

Emergency Powers in the Trump Era and Beyond

JANUARY 16, 2019

Brennan Center for Justice at *New York University School of Law*
R Street Institute

About the Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving constitutional protections in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

The Brennan Center's Liberty and National Security Program seeks effective national security policies that respect constitutional values and the rule of law. The Liberty and National Security program focuses on restoring the proper flow of information between the government and the people by securing increased public access to government information; ensuring government policies targeting terrorists do so effectively and without religious or ethnic profiling; and securing appropriate government oversight and accountability. We advocate for national security policies that respect constitutional values, and we fight for a vision of the Constitution that upholds the rule of law and the rights of all Americans.

About R Street Institute

R Street Institute is a nonprofit, nonpartisan, public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government. In addition to our D.C. headquarters, we have offices in Georgia, Texas, Ohio, California and Massachusetts. We work extensively on both state and national policy, and focus on issues that other groups tend to neglect. Our specialty is tackling issues that are complex, but don't necessarily grab major headlines. These are the areas where we think we can have a real impact. We believe free markets work better than the alternatives. We also recognize that the legislative process calls for practical responses to current problems. To that end, our motto is "Free markets. Real solutions." We also differ from other groups in our dedication to building broad coalitions and working with a wide array of groups who share specific policy goals. This makes us uniquely capable of building support for pragmatic, free-market proposals that can earn bipartisan consensus.

About This Convening

The term “emergency powers” conjures images of crackdowns and rights abuses by authoritarian regimes. But emergency powers are also a standard feature of modern democracies—including the United States. Unknown to most Americans, Congress has passed more than a hundred laws that give the president special authority when he declares an emergency, including powers to shut down communications facilities, freeze Americans’ bank accounts, and deploy troops inside the U.S. In a time when institutional checks and balances are being tested, do these extraordinary powers protect our democracy... or do they put it at risk?

Join the Brennan Center for Justice and R Street Institute for a symposium that will explore the deeply important and timely questions raised by presidential emergency powers in the U.S. Former government officials, scholars, and advocates will come together for a day of discussion including:

- An overview of the legal framework for emergency powers in the U.S., focusing on some of the most extraordinary powers in the president’s legal arsenal;
- What kinds of emergency power the Founders intended, and didn’t intend, to give the president;
- Perspectives from the inside, featuring former executive branch officials with direct experience in governing during emergencies;
- Lessons we can draw from experiences with emergency powers in other nations; and
- A conversation about the risks vulnerable communities face in emergencies, and how to mitigate those risks.

This symposium was made possible through the dedicated support of the Democracy Fund and the William and Flora Hewlett Foundation. We are grateful for their support.

Agenda

BRENNAN CENTER FOR JUSTICE AND R STREET INSTITUTE

January 16, 2019

1616 Rhode Island Ave. NW, Washington, D.C. 20036

9:00—9:10AM

Welcome and Opening Remarks

9:10—10:35AM

Setting the Scene: An Introduction to Emergency Powers

Sahar Aziz, Professor of Law, Rutgers Law School

William Banks, Professor of Law Emeritus, Syracuse College of Law

Elizabeth Goitein, Co-Director of the Liberty and National Security Program,
Brennan Center for Justice

Ashkhen Kazaryan, Director of Civil Liberties and Legal Research Fellow,
TechFreedom

Wendy Parmet, Matthews Distinguished University Professor of Law and Director,
Center for Health Policy and Law, Northeastern University

Phil Wallach, Senior Fellow, Governance Project, R Street Institute

10:35AM—10:45PM

Break

10:45—12:00PM

Perspectives from the Inside

Christopher Fonzone, former Legal Adviser to the National Security Council

Avril Haines, former Deputy National Security Advisor

Tevi Troy, former Deputy Secretary of Health and Human Services

Carl Wagner, former Associate Deputy General Counsel for Homeland Defense

12:00—12:30PM

Break to Collect Buffet Lunch

12:30–1:15PM

Lunchtime Talk: The Constitution and Emergency Powers

Saikhishna Prakash, James Monroe Distinguished Professor of Law, University of Virginia School of Law

1:30–2:45PM

Lessons from Overseas

Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, United Nations (TBC)

Anil Kalhan, Professor of Law, Thomas R. Kline School of Law, Drexel University

Rachel Kleinfeld, Senior Fellow, Democracy, Conflict and Governance Program, Carnegie Endowment for International Peace

Gabriel Negretto, Professor, Political Studies Division, Centro de Investigación y Docencia Económicas (C.I.D.E.)

Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs, Woodrow Wilson School of Public & International Affairs, Princeton University

2:45–3:00PM

Break

3:00–4:15PM

Protecting Vulnerable Groups in Emergencies

Rachel Brown, Executive Director, Over Zero

Nadia Firozvi, Project Manager for the Special Project on Fostering a Just and Inclusive Society, Democracy Fund

Michelle Mendez, Managing Attorney, Defending Vulnerable Populations Project, Catholic Legal Immigration Network Inc.

Eric Muller, Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics, UNC School of Law

Arjun Sethi, Adjunct Professor of Law, Georgetown University Law Center

4:15–4:30PM

Concluding Remarks

Participants



FIONNUALA NÍ AOLÁIN

U.N. Special Rapporteur

Professor Fionnuala Ní Aoláin serves as the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. She also concurrently serves as the Robina Chair in Law, Public Policy, and Society at the University of Minnesota Law School

and as Professor of Law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. She has published extensively on emergency powers, including her book *Law in Times of Crisis* (CUP 2006).



SAHAR AZIZ

Professor of Law, Rutgers Law School

Sahar Aziz is Professor of Law, Chancellor's Social Justice Scholar, and Middle East and Legal Studies Scholar at Rutgers University Law School. Professor Aziz's scholarship adopts an interdisciplinary approach to examine intersections of national security, race, and civil rights with a focus on the adverse impact

of national security laws and policies on racial, ethnic, and religious minorities in the U.S. She is the founding director of the interdisciplinary Rutgers Center for Security, Race, and Rights. Her book *The Muslim Menace: The Racialization of Religion in the Post-9/11 Era* is forthcoming with Harvard University Press.



WILLIAM BANKS

Professor of Law, Syracuse College of Law

William Banks is a Professor of Law at Syracuse University College of Law and the Founding Director of the Institute for National Security and Counterterrorism (INSCT). Along with Stephen Dycus, he is the author of the book *Soldiers on the Home Front: The Domestic Role of the American Military*. Among his

public service appointments, he has served as a Special Counsel to the U.S. Senate Judiciary Committee; on the ABA Standing Committee on Law and National Security; and as an Editorial Board member at The International Centre for Counter-Terrorism in The Hague. He also is the Editor-in-Chief of the *Journal of National Security Law & Policy*.



RACHEL BROWN

Executive Director, Over Zero

Rachel Brown is the Executive Director of Over Zero. Any number over zero cannot be divided, and Over Zero supports societies to resist division and create long-term resilience to identity-based conflict. She is the author of *Defusing Hate: A Strategic Communication Guide to Counteract Dangerous Speech*, which brings together

insights from diverse fields of expertise – from marketing to cognitive neuroscience – to support practitioners seeking to design communications-based interventions for atrocity prevention.



NADIA FIROZVI

Project Manager, Just and Inclusive Society, Democracy Fund

Nadia Firozvi is the Project Manager for the Just and Inclusive Society Project at the Democracy Fund, a bipartisan foundation working to ensure that our political system is able to withstand new challenges and deliver on its promise to the American people.

Nadia oversees strategy development, grant making, provides expertise and guidance to grantees, and more. Nadia previously served as a Policy Advisor in the Office for Civil Rights and Civil Liberties in the U.S. Department of Homeland Security.



CHRISTOPHER FONZONE

Partner, Sidley Austin LLP; Former Legal Adviser to the National Security Council

Christopher Fonzone is a partner in Sidley Austin LLP's Privacy and Cybersecurity group. He advises clients on the management of crisis situations and a variety of national security issues, including military and intelligence operations, encryption,

foreign trade sanctions, and Committee on Foreign Investment in the United States (CFIUS) matters. Before joining Sidley, Christopher was Deputy Assistant and Deputy Counsel to President Obama and the Legal Adviser to the National Security Council (NSC). He served as legal adviser and counselor to the President, the National Security Advisor, the Homeland Security Adviser, and other senior White House officials on the full range of matters before the NSC.



ELIZABETH GOITEIN

Co-Director, LNS Program, Brennan Center

Elizabeth (Liza) Goitein co-directs the Brennan Center for Justice's Liberty and National Security Program. Ms. Goitein is the author of the Brennan Center's report *The New Era of Secret Law*. Her writing has been featured in major media outlets,

including a recent feature in *The Atlantic*, “What the President Could Do if He Declares a State of Emergency.” She previously served as counsel to Senator Russell Feingold, Chairman of the Constitution Subcommittee of the Senate Judiciary Committee, and as a trial attorney in the Federal Programs Branch of the Department of Justice.



AVRIL HAINES

Deputy Director, Columbia World Projects

Avril Haines is Deputy Director of Columbia World Projects and a Lecturer in Law at the Columbia Law School. She is a Member of the National Commission on Military, National, and Public Service, and a Senior Fellow at the Johns Hopkins University Applied Physics Laboratory. She previously served as Deputy

National Security Advisor to President Obama, was the Deputy Director of the Central Intelligence Agency and served as the Legal Adviser to the National Security Council.



ANIL KALHAN

Professor of Law, Thomas R. Kline School of Law, Drexel University

Anil Kalhan is a Professor of Law at the Drexel University Thomas R. Kline School of Law. He also is an Affiliated Faculty Member at the University of Pennsylvania South Asia Center.

From 2015 to 2018, he served as chair of the New York City

Bar Association’s International Human Rights Committee. Professor Kalhan’s scholarly and teaching interests lie in the areas of immigration law, U.S. and comparative constitutional law, international human rights law, and privacy and surveillance.



ASHKHEN KAZARYAN

Director of Civil Liberties, TechFreedom

As the Director of Civil Liberties and Legal Research Fellow at TechFreedom, Ashken manages and develops policy projects on free speech, artificial intelligence, surveillance reform and the sharing economy. She also handles outreach and coalition building for the organization. Ashkhen is an Internet Law and

Policy Fellow and an expert at the Federalist Society’s Emerging Technology Working Group, part of the Regulatory Transparency Project.



RACHEL KLEINFELD

Senior Fellow, Democracy, Conflict and Governance Program, CEIP

Dr. Rachel Kleinfeld is a senior fellow at the Carnegie Endowment for International Peace, where she focuses on issues

of rule of law, security, and governance in post-conflict countries, fragile states, and states in transition. As the founding CEO of the Truman National Security Project, she led a movement of national security, political, and military leaders working to promote people and policies that strengthen security, stability, rights, and human dignity in America and around the world. She is the author of *Advancing the Rule of Law Abroad: Next Generation Reform* (Carnegie 2012).



MICHELLE MENDEZ

Managing Attorney, Defending Vulnerable Populations Project, CLINIC

Before managing the Defending Vulnerable Populations Project, Mendez oversaw CLINIC's role in the CARA Pro Bono Project in Dilley, Texas, which focuses on providing legal assistance to detained asylum-seeking mothers and children. Prior to joining

CLINIC, she served as senior managing attorney in the Immigration Legal Services Program at Catholic Charities for the Archdiocese of Washington, where she began as an Equal Justice Works Fellow sponsored by DLA Piper. Mendez has taught the Immigration Litigation Clinic at Catholic University Columbus School of Law, served as a Visiting Clinical Lecturer in Law at Yale Law School, and assisted the Immigrant Rights Clinic at the University of Baltimore School of Law.



ERIC MULLER

Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics, UNC School of Law

Professor Eric Muller joined the UNC faculty in the fall of 1998. He has written three critically acclaimed books on the plight of Japanese Americans during WWII, including most recently *Colors of Confinement: Rare Kodachrome Photographs of Japanese American Incarceration in World War II* (UNC Press 2012). It

won the Joan Patterson Kerr Book Award from the Western History Association in 2013. Muller serves as Chair of the Board of Governors of the University of North Carolina Press and is a member of the university-level Appointments, Promotion and Tenure Committee at UNC-Chapel Hill.



GABRIEL NEGRETTO

Professor, Political Studies Division, Centro de Investigación y Docencia Económicas (C.I.D.E.)

Gabriel Negretto is professor of Political Science at the Center for Research and Teaching in Economics (CIDE), in Mexico City. His research focuses on comparative constitutional politics, institutional design, and comparative political institutions, with

an emphasis on Latin American cases. He has published numerous academic articles and book chapters on these topics in the United States, Europe, and Latin America. His most

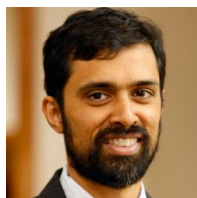
recent book is *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (Cambridge University Press, 2013).



WENDY PARMET

Professor of Law and Director, Center for Health Policy and Law, Northeastern University

Wendy E. Parmet is the George J. and Kathleen Waters Matthews Distinguished Professor of Law and Professor of Public Policy and Urban Affairs at Northeastern University, where she is also the faculty director of the Center on Health Policy and Law. Her most recent book is *The Health of Newcomers: Immigration, Health Policy and the Case for Global Solidarity*, co-authored with Patricia Illingworth.



SAIKRISHNA PRAKASH

James Monroe Distinguished Professor of Law, University of Virginia School of Law

Saikrishna Prakash's scholarship focuses on separation of powers with a focus on executive powers. He teaches Constitutional Law, Foreign Relations Law and Presidential Powers at the Law School. Among Prakash's articles are "50 States, 50 Attorneys General and 50 Approaches to the Duty to Defend," published in the *Yale Law Journal*; "The Imbecilic Executive," published in the *Virginia Law Review*; and "The Sweeping Domestic War Powers of Congress," published in the *Michigan Law Review*. He is the author of *Imperial from the Beginning: The Constitution of the Original Executive* (Yale University Press 2015).



KIM LANE SCHEPPELE

Professor of Sociology and International Affairs, Woodrow Wilson School, Princeton University

Professor Kim Lane Scheppele is the Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values at Princeton University. Scheppele's work focuses on the intersection of constitutional and international law, particularly in constitutional systems under stress. She is presently the elected President of the Law and Society Association.



ARJUN SETHI

Adjunct Professor of Law, Georgetown Law

Arjun Sethi is a longtime community activist and writer based in Washington, D.C. He has worked closely with Muslim, Arab, South Asian, and Sikh communities for years, and represented

their interests in court, congress, and international bodies. He is particularly active on domestic and international surveillance issues and pre-arrest police civilian encounters, including racial and faith based profiling, predictive policing, location tracking, biometric data collection, and countering violent extremist programs. He presently serves as Co-Chair of the American Bar Association's National Committee on Homeland Security, Counterterrorism, and Treatment of Enemy Combatants.



TEVI TROY

Vice President of Public Policy at JUUL Labs,
former Deputy Secretary of Health and Human
Services

Tevi Troy is the Vice President of Public Policy at JUUL Labs, a presidential historian, and a former senior government official. His latest book is *Shall We Wake the President? Two Centuries of*

Disaster Management in the Oval Office. Dr Troy was previously the founding CEO of American Health Policy Institute. From 2009 to 2013, Dr. Troy was Senior Fellow at Hudson Institute, where he remains an Adjunct Fellow. He has also been a Researcher at the American Enterprise Institute. He served as Deputy Secretary of Health and Human Services under George W. Bush from 2007 to 2009.



CARL WAGNER

Former Associate Deputy General Counsel for
Homeland Defense

Carl Wagner served as an attorney in the Office of the General Counsel of the Department of Defense (DoD) from 2004 to 2016. His primary duties included advising the Assistant Secretary of Defense for Homeland Defense and other DoD

leaders on issues related to Homeland Defense and DoD support of civil authorities. Prior to this, he served in a variety of assignments as an Army judge advocate.



PHILIP WALLACH

Senior Fellow, Governance Project, R Street Institute

Philip A. Wallach is a senior fellow of governance at the R Street Institute, where he researches America's separation of powers with a focus on the relationship between Congress and the administrative state. He also follows a wide range of regulatory policy issues, including the efficacy of the Trump administration's deregulatory efforts. Philip was previously a Fellow and then

senior fellow in governance studies at the Brookings Institution, where he authored *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis* (2015).

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