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**Governing Emergency? State of
Exception in the Anglo-American
Liberal Tradition**

State of Exception – An Overview

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5 ...the good of the society requires that several things should be left to
6 the discretion of him who has the executive power. For the legislators not
7 being able to foresee, and provide by laws, for all that may be useful to the
8 community, the executor of the laws having the power in his hands, has by
9 the common law of nature a right to make use of it for the good of the
10 society, in many cases, where the municipal law has given no direction, till
11 the legislative can conveniently be assembled to provide for it. Many things
12 there are, which the law can by no means provide for; and those must
13 necessarily be left to the discretion of him that has the executive power in
14 his hands, to be ordered by him as the public good and advantage shall
15 require...

16 This power to act according to discretion, for the public good, without the
17 prescription of the law, and sometimes even against it, is that which is
18 called prerogative.

19 *John Locke, Second Treatise on Government, Sec. 159-160*

20

21 The authorities essential to the common defense are these: to raise
22 armies; to build and equip fleets; to prescribe rules for the government of
23 both; to direct their operations; to provide for their support. These powers
24 ought to exist without limitation, because it is impossible to foresee or
25 define the extent and variety of national exigencies, or the correspondent
26 extent and variety of the means which may be necessary to satisfy them.
27 The circumstances that endanger the safety of nations are infinite, and for
28 this reason no constitutional shackles can wisely be imposed on the power
29 to which the care of it is committed. This power ought to be coextensive
30 with all the possible combinations of such circumstances; and ought to be
31 under the direction of the same councils which are appointed to preside
32 over the common defense.

33 *Federalist #23 (Alexander Hamilton)*

34

35 How should constitutional democracies navigate current problems
36 of security? Presently, the globe's established liberal democracies
37 face almost no threat to their borders: large-scale warfare is dormant;

38 there are very few examples of violent internal insurrection.
39 Nevertheless, since the end of World War Two, liberal democracies
40 have been confronted with pervasive insecurity, compounded in
41 recent decades by the threat of terrorism, and anxieties about
42 appropriate responses. This has led to unprecedented strengthening
43 of executive power, ever more powerful systems of surveillance, and
44 to near normalization of states of emergency.

45 Violent challenges to public safety are characteristic problems for
46 sovereign states that claim indivisible control over a particular
47 territory and its population. However, security dilemmas are
48 especially intense for regimes whose norms and forms of
49 government include the rule of law, government by consent,
50 individual rights, and political representation—conceptions that have
51 been at the heart of political liberalism since it was powerfully and
52 originally elaborated by such thinkers as Locke and Montesquieu.

53 Probing the Anglo-American tradition of liberal political thought
54 and practice, we seek to identify conceptual and institutional
55 approaches for meeting security challenges without compromising
56 constitutional and ethical principles. Although of broader significance,
57 this essay focuses on the United States and Great Britain as the
58 longest standing and most continuous examples of constitutional
59 regimes struggling with these questions. As both countries have
60 possessed disproportionate global power and have faced security
61 issues with magnified intensity and scope, each has generated much
62 experimentation in thought and institutional arrangements for dealing
63 with emergency. These experiences and their lessons, we argue,
64 have wide applicability.

65 We aim to show that, from its founding moments, political
66 liberalism confronted central puzzles associated with the state of
67 exception, and elaborated a significant repertoire of ideas, impulses,
68 and institutions that remain instructive. This lineage, whose central
69 figures include John Locke and Alexander Hamilton, found an
70 intellectual and practical elaboration in the work of interwar and post-

71 war twentieth century American political scientists Carl Friedrich, his
72 Harvard doctoral student Frederick Watkins, and Clinton Rossiter. By
73 forging a liberal response to Carl Schmitt, these American scholars
74 revised and deepened a genuinely liberal approach to emergency.
75 Having proposed that the Anglo-American tradition has articulated a
76 set of principles and institutional approaches that remain valid, we
77 also discuss its limitations. Sketching the historical and political
78 developments since the mid-twentieth century, we conclude that
79 while still germane and worth learning from, the solutions promoted
80 by the liberal tradition seem no longer adequate to the present
81 conditions of prolonged, as it were permanent, emergency. Fresh
82 imagination is needed. We conclude by offering four broad guidelines
83 as well as examples of institutional experimentation aiming to allay
84 the inevitable tensions between security and liberty under today's
85 conditions.

86 **1: Liberal beginnings**

87 The problematic of emergency, safety, and regime preservation
88 under conditions of danger was integral to the liberal tradition from its
89 initial formation. As our epigrams suggest, liberal solutions to the
90 problem of emergency, and the challenges it posed to a
91 constitutional polity, were already articulated by John Locke and
92 Alexander Hamilton. Both statesmen were profoundly concerned with
93 issues of security, and searched for institutional solutions. Both were
94 aware of ancient Rome's institution of temporary dictatorship under
95 emergency conditions that offered a republican model for addressing
96 the questions of security and survival of a constitutional order. This
97 model (as analyzed by Machiavelli, and later by Carl Schmitt)
98 confined emergency provisions to dealing with a concrete situation
99 under the supervision of constitutional authorities, and assumed both
100 strict time limits and disinterested virtue: the dictator's commitment to
101 speedily restoring the legal order.

102 Locke's Second Treatise on Government, a foundational
103 statement of liberal constitutionalism and a blueprint for the American

104 founding, comprehensively argues that the rule of law is the sine qua
105 non of a well-framed government. Locke identifies the legislature
106 and its mechanisms of political representation as a good polity's
107 locus of legitimacy and effective action, while reserving ultimate
108 sovereignty to the people. Accompanying his analysis is a crucial
109 chapter on prerogative that recognizes the inherent limitations of any
110 legal framework, and of the lawmaking body whose role is to uphold
111 it. These include situations that require a more resolute and speedier
112 decision-making than the legislative process could allow, as well as
113 those "many things... that the law can by no means provide for."
114 While asserting that in exceptional circumstances, there is a pressing
115 need for executive prerogative power, Locke was quick to insist that
116 these exceptions must by no means be arbitrary. Prerogative power
117 should be limited in time, and stay in play only until the legislature
118 can resume its functions. Moreover, executive power to act outside
119 ordinary procedures is both validated and constrained by principles
120 and maxims that proclaim the public good and the preservation of
121 society as the supreme law.¹

122 For Hamilton, the problem of emergency was far from abstract:
123 the young United States faced challenges to its safety from Native
124 Americans, internal insurrections, and global geopolitics. Like Locke,
125 Hamilton did not merely raise a stubborn dilemma; he also identified
126 institutional means within the scope of federal authority and state
127 capacity to address it. Recognizing that questions of defense cannot
128 be delimited in advance, he effectively announced the need for
129 prerogative power and underscored the sporadic necessity for the
130 central government to be unconstrained by "constitutional shackles."
131 At the same time, concern for protecting civil liberties led him to
132 advocate constitutional provisions ensuring that the legislature would
133 have the central say regarding defense. One such provision is to
134 restrain "the appropriations of money for military purposes to the
135 period of two years."² By arguing that decisions about military

¹ Locke 1990 [1680-1690]: 158-159

² Federalist # 26, in: Hamilton, Jam Madison 2001 [1788]: 129

136 spending should be periodically reviewed and debated by Congress,
137 Hamilton advocated embedding a constitutional check on the
138 executive. In the Federalist papers, Hamilton stressed the
139 importance of Congress and pointed to legislative consent as pre-
140 condition for reconciling state power with legitimacy and governing
141 efficacy with freedom. It was Congress, he insisted, that “is the
142 essential, and, after all, the only efficacious security for the rights and
143 privileges of the people, which is attainable in civil society.”³

144 These two foundational authors remind us that the puzzle of
145 realistic liberalism, or how to be a secure state in the world of states
146 without compromising civil liberties, was already understood in the
147 17th and 18th centuries to be fundamentally important for the
148 existence, and for the qualities of existence, of representative
149 republics. While both Locke and Hamilton recognized an abiding
150 need for discretionary executive power to tackle emergency
151 situations, they both maintained that such power must not be
152 arbitrary or wholly unconstrained, and elaborated institutional and
153 moral means for folding it back under legislative control. While
154 instructive, their writings also leave us with a series of vexing
155 questions: about the meaning of emergency; the duration of
156 exception; the status of law and the boundary of constitutionalism.
157 These questions, we suggest, underpinned both Carl Schmitt’s
158 penetrating critique of liberalism, and the responses of his American
159 critics.

160 **2: Liberal Responses to Schmitt**

161 It would be no exaggeration to say that 20th century liberal
162 thought about emergency was profoundly shaped by Carl Schmitt
163 (1921, 1922, 1926). From the vantage of post WWI Germany, this
164 philosopher of jurisprudence came to be persuaded that liberal states
165 were unable to grapple with conundrums of security without stepping
166 wholly outside their self-conscious remit. Institutionally as well as

³ Federalist # 28, also #21-16

167 ideologically, Schmitt considered liberal parliamentary order as ill-
168 equipped to deal with the fundamentals of security and sovereignty.
169 His skepticism about the capacities of liberal polities went hand in
170 hand with the view that exigencies demand action outside the rule of
171 law. Schmitt's plan for an exceptional sovereign—a "sovereign
172 dictator" embodying the nation's will—offered a decidedly non-liberal
173 solution to the challenges of emergency. As it turned out, the Nazi
174 regime to which Schmitt pledged allegiance would offer a radical
175 instance of his proposed solution. In our time, his fierce critique of
176 liberalism has been taken up most notably by Giorgio Agamben
177 (2005) who, like Schmitt, treats the liberal tradition as both inattentive
178 to and simply incapable of dealing with, or resisting, the growing
179 dominance of states of exception.

180 It is just this emphasis on exception that an important group of
181 interwar and postwar 20th century American thinkers rejected as they
182 forged a liberal alternative to the Schmittian perspective, thus
183 continuing a long lineage of liberal reflection on the problem of
184 emergency. This estimable group included three political scientists:
185 German émigré Carl Friedrich (1941), his Harvard doctoral student
186 Frederick Watkins (1939, 1940), and Cornell University's Clinton
187 Rossiter (1948). Individually and as a coherent group, they sought,
188 above all, to place responses to emergency within the ambit of the
189 restraining qualities of law. Resurrecting the Roman model, they
190 explored the character of temporary abrogation, whose central aim
191 would be the protection of the liberal order itself.

192 As realists reeling from the collapse of the Weimar Republic and
193 other representative governments between the two world wars, they
194 understood that liberal democracies urgently require formulas for
195 crisis government to concentrate executive state capacity. But unlike
196 Schmitt, they refused extra-legality as an acceptable orientation or
197 pattern of policy that could turn temporary measures into the norm.
198 They also repudiated his embrace of unconstrained sovereignty in

199 the form of a dictator, legitimated by an abstract idea of ‘the people’
200 understood as a cohesive force.

201 Like Hamilton, the quest by Friedrich, Watkins, and Rossiter to
202 ensure safety in ways that would be as consistent as possible with
203 the mores, conventions, institutions, and patterns of liberal
204 governance focused on legislatures and lawmaking about delegation.
205 Drawing on the experience of the democracies that fought World War
206 One, and on empirical wartime examples of effective government
207 whose powers had been based on temporary delegations by
208 legislatures, these thinkers insisted that there must be no departure
209 from the zone of law. Furthermore, they insisted, delegations had to
210 be specific, targeted, and limited in time. Only when such authority
211 existed could emergencies be governed within a liberal frame.

212 So arguing, they revisited and deepened a genuinely liberal
213 approach to emergency. Their alternative to Schmitt’s conception of
214 a sovereign dictator sought to enclose the state and its sovereignty
215 within constitutionalism and law—the hallmarks of a liberal polity—
216 thus to transform sovereignty from sheer power to legitimate
217 authority. Without such a move, they believed, it would not be
218 possible under conditions of duress to safeguard the rights of
219 citizens, the core intention of the liberal understanding of the rule of
220 law. The exception must not connote an empty space from which law
221 is absent.

222 In this vision, sovereignty and law do not vie but are imbricated
223 and mutually constitutive. By offering normatively appealing
224 guidelines, these non-Schmittian principles remain compelling.
225 However the structural, institutional, and ethical conditions within
226 which these mid-century thinkers wrote no longer exist. Their work
227 was premised on a crisp partition between ordinary and exceptional
228 times, a boundary that has become increasingly porous. Moreover,
229 responses to the circumstances of Cold War and terrorism have
230 produced cumulative and layered legislative delegations and
231 enhanced prerogative power to the point of calling into question the

232 scope and character of liberty. While tensions between liberty and
233 security, as we show, are integral to liberal thought and institutional
234 practice, what seems new today is the extent to which the trials of
235 liberty and security have become widespread, acute, and durable.

236 **3: Governing Emergency today**

237 In the long history of consideration of emergency circumstances
238 by liberal thinkers and policymakers a particular temporal premise
239 has predominated. Such circumstances have been understood to
240 have a beginning and an end. Ever since the Roman republic, which
241 between 501 to 202BC witnessed the appointment of seventy-six
242 constitutional dictators granted exceptional powers for a limited time,
243 emergency institutions and actions have been conceived as time-
244 bound. Moreover a characteristic feature of the liberal tradition, as
245 Bernard Manin has underscored, is the argument that “liberty may be
246 restricted only for the sake of liberty, not just for the sake of just any
247 kind of common good.”⁴

248 Such limitations to the time, scope and purpose of emergency
249 powers assumed conditions in which a combination of specification in
250 advance, policy regulation, and post-hoc appraisal could raise the
251 probability that security measures could be made compatible with
252 core liberal values and the rule of law. Underneath such actions lay
253 the supposition that emergencies are limited in time and content.⁵

254 It is just this core assumption that has been brought under
255 question, arguably made permanently obsolete, by three
256 developments over the course of the past century—the intensity of
257 violence, the vulnerability of civilians, and the growing opacity of the
258 start and end of emergencies. The two World Wars were

4 Manin 2008: 143

5 We can see this postulate underpinning a remarkable 1918 US Government document, prepared by the order of the Attorney General and running more than 1,000 pages, that chronicles “emergency legislation passed prior to December 1917” (Clark 1918). Excluding matters of military organization and finance, it focuses on statutes together with presidential orders and proclamations that authorized “the taking and control of private property” during the Revolutionary War, the wars of 1812 and 1847, the Civil War, and World War One. On this account, emergency acts are associated with moments that possess a clear boundary between war and peace.

259 unprecedented not only in geographic range and combatant deaths
260 but especially in civilian casualties. Over the course of World War
261 One, fully 5 million noncombatants were killed. In World War Two,
262 beyond the horror of concentrations camps, more deaths were
263 suffered by civilians through the use of strategic and carpet bombing
264 than by soldiers. The astonishing amplification of the means of
265 violence culminating in atomic weaponry, as well as the Cold War put
266 further pressure on traditional assumptions and liberal instruments.
267 These circumstances and the fears they generated prompted a
268 significant increase of the security-related actions of government.
269 This led to what Rossiter termed an “extraordinary expansion in the
270 authority of the national executive, in both relative and absolute
271 terms” in the face of what seemed like an emergency without end.⁶

272 In the US context the Vietnam War led to congressional hearings
273 and attempts to recoup legislative capacity regarding emergencies.
274 This effort to restore the core features of the liberal tradition was
275 significant. But with limited effect, as it turned out.⁷ Though following
276 the debacle in Vietnam, the US Congress reasserted its role in
277 reviewing declarations of emergency, in practice deferral to the
278 president proved the rule. Moreover, no fewer than twenty-three
279 targeted executive declarations of emergency were promulgated in
280 the quarter-century before the terror attacks of 9/11. Ever since these
281 attacks, the United States has been under state of national
282 emergency originally introduced and annually extended by Executive
283 Order. A massive array of new instruments of surveillance and
284 security have been deployed both through statutes, and through
285 orders by Presidents Bush, Obama and Trump. In Britain, in

6 Rossiter 1950: 417. By 1947, the Atomic Energy Act was complemented by a fundamental National Security Act that fashioned the still-existing main instruments of a national security state, including the Pentagon and its military organization, the National Security Council, and the Central Intelligence Agency (CIA), alongside federal government regulations that subjected government employees for the first-time to systematic loyalty reviews.

7 This pushback culminated in the passage of the National Emergencies Act, signed into law by President Ford in 1976, that put previous declarations of emergency into dormancy within two years. It also offered means for Congress to negate future executive declarations by way of a legislative veto (ruled invalid by the Supreme Court in 1983), and specified that presidents must in the future clarify the emergencies at hand should they take such action, which would have to be time-bound

286 response to several terrorist attacks on British soil just this year
287 Prime Minister Theresa May called for strengthening the counter-
288 terrorism and intelligence police, and promised to bolster what is
289 already among the most powerful surveillance systems in Europe.

290 These circumstances and policies have cumulatively narrowed
291 legislative power, widened executive prerogatives, and shrunk the
292 secure range of rights possessed by citizens and foreign prisoners.
293 One does not have to embrace Schmitt's historical and conceptual
294 account to note how conditions of 'exception' have become wider in
295 scope, more heterogeneous in character, and ever more routine and
296 seemingly durable features of liberal democracies. The liberal
297 centerpieces of law as legislated, implemented, and enforced and of
298 rights that are intended to offer protection against encroachments on
299 basic freedoms have been transformed by responses to the
300 permanence of emergency.

301 With this shift in the landscape of the liberal state, it has become
302 ever more urgent to consider how to strengthen the liberal repertoire
303 that can be deployed to govern emergencies. Although the puzzles
304 posed by previous generations of liberal thinkers remain, and we
305 stand to learn from their conceptual and practical proposals, today's
306 challenges are not simply resolvable by pointing to past solutions.
307 Fresh circumstances have placed great pressure both on
308 constitutional constraints and the distinction between the temporary
309 and permanent.

310 In this context one central challenge is that of discerning norms to
311 guide choices about discretion and constraint together with devising
312 institutional arrangements that reinforce liberal imperatives to
313 compensate, at least in part, for the erosion of once clearer
314 boundaries and guidelines. How can security and liberty, including
315 mechanisms of accountability be served simultaneously without
316 undermining fundamental liberal norms or inhibiting means of
317 learning and correction? Based on the liberal resources discussed
318 above, we suggest four broadly portable guidelines:

319 1: Whenever possible, a distinction between temporary action and
320 permanent policy should be insisted upon. Persisting threats
321 notwithstanding, political actors can continue to recognize this
322 traditional division through the requirement that key legislative acts
323 and delegations to the executive be fixed in time, and subject to
324 formal renewal.

325 2: Neither individual leaders nor institutions should be
326 continuously exempt from oversight. Policies of exception must not
327 portend invisibility or isolation from democratic practices. To the
328 contrary each branch of government— judiciary, legislature, and
329 within the executive itself— must have opportunities for information
330 sharing, judgments, and supervision in real time.

331 3: Policy decisions taken to anticipate and respond to security
332 exigencies should be governed by prudential standards and
333 definitions of necessity. The quest for such standards has a long-
334 standing lineage within liberal thought. A particularly resonant one
335 was elaborated by the German émigré scholar Frances Lieber who
336 advised President Lincoln during the Civil War. For Lieber,
337 emergency actions by the government should be appraised by what
338 he called a “reasonable person standard.” In considerations of
339 necessity, “reason and common sense must approve the particular
340 act.” He argued that, “if these conditions are not fulfilled, the act
341 becomes unlawful.”⁸

342 4: No less important are opportunities for retrospective judgment
343 and appraisal after the fact. A process of calm learning and
344 evaluation, tied to sanctions when liberal norms have been violated,
345 is particularly valuable for political regimes committed to democratic
346 deliberation and collective choice. Unlike the United States, Great
347 Britain has an institution - the Investigatory Powers Tribunal - and a
348 tradition of public inquiries in matters of national security that deserve
349 broader consideration. The most recent example is the Iraq Inquiry

⁸ Cited in Witt 2015: 26.

350 led by Sir John Chilcot whose voluminous 2016 Report recapitulated
351 an investigation lasting some seven years.⁹

352 Instituting such or similar procedures would pose different
353 challenges in different legal and political contexts. Likewise policy
354 responses to present conditions will be variously inflected by
355 expectations, values, and dispositions about the order of political
356 priorities. In short, there is no one-size-fits-all solution to governing
357 emergency in a liberal frame. Nor can the tensions between security
358 and freedom be permanently resolved.

359 In conclusion, we wish to underscore that for a liberal state the
360 end of governing exigency cannot be a fail-proof environment from
361 which risk and uncertainty - and therewith liberty - are forever
362 banished. The goal, we suggest, should be to achieve and maintain a
363 resilient framework within which the inherent conundrums of liberty
364 and security can be negotiated and allayed. While we diagnose the
365 need for new institutional ideas to grapple with the inevitable tensions
366 of security and liberty under today's conditions, we insist that liberal
367 polities possess the conceptual and institutional resources to build
368 such a framework: viz. by both strengthening existing mechanisms of
369 supervision and control, and creating new means that build on
370 appealing examples drawn from centuries of liberal thought and
371 practice. If by the standards elaborated above constitutional
372 democracies are yet to display sufficient institutional imagination,
373 there is no lack of promising models and successful examples.
374 These, we submit, are grounds for cautious optimism.

⁹ www.iraqinquiry.org.uk/the-report

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