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Governing Emergency? State of Exception in the Anglo-American Liberal Tradition
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…the good of the society requires that several things should be left to the discretion of him who has the executive power. For the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require...

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

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

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

*Federalist #23 (Alexander Hamilton)*

How should constitutional democracies navigate current problems of security? Presently, the globe’s established liberal democracies face almost no threat to their borders: large-scale warfare is dormant;
there are very few examples of violent internal insurrection. Nevertheless, since the end of World War Two, liberal democracies have been confronted with pervasive insecurity, compounded in recent decades by the threat of terrorism, and anxieties about appropriate responses. This has led to unprecedented strengthening of executive power, ever more powerful systems of surveillance, and to near normalization of states of emergency.

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

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

We aim to show that, from its founding moments, political liberalism confronted central puzzles associated with the state of exception, and elaborated a significant repertoire of ideas, impulses, and institutions that remain instructive. This lineage, whose central figures include John Locke and Alexander Hamilton, found an intellectual and practical elaboration in the work of interwar and post-
war twentieth century American political scientists Carl Friedrich, his Harvard doctoral student Frederick Watkins, and Clinton Rossiter. By forging a liberal response to Carl Schmitt, these American scholars revised and deepened a genuinely liberal approach to emergency. Having proposed that the Anglo-American tradition has articulated a set of principles and institutional approaches that remain valid, we also discuss its limitations. Sketching the historical and political developments since the mid-twentieth century, we conclude that while still germane and worth learning from, the solutions promoted by the liberal tradition seem no longer adequate to the present conditions of prolonged, as it were permanent, emergency. Fresh imagination is needed. We conclude by offering four broad guidelines as well as examples of institutional experimentation aiming to allay the inevitable tensions between security and liberty under today's conditions.

1: Liberal beginnings

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

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

For Hamilton, the problem of emergency was far from abstract: the young United States faced challenges to its safety from Native Americans, internal insurrections, and global geopolitics. Like Locke, Hamilton did not merely raise a stubborn dilemma; he also identified institutional means within the scope of federal authority and state capacity to address it. Recognizing that questions of defense cannot be delimited in advance, he effectively announced the need for prerogative power and underscored the sporadic necessity for the central government to be unconstrained by “constitutional shackles.” At the same time, concern for protecting civil liberties led him to advocate constitutional provisions ensuring that the legislature would have the central say regarding defense. One such provision is to restrain “the appropriations of money for military purposes to the 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
spending should be periodically reviewed and debated by Congress, Hamilton advocated embedding a constitutional check on the executive. In the Federalist papers, Hamilton stressed the importance of Congress and pointed to legislative consent as pre-condition for reconciling state power with legitimacy and governing efficacy with freedom. It was Congress, he insisted, that “is the essential, and, after all, the only efficacious security for the rights and privileges of the people, which is attainable in civil society.”3

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

2: Liberal Responses to Schmitt

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

3 Federalist # 28, also #21-16
ideologically, Schmitt considered liberal parliamentary order as ill-equipped to deal with the fundamentals of security and sovereignty. His skepticism about the capacities of liberal polities went hand in hand with the view that exigencies demand action outside the rule of law. Schmitt’s plan for an exceptional sovereign—a “sovereign dictator” embodying the nation’s will—offered a decidedly non-liberal solution to the challenges of emergency. As it turned out, the Nazi regime to which Schmitt pledged allegiance would offer a radical instance of his proposed solution. In our time, his fierce critique of liberalism has been taken up most notably by Giorgio Agamben (2005) who, like Schmitt, treats the liberal tradition as both inattentive to and simply incapable of dealing with, or resisting, the growing dominance of states of exception.

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

As realists reeling from the collapse of the Weimar Republic and other representative governments between the two world wars, they understood that liberal democracies urgently require formulas for crisis government to concentrate executive state capacity. But unlike Schmitt, they refused extra-legality as an acceptable orientation or pattern of policy that could turn temporary measures into the norm. They also repudiated his embrace of unconstrained sovereignty in
the form of a dictator, legitimated by an abstract idea of ‘the people’ understood as a cohesive force.

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

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

In this vision, sovereignty and law do not vie but are imbricated and mutually constitutive. By offering normatively appealing guidelines, these non-Schmittian principles remain compelling. However the structural, institutional, and ethical conditions within which these mid-century thinkers wrote no longer exist. Their work was premised on a crisp partition between ordinary and exceptional times, a boundary that has become increasingly porous. Moreover, responses to the circumstances of Cold War and terrorism have produced cumulative and layered legislative delegations and enhanced prerogative power to the point of calling into question the
scope and character of liberty. While tensions between liberty and security, as we show, are integral to liberal thought and institutional practice, what seems new today is the extent to which the trials of liberty and security have become widespread, acute, and durable.

3: Governing Emergency today

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

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

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

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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.
unprecedented not only in geographic range and combatant deaths but especially in civilian casualties. Over the course of World War One, fully 5 million noncombatants were killed. In World War Two, beyond the horror of concentrations camps, more deaths were suffered by civilians through the use of strategic and carpet bombing than by soldiers. The astonishing amplification of the means of violence culminating in atomic weaponry, as well as the Cold War put further pressure on traditional assumptions and liberal instruments.

These circumstances and the fears they generated prompted a significant increase of the security-related actions of government. This led to what Rossiter termed an “extraordinary expansion in the authority of the national executive, in both relative and absolute terms” in the face of what seemed like an emergency without end.6

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

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

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

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

In this context one central challenge is that of discerning norms to
guide choices about discretion and constraint together with devising
institutional arrangements that reinforce liberal imperatives to
compensate, at least in part, for the erosion of once clearer
boundaries and guidelines. How can security and liberty, including
mechanisms of accountability be served simultaneously without
undermining fundamental liberal norms or inhibiting means of
learning and correction? Based on the liberal resources discussed
above, we suggest four broadly portable guidelines:
1: Whenever possible, a distinction between temporary action and permanent policy should be insisted upon. Persisting threats notwithstanding, political actors can continue to recognize this traditional division through the requirement that key legislative acts and delegations to the executive be fixed in time, and subject to formal renewal.

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

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

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

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

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

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

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9 www.iraqinquiry.org.uk/the-report
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