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September 11th, 2001, Fifteen Years After:

The State of Exception vs. the Sovereign Rule of Law

The tradition of the downtrodden teaches us that the state of exception in which we live is not the exception but the rule. We must reach a concept of history that is in keeping with this insight.

---Walter Benjamin, “Theses on the Philosophy of History”

i

In *The State of Exception*, the Italian philosopher, Giorgio Agamben, drew attention to the dangerous loophole in Western European (Greek and Roman) constitutional law, which allows the sovereign ruler or absolute dictator (the Greek tyrant or the Roman emperor) to declare a state of exception or state of emergency in the sovereign rule of constitutional law, by which the strict limits on the sovereign’s monopoly on violence are temporarily suspended, while, superficially, constitutional law remains in effect, thereby permitting the sovereign ruler or absolute dictator (the Soviet commissar, the Nazi chancellor, the British prime minister, the American president, etc.) to exercise the sovereign monopoly on violence *above* and *beyond* the strict limits of the rule of law, to commit flagrant abuses of civil and constitutional rights, or to carry out war-crimes and atrocities against both foreign and domestic populations, while still cloaking those flagrant abuses of sovereign authority behind the spurious pretext of the strict rule of constitutional law. Although *The State of Exception*, following from Walter Benjamin’s “Critique of Violence,” is frequently read by Agamben’s fans as a call to the politically-engaged intellectual or leftist-anarchist activist to take advantage of that state of exception or state of emergency to bring about what Benjamin calls “a real state of exception,” in which revolutionary change or radical anarchy can come about, *The State of Exception* really should be read, I have argued, as a cautionary parable abut the clear and present danger present in Western European constitutional law, which arises when the sovereign ruler or absolute dictator takes advantage of the breakdown of the rule of law to seize absolute dictatorial powers, to rule by sovereign *diktat*, and to exercise the monopoly on violence outside the strict limits of constitutional law, while, simultaneously, the sovereign state or democratic *polis* descends into a perilous state of fractious political strife and internecine civil war, in which the embattled political factions fight violently against each other, in the spurious ‘state of nature’ or ‘state of war’ called, by Thomas Hobbes, the *bellum omnium contra omnes* (“the war of all against all”), and the only sovereign law is the absolute rule of superior violence, in which the sovereign ruler who possesses superior violence therefore rules by fear and terror over all. And even if the sovereign ruler or absolute dictator still maintains the superficial pretext of a constitutional rule of law within the sovereign state or democratic *polis* itself, so that its privileged citizens and complacent subjects enjoy a comparatively tranquil, secure, and safe existence, unhindered by the suspension of their civil rights and unscathed by sovereign’s monopoly on violence, the sovereign ruler or absolute dictator can still take advantage of selective application of that state of exception or that state of emergency, to carry out war-crimes and atrocities against the foreign citizens or designated enemies of the sovereign state or democratic *polis*, who, of course, have no civil rights, and to censor and suppress dissident opinions and dissenting viewpoints within the sovereign state or democratic *polis* itself. Which appears to be what has taken place in the United States of America since September 11th, 2001, under the spurious pretext of the international war on terror.

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The September 11th attacks against the World Trade Towers in New York, and against the Pentagon in Washington, D.C., which instigated the U.S. response to the international war on terror, have been employed as a superficial pretext to declare a state of exception or a state of emergency in the sovereign rule of U.S. constitutional law, to suspend *habeas corpus* for American detainees, and to permit the U.S. president to rule by *diktat* over the sovereign executive branch, the Pentagon, the Department of Defense, the FBI and the CIA, in contravention of the sacrosanct principles of checks and balances and separation of powers, enshrined in the U.S. Constitution. And this false state of exception or spurious state of emergency has had the further unfortunate result that certain sectors of American political life still remain under the shadow of that state of emergency, which places unconstitutional constraints on civil liberties, and permits the sovereign executive branch to carry out the surveillance, detention, incrimination, and arrest of U.S. citizens, even adolescent juveniles, for alleged terrorist acts, which they had no prior intention of actually committing, before their unwitting recruitment as ‘suspected terrorists’ by FBI or CIA agents. And that state of emergency or state of martial law has persisted for fifteen years, despite the absence of terrorist attacks which might justify the suspension of *habeas corpus* and the infringement of civil rights under the US Constitution, which clearly states that the right of *habeas corpus* shall not be suspended, except in cases of invasion or insurrection, threatening civil war within the American Republic itself. The September 11th attacks have also been employed as a superficial pretext to justify the invasions of the sovereign foreign nations, Afghanistan and Iraq, which allegedly aided and abetted the September 11th terrorists, despite the obvious fact that the vast majority of the citizens and subjects of those sovereign nations had absolutely nothing to do with the September 11th attacks, or with the subsequent terrorists acts committed by a small percentage of their indigenous or foreign population, without their knowledge or choice, thereby applying a spurious principle of guilt-by-association to the prosecution of criminal terrorism, which punishes those innocent civilians with suffering, torture, and death, for crimes that they did not commit, or of which they were themselves the suffering victims. But, worse, fifteen years after the September 11th terror attacks, that state of emergency or state of martial law his been blown up out of all proportion to justify counter-terrorist attacks, not only against the September 11th terrorists, who are all dead or in US prisons, and their Al Qaeda co-conspirators, who no longer pose a major threat to US national security, but also against, for example, Al Qaeda’s distant progeny, the Islamic State terrorists, who emerged from the U.S. prisons in Afghanistan and Iraq, after what might be called the Second Gulf War---the U.S. invasion of Iraq in 2004---but who are only distantly related to the September 11th terrorists, against whom the Congressional decree of sovereign authority for the U.S. president and the executive branch in prosecuting the war on terror was issued, in the first case. Further, this state of emergency or state of martial law has been applied as a superficial pretext to justify targeted assassination of U.S. and foreign citizens by predator drone attacks, thereby condemning those ‘suspected terrorists’ to extrajudicial death, without the slightest proof of guilt or substantive due process for their alleged criminal acts; and that state of emergency or state of martial law has also been used as a pretext to launch indiscriminate bombing-strikes against civilian targets, allegedly serving as human shields for the suspected terrorists, under the specious rationale that these counter-terrorist actions have been carried out to prevent a clear and present threat to the security, safety, and health of the U.S. populace, which clear and present threat doesn’t currently exist.

Whether the September 11th attacks really qualify as a catastrophe in the world history of the human species, or as a war-crime or atrocity---a crime against humanity---of comparable criminal guilt and moral weight to the greatest crimes and atrocities of the previous blood-stained centuries, like the Stalinist Great Terror or the Nazi Holocaust, is a difficult question that reasonable women and men can differ about. Because, after all, there’s really no strict moral equivalency between criminal terrorist acts, war-crimes and atrocities, and the plagues, famines, earthquakes, volcanoes, and other natural disasters, which we call acts of god, and really no way of weighing the comparative criminal or moral guilt of war-crimes and atrocities, between which no scale of equivalence is finally adequate. But whether the subsequent reaction of the White House, the Pentagon, and the US military, to the September 11th attacks, was really excessively violent, out of all proportion to the terrorist crime, and unjustifiable under international law, is almost a foregone conclusion, since the CIA’s targeted assassinations clearly offend against contemporary civil and human rights law, by applying punishment and death to presumptively innocent persons, called suspected terrorists, without the slightest procedural due process or substantive law, while the collateral damage in innocent civilian casualties---women, children, and non-combatants---of the Pentagon’s bombing strikes clearly exceeds the most punitive strictures of the old law of sacrifice and vengeance, by applying blood-guilt to the unwitting witnesses of crimes committed by others, of which those unwitting witnesses were themselves sacrificial victims. But the demoralizing effect of the White House’s war on terror, the Pentagon’s bombing strikes, and the CIA’s targeted assassinations, can’t be measured in the crude moral calculus of casualties and body-counts alone, but must also take into account the incalculable damage done to the US Constitution, the Geneva Convention, and the international rule of law, by the decision of the executive branch to place itself above and beyond the sovereign rule of law,to implement a state of exception or state of martial law that allows the US President, the Pentagon, the FBI, and the CIA, to claim a monopoly on violence to carry out counter-terrorist attacks, without observing constitutional limits upon their sovereign authority, and to exercise sovereign violence with callous disregard for the innocent victims, cruelly tortured and condemned to death, in the supremely violent pursuit of retribution and vengeance for criminal acts actually committed by others. Just as the criminal violence of the Reagan/Bush regime in Central America in the 1980s, has now recoiled on the US/Mexico border with the Mexican drug cartels and their terrorist hit-men, the Zetas, who were, at least in part, schooled and trained by the US military in the School of the Americas, so also the terrorist violence of the Reagan/Bush regime, which sponsored Al Qaeda and the Taliban as Muslim holy warriors against the Soviet Union in Afghanistan, has also recoiled upon the United States in the World Trade Center bombing-plots, the US Embassy bombings, the September 11th attacks, and, finally, the precipitous rise of the Islamic State, in the U.S. prisons in Iraq and Afghanistan, which were ostensibly designed to stop the criminal terrorists from committing more terrorist attacks. By conspiring with criminal drug dealers and fanatical *jihadis*, the White House, the Pentagon, the FBI, and the CIA, have made themselves complicitous, however inadvertently, with the criminal terrorist violence and suicidal attacks subsequently unleashed against the American people on September 11th, and with the wholesale atrocities performed by Islamic State terrorists in Afghanistan and Iraq, after the U.S. invasions, while the White House, the Pentagon, the FBI, and the CIA, have also become complicitous, without explicit design, with the criminal violence of the Mexican cartels, who have not only committed atrocities against Mexican civilians, but are establishing strongholds of drug-trafficking and violent death in American cities. Further, by choosing to exercise their sovereign monopoly on violence outside the sacrosanct limits of the U.S. Constitution and the international rule of law, the White House, the Pentagon, and the CIA, have left themselves---and, indirectly, the American People---vulnerable to criminal charges of war-crimes and atrocities (bombing of hospitals, killing of civilians, torture of detainees, etc.) in the world court of international law, and have provided justification for the war-crimes and atrocities committed by terrorist states, like Bashar al-Assad’s Syria and Vladimir Putin’s Russia, which can now claim sovereign immunity for their criminal actions, under the spurious rationale that the United States did it first. But whether the criminal terrorist violence of the World Trade Center bombing-plots, the US Embassy bombings, and the September 11th attacks, was originally set in motion in Afghanistan, Pakistan, Iraq, Moscow, or Washington, D.C., is, finally, only of secondary importance; because criminal terrorist violence, like primitive sacrificial violence, finally proliferates beyond the control of both the sovereign master and the sacrificial victim, and becomes a self-perpetuating cycle of warfare and vengeance, crime and punishment, and simply goes right on proliferating, goes right on escalating, without even the supreme tribunals of the contemporary international world-system---the United Nations Security Council or the International Criminal Court---quite knowing how to re-establish the sovereign rule of law, or to make the self-perpetuating cycle of terrorist violence finally, simply, stop.

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But it’s not the fault of the White House, the Pentagon, the FBI, or the CIA alone, that the US response to the September 11th tragedy has been so excessive, so out of all proportion to the criminal terrorist act that spawned it, and so obviously in violation of the US Constitution, the Geneva Convention, and the international rule of law. The US Constitution gives the federal courts Article III jurisdiction to rule over the actions of the executive and legislative branches, and to place checks and balances on the exercise of executive power: a constitutional duty of the federal courts, especially the US Supreme Court, clearly upheld by the famous test case, *Marbury v Madison* (5 US [1 Cranch] 137 [1803]), which declared that the sovereign authority of the president and the executive branch was still subject to the scrutiny of the U.S. Supreme Court, especially in cases of high crimes and misdemeanors foreboding the possibility of impeachment of the president and executive branch. And, to its considerable credit, the US Supreme Court has three times (in *Hamdi v Rumsfeld* [524 US 507 (2004)], *Rasul v Bush* [542 US 466 (2004)], and *Boumediene v Bush* [553 US 723 (2006)]) ruled that the White House policy for treatment of US detainees at Guantanamo Bay detention camp, and the US military tribunals used to prosecute and punish US detainees, were constitutionally insufficient to satisfy minimal due process or *habeas corpus* standards, and incompatible with the US Constitution, the Geneva Convention, and the international rule of law. But the lower federal courts, and especially the DC Circuit Court, have shirked their constitutional duty, under the US Supreme Court’s decisions, to preside over *habeas* cases, and to provide full and fair hearings for presumptively innocent detainees incarcerated as ‘suspected terrorists,’ ‘non-state actors,’ or ‘enemy combatants,’ in the US military prison-camp system; and, even more disturbingly, those U.S. federal courts have simply refused to admit evidence of the coercive interrogation and psychological and physical torture inflicted upon US detainees at CIA black sites, into the US courts, citing state secrets doctrine and national security privilege as unconstitutional precedent for conferring sovereign immunity upon the US President, the Chiefs of Staff, the Pentagon, the FBI, and the CIA, when acting in their official capacity as federal agents in the international war on terror. The US Supreme Court’s spurious sovereign immunity doctrine is clearly an obsolete relic of 17th Century British absolute monarchy, which conferred upon the British King, James the First and his Stuart heirs, absolute immunity against prosecution for even high crimes and misdemeanors, under the specious rationale that ‘The King can do no wrong,’ so long as he is acting in his sacrosanct capacity as the British sovereign, upon whom, of course, the British sun never set, while the US Supreme Curt’s spurious sovereignty doctrine is also an atavistic throwback to the Elizabethan mythology of ’The King’s Two Bodies,’ which distinguished between the Tudor King, Henry the Eighth’s fallible, mortal body, which could, and did, commit horrible crimes, and the Sovereign’s mystical body, which was the corporate body of the British Commonwealth, which could not commit crimes against itself, and which, therefore, could also never do wrong. But even in the 17th Century British absolute monarchy, the *Magna Carta* placed strict limits on the sovereign’s exercise of his sacrosanct authority to indefinitely detain, without trial, presumptively innocent defendants, or to punish the suspected criminal without due process of law; and the English common law also contained certain principles of civil and human rights---the sovereign rights of due process and *habeas corpus*, for example--- which the British sovereign could not violate without breaking the social contract or sacred covenant with his citizens and subjects, and therefore giving them the right to depose the king and to elect a new sovereign.

Still, it’s obvious to critical observers that the White House’s unwillingness to provide full and fair trials for US detainees, and the US Justice Department’s willingness to subject US detainees to indefinite detention and cruel and unusual punishment, without judge, jury, or trial, like the U.S. Supreme Court’s sovereignty doctrine, stem, not from the desire to protect the American People, but from clandestine attempts to cover up the crimes and misdeeds of the White House, the Pentagon, the FBI, and the CIA themselves, whose scorn and contempt for the U.S. courts, and for international law, betray their fear of exposing themselves to criminal prosecution for their past misdeeds. Further, the U.S. courts have repeatedly failed to review cases brought to test the constitutionality and the legality, under the U.S. Constitution and international law, of the CIA drone strikes and US bombing missions that have killed countless thousands of innocent civilians, as collateral damage of these supposed counter-terrorist missions, but which have been cloaked from judicial scrutiny by the spurious sovereign immunity of national security doctrine or state secrets privilege, although those alleged precedents for a suspension of the U.S. Constitution can only apply in a state of emergency or a state of martial law, whose statute of limitations, if triggered by the September 11th attacks, has now long since expired.

But it is a basic principle of the US Constitution, under the fundamental doctrines of checks and balances and separation of powers, that no single branch of government can be a sovereign law unto itself, but must observe the strict limits imposed upon its powers by the other branches; and the sovereign executive branch and its monopoly on violence must submit to the strict limits imposed by the US Congress and the US courts, lest that sovereign violence subvert the rule of law and destroy the constitutional system upon which its authority is predicated. The White House, the Pentagon, the FBI, and the CIA, have subverted the US Constitution, the Geneva Convention, and the Western rule of law, by committing acts of counter-terrorist violence, which, while obviously not as barbarous and heinous as the terrorist beheadings and suicide bombings of their self-proclaimed opponents, are still profoundly contrary to the Western rule of law and the Judeo-Christian moral code upon which Western European Christian civilization is founded. The US courts, then, should exercise their duty, under the US Constitution, to place checks and balances on the sovereign executive branch, to bring its monopoly on violence back within the strict limits prescribed by the US Constitution and the international rule of law, lest the sovereign violence unleashed by the counter-terrorist attacks of the sovereign executive branch finally destroy the rule of law, and drag us back, once again, into that benighted era, when ‘the old law’ of ‘death to the infidel!’ and ‘an eye for an eye, a tooth for a tooth!’ condemned the primitive human species to a perpetual unholy war between the sovereign masters and their suffering slaves and sacrificial victims, which should have been obsolete, two thousand years or more ago, when the first political dissident and the first spiritual revolutionary gave their lives as self-sacrificial martyrs, simply to bring that sacrificial violence to a final stop.