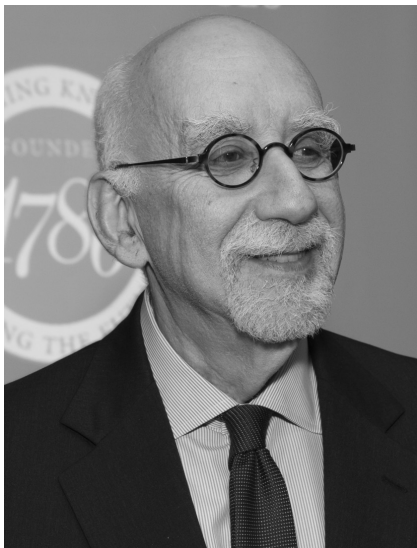


Fear and Democracy: Reflections on Security and Freedom

On December 7, 2015, the Academy hosted a meeting at Columbia University on the topic of fear and democracy. **Ira Katznelson** (Ruggles Professor of Political Science and History at Columbia University and President of the Social Science Research Council) and **Samuel Issacharoff** (Bonnie and Richard Reiss Professor of Constitutional Law at New York University School of Law) discussed the state of security and freedom and the role of fear in a modern democracy. The program, which served as the Academy's 2029th Stated Meeting, included a welcome from **Jonathan F. Fanton** (President of the American Academy). The following is an edited transcript of the discussion.



Ira Katznelson

Ira Katznelson is the Ruggles Professor of Political Science and History at Columbia University and President of the Social Science Research Council. He was elected to the American Academy of Arts and Sciences in 2000.

Throughout our country's history, one could name many shocks that generated deep anxiety and fear. Generally, these were situations and circumstances of deep uncertainty, in which citizens felt they had little capacity to understand the parameters within which they were to appraise change. While today's terrorism willfully creates such circumstances, so, too, did the collapse of capitalism in 1929. Fear, as I would like to discuss it today, becomes a context

Fear becomes a context that questions the legitimacy of institutions in which there is no substantive status quo, in which there is a requirement to act in a speedy way without much reflection, and in which, at least in constitutional regimes, there is enormous pressure to find exceptions and to reach expedited decisions.

that questions the legitimacy of institutions in which there is no substantive status quo, in which there is a requirement to act in a speedy way without much reflection, and in which, at least in constitutional regimes, there is enormous pressure to find exceptions and to reach expedited decisions. Fear can also be a motivation to act. It often highlights anxiety over rationality, and creates intensities of feeling. It widens the scope of available models of acting. And it sometimes creates very strange bedfellows.

The most famous set of remarks in political life about fear was Franklin Delano Roosevelt's "Fear Itself" speech, his first inaugural address delivered in March 1933. He said, "Let me assert my firm belief that the only thing we have to fear is fear itself – nameless, unreasoned, unjustified terror which paralyzes needed efforts to convert retreat into advance." As an empirical matter, this was wrong. The fear of 1933 was not unjustified; it was deeply justified, just as many of our fears today are justified. The question, then, is how

to find a leadership of frankness and vigor – to use Roosevelt's language – that, with understanding and support of the people themselves, can navigate us through fear itself.

Fear, however, did not disappear with the end of the Roosevelt or Truman years. If we take a brief look at Eisenhower's inaugural address of January 20, 1953, we find this passage in the middle: "The world and we have passed the midway point of a century of continuing challenge. We sense with all our faculties that forces of good and evil are massed and armed and opposed as rarely before in history."

And he ends with some Manichean language: "Freedom is pitted against slavery, lightness against the dark." In this speech, the new president of the United States spoke of *atomic fear*, and the capacity of humankind to erase all human life from the planet. This was a speech with almost no reference to domestic politics whatsoever. Now contrast that with Franklin Roosevelt's remarks in 1933: foreign affairs are pressing, but they

are nothing like the domestic concerns at home. That, of course, did not quite hold.

Consider the kind of fear that existed in 1933. Walter Lippmann, the leading columnist in the United States at the time, counseled the president of the United States that the “danger we have to fear is not that Congress will give Franklin D. Roosevelt too much power, but that it will deny him the power he needs.” This was a period in which

the achievements of the New Deal, from the National Industrial Recovery Act (NIRA), to the Social Security Act, to the Fair Labor Standards Act, were legislative acts created through regular procedure. Having said that, there were a series of actions (that were not quite enabling acts) that *did* transfer capacity to the executive branch in a powerful way. For instance, in 1936, the president ordered surveillance of American citizens who were

from normal budgetary procedures. From then on, the CIA was no longer obliged to report the uses of its funds to Congress in any detail. The federal loyalty investigations in the Truman administration followed.

By the early 1950s, we had what might be called a dual state: a procedural state and a crusading state. Washington is thick with procedures; getting a law passed is almost impossible with congressional veto points, and there is a very thin sense of public interest. On the other side, we have a crusading state that is very thin on procedures: the president of the United States can declare – for good reasons or not – that it is necessary to kill an American citizen who happens to be in Yemen, and who is a terror threat, without trial. The president can do that. We also have a thick sense of unified public interest: to defend democracy, to fight dictatorship, and to protect citizens against terror.

We have many potential sources of fear, including fear for our sovereign security, fear for our internal safety, fear generated by the permanent war against terror, fear for the institutional capacity of our organizations, and fear, even, for the legitimacy of democratic life.

So what do we do about these sources of fear? We might turn to German jurist Carl Schmitt, who suggested the most familiar model that we have for discussing emergency and states of exceptions. Schmitt wrote brilliant works on dictatorship, political theology, and the concept of the political. He believed that liberal democracies like ours were not capable of solving the dilemmas of fear, emergencies, and exceptions. He joined the Nazi Party, and became a leading jurist under Nazism. This fact makes it difficult, of course, to take him completely seriously within our context of liberal democracy. The reality with which we nonetheless have to reckon was his assertion that the exception could not be carried out under the rules of the normal. Liberal constitutional

We have many potential sources of fear, including fear for our sovereign security, fear for our internal safety, fear generated by the permanent war against terror, fear for the institutional capacity of our organizations, and fear, even, for the legitimacy of democratic life.

the known dictatorships, in Italy, and soon Germany, passed Enabling Acts that transferred all legislative power from the legislature to the executive. Lippmann, in his columns in *The New York Herald*, counseled Roosevelt to suspend temporarily the rule of Congress, and to limit, drastically, the right of amendment, to put the democratic majority in both houses at the time under the decisions of a party caucus.

Let us return to a part of Roosevelt’s speech that often is forgotten: “I shall ask the Congress for the one remaining instrument to meet the crisis – broad, Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.” This was not an abstract thought in 1933. During World War I, the U.S. government assumed enormous executive powers, including the power to restrict speech.

The greatest success of the New Deal was that these changes never happened. Congress was never suspended. Elections were never stopped. Constitutional democracy solved problems and met the emergency. All

suspected of having Communist and – especially then – Nazi sympathies, thus extending FBI activities beyond the investigation of specific crimes. Very quickly, FBI field offices began to work with the Office of Naval Intelligence and the Military Intelligence Division to track subversive activity. Ever since, the Bureau has conducted intelligence gathering of potentially destabilizing groups as a regular responsibility.

In 1941 and 1942, Congress passed remarkably expansive War Powers Acts that expanded the president’s economic authority, repealed the confidential status of census data, and authorized the censorship of mail, telegraph, cable communications, and radio broadcasts “when deemed necessary to the public safety.” After the war, the Atomic Energy Act lodged in the president full authority not only over the decision to drop or not drop an atomic bomb, but also full authority over anything to do with atomic energy. Likewise, the National Security Act of 1947 placed unprecedented powers in the executive branch; amended in 1949, the act exempted agencies such as the Central Intelligence Agency (CIA)

orders must become consistent with tools of power that take necessary decisive action in sovereign dictatorships, which are placed outside of existing law. The emergency, as Schmitt defined it, is a state of nature that returns places and regimes to their original sovereignty, and in which the government governs in the name of an “abstract founding people,” espousing abstract values and moral principles, without the mediation of standard institutions, conflict, or debate.

Are there alternatives? For one, there is a forgotten American tradition. Political science scholars including Francis Lieber, a key founder of the modern discipline in the nineteenth century and an adviser to President Lincoln about constitutional exceptions, and mid-twentieth-century figures Lindsay Rogers, Frederick Watkins, and Clinton Rossiter, who sought an alternative to Schmitt’s position, all wanted issues of emergency conduct to be rooted in the lawful traditions of liberalism, including constitutional prerogative powers. They saw sovereignty as a matter of

To gauge the morality of an action, it might be asked not just what the president would do, but what would a group of reasonable people do.

legal competence, not as a matter that stood outside the law. They were in favor of very selective legislative delegations and limited time spans, including sunset provisions for any kind of emergency.

Today, we not only have a New Deal-era inheritance of a crusading state, but we also have the legacy of a post-9/11 world. In his wonderful essay “Political Safeguards in Democracies at War,” Samuel Issacharoff wrote, “During the presidencies of Lincoln and FDR, an effort was made to enlist Congress as an ally in policy decisions, even if this effort was made after the decision had been initiated. By contrast, during the Iraq

It is impossible to claim that we face no threat. We have to factor in some fear even when we are positioned outside the “zone of emergency.”

War, and through the controversial decisions over detentions and even torture, the persistent Bush executive claim was of exclusive and unaccountable powers flowing from the president’s role as commander-in-chief. Indeed, the claims of such executive prerogatives run well beyond any modern conceptions of constitutional democracy.”

In short, it is impossible to claim that we face no threat. We have to factor in some fear even when we are positioned outside the “zone of emergency.” So, what are the zones of possibility that we might think about? One involves a set of normative as well as practical arguments; we must never forget the distinction between the temporary and the permanent. It was the 13th Amendment, as an example, that permanently eliminated

slavery, not the Emancipation Proclamation based on war powers claims. As the American, non-Schmittian tradition instructs, we should think about emergency actions as ones to be mediated by law, guided by a constitutional community standard that recalls how the United States is a constitutional community, not just a security community. We might also think about exceptions requiring higher justifications, about tension-charged monitoring by different branches of government, and guidance by a norm of limitation, by the most prudent definitions of necessity. There could be a reasonable person standard, a concept both

Francis Lieber and, in our time, John Rawls suggested in different ways. To gauge the morality of an action, it might be asked not just what the president would do, but what would a group of reasonable people do. Finally, we might think, as Francis Lieber recommended, that retrospective judgment be brought into existence. The purpose would not be to punish those who went too far, but to learn, retrospectively, to come to some understanding of the strengths and weaknesses of different modes of acting under conditions of fear and emergency.

In *Federalist 24*, Alexander Hamilton announced that “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.” Clinton Rossiter closed his 1948 book, *Constitutional Dictatorship*, by averring that “no sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.” Unless richly specified within the ambit of constitutional democracy, these calls for exception, whether permanent or temporary, threaten more than a temporary sacrifice.



Samuel Issacharoff

Samuel Issacharoff is the Bonnie and Richard Reiss Professor of Constitutional Law at New York University School of Law. He was elected to the American Academy of Arts and Sciences in 2003.

Let me begin with a simple proposition. A healthy democracy is a porous political entity. Democracies need access: they need give and take; they need the ferment; they need the capacity to accommodate dissent; and they need to allow citizens to think and to act in order to survive, persist, and flourish. We begin with these givens, but we do not end there, because the other reality is that democracies under stress will turn against the very porousness that makes them flourish.

I am not proposing this as a normative statement. We know that democracies will act in this way because they always have. If we start with that proposition, then the question becomes: How should democracies react in times of stress when, for reasons of fear, for reasons of military challenge, for reasons of domestic unrest, they will have to clamp down on enemies – in-

A healthy democracy is a porous political entity. Democracies need access: they need the capacity to accommodate dissent; and they need to allow citizens to think and to act in order to survive, persist, and flourish. But the other reality is that democracies under stress will turn against the very porousness that makes them flourish.

ternal and external, and as a consequence, they will have to constrict the liberties that are available normally to their citizens, and the conditions under which they normally fashion their political affairs?

Let us begin by considering France, which provides the most recent, and also the most graphic and horrible of current affronts to democratic rule. Immediately after these recent assaults, there was a presidential decree, suspending for a period of twelve days all normal customary operations of law regarding public assembly, expression, entry and exit from the country, the capacity of citizens to gather, to speak, and to protest the government. This was the constitutional framework that France inherited with the Fifth Republic. After twelve days, that power was no longer held by President Hollande. Does that mean that things went back to normal? Quite clearly no. The national assembly voted in favor of a state of emergency for three months, which allows the government many of the powers that it had assumed during the initial twelve-day period of emergency.

This case in France is what is known as a constitutional state of emergency. This is the norm in democracies around the world. In a constitutional state of emergency, there are three questions that have to be asked. First, who declares the emergency? Second, what is the scope of the emergency powers? And third, when does the emergency end?

Typically, in modern constitutional orders, we separate those three questions, because we realize that democracies at such moments of fear and provocations will likely overreact; they may not be able to harness the resources they need, and organize all the instrumentalities of government to defend themselves successfully against the threat.

If we look at our allies, what do we see at this moment? We see that the German parliament has voted for the first time to send troops abroad. We also see that the British parliament voted on the same matter, which is significant because historically the deployment of troops in Britain was part of the prerogative power of the sovereign. After the fiasco in Iraq and the unilateralism of that period, Britain went through a period of reform in which they required parliament to be consulted on matters of sending troops overseas. Gordon Brown called this a part of the informal constitution of Britain, since Britain does not have a written constitution.

Here in the United States, we find we have no constitutional provision for a state of emergency. We have one formal provision for the suspension of the writ of habeas corpus. As it turns out, this is a very minor power in light of the powers that governments truly need in times of real emergency. Consider Lincoln's challenges in the run up to the Civil War, or Roosevelt's needs as a leader in the run up to World War II. The suspension of habeas corpus may be significant

for the government at any given point, but it is a secondary power compared to the mobilization that is necessary by executive leadership in a state of war. Again, we can always debate over whether we are in a state of war or not. We could also argue about whether we were really in a state of war in 1861. For this discussion, let us assume that at some point, we will have wars; there will be real emergencies; and there will be a need for institutional response.

The standard American response has been to improvise. We are very good, as a society, at making things up as we go along. It is interesting to contrast the decision of the framers not to build this flexibility into the American system, with the similar decision of the framers of the European constitutions that such flexibility was an essential feature of a constitutional order in Europe. Perhaps it is the proximity of the continental wars. Perhaps it is the influence of thinkers like Schmitt and before him Machiavelli, who suggested that there needed to be an

Here in the United States, we find we have no constitutional provision for a state of emergency. We have one formal provision for the suspension of the writ of habeas corpus. As it turns out, this is a very minor power in light of the powers that governments truly need in times of real emergency.

institutional form of response, otherwise a country would be at risk of either failing to be able to mobilize itself militarily, or correspondingly, at risk of overreacting and compromising the institutions that give it its vigor.

How do we do this in the United States? There are three parts to this consideration: Who declares it? What are the powers? What is the duration? We have to keep in

How should democracies react in times of stress when, for reasons of fear, for reasons of military challenge, for reasons of domestic unrest, they will have to clamp down on enemies – internal and external, and as a consequence, they will have to constrict the liberties that are available normally to their citizens, and the conditions under which they normally fashion their political affairs?

mind that there has been only one constitutional order – Weimar Germany – in the last one hundred years that has tried to concentrate all these three powers in one person. Weimar Germany lived from exceptional decree to exceptional decree, from presidential authority of extraordinary measure to presidential authority of extraordinary measure, including the presidential appointment of Adolf Hitler as the Reich’s Chancellor.

During the 2000s, some in the U.S. administration claimed that it is inherent to the unilateral executive that there be the power to conduct military activities abroad, and that there be the power of a commander-in-chief centralized in the person of the president. That is clearly right. Roosevelt claimed that same authority, giving J. Edgar Hoover the powers to wiretap every individual he essentially did not like. This was also

the power asserted by Lincoln. In the 2000s, however, the difference was that the executive, in its unitary capacity, must be able to discharge all three functions: to proclaim, to determine the duration, and to determine what steps are necessary.

This process is not an American tradition, a fact that I have spent a fair amount of time over the last fifteen years writing about, and counseling the government on. In fact, the American tradition is quite distinct because we indirectly follow Machiavelli, in that the response to the state of emergency and the need for emergency powers is not an individual action, but rather an institutional one.

We can see how this process is laid out intellectually if we return to the thoughts written by Supreme Court Justice Robert Jackson in a famous set of papers that were delivered to Roosevelt. Robert Jackson was Roosevelt’s Attorney General during the run up to World War II. He was asked about the power of the president to embark upon foreign affairs on his own initiative as commander-in-chief; these ventures took the form of the Lend Lease Act with Britain, and the efforts to start shoring up Britain before there was ever a formal declaration of war. In the papers, Jackson outlined how presidential power can be exercised in the United States in times of emergency in a way that foreshadowed exactly what he would even-

tually write in his Youngstown Steel Seizure Case opinion. He outlined how the exercise of presidential authority needs to be divided according to the relationship with Congress, stressing that this authority is an institutional matter; it is not a question of the commander-in-chief's powers. When the president acts with the support and authorization of Congress, he is allowed to autho-

During the 2000s, some in the U.S. administration claimed that it is inherent to the unilateral executive that there be the power to conduct military activities abroad, and that there be the power of a commander-in-chief centralized in the person of the president.

alize the budget that allows for the buildup of troops, and to authorize the use of military force. Whatever form this takes, Jackson wrote, presidential power is at its zenith.

Alternately, when Congress has said no to the president, when it has enacted a prohibition – whether engaging in torture or in black site assassinations – then, wrote Jackson, the president's powers are the most diminished, and are subject to the most challenge. There is the gray area between these modes of power, an area in which temporal necessity and exigency demand action. This space allows us room to figure out what Congress might allow, so that we know whether we are in the domain of prohibited presidential conduct or in the domain of permitted presidential conduct.

Power Wars, a recent book by Charlie Savage about Obama's presidency after 9/11, is in large measure an indictment of some of the naiveté of the Obama administration in its early days. It addresses a popular theme, namely, the continuity or discontinuity of war between the Bush administration and the Obama administration. Savage's main argument is that threat and power disci-

pline us, that responsibility forces us to act in ways that we may not want to act. He argues that the main difference between the Obama and the Bush administrations is that the Obama administration believed in rule of law principles while the Bush administration did not. This, however, does not mean that we, currently under the Obama administration, still do not engage in warfare; it

does not mean that we are not using drones or are not still holding people in Guantanamo. Instead, the contentious acts of war enforced under Obama have all been put before the political process, to the extent the political processes in place can handle this measure of detail and exigency. In these circumstances, the Obama administration has distinguished itself from its predecessor in trying to engage Congress. This is the American institutional response: a bilateral process that forces political branches to be partners in a venture.

Let me conclude with a note of grave pessimism and warning about our capacity to sustain this model. The reason that the American institutional and pragmatic response to an informal state of emergency has worked is because our domestic political order required accountability. If you try to impose a draft in this country, you will see riots; we have seen this throughout history, in Western Pennsylvania, and then again in New York during the Civil War. If you want to force young men – and now, young men and women – into combat, you have to build up the political will and the body politic to

be able to do this. Going to war requires tremendous expenditure.

Today, conscripts are irrelevant. The last thing that we want to do is to put young American boys and girls on the ground in Iraq or Syria, because they would just be targets for kidnappings and beheadings. You need a professional and technologically sophisticated army, which is not costly in terms of our civilian population. And in this situation, accountability drops out. We might consider this in tandem with the institutional collapse of the Congress as a serious policy-making body. If the Syrian conflict had taken place when I was young, the news media would first go to the Senate Foreign Relations Committee, who were stewards of our national tradition, and who knew how to think about crises. Today, we would be hard pressed to name any one individual on the Senate Foreign Relations Committee, caught up as it is in a series of partisan dysfunctions. The consequence, then, is that there is tremendous incentive for the executive to go at it alone. With this responsibility, of course, comes the risk of mistakes, and the risk that the office might claim too much power. Finally, there is the risk that the president might not encounter enough institutional resistance to understand how to calibrate the fine relationship between democracy and the need for self-defense. ■

© 2016 by Ira Katznelson and Samuel Issacharoff, respectively



To view or listen to the presentations, visit <https://www.amacad.org/fearanddemocracy>.