for her painstaking proofreading, but most of all for her patience, joy and love.

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Introduction

How are claims about exceptional events being used to give legitimate authority to exceptional practices? Since the violent destruction of the World Trade Centre on September 11th 2001, a notable transformation has occurred in political discourse and practice. Politicians and commentators have frequently made the argument that the rules of the game have changed, that this is a new kind of war, that exceptional times require exceptional measures. Under this discourse, an array of exceptional measures have been put into practice, such as detention without trial, extraordinary rendition, derogations from human rights law, sanction or connivance in torture, the curtailment of civil liberties and aggressive war against international law. The category of the 'exceptional' has been invoked to legitimize and mobilize an array of violent and illiberal practices. These exceptional policies and practices, legitimated by claims about exceptional events and circumstances, I will call *exceptionalism*.

Many difficult questions are raised by the problem of exceptionalism. What makes an event or situation exceptional? Are there certain recognizable qualities and conditions that mark something out as being so? Does the exception bring about certain necessities and imperatives? Does the exception dictate an exceptional response? What is the relationship between the exceptional event and practices of exceptionalism? How do claims about exceptions work? How are they received? What gives discourses of exceptionalism authority? Who designates the exceptional? How do they overcome political contestation? How is an imperative and mobilizing link made between exceptional events and exceptional practices? What is at stake in the discourse and practice of exceptionalism? What are the politics of the exception?

These post-9/11 transformations in political discourse and practice have not gone unnoticed or uncontested. A broad argument has emerged about the proper relationship between liberty and security. Many urgent and challenging questions have been raised. Should liberal states ever act illiberally? Are there certain situations in which it is necessary to make exceptions to the law and the norm? Or do exceptional security practices destroy the very 'freedoms' they are supposed to protect?¹ I take this 'liberty/security' debate as the starting point for an investigation into the politics of the exception. Does this debate capture what is at stake? I argue that it does not, because many

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assumptions about liberty and security are problematized by exceptionalism itself.

The need to defend the liberal subject as a historical achievement is taken as a central principle of Western politics, yet the liberal subject, bearing freedom and rights, is thrown into contestation in the liberty/security debate. Is it 'terrorism' that threatens liberty, or the state itself? In this contested field, the discourse of liberty is used both to oppose illiberal security practices and to legitimate them. We must be defended against illiberal and fanatical fundamentalists who are not proper liberal citizens at all, we are told. Terrorist suspects do not deserve liberty and rights, it is claimed. The political implications of liberal principles are being heavily contested. Judgements are put into play about who is liberal and who is illiberal, who is modern and who is pre-modern, and who is normal and who is exceptional. Liberal societies must be defended, we hear, but by and from whom?

The conventional liberal debate contains contradictions that suggest there is something profoundly at stake in the politics of the exception. Exceptionalism problematizes not only the liberal subject, but also liberal society and the principle of liberty itself. How do liberal societies defend themselves, and what is the relationship between their liberal identity and their security practices? How do liberal political authorities make sovereign decisions about who and what is exceptional? How can the sovereign state make exceptions to liberty in the name of liberty, or exceptions to the law in the name of the law? These questions point towards a set of problems that need to be taken very seriously.

One effect of the discourse of exceptionalism and the liberty/security debate has been a resurgence of interest in the sometime Nazi jurist Carl Schmitt. In 1922, Schmitt proclaimed that 'Sovereign is he who decides on the exception'.² Schmitt argued that there is always the 'real possibility' of an existentially threatening exceptional event or situation that falls beyond the limits of law, liberty, rights and constitutional government. The exception, according to Schmitt, brings about a more fundamental range of imperatives and necessities that can only be answered by unlimited, unconstrained and unmitigated exceptional sovereign power. For Schmitt, security always trumps liberty and liberal politics; the exception always trumps the norm.

As a spectre haunting contemporary security politics, Schmitt seems to be winning the argument, and has expressed a serious challenge that has not been adequately met by the popular liberal discourse. To ask how and why the claims of Schmitt work is to ask how and why the claims of exceptionalism work. If exceptionalism has taken hold in contemporary political discourse and practice, then how does Schmitt, as one of its sharpest and most uncompromising proponents, make his case? Schmitt's exceptionalism operates as a pointed critique of the political and philosophical limits of liberalism. The reanimation of Schmitt is a symptom of the empirical rise of practices of exceptionalism. This book claims that a critique of Schmitt is also a critique of those practices.

Close engagement with the classic political theory of liberty offers many resources for understanding why Schmitt's claims are so expressive of the apparent contradictions between liberty and security. While the popular liberty/security debate posits the subject and the sovereign as opposites, the more serious political theory, considered here through Hobbes and Kant, holds that liberty is only possible under heavily restrictive political conditions. In this tradition, it is not a case of liberty *or* security, but liberty *under* security. The classic discourse of political theory argues that liberty can only exist in a permanent and necessary relationship with the possibility of its own suspension. Thus the limits of liberty and the possibility of its exceptional suspension appear to play a decisive role in its continuing possibility. Schmitt operates precisely upon this tension, which suggests that he works not as the *opposite* of liberalism but at a *constitutive limit* of liberalism. This apparent place for Schmitt at the heart of the modern Western tradition of political thought is why he must be taken seriously.

It is for these reasons that the challenge of Schmitt has been taken up by critical political thought.³ The problem of Schmitt and the exception has become a point of departure for critical political approaches that take the contradictions and limits of liberalism seriously. This departure raises two sets of questions. First, what is the value of the discourse of exceptionalism as a *critical* tool? That is, how can the discourse be used to understand and critique contemporary political claims and practices? What does it mean to understand contemporary political practices as exceptional, and what political effect does that designation have? Second, if exceptionalism is a defining challenge of contemporary politics, and Schmitt is representative of that challenge, then how can these critical approaches be used to win the argument with Schmitt? If the empirical experience of exceptionalism and the apparent impotence of liberal opposition mean that Schmitt is in ascendance, can a critical discourse of exceptionalism gain the upper hand? These questions about the possibility of a critical approach to exceptionalism permeate this book.

Schmitt has a particularly strong presence in two influential branches of contemporary political thought, explored in Chapters 4 and 5. The first is the political philosophy of Giorgio Agamben, who attempts to take the problem of the exception seriously by placing it at the centre of the Western political tradition going back to the Greeks.⁴ He argues that Western subjectivity has only ever been produced through the sovereign production of a relation between norm and exception. For Agamben, the decisions and judgements of exceptional sovereign power produce a political topology of forms of qualified and disqualified life.

The second influential approach is 'securitization theory'.⁵ This dispenses with the idea that security issues or threats are objective, independently occurring things, and instead argues that security issues are constructed through practices of 'securitization'. Issues are turned into security issues through particular political prerogatives and processes. This challenges the

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idea that the exceptional security threat is an ever-present 'real possibility' that brings forth its own existential imperatives. Instead, an event or situation is made exceptional for political and strategic purposes through discursive processes and practices.

These two approaches go some way towards taking the problem of the politics of the exception seriously. Agamben suggests that the liberal *subject* should not be taken as a stable and fixed point of reference, because the production of liberal subjectivity is deeply implicated in practices of exceptionalism. Securitization theory problematizes the *object* of exceptionalism by theorizing the ways in which events and situations are *named* and *declared* as exceptional. It could be said that Agamben problematizes the *subject* of exceptionalism and securitization theory problematizes the *object* of exceptionalism. They engage with practices of sovereign *subjectification* and sovereign *objectification*. As such, they attempt to take the limits of liberal subjectivity and the constitutive effects of sovereign practices seriously. But there is a danger that although these critical approaches engage with Schmitt, they do not win the argument but ultimately prove him right. Does Schmitt's exceptional sovereign emerge from these encounters seated even more firmly upon his throne?

In search of a more rigorous critique of the politics of the exception I turn to the work of Michel Foucault. In his call to 'cut off the King's head in political theory',⁶ Foucault throws down a specific challenge that directly squares up to Schmitt. How can the problem of sovereignty be deposed from its central position in political thought? Can Foucault offer a critical response to the politics of the exception that does not allow Schmitt to win the argument? Can exceptionalism be critiqued in a way that does not reify exceptional sovereign power, as Agamben and securitization theory ultimately do?

The methodology of Foucault's early work corresponds particularly well with the problematic categories of the discourse of exceptionalism. His method of 'archaeology', articulated in *The Archaeology of Knowledge*, first published in 1969, engages with the modern categories of knowing and being that are, I argue, discernibly in play in the politics of the exception. 'Archaeology' is a concept that emphasizes the analysis of practices, knowledges, structures, principles and discourses as dispersed historical sites. This allows a close engagement with the multiple modes and sites of the discourse and practice of exceptionalism, such as: the ways in which exceptional events are made into objects of political thought and discourse; the ways in which different subject positions are constituted through exceptionalism such as the sanctified liberal subject and the knowing, naming, judging and deciding sovereign; and the ways in which key terms such as 'exception' and 'security' have been constituted as concepts that imply their own political imperatives and necessities.

'Archaeology' as a mode of analysis is closely engaged with Kant's notion of critique.⁷ It is a way of rigorously understanding the conditions under which authoritative knowledge-claims are possible. This is particularly appropriate for this project because the problem of the exception is a Kantian

problematic in two specific ways. First, in the pervasive insistence on the salvation of freedom, or liberal subjectivity, whether from the dangers of uncivilized enemies or from illiberal tyranny; and, second, in the sovereign imposition of categories of knowledge upon the world. In Kantian fashion, the liberal subject maintains a sovereign presence at the heart of Western modes of being and thought; its faculties of knowledge and understanding shape and order the chaotic and contingent world into knowable categories according to its own image.⁸ In political terms, this is manifested in such dualisms as liberal and illiberal, modern and pre-modern, civilized and barbarous, friend and enemy, and norm and exception. Exceptionalism is a problem of the limits of liberal life; a problem of the sovereign imposition of categories of interpretation onto contingent events and situations; and a problem of a King's head that is Kantian in its modes of being, thinking, judging and acting. It is therefore particularly enticing that Foucault's method of 'archaeological' critique attempts to explicitly depart from Kant by deposing the sovereign subject from the centre of Western critical thought. It is for this reason that I take my questions about the politics of the exception to the early Foucault.

Exceptionalism and the Politics of Counter-Terrorism pursues three broad questions: what is at stake in the politics of the exception? What kind of critique is called for? Can Foucault be used to defeat Schmitt?

Chapter 1 begins by identifying exceptionalism as a contemporary political problem that is present in empirical events, situations and practices, and in the discourses being used to interpret, represent, legitimate and criticize those empirical sites. It establishes points of contention in the popular debate about liberty and security and the notion of 'balance', noting symptomatic contradictions and blind spots. The chapter uses three case studies to develop an understanding of the general problem. These are: the civil liberties discourse in the United States; the legal argument over exceptionalism in the European Union; and the issues raised during the drafting process of new civil contingencies legislation in the UK. The end of the chapter reflects on the issues and difficulties raised and establishes a theoretical framework for the book.

Chapter 2 analyses two canonical theorists of the politics of liberty: Hobbes and Kant. These thinkers engage seriously with the political and philosophical implications of the problem of human freedom at both the individual and social levels. The chapter investigates the problem of the exception as a symptom of liberal politics rather than an aberration of liberal politics. Departing from the problematic understanding of exceptionalism as a dualistic problem of liberty and security, it reads the relation between liberty and security as a mutually constitutive dialectic rather than an either/or dualism. The aim is to understand how Schmitt effectively captures and deploys the difficulties that occur at the limits of liberal politics, and to ask what it might mean to consider Schmitt as the constitutive limit, rather than the opposite, of liberalism.

Chapter 3 is a detailed critique of Schmitt that engages in a careful textual analysis of his key exceptionalist texts: *Political Theology* and *The Concept of*

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the Political. The chapter works towards a more rigorous understanding of the problem of the exception in its different forms, testing the immanent validity of Schmitt's arguments. The most important aim is to understand what is at stake in Schmitt's work and thus what is at stake in the politics of the exception.

Chapter 4 deals with the work of Giorgio Agamben. It tries to establish how Agamben grapples with Schmitt and the problem of the exception, why his work is important and what it means for this study. Through Agamben, the chapter explores the work of key theorists in further detail, including Schmitt, Foucault and Walter Benjamin. The aim is to establish how far Agamben's work can be used to critique Schmitt and the problem of the exception, what its limitations are and why the problem needs to be addressed differently.

Chapter 5 assesses the implications of securitization theory for the problem of the exception. What resources does securitization theory provide for tackling the problem? The chapter analyses the theory's constructivist approach to security and its relationship to Schmitt, questioning their closeness and whether the methodological and political choices of securitization theory allow it to break free from Schmitt's central claims and their political implications. The final part of this chapter begins to introduce an alternative 'archaeological' approach derived from the work of Foucault.

Chapter 6 explores Foucault's archaeological method in detail, establishing how it might be used to tackle the politics of the exception. It then applies these methods to the issue of extra-legal imprisonment and torture with specific reference to the experiences of the 'Tipton Three' in Guantanamo Bay.

Chapter 7, the concluding chapter, is a definitive statement on Schmittian and Foucauldian approaches to the problem of the exception and exceptionalism. It discusses a range of contemporary scholars, dividing them into these two camps. It explains the reasons for the rise of Schmitt amongst critical scholars of security, critiques that debate for its failings, and establishes in detail a Foucauldian methodology and response to the politics of the exception and the problem of exceptionalism.

1 The liberty/security discourse and the problem of the exception

Since September 11th 2001, the 'exception' has become central to political discourse and practice. Many policymakers and commentators have sought to define 9/11 as an exceptional event that brought about an exceptional set of circumstances, which in turn both require and justify exceptional responses. As such, governments and their agents have unleashed huge levels of violence both domestically, against citizens and aliens it deems threatening, and externally, with seemingly global reach. It is possible to describe an extensive array of exceptional measures that have been legitimated and put in practice under claims about exceptional circumstances. This trend has been a particular feature of the political landscape in the UK, the US and the EU, made all the more notable as these are places that claim a liberal heritage. Much of this has consisted of a series of illiberal antiterrorism laws enacted, often quickly and with little opposition, under the aegis of urgency, necessity, emergency and exception, but many contemporary transformations have occurred outside and away from the field of law, instigated by executive fiat, changes in operational policy, and a generalized sentiment of exceptional legitimacy and mobilization not simply in government, but at multiple levels of governance, governmentality and public practice. Under the same series of claims about the rules of the game having changed, the US and UK have waged aggressive international war contrary to international law.¹

Most disturbingly, this pattern of *exceptionalism* extends far beyond these visible areas into what has been called a 'global archipelago of the exception'.² It has become clear that Guantanamo Bay is only the best-known instance of a network of extra-legal practices of kidnapping, detention, abuse and torture that reaches into both Western and Eastern Europe, North and sub-Saharan Africa, the Middle East, Central Asia, and innumerable military and intelligence bases, prisons and camps in other untold locations.³ The stories of former prisoners are both horrendous and similar.⁴ The revelations continue apace.

There has been a concerted effort to document these exceptional policies and practices at the legal, institutional and sociological levels,⁵ accompanied by widespread anxiety about an apparently growing gap between the realms of norm/law and potentially arbitrary and often unseen assertions of illiberal and violent practices of exceptionalism. These empirical trends are readily

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visible in public discourse and political practice. They have spawned many different responses and interpretations, the most dramatic, profound and interesting of which is an appeal to the concepts of exception and exceptionalism. There is much significance in the fact that these concepts have returned to scholarly discourse, having last been significantly in play in interwar Europe.

There is an implicit exceptionalism in the many contemporary claims and commentaries that refer in one way or another to a well-established account of the relation between liberty and security. This chapter will show that the limitations and contradictions in this discourse are both palpable and well exercised critically. In portraying the relationship between liberty and security as one of trade-off or striking the right balance, there is a profound failure to grasp the contradictory, aporetic or perhaps dialectical nature of that relationship, as understood by more serious theoretical approaches. The most interesting theories and critiques of exceptionalism illustrate that beyond these problems of liberty and security there is more at stake. This first chapter, therefore, has three main aims, to be pursued together: first, to describe the empirical existence of exceptionalism as a discourse and practice; second, to describe the empirical existence of the prevailing liberty/security discourse and subject it to critique; and, third, to show that in these first two areas of concern there is something more profound at stake. This will lead, in later chapters, to a sustained critical engagement with the merits and failures of key theoretical departures on exceptionalism. Ultimately, the aim in the final chapter (Chapter 7) is to sketch a radically different theoretical response to the problem.

9/11 and the liberty/security discourse

Since September 11th 2001 an intense debate has sprung up about liberty and security. Within that debate there appear to be two poles. At one pole there is political authority, often in the form of states and their agents, but also increasingly manifested in forms of governance and governmentality that exceed the traditional boundaries of the state. The leaders, agents, ideologues and commentators of these political authorities claim that we need to sacrifice some liberty for security because of the renewed threat of terrorism. Hence governments have responded to large-scale acts of murderous political violence by implementing what they call necessary renegotiations of the liberty of their citizens, or more likely a specific minority, in order to meet the demands of security. At the other pole there is a broad coalition that claims to speak for civil society by standing up for liberty and rights against the encroachment of the state and other political authorities. From civil liberties campaigners to international lawyers, it is anti-terrorism itself that is seen as the threat to liberty. Many suspect that the threat of a ubiquitous 'terrorist' enemy is being used to legitimate contentious, illiberal and violent policies and practices across the globe. Post-September 11th anti-terrorism measures