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Who Decides on Security?

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Who Decides on Security?

Aziz Rana*

Abstract

Despite over six decades of reform initiatives, the overwhelming drift of security arrangements in the United States has been toward greater – not less – executive centralization and discretion. This Article explores why efforts to curb presidential prerogative have failed so consistently. It argues that while constitutional scholars have overwhelmingly focused their attention on procedural solutions, the underlying reason for the growth of emergency powers is ultimately political rather than purely legal. In particular, scholars have ignored how the basic meaning of ‘security’ has itself shifted dramatically since World War II and the beginning of the Cold War in line with changing ideas about popular competence. Paying special attention to the decisive role of actors such as Supreme Court Justice Felix Frankfurter and Pendleton Herring, co-author of 1947’s National Security Act, the Article details how emerging judgments about the limits of popular knowledge and mass deliberation fundamentally altered the basic structure of security practices.

Countering the pervasive wisdom at the founding and throughout the nineteenth century, this contemporary shift has recast war and external threat as matters too complex and specialized for ordinary Americans to comprehend. Today, the dominant conceptual approach to security presumes that insulated decision-makers in the executive branch (armed with the military’s professional expertise) are best equipped to make sense of complicated and often conflicting information about safety and self-defense. The result is that the other branches – let alone the public writ large – face a profound legitimacy deficit whenever they call for transparency or seek to challenge coercive security programs. Not surprisingly, the tendency of legalistic reform efforts has been to place greater decision-making power in the other branches and then to watch those branches delegate such power back to the executive.

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I. INTRODUCTION: SECURITY, REFORM, AND THE ARGUMENTATIVE LOOP

Today politicians and legal scholars routinely invoke fears that the balance between liberty and security has swung drastically in the direction of government’s coercive powers. In the post-September 11 era, such worries are so commonplace that in the words of one commentator, “it has become part of the drinking water of this country that there has been a trade-off of liberty for security.”¹ According to civil libertarians, centralizing executive power and removing the legal constraints that inhibit state violence (all in the name of heightened security) mean the steady erosion of both popular deliberation and the rule of law. For Jeremy Waldron, current practices, from coercive interrogation to terrorism surveillance and diminished detainee rights, provide government the ability not only to intimidate external enemies but also internal dissidents and legitimate political opponents. As he writes, “We have to worry that the very means given to the government to combat our enemies will be used by the government against *its* enemies.”² Especially disconcerting for many commentators,

¹ James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REVIEW 403, 403 (2006).

² Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191-210, 206 (2003). For more on Waldron’s account of the prevailing trade-off between liberty and security, see generally JEREMY WALDRON, *TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE* (2010).

executive judgments – due to fears of infiltration and security leaks – are often cloaked in secrecy. This lack of transparency undermines a core value of democratic decision-making: popular scrutiny of government action. As U.S. Circuit Judge Damon Keith famously declared in a case involving secret deportations by the executive branch, “Democracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”³ In the view of no less an establishment figure than Neal Katyal, now the Principal Deputy Solicitor General, such security measures transform the current presidency into “the most dangerous branch,” one that “subsumes much of the tripartite structure of government.”⁴

Widespread concerns with the government’s security infrastructure are by no means a new phenomenon. In fact, such voices are part of a sixty-year history of reform aimed at limiting state (particularly presidential) discretion and preventing likely abuses. What is remarkable about these reform efforts is that, every generation, critics articulate the same basic anxieties and present virtually identical procedural solutions. These procedural solutions focus on enhancing the institutional strength of both Congress and the courts to rein in the unitary executive. They either promote new statutory schemes that codify legislative responsibilities or call for greater court activism. As early as the 1940s, Clinton Rossiter argued that only a clearly established legal framework in which Congress enjoyed the power to declare and terminate states of emergency would prevent executive tyranny and rights violations in times of crisis.⁵ After the Iran-Contra scandal, Harold Koh, now State Department Legal Adviser, once more raised this approach, calling for passage of a National Security Charter that explicitly enumerated the powers of both the executive and the legislature, promoting greater balance between the branches and explicit constraints on government action.⁶ More recently, Bruce Ackerman has defended the need for an “emergency constitution” premised on congressional oversight and procedurally specified practices.⁷ As for increased judicial vigilance, Arthur Schlesinger argued nearly forty years ago, in his seminal book *The Imperial Presidency* (1973), that the courts “had to reclaim their own

³ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

⁴ Neal Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch From Within*, 115 *YALE LAW JOURNAL* 2314, 2316 (2006).

⁵ See CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 297, 306–13 (1948). According to Rossiter, “If Congress is to play a salutary part in future emergency governments in this country, then its functions of legislation, investigation, and control must be streamlined and strengthened.” *Id.* at 309.

⁶ See generally HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990). Koh wrote at the time that:

What the Iran-Contra affair underscores is the need for a new national security charter—an omnibus statutory amendment to the National Security Constitution—in the form of a framework statute designed to regulate and protect many aspects of the foreign-policy-making process. Unlike the current patchwork of laws, executive orders, national security directives, and informal accords that govern covert and overt war making, emergency economic power, foreign intelligence, and arms sales, such a statute would act as a successor to the National Security Act of 1947.

Id. at 157.

⁷ See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 19 (2006) (arguing that both “Congress and the public [need to be invited] to make the necessary discriminations” on presidential military powers).

dignity and meet their own responsibilities” by abandoning deference and by offering a meaningful check to the political branches.⁸ Today, Lawrence Tribe and Patrick Gudridge once more imagine that, by providing a powerful voice of dissent, the courts can play a critical role in balancing the branches. They write that adjudication can “generate[]—even if largely (or, at times, only) in eloquent and cogently reasoned dissent—an apt language for potent criticism.”⁹

The hope – returned to by constitutional scholars for decades – has been that by creating clear legal guidelines for security matters and by increasing the role of the legislative and judicial branches, government abuse can be stemmed. Yet despite this reformist belief, presidential and military prerogatives continue to expand even when the courts or Congress intervene. Indeed, the ultimate result has primarily been to entrench further the system of discretion and centralization. In the case of congressional legislation (from the 200 standby statutes on the books to the post-September 11 and Iraq War Authorizations for the Use of Military Force to the Detainee Treatment Act and the Military Commissions Acts), this has often entailed Congress self-consciously playing the role of junior partner – buttressing executive practices by providing its own constitutional imprimatur to them. Thus, rather than rolling back security practices, greater congressional involvement has tended to further strengthen and internalize emergency norms within the ordinary operation of politics.¹⁰ As just one example, the USA PATRIOT Act, while no doubt controversial, has been renewed by Congress a remarkable ten consecutive times without any meaningful curtailments.¹¹ Such realities underscore the dominant drift of security arrangements, a drift unhindered by scholarly suggestions and reform initiatives. Indeed, if anything, today’s scholarship finds itself mired in an argumentative loop, re-presenting inadequate remedies and seemingly incapable of recognizing past failures.

What explains both the persistent expansion of the federal government’s security framework as well as the inability of civil libertarian solutions to curb this expansion? In this article I argue that the current reform debate ignores the broader ideological context that shapes how the balance between liberty and security is struck. In particular, the very meaning of security has not remained static but rather has changed dramatically since World War II and the beginning of the Cold War. This shift has principally concerned the basic question of *who decides* on issues of war and emergency. And as the following pages explore, at the center of this shift has been a transformation in legal and political judgments about the capacity of citizens to make informed and knowledgeable decisions in security domains. Yet, while underlying assumptions about popular knowledge – its strengths and limitations – have played a

⁸ See SCHLESINGER, *THE IMPERIAL PRESIDENCY* 418 (1973) (admonishing also “Congress, . . . the executive establishment, the press, the universities, [and] public opinion”).

⁹ Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 *YALE L.J.* 1801, 1846 (2004).

¹⁰ For more on the normalization of emergency in American law, see Kim L. Scheppelle, *Exceptions that Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 124 (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

¹¹ The most recent blanket renewal, signed into law by President Obama on May 26, 2011, was for four additional years. Tom Cohen, *Obama Approves Extension of Expiring Patriot Act Provision*, CNN (May 27, 2011), http://articles.cnn.com/2011-05-27/politics/congress.patriot.act_1_lone-wolf-provision-patriot-act-provisions-fisa-court?_s=PM:POLITICS.

key role in shaping security practices in each era of American constitutional history, this role has not been explored in any sustained way in the scholarly literature.

As an initial effort to delineate the relationship between knowledge and security, I will argue that throughout most of the American experience, the dominant ideological perspective saw security as grounded in protecting citizens from threats to their property and physical well-being (especially those threats posed by external warfare and domestic insurrection). Drawing from a philosophical tradition extending back to John Locke, politicians and thinkers – ranging from Alexander Hamilton and James Madison at the founding to Abraham Lincoln and Roger Taney – maintained that most citizens understood the forms of danger that imperiled their physical safety. The average individual knew that securing collective life was in his or her own interest, and also knew the institutional arrangements and practices that would fulfill this paramount interest. A widespread knowledge of security needs was presumed to be embedded in social experience, indicating that citizens had the skill to take part in democratic discussion regarding how best to protect property or to respond to forms of external violence. Thus the question of *who decides* was answered decisively in favor of the general public and those institutions – especially majoritarian legislatures and juries – most closely bound to the public’s wishes.

What marks the present moment as distinct is an increasing repudiation of these assumptions about shared and general social knowledge. Today the dominant approach to security presumes that conditions of modern complexity (marked by heightened bureaucracy, institutional specialization, global interdependence, and technological development) mean that while protection from external danger remains a paramount interest of ordinary citizens, these citizens rarely possess the capacity to pursue such objectives adequately. Rather than viewing security as a matter open to popular understanding and collective assessment, in ways both small and large the prevailing concept sees threat as sociologically complex and as requiring elite modes of expertise. Insulated decision-makers in the executive branch, armed with the specialized skills of the professional military, are assumed to be best equipped to make sense of complicated and often conflicting information about safety and self-defense.¹² The result is that the other branches – let alone the public writ large – face a profound legitimacy deficit whenever they call for transparency or seek to challenge presidential discretion. Not surprisingly, the tendency of procedural reform efforts has been to place greater decision-making power in the other branches and then to watch those branches delegate such power back to the very same executive bodies.

How did the governing, expertise-oriented concept of security gain such theoretical and institutional dominance and what alternative formulations exist to challenge its ideological supremacy? In offering an answer to these questions, I begin in Part II by examining the principal philosophical alternatives that existed prior to the emergence of today’s approach, one of which grounded early American thought on security issues. I refer to these alternatives in the Anglo-American tradition as broadly ‘Hobbesian’ and ‘Lockean’ and develop them through a close reading of the two thinkers’ accounts of security. For all their internal differences, what is noteworthy for my purposes is that each approach rejected the idea – pervasive at present – that there exists a basic divide between elite understanding and mass uncertainty. In other words,

¹² For an account of how such security assumptions are shared by both major political parties and help to explain legal continuities across the Bush and Obama Administrations, see Author, *Ten Questions*, JOURNAL OF THE NATIONAL SECURITY FORUM (forthcoming 2011).

John Locke and even Thomas Hobbes (famous as the philosopher of absolutism) presented accounts of security and self-defense that I argue were normatively more democratic than the current framework. Part III will then explore how the Lockean perspective in particular took constitutional root in early American life, focusing especially on the views of the founders and on the intellectual and legal climate in the mid nineteenth century.

In Part IV, I will continue by detailing the steady emergence beginning during the New Deal of our prevailing idea of security, with its emphasis on professional expertise and insulated decision-making. This discussion highlights the work of Pendleton Herring, a political scientist and policymaker in the 1930s and 1940s who co-wrote the National Security Act of 1947 and played a critical role in tying notions of elite specialization to a new language of ‘national security.’ Part V will then show how Herring’s ‘national security’ vision increasingly became internalized by judicial actors during and after World War II. I argue that the emblematic figure in this development was Supreme Court Justice Felix Frankfurter, who not only defended security expertise but actually sought to redefine the very meaning of democracy in terms of such expertise. For Frankfurter, the ideal of an ‘open society’ was one premised on *meritocracy*, or the belief that decisions should be made by those whose natural talents make them most capable of reaching the technically correct outcome. According to Frankfurter, the rise of security expertise meant the welcome spread of meritocratic commitments to a critical and complex arena of policymaking. In this discussion, I focus especially on a series of Frankfurter opinions, including in *Ex parte Quirin* (1942), *Hirabayashi v. United States* (1943), *Korematsu v. United States* (1944), and *Youngstown Steel & Tube Co. v. Sawyer* (1952), and connect these opinions to contemporary cases such as *Holder v. Humanitarian Law Project* (2010). Finally, by way of conclusion, I note how today’s security concept – normatively sustained by Frankfurter’s judgments about merit and elite authority – shapes current discussions over threat and foreign policy in ways that often inhibit rather than promote actual security. I then end with some reflections on what would be required to alter governing arrangements.

As a final introductory note, a clarification of what I mean by the term ‘security’ is in order. Despite its continuous invocation in public life, the concept remains slippery and surprisingly under-theorized. As Jeremy Waldron writes, “Although we know that ‘security’ is a vague and ambiguous concept, and though we should suspect that its vagueness is a source of danger when talk of trade-offs is in the air, still there has been little or no attempt in the literature of legal and political theory to bring any sort of clarity to the concept.”¹³ As a general matter, security refers to protection from those threats that imperil survival – both of the individual and of a given society’s collective institutions or way of life. At its broadest, these threats are multidimensional and can result from phenomena as wide-ranging as environmental disasters or food shortages. Thus, political actors with divergent ideological commitments defend the often competing goals of social security, economic security, financial security, collective security, human security, food security, environmental security, and – the granddaddy of them all – national security. But for my purposes, when invoked without any modifier the word ‘security’ refers to more specific questions of common defense and physical safety. These questions, emphasizing issues of war and peace, are largely

¹³ See Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 456 (2006).

coterminous with what Franklin Delano Roosevelt famously referred to in his “Four Freedoms” State of the Union Address as “the freedom from fear”: namely ensuring that citizens are protected from external and internal acts of “physical aggression.”¹⁴

This definitional choice is meant to serve two connected theoretical objectives. First, as a conceptual matter it is important to keep the term security analytically separate from ‘national security’ – a phrase ubiquitous in current legal and political debate. While on the face of it, both terms might appear synonymous, my claim in the following pages is that ‘national security’ is in fact a relatively novel concept, which emerged in the mid twentieth century as a particular vision of how to address issues of common defense and personal safety. Thus national security embodies only *one* of a number of competing theoretical and historical approaches to matters of external violence and warfare. Second, and relatedly, it has become a truism in political philosophy that the concept of liberty is plural and multifaceted.¹⁵ In other words, different ideals of liberty presuppose distinct visions of political life and possibility. Yet far less attention has been paid to the fact that security is similarly a plural concept, embodying divergent assumptions about social ordering. In fact, competing notions of security – by offering different answers to the question of “who decides?” – can be more or less compatible with democratic ideals. If anything, the problem of the contemporary moment is the dominance of a security concept that systematically challenges those sociological and normative assumptions required to sustain popular involvement in matters of threat and safety.

II. SECURITY AND KNOWLEDGE IN THE ANGLO-AMERICAN TRADITION

In order to appreciate just how plural the concept of security has been historically let me begin by describing key alternatives in the philosophical canon. These alternatives are most systematically articulated in the writings of Thomas Hobbes and John Locke, the two figures most central to the development of Anglo-American political thought. Both thinkers saw the goal of security as the primary impetus for individuals to establish civil society, but adopted fundamentally conflicting accounts of the security knowledge possessed by ordinary citizens – and thus the forms of political association that best protected people from external threat. Their alternative approaches to security are worth assessing in detail, as they provide the conceptual backdrop for making sense of earlier American legal and political notions of security, especially as embodied in constitutional text and nineteenth century case law. They also offer countervailing philosophical approaches to today’s dominant perspective. In the process, these alternatives highlight the extent to which our contemporary account rests on deeply contested assumptions about rationality, deliberation, and citizenship.

¹⁴ Franklin Delano Roosevelt, State of the Union Address (Jan. 6, 1941), <http://www.wwnorton.com/college/history/ralph/workbook/ralprs36b.htm>.

¹⁵ See Isaiah Berlin’s 1958 lecture, “Two Concepts of Liberty,” for the seminal articulation of the multiple and potentially conflicting meanings of liberty. ISIAH BERLIN, “Two Concepts of Liberty,” *in* FOUR ESSAYS ON LIBERTY 118 (1969).

A. *Hobbes, Epistemological Skepticism, and Democratic Security*

Modern political thought is often presented as beginning with the debate between Thomas Hobbes and John Locke over the nature of political government.¹⁶ In fact, as Part III will emphasize, the eighteenth and nineteenth century American approach to security hewed closely to key elements of the Lockean narrative and questioned the Hobbesian image of unitary authority. Yet, in distinct ways, each thinker offered a politics of security more potentially compatible with democratic practice than what has emerged in recent decades. This might be especially surprising in the case of Hobbes, given his reputation as the philosopher par excellence of absolutism. But unlike with today's pervasive security concept, Hobbes fundamentally rejected the belief that there existed a 'science' of security, and thus also rejected the view that assertions of elite expertise could warrant restricting the public's decision-making responsibilities. Indeed, as we will later see, a remarkable feature of today's security paradigm is the extent to which it reproduces the centralizing and hierarchical presumptions of the Hobbesian account, while deemphasizing those components that for Hobbes nonetheless sustained popular accountability. For this reason alone, revisiting his vision of security is deeply instructive for the present moment.

Hobbes begins by positing that individuals exist in a state of nature prior to the construction of civil society. Due to the conflicts and insecurities that bedevil this original position, individuals develop a social contract and with it governmental arrangements. The necessity and structure of these arrangements ultimately derive from assumptions Hobbes makes about the nature of human reason and its implications for collective life. Hobbes contends that as an epistemological matter we can possess no definitive knowledge regarding the external world around us. He presents this argument in part by questioning the traditional Aristotelian conception of colors. Rather than being essential qualities of objects, colors are merely those images reflected back to us through the sensory organ of the eye.¹⁷ We have no knowledge of what an object really looks like, only its sensory appearance. Yet, despite this rejection of natural essences, Hobbes does claim that we know that the external world exists as such.¹⁸ He reaches this conclusion based on the fact that humans experience change. People do not apprehend a static image of the world, but a series of constantly shifting images, thoughts, noises, and tactile sensations. This indicates that there exists some "matter"¹⁹ in the world, which is in a constant state of motion. The world that we apprehend is the result of this external material acting upon our sensory organs and thus causing our perceptions, thoughts, and feelings. Hobbes writes, "So that sense in all

¹⁶ This view has been presented by individuals as ideologically diverse as conservative philosopher Leo Strauss in *NATIONAL RIGHT AND HISTORY* (1953) and Marxist philosopher C.B. Macpherson in *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: FROM HOBBS TO LOCKE* (1962). In the American context, this argument grounds Louis Hartz's famous account of U.S. political life as marked by a "Lockean consensus." See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

¹⁷ See THOMAS HOBBS, *LEVIATHAN* 6-7 (Edwin Curley ed., 1994) (1651).

¹⁸ This is in contrast to René Descartes, who famously took as his philosophical starting point a position of extreme doubt regarding the existence of the world itself and then set out to establish a firm basis for objective knowledge. See generally RENÉ DESCARTES, *DISCOURSE ON METHOD* (Donald A. Cress ed. & trans., 1998) (1637).

¹⁹ HOBBS, *LEVIATHAN*, *supra* note 17, at 20 (Edwin Curley ed., 1994) (1651).

cases, is nothing else but original fancy, caused (as I have said) by pressure, that is, by the motion, of external things upon our eyes, ears, and other organs.”²⁰

For Hobbes, this epistemological skepticism, presented through an account of colors, leads to far reaching conclusions about human experience and how individuals interact in the state of nature. Above all, it means that while all human beings seek self-preservation, their ability to establish definitively what enhances or decreases their security is deeply circumscribed. Since individuals possess no authoritative knowledge regarding the character of the external world, they reach different and often contradictory conclusions about what may pose a threat to their physical safety. What makes this informational uncertainty even more problematic is that humans possess no shared moral faculty, deriving either from God or nature itself, which could produce consensus and cooperation. According to Hobbes, our moral language is inexorably subject to the same illusions as those that confound our general awareness of the world around us. In *The Elements of Law*, he writes:

Every man, for his own part, calleth that which pleaseth, and is delightful to himself, GOOD; and that EVIL which displeaseth him: insomuch that while every man differeth from other in constitution, they differ also one from another concerning the common distinction of good and evil. Nor is there any such thing as . . . simply good.²¹

Views of the good are idiosyncratic; they are the product of an emotional and psychological makeup whose subjective preferences are different in every human being.²² The result is that in the state of nature we have no basis by which to convince others of the good, since what might please one person may in fact harm another. As a consequence, for Hobbes the most dangerous threats to insecurity are ultimately moral disagreements over good and evil itself. These disagreements, combined with our difficulties perceiving the sources and meaning of various threats, reduce the state of nature to one of war. Such warfare is not only marked by moments of actual violence but by a pervasive condition of fear and uncertainty. Without a common moral framework or the capacity to judge events properly, a Hobbesian state of nature embodies a permanent crisis “wherein men live without other security than what their own strength and their own invention shall furnish them withal.”²³

For Hobbes, our lack of knowledge directly implies the political need for absolutism. In submitting to the common authority of the Leviathan, all individuals give up their private right to decide questions of preservation and security and instead choose to accept the opinions of the sovereign. Individuals are willing to make this substitution, because as they have no certainty about the world themselves they also have no basis to question the accuracy of the sovereign’s judgments. In fact, precisely since war is the result of epistemological disagreements (regarding what might be dangerous, what constitutes good and evil, or how to divide material spoils), having a single and final arbiter transforms the natural condition of endemic fear and conflict

²⁰ *Id.* at 7.

²¹ THOMAS HOBBS, HUMAN NATURE AND DE CORPORE POLITICO 44 (J.C.A. Gaskin ed., 1994).

²² As political theorist Richard Tuck writes, in Hobbes’s view our interpretations of good and evil are analogous to our perception of color. These interpretations are simply the product of external matter acting upon us, creating a “system of passions and wants which make up the human emotive psychology.” See RICHARD TUCK, HOBBS 53 (1989).

²³ HOBBS, LEVIATHAN, *supra* note 17, at 76.

into a civil one of security. According to Hobbes, the decisions of the Leviathan therefore establish what citizens accept as the “rules of propriety (or *meum* and *tuum*) and of good, evil, lawful, unlawful.”²⁴ In other words, property allocations, moral valuations, and justice claims have no content beyond the determinations of civil government. In fact, even what constitutes a ‘person’ is ultimately the artificial determination of the sovereign, since the definition of a ‘human being’ is grounded not in any shared knowledge, but rather in opinion and conjecture. Hobbes writes that, “upon the occasion of some strange or deformed birth, it shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws.”²⁵

This radical uncertainty means that for Hobbes politics must be framed around a centralized and unlimited power. In order to impose moral consensus and to choose definitively among competing accounts of harm, the Leviathan has to possess a single and undivided will – one unconstrained by constitutional checks. Moreover, as individuals do not have the ability to assess the appropriateness of sovereign actions – unless the state is actually trying to kill or clearly endanger the particular citizen – he or she has no basis to resist or critique this established order. In essence, the lack of knowledge undermines those justifications one might offer for a politics of dissent or of legal limitation. In Hobbes’s account, since our original condition is one of continuous crisis and rational uncertainty, a centralized regime (regardless of the potential costs) is still at root preferable to endemic insecurity.

But if Hobbes is considered to be the foremost Anglo-American theorist of absolutism, commentators have paid far less attention to the surprisingly democratic implications of his security politics. At the same time as he defends unitary authority, Hobbes’s view of knowledge also opens the door to expansive popular involvement in collective decision-making. This is because his epistemology is fundamentally egalitarian, and thoroughly rejects any distinction between elite and ordinary rationality. Hobbes argues that security knowledge eludes all individuals, regardless of social position, education, military background, or class standing. In effect, no science or expertise of security exists, one which would independently legitimate particular determinations of danger. The sovereign’s judgments about preservation are thus qualitatively indistinct from those reached by the average person; they are simply opinions that we as members of the polity allow to gain the force of law. This suggests that the Leviathan need not be organized around a single executive or specialized body of decision-makers; such entities have no unique or higher knowledge. For Hobbes, the choice between forms of government is merely a “difference of convenience.”²⁶ State authority can be placed legitimately in an all-powerful democratic legislature – in one “assembly of men” – so long as that assembly “reduce[s] all their wills, by plurality of voices, unto one will.”²⁷

As security is in everyone’s interest and no one possesses any heightened capacity to discern how best to achieve it, the public as a whole rightfully can participate in full deliberation and decision-making – even if the final decision may

²⁴ *Id.* at 114.

²⁵ HOBBS, HUMAN NATURE, *supra* note 21, at 181.

²⁶ HOBBS, LEVIATHAN, *supra* note 17, at 120.

²⁷ *Id.* at 109.

ultimately curtail the public's freedom of action. Popular opinions are no better or worse than those of executives or aristocratic bodies. For Hobbes, security claims about threat are ultimately complex and ideologically infused opinions rather than established truths; they are inevitably subject to debate and disagreement. Thus, without a technical proof of what would constitute security, Hobbes views it as perfectly acceptable for security judgments and practices to emerge through democratic discussion – with the one caveat that the assembly's choice be taken as absolute.

A. *Locke and the Choice between “Pole-Cats” and “Lions”*

In many ways, Locke's views were a response to Hobbes's unitary theory of government and his belief that the state of nature was one of endemic and continuous threats, bereft of any discernible moral principles. In the process, Locke offered a competing vision of how popular accountability could be wedded to the project of securing collective life, one that promoted constitutional checks and challenged unlimited authority in any form. By combining popular consent with limited government, Locke's security vision provided the philosophical framework for both the Federal Constitution and early American judgments about the appropriate role of ordinary citizens in issues of war and peace.

Like Hobbes, Locke commences his discussion of politics by positing a state of nature in which individuals exist prior to civil society, and goes on to highlight the insecurities which then generate a social contract. As a result, he too underscores the priority of security for political life and views civil society as the product of our search for such security. What differentiates Locke from his predecessor is a fundamental disagreement about rationality and human knowledge in the state of nature. Unlike Hobbes, Locke argues that human beings are endowed by God with a faculty of reason. This capacity allows individuals to apprehend and follow foundational laws that operate in the state of nature even before the construction of government. The central law is that due to our shared rationality all people are “*equal and independent* [and] no one ought to harm another in his life, liberty, or possessions.”²⁸ In addition, it also indicates that we have property in ourselves, and a natural right to life, liberty, and estate.

What follows from Locke's analysis is the existence of moral claims prior to politics. Rather than property, justice, and good and evil being the product of political choices made by governmental decision-makers in civil society, these terms are natural and have a universally accessible content. For Locke, reason provides us the ability to apprehend the existence of God whose “workmanship”²⁹ we are, to know good from evil, and to arbitrate disputes with justice and equanimity. Given these assumptions about human knowledge, the Lockean state of nature is therefore primarily a state of calm, which is only occasionally interrupted by violence. It is pointedly not the condition of endemic danger depicted by Hobbes. Since people understand the distinction between right and wrong, a moral consensus often prevails that limits discord and generally prevents the slide toward conflict. Moreover, the primary threats to security that individuals face are encroachments on their private property. While these encroachments have the potential to pose serious obstacles to physical safety – by erupting into violence – they are usually readily addressed within the state of nature.

²⁸ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 9 (C.B. Macpherson ed., 1980) (1690).

²⁹ *Id.*

This is because most people know the sources of their insecurity (i.e., a neighbor claiming ownership over your land) as well as how best to settle these disputes. Problems of security are ultimately no different qualitatively than any other issue, and no specialized expertise or information is required to address them.

Nonetheless, given that all individuals in the state of nature have the right to be judges in their own case, inconveniences inevitably emerge due to confusion and disorder. Without a common authority, disputes – again mostly over property rather than religious or ideological belief – which could be readily arbitrated have the potential to fester and compromise general expectations of security. Locke argues that these difficulties are pervasive enough to require the establishment of government:

[C]ivil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great, where men may be judges in their own case, since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it.³⁰

Yet, even if these problems justify the creation of a common magistrate, they also suggest limits on the mode of power that would be legitimate. In particular, the reality of general moral consensus and widespread security knowledge – which exist prior to politics – leads Locke to reject Hobbesian absolutism or a centralized legislative and executive authority as an acceptable solution. First, absolutism does not generate civil society but rather reproduces a state of nature, because while everyone else submits to a common judge, the sovereign remains as judge in his or her own case. And since any individual who may have a dispute with the sovereign has no alternative power to appeal to, the natural condition reemerges. Locke writes, “where-ever any persons are, who have not such an authority to appeal to . . . there those persons are still *in the state of nature*; and so is every *absolute prince*, in respect of those who are under his dominion.”³¹

More important for our purposes, Locke also argues that the popular capacity to understand and respond to security threats suggests that individuals can gauge the relative intensity of competing dangers. Thus, leaving the state of nature (in which all are judges in their own case) to enter political absolutism is choosing the worse of two evils. Locke dismisses the Hobbesian solution by commenting:

[A]s if men when quitting the state of nature . . . agreed that all of them but one, should be under the restraint of the laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by *polecats*, or *foxes*; but are content, nay think it safety, to be devoured by *lions*.³²

At the heart of this argument is a claim about the relationship for ordinary individuals between interests and knowledge, one directly contradictory to Hobbes’s assumption about epistemological uncertainty. Locke implies that people do not simply know that maintaining a condition of security is in their self-interest. They also are able to

³⁰ *Id.* at 12.

³¹ *Id.* at 48.

³² *Id.* at 50.

recognize the most appropriate means to overcome violence and thus which specific governmental structures or political decisions actually contradict their basic interests. Therefore the capacity to distinguish between threats posed by “pole-cats” and by “lions” not only questions the legitimacy of absolutism, it also provides a rationale for collective and shared deliberation. Precisely because we know best the causes of our own insecurity, we should have a say in generating the policies aimed at alleviating these inconveniences.

The democratic implications of Locke’s account of knowledge and security are often obscured in the scholarly literature, because of his parallel claims in the *Second Treatise* about executive prerogative.³³ Locke argues that once in civil society, unexpected “accidents and necessities”³⁴ may occur requiring immediate and flexible action. Since legislatures are “usually too numerous, and so too slow”³⁵ to address fully these moments of crisis, the executive branch enjoys a discretionary authority in such circumstances “to do many things of choice which the laws do not prescribe.”³⁶ This expansive extra-legal authority no doubt runs contrary to the politics of limited government, which Locke so carefully establishes elsewhere. Yet, the affects of prerogative power on collective life should not be exaggerated. To begin with, if the state of nature is primarily a state of calm punctuated by moments of insecurity, civil society is even closer to a condition of peace. Due to rationality and moral consensus, crisis is far from the normal order and therefore the times in which executives exercise prerogative power are necessarily limited.

Just as crucial, individual knowledge means that publics hold the capacity to determine the appropriateness of prerogative action and to recognize when executive judgments compromise rather than enhance their interests.³⁷ It is this capacity – to appreciate when governmental actions are contrary to basic security – that in particularly egregious circumstances can justify revolution. Locke sees prerogative power as the occasional emergence of the state of nature within civil society, since during these moments of crisis “no judge on earth”³⁸ exists to adjudicate independently popular opposition to the use of discretion. He argues that when publics believe their security to be compromised fundamentally by executive decisions, they have no alternative political recourse and the only possible remedy is an “appeal to heaven.”³⁹ This appeal is ultimately a call to God – and in particular those God-given laws of nature – to justify the rejection of earthly political authority.⁴⁰ Given his belief that the

³³ See, e.g., Mark Neocleous, who in his fine book, *CRITIQUE OF SECURITY* (2008), nonetheless problematically presents the Lockean concept as the intellectual foundation of the modern security framework by focusing too exclusively on his arguments about prerogative. Neocleous describes the book’s thesis as “trac[ing] security politics back into Locke’s account of prerogative and then expand[ing] this into a wider set of claims about liberalism and security.” *Id.* at 7-8.

³⁴ LOCKE, *supra* note 28, at 84.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Locke writes of uses of prerogative which contradict the public good, “rulers, in such attempts, exercising a power the people never put into their hands, (who can never be supposed to consent that any body should rule over them for their harm) do that which they have not a right to do.” *Id.* at 87.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ As Locke remarks, “[I]t being out of a man’s power to submit himself to another, as to give him a liberty to destroy him; God and nature never allowing a man so to abandon himself, as to neglect

public has the right to determine the legitimacy of executive action, Locke's claims about prerogative are actually consistent with his larger views about security and knowledge. They reinforce – rather than contradict – the ability of ordinary citizens to understand and appropriately pursue their interests in matters of preservation and survival.

Ultimately, both Hobbes and Locke contend that all human beings enjoy the same epistemological position, one marked either by a thoroughgoing lack of security knowledge or instead by widespread rationality and understanding. For Locke, such understanding not only justifies popular accountability, but it also protects against the tyranny wrought by government discretion, whether exercised by a unitary executive or by an all powerful and democratic assembly. As I will discuss in Parts IV and V, today's security orientation rejects the philosophical thread shared by both thinkers – the egalitarian belief that all individuals possess the same skills in discerning and responding to external danger. By sustaining a divide between elite and popular capacities, today's orientation holds on to the most troubling aspects of the Hobbesian narrative (its vision of endemic threat and its skepticism of constraints on state power) while casting aside the elements in both thinkers that promote popular participation and widespread self-rule.

III. LOCKEAN RATIONALITY IN THE EARLY AMERICAN REPUBLIC

The philosophical positions of Hobbes and Locke not only shaped the development of modern political thought, but also provided the intellectual context for early American debates about the meaning and implications of security. In fact, during the eighteenth and nineteenth centuries, dominant American assumptions about the relationship between security and knowledge fundamentally mirrored the classic Lockean account and would be a far cry from today's principal approach. Indeed figures as politically opposed as Abraham Lincoln and Supreme Court Chief Justice Roger Taney nonetheless held the same basic belief that individuals by and large understood the causes of their insecurity as well as the appropriate methods for responding to threats. Moreover, such figures presupposed that a general moral consensus existed, which created a collective framework for conceiving of questions of property and justice. To the extent that early Americans disagreed, it usually had less to do with knowledge claims and far more with whether the mass of laborers had the virtue to think in terms of this collective moral framework rather than their own partisan interests; the issue was one of judgment as opposed to technical expertise.

This section focuses on constitutional debates at two key moments in the early republic in order to highlight how Lockean beliefs about popular rationality structured security practices and institutions. First, I explore how views about security knowledge set the terms for the constitutions' initial distribution of war-making and common defense powers between executive and legislative branches. Then, I detail how courts in the mid nineteenth century assessed questions of emergency. This discussion pays particular attention to *Mitchell v. Harmony* (1851), a case from the Mexican-American War and among the most sustained legal explorations in the early republic of 1) what

his own preservation: and since he cannot take away his own life, neither can he give another power to take it." *Id.* at 88.

constitutes an emergency; 2) who decides whether one exists; and 3) which departures from constitutional normalcy are legally justified.

A. Abundance, Insularity, and the Founders' Constitution

To appreciate fully the meaning of constitutional debates regarding security and executive power during the founding period, it is critical to recognize the political circumstances. A central and irreversible consequence of the Revolution was a process by which the hierarchical character of colonial life faced intense pressure from below. Both the conflict with Britain and the larger project of independence made merchants and landed gentry militarily and politically dependent on small farmers. In this context, historian Robert Wiebe describes the 1770s and 1780s as a period of rising egalitarian commitments, marked by the diffusion of political control and the creation of “a multitude of small political units, governmental and quasi-governmental, [which] rushed to fill the vacuum of British authority, [and] resisted the pulls from patriot capitals almost as stubbornly as they resisted the British.”⁴¹ Such decentralization, coupled with the social emergence of less affluent settlers, meant that politics in the late eighteenth century was characterized by an impressive degree of public assertiveness – through elections, petitions, protests, and even outright rebellion.⁴²

No doubt gentry and commercial elites found many of these developments deeply troubling, and wariness of popular power – and its perceived instability – played a key role in the institutional move to the new Federal Constitution.⁴³ James Madison famously remarked in *Federalist No. 55* that, “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”⁴⁴ In his view, “avoid[ing] the confusion and intemperance of a multitude”⁴⁵ meant creating a detached national government that divided sovereignty across multiple branches and ensured that there existed governmental checks on the actions of poor citizens. Yet, even these gentry elites appreciated how the political terrain had been fundamentally altered by Revolution. In keeping with the pervasive sentiment of the era, the Constitution’s framers took for granted that the new political community would have to be grounded in the democratic principle of majority rule and thus expand the domain of meaningful control beyond powerful families and landed interests. Such participatory politics presumed that ordinary citizens broadly knew their interests as well as how to achieve them. Moreover, there were no political matters appropriately closed off to determination by majority rule or which required technical knowledge beyond what farmers and artisans gained through shared and common social experiences. In other

⁴¹ See ROBERT WIEBE, *THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION* 3 (1984). See also GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

⁴² For detailed discussions of two of the era’s most notorious popular uprisings, the Shays Rebellion and the Whiskey Rebellion, see generally DAVID SZATMARY, *SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980) and THOMAS SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986).

⁴³ See, e.g., AUTHOR, *THE TWO FACES OF AMERICAN FREEDOM* 131-142 (2010) (describing how the shift to the new Federal Constitution was precipitated in part by elite fears, especially in the context of the Shays’ Rebellion, of the consequences of increased popular participation).

⁴⁴ THE FEDERALIST NO. 55 (Madison), http://avalon.law.yale.edu/18th_century/fed55.asp.

⁴⁵ *Id.*

words, politics was properly a matter of popular judgment rather than specialized expertise. Madison and others clearly questioned the wisdom of such faith and hoped to establish new frameworks that, as Bruce Ackerman notes, “economize[d] on virtue”⁴⁶ by creating political bodies with overlapping responsibilities. Still, the founders assumed that at root collective choices would have to rest on popular judgment and deliberation – if for no other reason than the realities of mass political pressure.

As a result, the Federal Constitution consistently affirmed the belief that fundamental social decisions (particularly those relating to common defense) were best made through broad and open public discussion, placing ultimate authority in democratic legislatures. Such legislatures, grounded in majoritarian rule, were viewed as closest to approximating both the interests and the will of the populace writ large. No less than Alexander Hamilton, among the founders most suspicious of laboring class opinion and influence, underscored in *Federalist No. 69* the role of both participation and majoritarian decision-making in matters of war and peace. As Hamilton wrote, while the prerogative of the British King “extend[ed] to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies, . . . by the Constitution under consideration, [these judgments] would appertain to the legislature.”⁴⁷ Indeed, not only did Article I of the Constitution give Congress, not the President, the power to declare war,⁴⁸ it provided Congress with the responsibility of raising both the army⁴⁹ and the navy.⁵⁰

Just as important, the legislative branch also enjoyed primary federal responsibility in directing the militias.⁵¹ During the early republic, in keeping with Lockean suspicions of insulated and elite control in security matters, widespread hostility existed toward professional standing armies; they were famously described by Virginia Congressman John Randolph as “mercenaries” and “ragamuffins.”⁵² The broad belief was that standing armies only served to promote the rise of military despotism. As a result, militia service was seen as essential to safeguarding republican government, because such service was largely coextensive with both voting rights and full membership.⁵³ It constituted perhaps the key mechanism by which ordinary citizens participated on a regular basis in questions of war and peace. Although the states controlled militia training and officer appointment, Congress was empowered to

⁴⁶ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 198-199 (1991).

⁴⁷ THE FEDERALIST NO. 69 (Hamilton), http://avalon.law.yale.edu/18th_century/fed69.asp.

⁴⁸ U.S. CONSTITUTION, art. I, § 8, cl. 11.

⁴⁹ *Id.* cl. 12.

⁵⁰ *Id.* cl. 13.

⁵¹ *Id.* cl. 15 (granting to Congress the authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”).

⁵² Quoted in LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 262 (1978).

⁵³ See generally *id.* at 261-264. Historian Lance Banning powerfully captures founding era judgments about the evils of a standing army and the value of militia service. As he writes of Randolph’s speech:

I know of no better example of the persistence of the idea that the militia is the agency through which freeman express their virtue in arms than the famous speech [of] John Randolph of Roanoke Gentlemen who raise alarms against foreign dangers should listen to “warnings against standing armies – against destroying the military spirit of the citizen by cultivating it only in the soldier by profession, against an institution which has wrought the downfall of every free state and riveted the fetters of despotism.”

Id.

determine how best to “organiz[e], arm[], and discipline[e]” the militias as well as how to “govern[] such Part of them as may be employed in the Service of the United States.”⁵⁴ This authority vis-à-vis the militias thus emphasizes the larger constitutional commitment to majoritarian supremacy in matters of common defense. Moreover, the importance of militia service and the collective wariness of a professional army also highlight the prevailing opinion of the time: meaningful security was undermined – not enhanced – when removed from the purview of the wider public.

In fact, this security faith in majoritarianism did not stop with the distant federal government; it went so far as to incorporate state legislatures as well. Article IV of the Constitution, which guaranteed to the states protection by the federal government against invasion and insurrection, gave local legislatures, rather than state governors or national officials, the primary authority to assess whether problems of “domestic violence” justified federal involvement.⁵⁵ During the revolutionary and post-revolutionary period, these legislatures were often the institutional entities most dominated by poorer voices and therefore a critical space for the expression of an immediate and unchecked popular will.⁵⁶ Their involvement in basic determinations of internal threat, especially viewed in conjunction with the centrality of militia service to political life, further reaffirm how assumptions about popular responsibility structured founding era security practices.

Part of what made elites willing to accept the rise of mass political involvement were background beliefs about the social conditions marking eighteenth century America. In particular, gentry and commercial elites believed that the new republic enjoyed the benefit of relative economic abundance and physical isolation from the dangers that marked European imperial rivalries. According to Thomas Jefferson, one of the primary sources of insecurity and social disorder was material scarcity and the conflicts over goods that it generated. When individuals did not possess land or the material resources required for their own subsistence chaos inevitably ensued. In his view, this scarcity was the cause of much of Europe’s political instability, where “[t]he mobs of great cities add just so much to the support of pure government as sores do to the strength of the human body.”⁵⁷ By contrast, citizens in colonial and postcolonial America enjoyed agricultural abundance and easy access to property, a condition that would persist “so long as there shall be vacant lands in any part of America.”⁵⁸ He believed that if property continued to be widely available to most settlers, society would remain in a state of relative peace with individuals securely possessing the means essential to self-preservation.

⁵⁴ U.S. CONSTITUTION, art. I, § 8, cl. 15. For more on congressional control of the federal military and the militias in particular, see Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1095-97 (2011).

⁵⁵ U.S. CONSTITUTION, art. IV, § 4. The relevant section reads, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

⁵⁶ For more on the populist role of state legislatures during the era, see CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 60-97 (1993).

⁵⁷ See Thomas Jefferson, “The Present State of Manufactures,” in *THE PHILOSOPHY OF MANUFACTURES* 17 (Michael Brewster Folsom & Steven B. Lubar eds., 1982).

⁵⁸ Thomas Jefferson, “Letter to James Madison, December 20, 1787,” in *POLITICAL WRITINGS* 363 (Joyce Appleby & Terence Ball eds., 1999).

Aiding such tranquility was the fact that Americans were largely isolated from Europe and its internecine conflicts. In *Federalist No. 8*, Hamilton argued that on the continent military despotism and centralized executive authority were inevitable, because “[t]he perpetual menacings of danger oblige the government to be always prepared to repel it.”⁵⁹ Facing continuous emergency, Hamilton wrote of European politics:

The military state becomes elevated above the civil. The inhabitants of territories, often the theatre of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors, but as their superiors.⁶⁰

By contrast, American insulation, dramatically aided by the barrier of the Atlantic Ocean, meant that as long as the republic did not fracture internally, its external position would be one of calm – perfectly compatible with the maintenance of both popular and civil authority. As he concluded, “Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position, be necessary to our security.”⁶¹

Thus for both Jefferson and his later political nemesis Hamilton, Americans had ready access to the means necessary for long-term security and therefore collective life was principally one of presumptive peace – only occasionally interrupted by violence and warfare. This indicated that for those elite voices like Hamilton, most skeptical of political self-rule by ordinary citizens, an accommodation with majority rule appeared far less politically dangerous. The lack of absolute destitution suggested that popular judgments were not likely to be as prone to extremism or to attacks on propertied interests. And the fact that emergency or crisis was an extraordinary rather than a normal condition of politics indicated that greater space existed for possible error in public deliberation. Since the potential consequences for survival were less severe, poor collective judgment, if simply an occasional occurrence, did not necessarily bring with it widespread social collapse. These assumptions of insulation and abundance, taken alongside the general commitment to popular knowledge and decision-making, suggested a political environment remarkably similar to that outlined by Locke. In particular, institutional frameworks took for granted that most citizens had the capacity to understand security threats and to respond appropriately to them. Moreover, since these threats were relatively infrequent, citizens were unlikely to be willing to transfer meaningful decision-making responsibility to centralized and authoritarian forms of government, or to address the inconveniences caused by “pole-cats” by allowing themselves to be devoured by “lions.”

B. Democratic Intelligence, Jacksonian Populism, and Mitchell v. Harmony

If elites during the founding era retained some concern about mass opinion and the potential pitfalls of majoritarian politics, subsequent generations increasingly deemphasized these worries. Particularly during and after the Jacksonian period,

⁵⁹ FEDERALIST NO. 8 (Hamilton), http://avalon.law.yale.edu/18th_century/fed08.asp.

⁶⁰ *Id.*

⁶¹ *Id.*

politicians and social critics questioned the view that propertyless citizens were any more liable than wealthy elites to think in terms of partial self-interest rather than the common good.⁶² In fact, a quick snapshot of the mid nineteenth century underscores how political and legal figures across the ideological spectrum argued that – if anything – collective life should be marked by the thorough democratization of intelligence. Individuals as diverse as Lincoln and Taney saw the incipient rise of industrialization and new professional occupations as posing a potential threat to popular self-government. In their opinion, if most citizens did not have the information and knowledge to understand their social condition, they similarly would be unable to fulfill their primary functions as participatory citizens. While Madison and Hamilton may have feared the judgment of less affluent citizens, later generations instead saw the driving threat to democracy in the social failure to distribute broadly scientific and cultural information. Under this reading, to the extent that informational cleavages were reproduced as group privileges – segmenting society into distinct classes of learning and labor – these cleavages had to be eliminated. As Jacksonian radical and social critic Orestes Brownson wrote in the 1840s, “There must not be a learned class and an unlearned, a cultivated class and an uncultivated, a refined class and a vulgar, a wealthy class and a poor.”⁶³

Such an account was perhaps most powerfully articulated by Abraham Lincoln, in his 1859 “Address before the Wisconsin State Agricultural Society.”⁶⁴ There, he

⁶² For an extended discussion of democratic leveling and Jacksonian faith in popular capacities during the mid nineteenth century see SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 312-329, 359-424 (2005) and LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 189-206 (2004).

⁶³ ORESTES BROWNSON, *Our Future Policy*, in 15 *THE WORKS OF ORESTES BROWNSON* 124 (Thorndike Nourse, Detroit 1884).

⁶⁴ Although Lincoln is well-known for defending executive power during the Civil War, the following discussion (perhaps counterintuitively) focuses on Lincoln’s vision of democratic intelligence rather than on his actions as President. This is for two principal reasons. First, and most important, his ideas, especially as highlighted in his “Address before the Wisconsin State Agricultural Society,” eloquently captured the broader spirit of the age. Lincoln’s arguments about democratic knowledge and popular capacities were part of the social fabric of American life at the time and represented the dominant collective wisdom about knowledge and expertise. Second, although Lincoln’s Civil War practices centralized authority and contradicted constitutional text (such as by unilaterally enlarging the army and navy and suspending habeas corpus), these actions were understood to be extreme responses to the extreme and highly unusual circumstance of internal rebellion. They did not signal a new collective experience of endemic and complex insecurity, which required a permanent extension of executive and military discretion even during periods of relative calm. Neither Lincoln nor his supporters believed that it had become necessary to revise fundamentally the basic relationship between the executive branch and the constitution or the Lockean presumption that peacetime normalcy was only occasionally punctuated by extraordinary threat. Indeed, Lincoln took for granted that there would be a return to constitutional and executive normalcy when the war ended. As we will see, such arguments about permanent danger and the need for a new institutional structure would have to wait for a much later day. For more on Lincoln’s measures and thinking as President see ROSSITER, *supra* note 5, at 223-239; LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 41-70 (2005); GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 79-134 (2004)

argued that the “mud-sill theory”⁶⁵ was more than simply a defense of slavery; it was also a claim about the imprudence of combining cultural and scientific knowledge with ordinary labor.⁶⁶ He declared, “By the ‘mud-sill’ theory it is assumed that labor and education are incompatible” and that “the education of laborers, is not only useless, but pernicious, and dangerous.”⁶⁷ Such education enhanced the intemperance and passions of the multitude, and threatened the capacity of prudent elites to exercise collective power. Under the mud-sill theory, Lincoln continued, “it is . . . deemed a misfortune that laborers should have heads at all,” which are “regarded as explosive materials, only to be safely kept in damp places, as far as possible from that peculiar sort of fire which ignites them.”⁶⁸

According to Lincoln, this belief was premised on “[t]he old general rule . . . that educated people did not perform manual labor. They managed to eat their bread, leaving the toil of producing it to the uneducated.”⁶⁹ In sharp contrast, the ideal of democratic self-government took for granted the value of “universal education,”⁷⁰ in which all individuals were raised to the level of deliberative and knowledgeable citizens. Lincoln maintained that, “as the Author of man makes every individual with one head and one pair of hands, it was probably intended that heads and hands should cooperate as friends; and that that particular head, should direct and control that particular pair of hands.”⁷¹ Emphasizing the need to unite labor and learning, and to ensure that everyone participate in the practices of independent ethical judgment at work and in politics, Lincoln concluded, “[E]ach head is the natural guardian, director, and protector of the hands and mouth inseparably connected with it; and that being so, every head should be cultivated, and improved, by whatever will add to its capacity for performing its charge.”⁷² For Lincoln, the democratic hope was that common education

⁶⁵ The theory was first expounded by South Carolina Senator James Henry Hammond in a Senate speech on March 4, 1858. In his speech, Hammond defended slave owning by arguing that all societies were sustained by having a lower class to engage in menial but essential forms of labor:

In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mud-sill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mud-sill.

James Henry Hammond, Speech to the United States Senate (Mar. 4, 1858), <http://www.pbs.org/wgbh/aia/part4/4h3439t.html>.

⁶⁶ See Abraham Lincoln, Address to the Wisconsin State Agricultural Society (Sept. 30, 1859), <http://showcase.netins.net/web/creative/lincoln/speeches/fair.htm>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* Lincoln’s evocative language of uniting heads and hands was not unique to him. Throughout the 19th century educators, moral reformers, and labor activists commonly referred to creating a ‘harmony of the head and the hand’ as a means for elevating all citizens to the status of independent moral agents. For instance, as trade unionist and presidential candidate, Eugene V. Debs continually invoked the same imagery to emphasize that workers were more than just ‘hands’ for a corporate employer. By combining labor and learning, they had the potential to assert their own political voice. In speech after speech, Debs declared, “A thousand heads have grown for every thousand pair of hands, a thousand hearts throb in testimony of the unity of heads and hands, and a thousand souls, though crushed

at school and at work would provide everyone with informational resources to participate on an equal footing in economic and political life – regardless of class standing. As one Indiana school superintendent noted in 1875, reflecting sentiment that was pervasive at the time, “If we shall limit education of the masses, and trust to the extended education of the few for directive power and skill, we must expect to be ruled by monopolies, demagogues and partisans.”⁷³

This faith in mass rationality and commitment to expanding popular knowledge extended far beyond rhetoric. In fact, it shaped much of the legal approach to matters of emergency and security during the mid nineteenth century. Such an approach emphasized the capacity of deliberative bodies and ordinary citizens to sit in judgment of the emergency practices of military officers and pointedly rejected the notion of judicial deference to claims of military necessity. To begin with, as legal scholar Jules Lobel has written, throughout the period, “executive officials who departed from legal norms in times of war or emergency could be liable for damages to individuals who suffered injury due to their actions.”⁷⁴ The presumption was that courts would sanction the official for violations, and later Congress could make the determination about whether to indemnify based on a judgment that necessity indeed justified such extra-legal practices. In other words, matters of necessity were not the exclusive province of executive officials and members of the professional military. Instead, democratic legislatures enjoyed the power to assess the appropriateness of measures taken to combat perceived threats.⁷⁵

Indeed, nineteenth century courts went much further and held that even the initial determination of whether security threats rose to the level of an emergency did not require any unique expertise or institutional specialization – it was a question that ordinary citizens could and should reasonably determine. In *Mitchell v. Harmony* (1851), a case concerning the seizure during the Mexican-American War of private property by a U.S. military colonel named David Mitchell, the Supreme Court provided perhaps its most extensive and direct examination of this issue.⁷⁶ In the case, the

and mangled, burn in protest and are pledged to redeem a thousand men.” Quoted in NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 228 (2nd ed. 2007).

⁷³ Quoted in SALVATORE, *supra* note 72, at 10.

⁷⁴ See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1394 (1989).

⁷⁵ As Lobel describes, this process played out in various well known cases. *Id.* at 1394-1395. For instance, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Supreme Court imposed individual liability on a naval commander who violated congressional statute by obeying a presidential directive during the Quasi-War with France. And following the War of 1812, Andrew Jackson similarly faced a federal fine of \$1,000 for his actions taken during military occupation of New Orleans following his victory over Britain. For more on the episode, see Abraham Sofaer, *Emergency Power and The Hero of New Orleans*, 2 CARDOZO L. REV. 233, 245-251 (1981). As for an additional example where the Supreme Court imposed a fine on an executive official irrespective of claims to necessity, see *The Apollon*, 22 U.S. (9 Wheat) 362 (1824).

⁷⁶ The great nineteenth century counterweight to the *Mitchell* ruling is generally considered to be Justice Robert Grier’s majority opinion for a 5-4 court in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863). The decision upheld the constitutionality of the President’s decision to pursue unilaterally a blockage of Confederate ports during the Civil War. There, Grier stated that the determination of how much force was required to “suppress[] an insurrection . . . is a question to be decided by *him* [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.” *Id.* at 670. Grier’s opinion has been used extensively by government lawyers

colonel's basic defense was that he should not face liability because his actions were taken due to a military emergency, and, moreover, that he had secret information that the person whose property was seized planned to carry on illegal trade across enemy lines. In his ruling on behalf of the Court, Chief Justice Roger Taney rejected these claims and presented a classic Jacksonian defense of popular knowledge and participation in issues of security. Today, Taney is most famous or rather infamous for his opinion in *Dred Scott v. Sandford* (1857).⁷⁷ But along classic Jacksonian lines – he had been Jackson's Attorney General and Secretary of the Treasury – Taney combined such defenses of a racially exclusive polity with the belief that white settlers (regardless of property or wealth) were universally worthy of full citizenship and self-rule.⁷⁸

He began his opinion in *Mitchell* by railing against governmental assertions of secrecy. According to Taney, executive officials could not base claims merely on secret information and expect the court to accept their judgments. If Colonel Mitchell wanted to assert that the plaintiff planned on violating the law by trading with the enemy, “these rumors and suspicions” had to be backed up by publicly offered evidence.⁷⁹ As he declared, “The fact that such an intention existed must be shown; and of that there is no evidence.”⁸⁰ Taney then proceeded to argue that the trial court had been correct to conclude that whether an emergency in actuality existed, and thus the security measures were potentially justified, was a matter of fact for the *jury* to decide. Thus, Taney not only rejected the notion that the judiciary should defer to conclusions reached by military officers or executive officials about what may or may not constitute a crisis; in his view, these personnel enjoyed no special decision-making prerogative, based on

in the post-9/11 context to defend the notion that the Constitution has long granted the executive extreme deference in issues of war and peace. See Louis Fisher, *The Law: John Yoo and the Republic*, 41 Pres. Stud. Q. 177, 189 (describing the persistent invocation by John Yoo and other lawyers in the Bush-era Office of Legal Counsel of *The Prize Cases* as precedent for wide-ranging unilateral executive action).

Yet, the use of *The Prize Cases* as setting forth a general constitutional theory of emergency powers is deeply mistaken. At the time, its account of presidential authority was understood to be an outlier, a unique decision referring to a singular historical event. Accordingly, unilateral presidential power was appropriate only as a defensive measure in response to domestic insurrection, and, in this case, insurrection as amounted to a “civil war of such alarming proportions.” *The Prize Cases*, 67 U.S. at 670. Although the Grier opinion extended the bounds of what had been historically permissible before the Civil War, *The Prize Cases* – unlike *Mitchell v. Harmony* – never addressed war powers more broadly, let alone issues of foreign invasion or offensive American action abroad.

Much like Lincoln, *The Prize* majority presumed that such rulings were bound to the supreme exigencies of the Civil War and did not imply a wider reordering of the constitutional roles of the executive and the legislative branches. Indeed, in struggling to limit the future applicability of the opinion, Grier defended his resort to presidential discretion by emphasizing the textual blind spot in the Constitution: no specific language existed giving Congress the ability to declare wars against states and thus to prosecute a civil war. According to Grier, “Congress alone has the power to declare a national or a foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution.” *Id.* at 668.

⁷⁷ There Taney notoriously wrote of the legal status of blacks, whether slave or free: “They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.” *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

⁷⁸ For more on how Taney connected settler judgments of internal liberty and external exclusion, see AUTHOR, *TWO FACES*, *supra* note 43, at 167-172.

⁷⁹ *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133 (1851).

⁸⁰ *Id.*

arguments about superior training or experience. He viewed determinations of threat as ultimately rooted in shared and popularly accessible judgments about safety and survival – judgments that might reasonably be reached by a group of ordinary Americans drawn from a representative pool of citizens.

Moreover, Taney articulated a remarkably narrow legal standard for emergency. In keeping with the Lockean view developed at the founding, he believed that the general social condition was one of peace and that crisis amounted to an extraordinary break from normal politics. In order to ensure that this presumptive order prevailed and was not overturned by false claims of crisis, Taney believed that courts should be especially reticent to expand the scope of governmental prerogative. For an emergency to exist, one which justified ceding discretionary authority to the president or to his military subordinates, the threat needed to be both “immediate and impending,”⁸¹ approximating an armed attack or invasion. And, critically, what counted as “immediate and impending” could not be based purely on the executive branch actor’s “honest judgment” of events.⁸² It had to accord with what a “reasonable”⁸³ person would believe when placed in a similar informational situation. It was therefore up to a jury of ordinary citizens to assess if this threshold had been met. Thus, if officials sought to avoid liability they would have to provide such a jury with all the relevant information – secret or otherwise – that might enhance the perceived reasonableness of their security decisions. In effect, Taney rejected wholesale any stratification between elite and mass judgment in questions of war and peace or in legitimate access to sensitive information. This rejection took for granted that the public enjoyed the basic capacity to understand what kinds of threats were major rather than minor and how each type might best be addressed.

Perhaps most important, it further assumed that these views were grounded in ordinary rationality, namely conceptions of reasonableness that emerged through everyday experience. This reasonableness approach was fundamentally distinct from what in contemporary case law is referred to as the “reasonable officer”⁸⁴ standard. This alternative standard is one for professional experts, and is often applied to assess whether soldiers or police officers may have used excessive force.⁸⁵ Such a

⁸¹ *Id.* at 134.

⁸² *Id.* at 135.

⁸³ *Id.*

⁸⁴ For a discussion and critique of the standard see *Whren v. United States*, 517 U.S. 806 (1996) (finding that as long as there is probable cause that a person has violated a traffic code, an officer is considered to be acting constitutionally under the reasonable officer standard, regardless of subjective intentions). *See also* *Anderson v. Creighton*, 483 U.S. 635, 641(1987) (finding that it is possible for an officer to “reasonably but mistakenly conclude” that probable cause is present and, in these cases, there is no constitutional right infringement based on the reasonable officer standard); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (holding that an officer must be reasonably aware that bringing members of the media into a home during the execution of an arrest warrant is lawful, in light of clearly established law and information available to said officer at the time, in order to be found not guilty of violating constitutional protections).

⁸⁵ *See* *Scott v. Harris*, 550 U.S. 372, (2007) (finding that claims of excessive force in the course of a seizure are properly evaluated under the objective reasonableness standard that applies to officers under the Fourth Amendment); *Graham v. Connor*, 490 U.S. 386, 396–397 (1989) (holding that the reasonableness of a particular use of force by an officer must be viewed from the perspective of a reasonable officer and must take into account “split-second judgments” that police officers are often forced to make when determining the amount of force necessary in a particular situation).

determination assumes that soldiering is a skill-based activity that entails a higher degree of expertise than what is broadly enjoyed. Thus, the question before courts in recent decades has primarily concerned how a reasonable officer (rather than a reasonable individual per se) would behave under the same or similar circumstances. Taney was pointedly not pursuing this contemporary logic. Although soldiers and officials no doubt may have special training or experience with warfare, this training and experience did not provide them with uniquely useful insight regarding how to make initial sense of threats, interpret information, or reach policy determinations. Indeed, given prevailing suspicions at the time of standing armies, professional soldiers were often viewed as institutionally liable to overemphasize perceived dangers or the need for emergency measures. Thus, Taney rejected wholesale executive branch or military claims to security expertise; instead he imagined citizens as fully equipped to reach conclusions about military necessity and – more broadly – to shape policies about war, peace, and common defense. For Taney, the subject of security was at root accessible to democratic deliberation and, if anything, embodied a critical site for the public to exercise political responsibility through popular institutions, especially legislatures and juries.

The ideological continuities between the Republican Lincoln and the Democrat Taney, author of *Dred Scott*, further underscore the centrality of the Lockean vision of knowledge and security to early American constitutional politics. Despite their profound political and legal disagreements, Lincoln and Taney nonetheless could both agree on the value of democratizing intelligence; they argued jointly against the legitimacy of stratifying decision-making responsibilities between elite and mass constituencies. And they justified this view by a set of sociological and ethical claims about popular knowledge and political capacity, claims that stretched back to the philosophy of John Locke. Certainly for Taney, the most central element of this shared security discourse was the notion that there existed no ‘science’ of security, with technical proofs of right or wrong discoverable by professional training. Over the following sections, I will explore what happened to this Lockean paradigm and how it became eclipsed in American legal and political practice. The startling implication of this shift is that Lincoln and Taney may in important respects share with each other more conceptual similarities than we do today with either.

IV. THE NEW DEAL, WORLD WAR II, AND THE RISE OF SECURITY EXPERTISE

These baseline conceptual judgments about the meaning of security meant that prior to the 1940s, the infrastructure undergirding American national defense held little in common with what we see today. In particular, the widespread belief that matters of war and peace should be decided through transparent and democratic mechanisms generated institutional arrangements that emphasized civilian control and deemphasized secrecy. The executive branch’s defense apparatus was quite small by comparison with the present day. The State Department dominated the formulation of peacetime foreign policy and the professional military (represented in executive branch deliberation by the War Department and the Navy) enjoyed a restricted institutional role in devising policy. Moreover, the United States had a limited foreign intelligence network with few actual spies, relying instead on overseas military attachés, Foreign Service officials,

Americans living abroad, and members of the press.⁸⁶ Presumptions against both secrecy and heightened bureaucracy were believed to be necessary for curtailing the ability of centralized actors – particularly executive officials and military personnel – to make unilateral judgments about defense and emergency.

Two massive political events produced a conceptual reevaluation of the prevailing wisdom and, ultimately, set the stage for the modern account of security: the Great Depression and Pearl Harbor. As this section argues, against the backdrop of these events, influential scholars, policymakers, and legal actors began to question the wisdom of leaving issues of basic survival to mass deliberative judgments. In particular, social scientists argued that modern sociological conditions were increasingly too complex for most citizens to make sense of and thus that issues of threat and necessity were no longer domains of popular understanding. In the process, they invoked those elements of Hobbes’ old security narrative that promoted absolutism, like his belief in permanent and continuous crisis, while rejecting Hobbes’ democratic dimension, i.e., his account of a shared mass and elite epistemological position. These claims first took root among New Deal reformers in the context of economic security, but as the 1930s closed they began to dominate the country’s foreign policy establishment as well.

A. The Great Depression and the Rule of Experts

The basic impetus to reconceive judgments about the relationship between security and knowledge was not the result of foreign threat but rather of domestic economic upheavals caused by the Great Depression. These new notions only later migrated to the domain of war and peace. Therefore, taking some time to recover this initial intellectual background is useful for making sense of the process by which the Lockean paradigm collapsed.

Following the stock market crash of 1929, the United States plunged into deep financial crisis, which by 1932 had cut the gross national product by a third and prices by half.⁸⁷ The Depression generated nearly wholesale joblessness as unemployment figures rose from 429,000 in October 1929 to over 15 million, or one-third of the labor force, in 1933.⁸⁸ Without work, men and women were left absolutely destitute, facing eviction and foreclosure and unable to feed or clothe their families. For many public intellectuals and politicians, this general experience of immiseration and poverty transformed the specific goal of economic security (i.e. freedom from material necessity) from one among a competing number of social issues into the essential precondition for political life. As British philosopher Harold Laski – a staunch supporter of FDR and the New Deal – wrote in 1938, if individuals remain destitute and bound to economic necessity, “liberty is not worth having. Men may well be free and yet unable to realize the purposes of freedom.”⁸⁹ According to Laski, basic economic welfare was the primary means for all other shared ends. For this reason, it should

⁸⁶ See DOUGLAS STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* 34–36 (2008) (describing in particular the remarkably small intelligence infrastructure that existed in the United States on the eve of World War II).

⁸⁷ See ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 195 (1999).

⁸⁸ See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEEDED, HOW THEY FAIL* 46, 108 (1979).

⁸⁹ See HAROLD LASKI, *LIBERTY IN THE MODERN STATE* 51 (1938).

properly precede our normal political debates and disagreements. In the words of Sidney Hillman, a key organizer of the Congress of Industrial Organizations (CIO) and one of the most popular figures in the union movement, economic security was nothing less than the “central issue in this life of modern man.”⁹⁰

For New Dealers, the Depression made clear that all Americans – regardless of sectional or class background – shared a common goal.⁹¹ But it also highlighted that the new industrial economy, marked by interdependence, heightened bureaucracy, and wild cycles of booms and busts, had made it systematically impossible for ordinary citizens to provide for their own economic self-preservation. Economist Abraham Epstein, whose 1933 book *Insecurity: A Challenge to America* played a pivotal role in justifying comprehensive social insurance and ultimately the Social Security Act (1935), provided perhaps the most extensive discussion of this new collective wisdom: namely that popular capacities were increasingly being outstripped by ever-more complex economic realities.⁹² According to Epstein, in the past, the U.S. was primarily a society of independent homesteaders and artisans. This meant that individuals and families were often self-sufficient, and that as long as they had access to property or the tools of a trade, they could ensure their own material survival. By contrast, the rise of industrial wage labor and salaried work meant that individuals no longer controlled their economic fortunes; as Epstein argued, financial wellbeing “depend[ed] entirely upon the stability of [their] jobs.”⁹³ According to him, “It is our present complex civilization which, while conquering nature, time and space, has made men the slaves of their jobs.”⁹⁴

In Epstein’s view, while scientific progress and economic concentration had brought with it tremendous gains in science, technology, and material abundance, it had also come at the cost of creating heightened forms of dependence. Trapped in large-scale bureaucratic and corporate institutions, individuals were at the mercy of external market conditions for basic material necessities. This dependence meant that economic insecurity was now a pervasive and dominant social experience. Given the cyclical and interconnected nature of the economy, destitution was always a present possibility. As such, Epstein concluded that for most Americans financial uncertainty had become “their paramount problem” because “the slightest interruption or reduction in their wages or any increase in expenditures immediately condemns them to defenselessness and poverty.”⁹⁵

These developments not only suggested that individuals could no longer shape the conditions necessary for their own economic self-preservation. It also implied that they no longer understood the forces that produced either wage interruptions or price reductions, and therefore how best to achieve long-term material wellbeing. For a

⁹⁰ Quoted in Steven Fraser, *The ‘Labor Question’, in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* 78 (Steven Fraser & Gary Gerstler eds., 1989).

⁹¹ Social scientist Max Rabinow was among the key New Dealers in emphasizing the pre-political nature of economic welfare and in calling on government to take responsibility for providing all citizens with basic material needs. He famously titled his book on the subject, *THE QUEST FOR SECURITY* (1934).

⁹² See generally ABRAHAM EPSTEIN, *INSECURITY: A CHALLENGE TO AMERICA* (1933).

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 6.

salaried employee in a large corporate entity one's livelihood might well depend on decisions made in a far corner of the economy or on the rippling effect of downturns in distant financial sectors – a fact magnified by the rise of nationalized markets for goods and products. Such events were often incomprehensible to the average individual, let alone subject to their foresight and prediction. Moreover, this lack of knowledge underscored a general sense of anxiety, in which many citizens viewed economic life as a permanent state of crisis beyond their control or meaningful intervention. For Epstein, the solution was ultimately twofold. First, it required that government employ state resources to create social insurance schemes for the aged, disabled, and unemployed, which established a broad safety-net to address problems of destitution. Second, and just as important, society required the education and empowerment of trained experts, who were not only capable of devising and running these new state programs, but who also had specialized knowledge in how the economy worked and how it could be adjusted to smooth the prevailing and destructive pattern of booms and busts.

This defense of expertise was part of an emerging and far broader critique among public intellectuals and social scientists of what Walter Lippmann evocatively called the nineteenth century belief in “omnicompetent citizenship.”⁹⁶ As Robert Lynd, the author of two classics of American sociology, *Middletown* (1929) and *Middletown in Transition* (1937), wrote, “So great is our reliance upon the rational, omnicompetence of human beings, that we largely persist . . . in the earlier habit of leaving everything up to the individual's precarious ability to ‘use his head.’”⁹⁷ For Lynd, Epstein, and others it was precisely this tendency to allow ordinary rationality and common sense to drive collective decision-making that was in part responsible for the economic collapse. Rather than simply having citizens use their “heads,” new conditions necessitated that policymakers elevate the role of professional classes, placing far greater responsibility in the hands of economists and political scientists not to mention lawyers, doctors, and engineers. These professionals operated on the basis of actual empirical information regarding the nature of modern bureaucracy, industrial life, and interdependence. This information gave them quantifiable insight into problems of material wellbeing; it meant that their judgments about social policy amounted to objective determinations of right and wrong. And since such technical knowledge could not be accessed by most Americans, it also suggested that professional experts – operating independent of public opinion and mass prejudices – were best equipped to solve endemic social problems.

During this heyday of New Deal faith in administrative expertise, it was common to argue that such professional groups could be counted on to pursue society's long-term needs rather than destructive partial or selfish interests.⁹⁸ Since their focus was on discerning scientific facts, they were consequently disinterested and committed above all to the public good. Lynd for example saw the New Deal's reformist impulse as the progressive spread of empirical truth to social institutions and asserted that,

⁹⁶ See WALTER LIPPMANN, PUBLIC OPINION 273, 284 (1922).

⁹⁷ See ROBERT LYND, KNOWLEDGE FOR WHAT? 234 (1939).

⁹⁸ For more see James Morone's excellent discussion of the New Deal administrative belief in the value of social science and administrative ‘rule by experts.’ JAMES MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 129-142 (1998).

“There is evidence that liberal attitudes are correlated with intelligence, and there is a great deal of evidence of the correlation of conservatism with property ownership.”⁹⁹ Therefore, as liberal social scientists took over decision-making from private business and legislative majorities, knowledge would itself become the guide for collective life. But a key point about such policy experts was that, while dedicated to the public good, they were not generalists. This was because modern complexity made it nearly impossible for one individual to understand the inner workings of all spheres of collective life. Rather, new professional decision-makers were specialized in a particular sliver of economic or bureaucratic organization. Yet taken as a whole, this patchwork of skilled specialists – located in diverse agencies across government and the private sector – could work jointly to bring order to the seemingly incomprehensible mass of institutions and social phenomena. This emerging focus on expertise was also distinct from the older idea of the grand statesman.¹⁰⁰ Social scientists claimed only role-specific decision-making ability and, unlike a towering political figure, did not assert any capacity for greater moral judgment or political virtue. The new experts emphasized the objective nature of their information – rather than the quality of their personal character – and thus grounded their right to authority on quantifiable skills.

In effect, Epstein, Lynd, and others sketched the outlines of a fundamentally altered relationship between knowledge and decision-making. They presented a modern world in which industrial complexity and new national markets left individuals subject to extreme economic vicissitudes. Moreover, the causes and implications of these forces were beyond the average citizen’s general understanding. While these ideas emerged in the context of the Depression, as we will see they quickly and comprehensively translated to issues of external threat and common defense.

B. Pendleton Herring and the New National Security State

Among the individuals most responsible for this translation of New Deal judgments about expertise to the domain of war and peace was Pendleton Herring. In the process, he helped to fashion an emerging security concept – far removed from the old Lockean position – that justified a dramatic restructuring of governmental institutions toward greater hierarchy and executive discretion. Herring was a political science professor in Harvard’s Government Department who later became president of the American Political Science Association as well as the first Secretary of the U.N. Atomic Energy Agency. During the war he chaired the Committee of Records of the War Administration, overseeing the publication of *The United States at War*, the official governmental account of World War II. In his most central public policy role, he then went on to be one of the primary authors of 1947’s National Security Act, which fundamentally reorganized the nature of American civil and military relations and generated our current defense policy framework.¹⁰¹ In two books, *Public Administration and the Public Interest* (1936) and *The Impact of War* (1941), Herring

⁹⁹ LYND, *supra* note 97, at 247.

¹⁰⁰ For more on the concept of statesmanship, particularly in the domain of foreign policy see generally HENRY KISSINGER, *DIPLOMACY* (1995). As for an account that presents statesmanship as the lawyer ideal par excellence, see generally ANTHONY T. KRONMAN, *THE LOST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

¹⁰¹ See STUART, *supra* note 86, at 1-31 for an excellent account of Herring’s career and his influence in structuring new defense practices.

defended the growing case for the benefits of professional expertise. In particular, he argued forcefully that the same specialized skills that were being applied to the economy could be employed equally to address gathering military threats from abroad.

Like Epstein and Lynd, Herring too had been an avid New Dealer. For him, the Depression underscored that any belief in a self-regulating commercial society – and with it a purely negative role for government – was profoundly inadequate. In his view, “The freedom of a competitive capitalistic order is not compatible with” the goal of protecting individuals from economic uncertainty.¹⁰² In keeping with other New Dealers, he saw freedom from destitution as an overriding aim of collective life and considered that “if a guarantee of economic security is demanded of the government, it must be forthcoming at whatever price.”¹⁰³ As a consequence, Herring took as a foundational element of the new politics the unavoidable truth that, “The day of the positive state is upon us. This is not a matter of choice.”¹⁰⁴ Moreover, this state intervention could not be organized along lines that emphasized the dominance of the legislative branch and thus mass popular participation. He argued that public involvement was a recipe for potential financial ruin, in which “the whole structure [of the economy] will topple and crash.”¹⁰⁵ Pluralistic and widespread deliberation on matters of material survival would only lead to conflict and to decision-making driven by special interests rather than those with actual knowledge about social conditions. As he argued, “Congress is torn by blocs and dominated by organized groups.”¹⁰⁶ Indeed, while Madison’s vision of divided government may have been appropriate for an earlier epoch, in the 1930s and 1940s it only accentuated these problems of disorder and governmental capture by business and sectional entities. For Herring, “A remote system of checks and balances between Congress and the President and between House and Senate has proved a device for stalemate and delay rather than for unity or responsibility of control.”¹⁰⁷ He believed that the solution was to develop an institutional structure “for introducing expertise”¹⁰⁸ into political decision-making. Such expertise would “join the disparate economic forces of society behind a unified political program,”¹⁰⁹ one that focused state action on the objective and technical provision of social welfare and material necessity.

In Herring’s opinion, the only sustainable method of ensuring this unity of purpose was by substantially expanding executive power and eliminating many of the existing checks on presidential prerogative: “The vast increase of the President’s powers is a trend that must be encouraged for the sake of democratic government. There is great need for guidance and unity in the framing of national policy, and this can best be done through the Chief Executive.”¹¹⁰ Importantly, however, this increase was not meant to establish supreme authority in the single will of the President himself,

¹⁰² Pendleton Herring, *A Prescription for Modern Democracy*, 180 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 138 (1935).

¹⁰³ *Id.*

¹⁰⁴ PENDLETON HERRING, *THE IMPACT OF WAR* 22 (1941).

¹⁰⁵ Herring, *Modern Democracy*, *supra* note 102, at 139.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 140.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 141.

as Hobbes may have imagined centuries earlier. Instead, Herring saw the executive branch as the best institutional site for situating new experts skilled in the science of economics and capable of making informed decisions about matters of industry and finance. He called for a series of agencies within the executive branch, each attuned to studying and solving specific aspects of the broader question of economic necessity. Above these agencies would be a “national administrative council.”¹¹¹ This council would combine and articulate expert advice, and in the process create a unified policy framework out of the patchwork structure of specialized professionals. Herring concluded that, “Our goal is not the eradication of all disagreement, but rather the expression of a state purpose by a responsible agency expert in character and in close touch with the realities of the situation that must be met.”¹¹²

Crucially, Herring did not call for the elevation of the President per se, but rather the elevation of a professional elite which would staff scientific agencies within the executive branch and thereby “become the responsible agent of public purpose.”¹¹³ Thus, the role of the President would be to take these technical judgments and present them to the public at large, where citizens could choose to “accept or reject”¹¹⁴ the programmatic agenda developed by administrators. The inevitable and, for Herring, much needed consequence would be a drastic reduction in the lawmaking responsibilities of Congress. According to Herring, “If Congress wishes to go contrary to the recommendations of this body, it remains free to do so, but it is . . . put on the defensive, and its decisions are open to the suspicious scrutiny of the administration, the public, and the special interests allied with the presidential program.”¹¹⁵ At the same time, he also sought to limit the President’s own function, precisely because Presidents too may be beholden to special interests and swayed by irrational public opinion. Instead, Herring imagined an insulated decision-making apparatus, independent of mass prejudice and corporate capture, which could set the parameters for political debate within representative government. He realized that such a vision appeared to repudiate much of the democratic notion of self-rule, but argued that these changes were essential given modern complexity and its related disorders. If individuals sought a “peaceful adjustment of social conflicts, it thereby involve[d] a willingness . . . to make substantial sacrifices.”¹¹⁶

As the 1930s drew to a close and Americans started to focus on international events, Herring began connecting these arguments about executive and administrative power to the looming specter of war. Herring maintained that those issues of modern complexity and permanent crisis which plagued domestic economic life were even more troubling in the context of foreign affairs. There, the rise of totalitarian regimes meant that the U.S. now faced external enemies that due to ideology could not be deterred in the same way as old European rivals. Moreover, technological improvements – especially the rise of air power – indicated that the U.S. was no longer safe behind the oceans. Hamilton had once imagined that American isolation ensured that peace from

¹¹¹ *Id.* at 143.

¹¹² *Id.* at 146.

¹¹³ *Id.* at 148.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 147.

¹¹⁶ *Id.*

foreign threat was the pervasive social experience. Now, by contrast, scientific developments implied that domestic tranquility faced continuous dangers from enemies that could not be accommodated or reasoned with through arguments about strategic self-interest. As Herring argued in *The Impact of War*, the result was that, “International affairs have become domestic problems.”¹¹⁷ By this, he not only meant that the home front was now under potential assault. He also suggested that domestic questions of economics were increasingly central to matters of defense and military preparedness. Since industrial production was the key to creating an air force and a mechanized army, economic prosperity was essential to limiting the threats posed by external foes. Herring posited that, “In our economic and social life we must now take on the characteristics of a people living in proximity to warlike neighbors and engaged in stern competition. The margins of safety that our democracy has known are being cut away.”¹¹⁸ What made the problems especially perilous was the fact that totalitarian regimes were better equipped than democracies to take advantage of new technologies of transportation, warfare, and even communication. This was because the centralized nature of fascist or communist states allowed them to aggregate authority in expert administrators and to avoid the inefficiencies and confusion of mass deliberation.

For Herring, the only method for overcoming these new circumstances was to employ the same conceptual and government structures appropriate to combat the Great Depression; this would create a permanent institutional infrastructure for responding to global threats. He began by invoking a relatively novel phrase – “national security”¹¹⁹ – to mirror the domestic discourse of economic security. The term itself had existed before, although used quite sparingly. During World War I, corporations and pro-war nativists had organized the National Security League, which at its peak in 1916 included nearly 100,000 members across the country. The League became a central mechanism for enflaming anti-German and then anti-communist hysteria as well as in assisting government efforts to suppress general opposition to the war. But with the end of the Red Scare the League crumbled and by 1940 the organization had declared bankruptcy; its leader burned the League’s archives to avoid public knowledge of its wartime practices.¹²⁰ As a result, during the 1930s the term was still largely unfamiliar. In fact, as historian Mark Neocleous writes, “the multi-volume *Encyclopaedia of the Social Sciences*, published by MacMillan in 1934, contained no entry for ‘national security.’”¹²¹

¹¹⁷ HERRING, *THE IMPACT OF WAR*, *supra* note 104, at 15.

¹¹⁸ *Id.* at 16.

¹¹⁹ See *id.*

¹²⁰ See generally Mark Shulman, *The Progressive Era Origins of the National Security Act*, 104 *DICKINSON LAW REVIEW* 289 (2000). For more on the rise and fall of League membership, see JOHN WHITECLAY CHAMBERS, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA* 81 (1987). The League was founded by Wall Street lawyer Solomon Stanwood Menken and bankrolled by wealthy businessmen and tycoons, like the publishing giant George H. Putman. By the early 1920s, it became synonymous with nationalist extremism and paranoia. According to the League, enemies to the country “included all those who were not ‘100% American,’ eventually meaning not only foreign nationals, pacifists, many immigrants, and political radicals, but also trade union members, Congressmen who voted against critical pieces of legislation, and even the people of Wisconsin.” Shulman, *supra* note 120, at 305-306.

¹²¹ See NEOCLEOUS, *supra* note 33, at 77.

But now, Herring employed the phrase to argue that just as economic security was the dominant domestic objective, national security – the protection of the state and the way of life associated with it – should be understood as the dominant global objective. The threats to collective survival meant that defense policy could not be left to the same special interests and conflicting social forces that so recently brought the country to financial destitution. Instead the commitment to national security required a degree of social unity and centralized command, which outstripped even that needed to confront the Depression. According to Herring, “[a]s a nation we are facing a new world. This means a drastic change in the context within which our political institutions operate.”¹²² Herring sought to reassure critics by arguing that although he was not calling for the U.S. simply to mimic authoritarian states, he nonetheless believed that the country’s leaders could learn from authoritarian methods of shaping policy and projecting power. In other words, “This does not mean that the opponents of Nazi Germany must become Nazified if they are to resist, but it does mean that totalitarian states can be opposed only through an equally effective mobilization of resources.”¹²³

Herring believed that such mobilization in the name of national security necessitated a series of basic shifts in the approach to American foreign relations. First, it entailed unleashing scientific and military expertise in the drive to eradicate external threats. Just as ordinary citizens were increasingly incapable of making sense of their own economic conditions, similar harsh truths governed the global arena. While individuals had an interest in their own physical protection, they had limited capacities to gauge the seriousness or immediacy of potential dangers. In order for such dangers to be assessed properly, government had to empower professionals skilled in intelligence gathering, technological development, and military preparedness. In the same way that economists and other financial experts should address market cycles, industrial production needs, and the provision of social welfare, similar professionals – centralized and insulated in the executive branch – also should exist to oversee matters of war and peace.¹²⁴

Second, this infrastructure should maintain a permanent and established role for professional soldiers in determining foreign policy goals. The Lockean security concept had long assumed that not only was civilian command essential to avoiding military despotism, but also that ordinary Americans – without any formal training in warfare – were capable of deciding how best to structure defense resources and military mobilization. Now, however, Herring asserted that, “if democratic governments are to cope with the world today the military must have an accepted place in our scheme of values.”¹²⁵ Only members of the military had the knowledge to make sense of specialized questions of preparedness, questions essential to long-term strategic thinking.

Finally, undergirding such centralization and military influence was a focus on secrecy and a rejection of old presumptions in favor of political transparency and public access. In order to respond to threats from abroad, the state needed to remain one step ahead of its potential enemies. This required developing a new formalized network of

¹²² HERRING, *THE IMPACT OF WAR*, *supra* note 104, at 277.

¹²³ *Id.* at 14.

¹²⁴ *Id.*

¹²⁵ *Id.* at 20.

spies as well as linguistic and technological experts skilled in collecting and sifting through intelligence. Above all, this national security framework – built on expertise, centralization, military influence, and institutional secrecy – took for granted that just as crisis was a permanent condition of economic life it also was a constant element of international politics. In contrast to the assumptions of Locke, Hamilton, or Jefferson, no clear sociological divide existed between times of war and times of peace. If anything, reality had come to approximate the old Hobbesian image of endemic insecurity in a world of ideological antagonism, one utterly bereft of any shared moral framework. As such, Herring concluded that Americans had to reconcile themselves, regardless of old fears of military despotism, to the fact that constant threat meant that, “Democracy may have to remain under arms for a long time to come.”¹²⁶

At root, Herring’s account entailed treating ‘national security’ as a unifying commitment, one that (even more so than with economic security) transcended ordinary popular disagreement and thus was appropriately removed from the regular political process. He argued that, if threats had now become continuous and ever-present, it was also the case that, “[a] democracy can stand under arms and remain true to its values to the extent that it can call upon deep communal reserves of agreement.”¹²⁷ For Herring, while the United States should remain an open society, he nonetheless concluded that, “[n]o internal resistances to these domestic efforts can be tolerated.”¹²⁸ As a consequence, if a balance between liberty and security must be struck, security had to enjoy primacy of place as both pre-political and the foundation of American unity. It embodied the lodestar around which to calibrate constitutional rights and other collective interests. In Herring’s view, although these new arrangements may reject previous assumptions about popular responsibility and self-rule, they nonetheless brought with them a far greater likelihood of survival in a world of unprecedented danger.

Herring’s national security vision was especially persuasive in the wake of World War II. To Washington policymakers, his arguments in *The Impact of War* appeared particularly prescient given that they were published only months before Pearl Harbor, an event which for many political commentators shattered the old faith in domestic safety behind the oceans.¹²⁹ The National Security Act of 1947, aptly using Herring’s phrase, gave legal substance to many of his ambitions. As historian Douglas Stuart writes of the law:

It created a National Military Establishment, which became the Department of Defense in 1949. It gave the Air Force an independent status and provided the Joint Chiefs of Staff with statutory identity. It established the National Security Council (NSC), the Central Intelligence Agency (CIA), and a cluster of lesser-known institutions, including the

¹²⁶ *Id.* at 277.

¹²⁷ *Id.* at 282.

¹²⁸ *Id.* at 14.

¹²⁹ In words that mimicked Herring, Secretary of War Henry Stimson wondered aloud to Roosevelt days after Pearl Harbor “whether our basic theory of defense and reliance upon that fortress is not too static and whether the Japanese have not . . . by this fearful disaster revealed to us a situation which must be remedied.” Quoted in DANIEL YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* 193 (1977). For more on the role of Pearl Harbor in pressing policymakers toward what historian Daniel Yergin influentially referred to as the “gospel of national security” and its related institutional infrastructure, see especially *id.* at 193-220.

National Security Resource Board, the Munitions Board, and the Research and Development Board.¹³⁰

Among the long-term implications of these changes was the creation of a permanent and peacetime structure for gathering intelligence, the elevation of the policymaking responsibility of military officers, and the dramatic growth of executive agencies tasked with issues of defense.

In a sense, the implementation of Herring's ideas embodied a direct assault on the classic Lockean account of the relationship between security, knowledge, and popular power. The modern security discourse presented an image of politics marked by uncertainty, public ignorance, and the near continuous condition of threat or crisis. It thus embodied some of the most troubling components of Hobbes's seventeenth century account and ignored those elements still compatible with democratic self-government. For Hobbes, a basic lack of knowledge left the state of nature as one of war and anxiety. It also justified the creation of a unified and absolutist authority to impose security on collective life. But precisely because no one – neither citizens nor the sovereign – had unique insight into the true causes and consequences of external threat, Hobbesian politics nevertheless was compatible with widespread deliberation and democratic discussion, so long as a final, authoritative decision was reached. By contrast, Herring, not to mention Lippmann, Epstein, and Lynd, indicated that ignorance was a specifically mass political and cultural phenomenon; the possibility of *elite* misjudgment was discounted if even addressed. On the most important issues of war and peace, therefore, deliberation had limited value in reaching conclusions and indeed was far more likely to produce greater chaos and instability. Thus, this new discourse went beyond Hobbes to present a world of hierarchy and danger with only limited space for popular action.

One should note that Herring and others did imagine a key check on state power. Given professional specialization, decision-making in the modern security state would necessarily incorporate massive numbers of issue-specific experts and thereby curtail centralizing tendencies. Rather than a single and absolutist Leviathan (whether an individual or an assembly), Herring presented decision-making as organized through pockets of overlapping administrative institutions and actors. This inevitably devolved authority across a broad class of professional managers, each ideally selected on the basis of actual knowledge and empirical skill. Nonetheless, the new arrangements still expanded fundamentally the discretion available to these actors and agencies. In fact, what reinforced this discretion was a concurrent shift in how the courts by and large came to approach the security judgments made within the executive broach. Nineteenth century jurists like Taney, wedded to the belief in democratic intelligence, had considered both judges and juries fully capable of assessing the reasonableness of security decisions. Taney saw his responsibility as policing state prerogatives and protecting the sphere for popular decision-making by empowered and knowledgeable citizens. By contrast, many of his twentieth century counterparts accepted the truth of role-specific expertise and the need for judicial deference, particularly in questions of emergency and self-preservation. As the next section explores, no judge better expressed the emerging approach than Felix Frankfurter, the great New Deal lawyer and Supreme Court Justice.

¹³⁰ STUART, *supra* note 86, at 8.

V. FELIX FRANKFURTER AND THE DEFERENTIAL COURT

Today, a central feature of American legal and political life is the pervasive tendency of courts to tread lightly with respect to executive branch determinations of external threat. This tendency evocatively illustrates the extent to which Herring's reworking of the security concept has been internalized even within the judiciary. At first glance, this fact is rather surprising, given the common image of the courts as an all-knowing and elevated priesthood.¹³¹ Yet, the clear trend in recent decades has been the steady reduction in judicial confidence to intercede where security expertise is invoked. In effect, growing judgments about knowledge, specialization, and threat have not only influenced political policymakers, but they have also shaped how judges imagine their own function and responsibilities. Such a reduction in confidence underscores how judges have come to see themselves as trapped in the same lay position of uncertainty as ordinary citizens and – therefore like the public writ large – ill equipped to intervene in matters of security.

To make sense of how the new security concept transformed the judicial role, this section will explore the philosophy of Supreme Court Justice Felix Frankfurter, the legal figure who best embodied the ideological developments of such arguments in mid-twentieth century jurisprudence. First, I will situate Frankfurter's defense of executive emergency power within a broader argument about the benefits of administrative expertise and the pitfalls of judicial activism. This discussion will focus on how Frankfurter, in defending enhanced decision-making responsibility by professionals, sought to reimagine the classic definition of democracy around the idea of merit. For Frankfurter, democracy should not be thought of as a principle of majority rule or of collective self-government, but rather as rule by those with natural talent in a socially mobile society. I will next describe how Frankfurter applied this theory of merit and expertise to questions of security, in the process reinscribing unfettered executive power as the fulfillment rather than the rejection of democratic practice. Finally, the section will end with a discussion of how Frankfurter's ideas continue to shape contemporary case law, highlighted most recently by the Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project*.

A. Merit, the Open Society, and Court Restraint

For Herring, continuous external threats in a world marked by technological change and totalitarian regimes required compromising on democratic principles. In his view, the move to centralized executive power, a large-scale defense bureaucracy, and a permanent role for the professional military in foreign policy were all understood as necessary but perhaps regrettable developments: he referred to them as “substantial

¹³¹ Perhaps the most famous twentieth century articulation of judicial supremacy in constitutional interpretation is the majority opinion in *Cooper v. Aaron*, 358 U.S. 1 (1958). There, the Court expanded upon the meaning of Chief Justice John Marshall's claim in *Marbury v. Madison* that it is “emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). According to the *Cooper* majority, *Marbury* stood for the “principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” *Cooper*, 358 U.S. at 18.

sacrifices.”¹³² But for Felix Frankfurter, these changes were perfectly consistent with what he believed to be an ‘open society’; to the extent that they placed authority in talented decision-makers they suggested a new and more compelling vision of democratic practice itself. Today, Frankfurter’s arguments about security, merit, and expertise are pervasive in the law of emergency and executive power; they also capture key ideological justifications for the country’s ever-expanding national security infrastructure.

In order to appreciate how Frankfurter developed his merit-based account of the relationship between security and democracy, it is helpful to begin with his own personal experience. He arrived in New York from Vienna at the age of twelve as a Jewish immigrant unable to speak English. But due to his intelligence and hard work, he rose quickly through the social ranks. He pursued a five-year program at City College of New York that combined both high school and college, and then went on to study law at Harvard, where he finished first in his class.¹³³ For Frankfurter, this life trajectory spoke to the openness of American society; the meritocratic nature of collective life distinguished the country from its European rivals and made it a polity uniquely structured for the achievement of material and cultural progress. As Frankfurter later wrote to FDR on the eve of World War II, social mobility was more than simply an aspiration, it was a lived experience in the United States and daily proof that success was open to all those with talent:

Not even you can quite feel what this country means to a man like me, who was brought here as an eager sensitive lad of twelve My father . . . fell in love with the country, and particularly with the spirit of freedom that was in the air. And so he persuaded my mother to uproot the family, and from the moment we landed on Manhattan I knew, with the sure instinct of a child, that this was my native spiritual home.¹³⁴

This belief that America was defined by an ideal of meritocratic opportunity was hardly a novel one. In a famous letter to John Adams, Thomas Jefferson argued in the early nineteenth century that there is a “natural aristocracy amongst men” who are marked by “virtue and talents.”¹³⁵ The natural aristocracy was “the most precious gift of nature for the instruction, the trusts, and government of society.”¹³⁶ He distinguished this natural aristocracy from the “artificial aristocracy founded on wealth and birth, without either virtue or talents.”¹³⁷ The latter won its power through circumstances and laws that protected the privileges of birth – like laws of primogeniture or hereditary political positions. For Jefferson, what distinguished the American project was a commitment to ending feudal and oppressive hierarchies and ensuring that those who wielded power actually deserved this authority.

¹³² See *supra* notes 110-116 and accompanying text.

¹³³ See JEFFREY D. HOCKETT, *NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON* 142 (1996).

¹³⁴ Quoted in Stanford Levinson, *The Democratic Faith of Felix Frankfurter*, 25 *STAN. L. REV.* 430, 446-447 (1973).

¹³⁵ Thomas Jefferson, Letter to John Adams (Oct. 28, 1813), <http://press-pubs.uchicago.edu/founders/documents/v1ch15s61.html>.

¹³⁶ *Id.*

¹³⁷ *Id.*

Still, during much of the nineteenth century calls for aristocracy in any form faced an uphill political battle, given the overwhelming leveling impulse – powerfully embodied by Jacksonian politicians and their supporters. For critics like Orestes Brownson, who rejected any divide between a “learned” and an “unlearned” class,¹³⁸ Jefferson’s view was only egalitarian in appearance. While it repudiated inherited status, wealth, and power as all undeserved, at its heart the ideal was nonetheless decidedly inegalitarian. Meritocracy was a theory of society in which a majority were deferential to, even subject to, the power and authority of the naturally talented few. Above all, a natural aristocracy undermined the presumption in favor of ‘omnicompetent’ citizenship and democratic intelligence, in which basic social knowledge was understood to be widely distributed. It suggested that differences in raw personal talent translated into meaningful differences in decision-making capacity, such that a select few should legitimately wield principal collective power. As a model for society, Jefferson’s vision did not challenge the permanent existence of a hierarchy, but instead sought to rearrange its membership.

Despite qualms voiced in earlier generations, Frankfurter – like Herring, Lynd, and others who came of age politically during the Great Depression – saw modern complexities as increasingly belying unquestioned Jacksonian faith in mass rationality. As Frankfurter wrote in *The Public and Its Government* (1930), the complexities and interdependence of modern society made “heavy demands upon wisdom and omniscience.”¹³⁹ Referencing economic turmoil as just one illustration of the need for specialized decision-making, Frankfurter declared, “We have seen the intricate range of problems thrown up by our industrial civilization; the vast body of technical knowledge, more and more beyond the comprehension even of the cultivated, which is required for an analysis of the issues underlying these problems and an exploration of possible remedies.”¹⁴⁰

These views encouraged Frankfurter to reclaim Jeffersonian judgments about natural aristocracy and to link them explicitly to growing intuitions about professional expertise. In his view, the complexity of prevailing conditions indicated that democracy conceived of as popular self-rule through direct and continuous participation was “not remotely an automatic device for good government nor even for a peaceful society.”¹⁴¹ The only way to make democracy compatible with long-term stability and security was to think of it in terms of meritocracy, as a political order marked by social mobility and governed by natural talent and objective knowledge. Under such an approach, democracy truly consisted of “the reign of reason on the most extensive scale.”¹⁴²

This reimagining of democratic ambition and purpose brought with it two key governmental shifts for Frankfurter. First, like Herring, it led Frankfurter to call for the expansion of a new administrative state housed in the executive branch. This apparatus would function in a manner similar to how he believed practices in England operated, where

¹³⁸ See *supra* text accompanying note 63.

¹³⁹ FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 35 (1930).

¹⁴⁰ *Id.* at 127.

¹⁴¹ *Id.* at 127.

¹⁴² *Id.*

the basis of political thinking . . . [was] the pervasive responsibility of a highly trained and disinterested permanent service, charged with the task of administering the broad policies formulated by Parliament and of putting at the disposal of government that ascertainable body of knowledge on which the choice of policies must be based.¹⁴³

In essence, while the public through its legislators and elected representatives would provide general statements of policy direction, it would be left to insulated administrators in presidential agencies to make sense of how to conceive of and pursue these goals.

Second, this vision of democracy as meritocracy indicated a profound wariness of judicial meddling into administrative, congressional, and presidential judgments. As long as the United States remained bound to the principle of equal opportunity, such that professional elites – selected on the basis of natural talent and scientific excellence – framed collective decision-making, little rationale existed for judicial interventionism and aggressiveness with respect to the other branches.¹⁴⁴ Frankfurter was particularly troubled by judicial efforts to strike down New Deal legislation, aimed at regulating the economy or providing minimum safeguards to workers, on the basis of theories of substantive due process and freedom of contract. Frankfurter believed that judges, due to the abstractness of their opinions and their lack of specialized knowledge about industrial processes, were poor decision-makers in most fields of social policy. He called the “veto power of the Supreme Court”:

at once the most destructive and the least responsible [tool of government]: the most destructive, because judicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error; the least responsible, because it so often turns on fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal dooms of the Constitution.¹⁴⁵

For Frankfurter, this lack of judicial expertise meant that deference should attach not only to the decisions of elected representatives but also to those of agencies tasked with specifying the meaning of broad policy objectives and implementing those objectives. In his view, the court was not an appropriate guard against bureaucratic mistakes or abuses of discretion. The “ultimate protection” against abuse was “to be found in ourselves, our zeal for liberty.”¹⁴⁶ This zeal had to be “institutionalized through machinery and processes.”¹⁴⁷ And successful institutionalization “largely

¹⁴³ *Id.* at 145.

¹⁴⁴ As Sanford Levinson wrote of Frankfurter, his “conception of America, and of the American presidency as represented by Franklin Roosevelt, led him to accept absolutely the major premise underlying his theory of judicial restraint – namely, the United States is in fact an open polity, and there is therefore no need for an alert and active Court to further the development of greater openness.” See Levinson, *supra* note 134, at 430.

¹⁴⁵ FRANKFURTER, *supra* note 139, at 50-51.

¹⁴⁶ *Id.* at 159.

¹⁴⁷ *Id.*

depend[ed] on very high standards of professional service.”¹⁴⁸ In other words, so long as merit and objective knowledge shaped administrative decision-making, the dangers presented by an unchecked executive or by bureaucratic discretion remained limited. This led him to conclude that in matters of administrative practice, the judiciary simply should assess whether decisions were consistent with the outer limits of rational policy.

Once on the Supreme Court, Frankfurter employed such a ‘rational basis’ test to assert a remarkably expansive vision of judicial deference, in one case arguing that:

Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts . . . to deem the view of the administrative tribunal . . . offensive to the Fourteenth Amendment.¹⁴⁹

In fact, the Court should go so far as to defer to administrative judgments “even in the face of convincing proof that a different result would have been better.”¹⁵⁰ At root, Frankfurter saw judicial intervention as liable to interject subjective prejudices and arbitrariness into public policymaking, in ways that countermanded much needed and socially beneficial expertise.

B. Security, Executive Practice, and the Functional Constitution

The extent to which Frankfurter imagined specialized knowledge as a limitation on judicial activism is most powerfully highlighted by his vision of executive leadership in questions of security. As World War II replaced the Depression as the overwhelming collective problem, Frankfurter readily employed the same judicial logic of deference to defend executive discretion and broad acceptance of judgments grounded in military necessity. In case after case, during and after World War II, Frankfurter developed a ‘national security’ jurisprudence built on constitutional flexibility and presidential power – often expanding the potential boundaries for future executive authority even in those cases in which he technically ruled against the executive branch.

In the context of military tribunals and the domestic treatment of those of Japanese descent, Frankfurter did not simply defend executive policies; he played the role of White House cheerleader on the Supreme Court, going out of his way to convince fellow justices to abstain from constraining presidential actions. Years later, Frankfurter referred to the decision in *Ex parte Quirin* (1942), as “not a happy precedent.”¹⁵¹ There the Supreme Court upheld the jurisdiction of a U.S. military tribunal, established by executive proclamation, to prosecute suspected saboteurs sent by the Nazi government.¹⁵² At the time, however, Frankfurter strongly backed the constitutionality of the tribunals. In the days preceding Roosevelt’s proclamation, he had frequent interactions with the White House, even telling Secretary of War Henry Stimson that the tribunal should be composed of soldiers entirely, as civilians may not fully appreciate the danger posed to the homeland by Nazi infiltration.¹⁵³ Despite these

¹⁴⁸ *Id.*

¹⁴⁹ See *Railroad Comm’n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 581-582 (1940), also quoted in HOCKETT, *supra* note 130, at 172.

¹⁵⁰ *Railroad Comm’n*, *supra* note 149, at 584.

¹⁵¹ Quoted in FISHER, *MILITARY TRIBUNALS*, *supra* note 64, at 124 (2005).

¹⁵² *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁵³ See FISHER, *MILITARY TRIBUNALS*, *supra* note 64, at 108.

encounters and the fact that months before the Court even agreed to hear the case Frankfurter already was committed to backing Roosevelt's actions,¹⁵⁴ he refused to recuse himself from the case. Instead, he actively campaigned on the Court for a single and unanimous majority opinion defending executive prerogative. As legal scholar Louis Fisher writes:

At some point in October, when it looked like the Court might fragment with separate statements, Frankfurter wrote a bizarre document he called "F. F.'s Soliloquy". . . . The soliloquy represented a conversation between Frankfurter and the saboteurs, six of whom were now dead. After listening to their legal claim, he called them "damned scoundrels [who] have a helluva cheek to ask for a writ that would take you out of the hands of the Military Commission." He referred to them as "just low-down, ordinary enemy spies," and that there was no cause to create "a bitter conflict" among the three branches "after your bodies will be rotting in lime."¹⁵⁵

Although Frankfurter's strong sentiments no doubt were influenced by the extreme nature of the Nazi regime in Germany, his approach to the case was hardly an anomaly. In 1943, when the legality of the military's domestic curfew on all enemy aliens – including Italians, Germans, and both citizen and non-citizen Japanese – reached the Supreme Court, Frankfurter played a similar role to that in *Quirin* a year earlier. In particular, he fought behind the scenes again to guarantee a unanimous opinion in *Hirabayashi v. United States* (1943), arguing that any dissension on the Court would undermine national unity during a time of war, and suggest to the public that the justices lacked confidence in presidential and military judgments. He ultimately convinced Justice Frank Murphy to recast his dissenting opinion as a concurrence, in the process ensuring a 9-0 vote upholding the curfew.¹⁵⁶

The following year, when the Court once more was faced with the constitutionality of presidential and military orders – this time to intern 110,000 Japanese and Japanese Americans living on the Pacific Coast – Frankfurter no longer could maintain a united front on the Court, as Murphy along with Justices Robert Jackson and Owen Roberts all dissented. Still, in his concurrence in *Korematsu v. United States* (1944), Frankfurter reasserted the importance of highly deferential review of executive practices, especially in security contexts where the government acted on the basis of perceived military necessity. For Frankfurter, just as judges did not have the social scientific knowledge to assess the intricacies of industrial life, they similarly lacked the capacity to determine what may or may not be required during wartime. Only military and civil defense professionals truly knew what dangers the country faced and how best to employ intelligence gathering, technological hardware, and the coercive tools of the state to confront these threats to security. In his view the "respective spheres of action" of judges and of military personnel were fundamentally "different."¹⁵⁷

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* at 116.

¹⁵⁶ *Hirabayashi v. U.S.* 320 U.S. 81 (1943). For more on the case and Frankfurter's private negotiations, see STONE, *supra* note 64, at 297-299 (2004).

¹⁵⁷ *Korematsu v. U.S.*, 323 U.S. 214, 225 (1944) (J. Frankfurter, concurring).

In dissent, Murphy challenged this vision of judicial deference and reminded those in the majority of the *Mitchell v. Harmony* standard, which had long been the Supreme Court's approach to assessing military necessity:

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.¹⁵⁸

According to Murphy, judges enjoyed the right to aggressively interrogate the necessity of military actions and had the ability to do so on the basis of shared and common knowledge.

But for Frankfurter, ordinary rationality was an unhelpful guide in matters of war and peace, and the same extreme deference – underscored by the Court's rational basis test – that applied in other policymaking arenas was appropriate when it came to professional judgments about warfare and emergency. In fact, Frankfurter argued that what counted as constitutional inevitably expanded depending on circumstance, and ultimately on whether experts trained in the science of warfare found their actions to be "reasonably expedient military precautions."¹⁵⁹ In his opinion:

[T]he validity of action under the war power must be judged wholly in the context of the war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality.¹⁶⁰

In effect, Frankfurter read the Constitution flexibly, as a set of functional powers that adapted to fit the security needs of the community.¹⁶¹ Just as in the case of economic policy, to allow the abstract thinking and "dialectic subtleties"¹⁶² of the Court to trump the specialized expertise of skilled professionals would leave the country in grave danger and at the mercy of its enemies.

Even when Frankfurter, in the context of the Korean War, was willing to curtail executive authority, he did so in a way that, as Jules Lobel has noted, contained "the seeds for an expansion of the President's emergency power."¹⁶³ In *Youngstown Sheet and Tube Co. v. Sawyer* (1952), the Court invalidated President Truman's seizure of the steel mills, holding that he lacked either the statutory or constitutional authority to do so, especially given Congress's explicit refusal to delegate this power when passing 1947's Taft-Hartley Act.¹⁶⁴ While Justice Hugo Black's opinion for the court (no opinion received a majority of votes) emphasized textualism and clear formal categories

¹⁵⁸ *Id.* at 234 (J. Murphy, dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ For more on idea of Frankfurter as articulating a functional theory of the constitution, see especially Lobel, *supra* note 74, at 1410-1412.

¹⁶² *Korematsu*, 323 U.S. at 225 (J. Frankfurter, concurring).

¹⁶³ *Id.* at 1410.

¹⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

of legality and illegality, Frankfurter's concurrence reiterated that the Constitution had to be read as a functional document. To begin with, this meant that while such authority may not have been justified in the case at the hand, the President nonetheless enjoyed inherent emergency power depending on the circumstances.¹⁶⁵ Even more important, congressional acquiescence to executive practice also had the potential to create a presumption in favor of constitutionality, in effect providing the President with legally-sanctioned lawmaking powers. Quoting Oliver Wendell Holmes, Frankfurter explicitly rejected Black's textual approach and declared that the "'great ordinances of the Constitution do not establish and divide fields of black and white.'"¹⁶⁶ According to him, the Constitution had to be understood in the context of contemporary problems, and as capable of contracting or extending its allocation of authority based on society's objective needs. He maintained that, "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."¹⁶⁷ For Frankfurter, this fluid reading of the law was an essential corollary to his larger judgments about security expertise. For government to implement policies on the basis of empirically tested evidence, the empty formalism of the courtroom could not be used as a tool to hamstring properly informed decision-making. As Frankfurter stated in *Korematsu*, it was his belief that the victory of such formalism over professional reason could not have been the wish of the Constitution's "hard-headed Framers."¹⁶⁸

C. Contemporary Case Law and Frankfurter's Progeny

At present, Frankfurter's vision of constitutional flexibility and his faith in security expertise have become defining features of how the courts often address questions of threat and emergency. In the process, judges and lawyers have embedded in contemporary constitutional interpretation a fundamental security divide between elite and lay capacities, one that promotes the increasing legal sanction of discretionary executive power. Take, for example, the Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project*: a striking example of how the conventional wisdom regarding security and knowledge has shifted since the days of *Mitchell v. Harmony*. In *Humanitarian Law Project*, Chief Justice John Roberts' majority opinion upheld the constitutionality of the "material support statute," 18 U.S.C. § 2339B, as it applied specifically to lawful and nonviolent support of foreign entities designated by the State Department as "terrorist" organizations.¹⁶⁹ In the case, Humanitarian Law Project (HLP), a non-governmental organization (NGO) with consultative status at the United Nations, had sought to provide humanitarian assistance to two such groups, the Kurdish People's Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The HLP's objective was to limit the propensity of the PKK and LTTE to resort to terrorism by

¹⁶⁵ In hinting at the potential legitimacy of inherent presidential authority under other, unspecified conditions, Frankfurter starts his concurrence by writing: "We must . . . put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short explicitly temporary period . . ." *Id* at 597 (J. Frankfurter, concurring).

¹⁶⁶ *Id.*, also quoted in Lobel, *supra* note 74, at 1411.

¹⁶⁷ *Youngstown*, *supra* note 164, at 610 (J. Frankfurter, concurring).

¹⁶⁸ *Korematsu*, *supra* note 157, at 225 (J. Frankfurter, concurring).

¹⁶⁹ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

promoting peaceful means for the groups to advocate on behalf of Kurdish and Tamil communities.¹⁷⁰ In defending the criminal prohibition, the Court argued that all external support, even peaceful training, was a “fungible” commodity, which “free[d] up other resources within the organization that may be put to violent ends.”¹⁷¹

In dissent, Justice Stephen Breyer questioned the fungibility claim, noting that the Government had provided “no empirical information” to support this proposition and that “there [was] no *obvious* way in which undertaking advocacy for political change . . . [was] fungible with other resources that might be put to more sinister ends.”¹⁷² The Majority’s reply was quite telling. Rather than marshalling concrete evidence, the Court invoked “an affidavit stating the Executive Branch’s conclusion on that question.”¹⁷³ Indeed, the Court continued by arguing that in matters of security, the executive branch’s judgments were entitled to deference, regardless of whether it had provided “hard proof—with ‘detail,’” “‘specific facts,’” or “‘specific evidence.’”¹⁷⁴ In this particular “area,” where the “impact of certain conduct [was] difficult to assess,” the judiciary’s “lack of competence” or capacity to “draw[] factual inferences” was “marked.”¹⁷⁵ In effect, the Court maintained – in language virtually identical to Frankfurter’s half a century earlier – that when it came to making sense of gathering threats, judges (much like citizens generally) did not possess the specialized skills needed to understand complex and often conflicting information. In issues of common defense, an interpretative gulf existed between expert and layperson, one that the judiciary was bound to respect.

The view expressed in *Humanitarian Law Project* follows the logic present in numerous other opinions – where the courts avoid challenging executive branch decisions by claiming security matters to be beyond the competence of the judiciary. As the Third Circuit declared in post-September 11 litigation concerning secret deportation hearings, “[w]e are quite hesitant to conduct a judicial inquiry into the credibility of [the government’s] security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise.”¹⁷⁶ Indeed what is most remarkable about the invocation of security expertise is that it does not only occur in the context of arcane intelligence debates, but also when questions of public record and seemingly common sense fact are involved. For example, the courts in recent years have proved especially unwilling to adjudicate as a question of fact whether or not military “hostilities” are imminent or constitute an actual state of war. In 1988, escalating tensions and tit for tat reprisals between the U.S. and Iran in the Persian Gulf, referred to as the “Tanker War,” ultimately led a U.S. cruiser mistakenly

¹⁷⁰ The HLP hoped to train the PKK and the LTTE in how to use international law to resolve disputes, including how to petition the United Nations and other representative bodies for relief. *Id.* at 2716.

¹⁷¹ *Id.* at 2725.

¹⁷² *Id.* at 2735 (Breyer, J., dissenting).

¹⁷³ *Id.* at 2727.

¹⁷⁴ *Id.* at 2727-28.

¹⁷⁵ *Id.* at 2727.

¹⁷⁶ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d 198, 219 (3rd Cir. 2002). This litigation produced a split in the circuits that remains unaddressed by the Supreme Court. While the Third Circuit upheld the constitutionality of the government’s decision to blanketly close hundreds of deportation hearings deemed of “special interest,” the Sixth Circuit – quoted in the introduction – struck down the practice. *See supra* note 3 and accompanying text.

to shoot down a civilian Iranian airliner in the Persian Gulf, killing 290 people. The reprisals generated litigation about whether the President was required under the War Powers Resolution to file an “imminent hostilities report” and to involve Congress at an early stage in military decision-making. In *Lowry v. Reagan*, the district court however found the case to present a non-justiciable political question.¹⁷⁷ Whether or not hostilities were imminent was a determination beyond the fact-finding capacities of any court, given the nature of the judicial process and the “Court’s lack of access to intelligence information and other pertinent expertise.”¹⁷⁸

Later, in the lead up to the First Gulf War with Iraq, another district court similarly concluded that assessments of whether or not a war existed or of what empirical conditions would even amount to war were outside the scope of judicial knowledge. As the judge in the case, Royce Lambert, wrote:

Ange [the plaintiff] asks the court to find that the President’s deployment of U.S. forces in the Persian Gulf constitutes “war,” “imminent hostilities,” or even the prelude to an offensive war. Time and again courts have refused to exercise jurisdiction in such cases and undertake such determinations because courts are ill-equipped to do so.¹⁷⁹

For Taney, Lambert’s claim would have been stunning to say the least. Nothing was more a matter of general and collective understanding than whether or not hostilities were underway or imminent. The difference between a condition of peace and one of war was self-evident and required only common sense to discern. In fact, to reject this belief left the public at the whim of executive determinations of when and in what circumstances to use state violence. It meant that one of the most momentous decisions in public life, a decision which was properly the domain of democratic deliberation, instead would be captured by unchecked political elites.

For Lambert’s view to make sense, let alone for it to be persuasive, a very different sociological vision of prospective threat would have to be compelling: one in line with the security concept developed by Herring in the 1930 and 1940s. In particular, one would have to see the category of ‘war’ as far more fluid and difficult to decipher. Threats must be viewed as pervasive and the country interpreted as in a near continuous state of existing or potential conflict, blurring any clear divide between a presumptive condition of peace and an extraordinary one of war. Under such circumstances, what amounts to actual ‘hostilities’ or what counts as ‘imminent’ may well be difficult to determine. Indeed, such sociological presumptions lay at the heart of Frankfurter’s defense of extreme judicial deference and his belief that due to modern complexities only specialized information and expertise could resolve even elementary security questions.

¹⁷⁷ Courts have developed a complex set of jurisprudential arguments to explain why certain disputes are not justiciable, or are outside the scope of judicial determination. One central rationale for non-justiciability is the political question doctrine, which asserts that the subject matter is fundamentally ‘political’ and thus entrusted to the other branches for resolution. For more on the doctrine see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959); Alexander Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961); and Fritz W. Sharpf, *Judicial Review and the Political Questions: A Functional Analysis*, 75 YALE L.J. 517 (1966).

¹⁷⁸ *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987).

¹⁷⁹ *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990).

The prevalence of these continuities between Frankfurter’s vision and contemporary judicial arguments raise serious concerns with today’s conceptual framework. Certainly, Frankfurter’s role during World War II in defending and promoting a number of infamous judicial decisions highlights the potential abuses embedded in a legal discourse premised on the specially-situated knowledge of executive officials and military personnel. As the example of Japanese internment dramatizes, too strong an assumption of expert understanding can easily allow elite prejudices – and with it state violence – to run rampant and unconstrained. For the present, it hints at an obvious question: How skeptical should we be of current assertions of expertise and, indeed, of the dominant security framework itself? One claim, repeated especially in the wake of September 11, has been that regardless of normative legitimacy, the prevailing security concept – with its account of unique knowledge, insulation, and hierarchy – is simply an unavoidable consequence of existing global dangers. Even if Herring and Frankfurter may have been wrong in principle about their answer to the question “who decides in matters of security?” they nevertheless were right to believe that complexity and endemic threat make it impossible to defend the old Lockean sensibility. In the final pages of the article, I explore this basic question of the degree to which objective conditions justify the conceptual shifts and offer some initial reflections on what might be required to limit the government’s expansive security powers.

VI. CONCLUSION: THE OPENNESS OF THREATS

The ideological transformation in the meaning of security has helped to generate a massive and largely secret infrastructure of overlapping executive agencies, all tasked with gathering information and keeping the country safe from perceived threats. In 2010, *The Washington Post* produced a series of articles outlining the buildings, personnel, and companies that make up this hidden national security apparatus. According to journalists Dana Priest and William Arkin, there exist “some 1271 government organizations and 1931 private companies” across 10,000 locations in the United States, all working on “counterterrorism, homeland security, and intelligence.”¹⁸⁰ This apparatus is especially concentrated in the Washington, D.C. area, which amounts to “the capital of an alternative geography of the United States.”¹⁸¹ Employed by these hidden agencies and bureaucratic entities are some 854,000 people (approximately 1.5 times as many people as live in Washington itself) who hold top-secret clearances.¹⁸² As Priest and Arkin make clear, the most elite of those with such clearance are highly trained experts, ranging from scientists and economists to regional specialists. “To do what it does, the NSA relies on the largest number of mathematicians in the world. It needs linguists and technology experts, as well as cryptologists, known as ‘crippies.’”¹⁸³

¹⁸⁰ See Dana Priest & William Arkin, *The Secrets Next Door*, WASH. POST., Jul. 21, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/secrets-next-door/print>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

These professionals cluster together in neighborhoods that are among the wealthiest in the country – six of the ten richest counties in the United States according to Census Bureau data.¹⁸⁴ As the executive of Howard County, Virginia, one such community, declared, “These are some of the most brilliant people in the world. . . . They demand good schools and a high quality of life.”¹⁸⁵ School excellence is particularly important, as education holds the key to sustaining elevated professional and financial status across generations. In fact, some schools are even “adopting a curriculum . . . that will teach students as young as 10 what kind of lifestyle it takes to get a security clearance and what kind of behavior would disqualify them.”¹⁸⁶ The implicit aim of this curriculum is to ensure that the children of NSA mathematicians and Defense Department linguists can one day succeed their parents on the job.

In effect, what Priest and Arkin detail is a striking illustration of how security has transformed from a matter of ordinary judgment into one of elite skill. They also underscore how this transformation is bound to a related set of developments regarding social privilege and status – developments that would have been welcome to Frankfurter but deeply disillusioning to Brownson, Lincoln, and Taney. Such changes highlight how one’s professional standing increasingly drives who has a right to make key institutional choices. Lost in the process, however, is the longstanding belief that issues of war and peace are fundamentally a domain of common care, marked by democratic intelligence and shared responsibility.

Despite such democratic concerns, a large part of what makes today’s dominant security concept so compelling are two purportedly objective sociological claims about the nature of modern threat. As these claims undergird the current security concept, by way of a conclusion I would like to assess them more directly and, in the process, indicate what they suggest about the prospects for any future reform. The first claim is that global interdependence means that the U.S. faces near continuous threats from abroad. Just as Pearl Harbor presented a physical attack on the homeland justifying a revised framework, the American position in the world since has been one of permanent insecurity in the face of new, equally objective dangers. Although today these threats no longer come from menacing totalitarian regimes like Nazi Germany or the Soviet Union, they nonetheless create a world of chaos and instability in which American domestic peace is imperiled by decentralized terrorists and aggressive rogue states.¹⁸⁷

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ These arguments, especially about the overwhelming dangers posed by Islamic extremism, have become the bread and butter of presidential rhetoric regardless of political party. For a selection of such claims made by both Presidents Bush and Obama, see George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 129 PUB. PAPERS 130 (Jan. 29, 2002) (stating that the ‘war on terror’ has only just begun, because there are “[t]housands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, [that] are now spread throughout the world like ticking time bombs, set to go off without warning.”); George Bush, Remarks to the Military Officers Association of America, 42 WEEKLY COMP. PRES. DOC. 1559 (Sept. 5, 2006) (identifying an Al Qaeda strategy to create “numerous, decentralized operating bases for the purpose of planning new attacks and, ultimately, destroying the free world”); Barack Obama, Address to the Nation on the Drawdown of United States Military Personnel in Afghanistan, 2011 DAILY COMP. PRES. DOC. (June 22, 2011) (recognizing that the “tide of war is receding” but still proposing a long term goal of leaving no safe haven from which Al Qaeda and its affiliates can attack the United States).

Second, and relatedly, the objective complexity of modern threats makes it impossible for ordinary citizens to comprehend fully the causes and likely consequences of existing dangers. Thus, the best response is the further entrenchment of Herring's national security state, with the U.S. permanently mobilized militarily to gather intelligence and to combat enemies wherever they strike – at home or abroad. Accordingly, modern legal and political institutions that privilege executive authority and insulated decision-making are simply the necessary consequence of these externally generated crises. Regardless of these trade-offs, the security benefits of an empowered presidency (one armed with countless secret and public agencies as well as with a truly global military footprint)¹⁸⁸ greatly outweigh the costs.

Yet, although these sociological views have become commonplace, the conclusions that Americans should draw about security requirements are not nearly as clear cut as the conventional wisdom assumes. In particular, a closer examination of contemporary arguments about endemic danger suggests that such claims are not objective empirical judgments but rather are socially complex and politically infused interpretations. Indeed, the openness of existing circumstances to multiple interpretations of threat implies that the presumptive need for secrecy and centralization is not self-evident. And as underscored by high profile failures in expert assessment, claims to security expertise are themselves riddled with ideological presuppositions and subjective biases. All this indicates that the gulf between elite knowledge and lay incomprehension in matters of security may be far less extensive than is ordinarily thought. It also means that the question of *who decides* – and with it the issue of how democratic or insular our institutions should be – remains open as well.

Clearly technological changes, from airpower to biological and chemical weapons, have shifted the nature of America's position in the world and its potential

These presidential assertions also mirror the conventional wisdom as expounded by key foreign policy figurers in both Democratic and Republican parties, as highlighted by Chair Thomas Kean's and Vice-Chair Lee Hamilton's public statement on the release of the 9/11 Commission report ("The American people must be prepared for a long and difficult struggle. We face a determined enemy who sees this as a war of attrition – indeed, as an epochal struggle. We expect further attacks. Against such an enemy, there can be no complacency. This is the challenge of our generation."). See Thomas Kean & Lee Hamilton, Public Statement: Release of 9/11 Commission Report 5 (July 22, 2004), http://govinfo.library.unt.edu/911/report/911Report_Statement.pdf. See also 9/11 Commission, Final Report of the National Commission on Terrorist Attacks Upon the United States: Executive Summary 16 (2004), http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf (describing Al Qaeda as representing an ideology rather than a finite group of people and stating that no matter who is captured or killed, referring at the time to Osama Bin Laden, there would still be a serious threat due to the decentralized nature of terrorist groups).

¹⁸⁸ As of 2009, some 516, 273 military service members – not including Department of Defense civilian officials – were deployed abroad, stationed across 716 reported overseas bases and present in approximately 150 foreign states (nearly 80 percent of the world's countries). This worldwide network is sustained by tremendous expenditures, which account for almost half of global defense spending – a number equal to the following twenty nations combined. See Department of Defense, Office of the Deputy Undersecretary of Defense (Installations and Environment), *Base Structure Report*, Fiscal Year 2009, p. DOD-22; Department of Defense, "Active Duty Military Personnel Strengths by Regional Area and by Country," June 30, 2009, available at <http://www.globalsecurity.org/military/library/report/2009/hst0906.pdf>; and Stockholm International Peace Research Institute, 'SIPRI Yearbook 2009: Appendix 5A. Military Expenditure Data, 1999-2008', available at <http://www.sipri.org/yearbook/2009/05/05A>.

vulnerability. As has been widely remarked for nearly a century, the oceans alone cannot guarantee our permanent safety. Yet, in truth they never fully ensured domestic tranquility. The nineteenth century was one of near continuous violence, especially with indigenous communities fighting to protect their territory from expansionist settlers.¹⁸⁹ But even if technological shifts make doomsday scenarios more chilling than those faced by Hamilton, Jefferson, or Taney, the mere existence of these scenarios tells us little about their likelihood or how best to address them. Indeed, these latter security judgments are inevitably permeated with subjective political assessments, assessments that carry with them preexisting ideological points of view – such as regarding how much risk constitutional societies should accept or how interventionist states should be in foreign policy.

In fact, from its emergence in the 1930s and 1940s, supporters of the modern security concept have – at times unwittingly – reaffirmed the *political* rather than purely *objective* nature of interpreting external threats. In particular, commentators have repeatedly noted the link between the idea of insecurity and America’s post-World War II position of global primacy, one which today has only expanded following the Cold War. In 1961, none other than Senator James William Fulbright declared, in terms reminiscent of Herring and Frankfurter, that security imperatives meant that “our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18th century,” was no longer “adequate” for the “20th-century nation.”¹⁹⁰ For Fulbright, the driving impetus behind the need to jettison antiquated constitutional practices was the importance of sustaining the country’s “preeminen[ce] in political and military power.”¹⁹¹ Fulbright held that greater executive action and war-making capacities were essential precisely because the United States found itself “burdened with all the enormous responsibilities that accompany such power.”¹⁹² According to Fulbright, the United States had both a right and a duty to suppress those forms of chaos and disorder that existed at the edges of American authority. Thus, rather than being purely objective, the American condition of permanent danger was itself deeply tied to political calculations about the importance of global primacy. What generated the condition of continual crisis was not only technological change, but also the belief that the United States’ own ‘national security’ rested on the successful projection of power into the internal affairs of foreign states.

The key point is that regardless of whether one agrees with such an underlying project, the value of this project is ultimately an open political question. This suggests that whether distant crises should be viewed as generating insecurity at home is similarly as much an interpretative judgment as an empirically verifiable conclusion.¹⁹³

¹⁸⁹ See RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860* (2000) for one seminal account of the violent conflicts that marked the early American experience, especially vis-à-vis native communities, and that structured national judgments about membership, identity, and expansion.

¹⁹⁰ See J. William Fulbright, *American Foreign Policy in the 20th Century under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 1 (1961).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ For more on the historical relationship in American life between accounts of security and contested political values, see generally DAVID CAMPBELL, *WRITING SECURITY: UNITED STATES FOREIGN POLICY AND THE POLITICS OF IDENTITY* (1998). See also Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433 (2011) (arguing that post-9/11 responses to perceived threat are bound

To appreciate the open nature of security determinations, one need only look at the presentation of terrorism as a principal and overriding danger facing the country. According to the State Department's Annual Country Reports on Terrorism, in 2009 "[t]here were just 25 U.S. noncombatant fatalities from terrorism worldwide" (sixteen abroad and nine at home).¹⁹⁴ While the fear of a terrorist attack is a legitimate concern, these numbers – which have been consistent in recent years – place the gravity of the threat in perspective. Rather than a condition of endemic danger – requiring ever-increasing secrecy and centralization – such facts are perfectly consistent with a reading that Americans do not face an existential crisis (one presumably comparable to Pearl Harbor) and actually enjoy relative security. Indeed, the disconnect between numbers and resources expended, especially in a time of profound *economic* insecurity, highlights the political choice of policymakers and citizens to persist in interpreting foreign events through a World War II and early Cold War lens of permanent threat. In fact, the continuous alteration of basic constitutional values to fit 'national security' aims highlights just how entrenched Herring's old vision of security as pre-political and foundational has become, regardless of whether other interpretations of the present moment may be equally compelling.

It also underscores a telling and often ignored point about the nature of modern security expertise, particularly as reproduced by the United States' massive intelligence infrastructure. To the extent that political assumptions – like the centrality of global primacy or the view that instability abroad necessarily implicates security at home – shape the interpretative approach of executive officials, what passes as objective security expertise is itself intertwined with contested claims about how to view external actors and their motivations. This means that while modern conditions may well be complex, the conclusions of the presumed experts may not be systematically less liable to subjective bias than judgments made by ordinary citizens based on publicly available information. It further underscores that the question of *who decides* cannot be foreclosed in advance by simply asserting deference to elite knowledge.

If anything, one can argue that the presumptive gulf between elite awareness and suspect mass opinion has generated its own very dramatic political and legal pathologies. In recent years, the country has witnessed a variety of security crises built on the basic failure of 'expertise.'¹⁹⁵ At present, part of what obscures this fact is the

more to longstanding American practices toward communal "others" than to objective evaluations of danger).

¹⁹⁴ State Department, Country Reports on Terrorism 2009, available at <http://www.state.gov/s/ct/rls/crt/2009/145700.htm>.

¹⁹⁵ Tying security to other domains of public policy, one can see the failure of presumed expertise in events that range from the financial meltdown to the lack of weapons of mass destruction in Iraq. See, e.g., Financial Crisis Inquiry Commission, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xvii (Jan. 2011), <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> (blaming the Federal Reserve for contributing to the 2008 financial meltdown, because of the Reserve's failure to set prudent mortgage-lending standards, as well as financial institutions generally, for not examining mortgage securities properly and thus helping to precipitate the meltdown). On weapons of mass destruction in Iraq, for one example among many see Dana Priest, *Report Finds No Evidence Syria Hid Iraqi Arms*, WASH. POST., Apr. 26, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501554.html> (noting that the Iraq Survey Group ultimately found no proof of American official claims that "Syria worked in tandem with Hussein's government to hide weapons before the U.S.-led invasion.").

very culture of secret information sustained by the modern security concept. Today, it is commonplace for government officials to leak security material about terrorism or external threat to newspapers as a method of shaping the public debate.¹⁹⁶ These ‘open’ secrets allow greater public access to elite information and embody a central and routine instrument for incorporating mass voice into state decision-making. But this mode of popular involvement comes at a key cost. Secret information is generally treated as worthy of a higher status than information already present in the public realm – the shared collective information through which ordinary citizens reach conclusions about emergency and defense. Yet, oftentimes, as with the lead up to the Iraq War in 2003, although the actual content of this secret information is flawed,¹⁹⁷ its status as secret masks these problems and allows policymakers to cloak their positions in added authority. This reality highlights the importance of approaching security information with far greater collective skepticism; it also means that security judgments may be more ‘Hobbesian’ – marked fundamentally by epistemological uncertainty as opposed to verifiable fact – than policymakers admit.

If both objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this mean for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that the central problem with the procedural solutions offered by constitutional scholars – emphasizing new statutory frameworks or greater judicial assertiveness – is that they mistake a question of *politics* for one of *law*. In other words, such scholars ignore the extent to which governing practices are the product of background political judgments about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants – danger too complex for the average citizen to comprehend independently – it is inevitable that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any systematic effort to challenge the current framing of the relationship between security and liberty must begin by challenging the underlying assumptions about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be no substantive shift in our

¹⁹⁶ See, e.g., James Risen, *Democrat Lodges Complaints over Leaks From Bush Camp*, N.Y. TIMES, Sept. 10, 2004, <http://www.nytimes.com/2004/09/10/politics/10leak.html?pagewanted=print&position> (noting concerns by the ranking Democrat on the Senate intelligence committee that senior Bush administration officials had systematically disclosed classified information to prominent journalists “for partisan purposes.”); and David Johnston & David E. Sanger, *Cheney’s Aide Says President Approved Leak*, N.Y. TIMES, Apr. 7, 2006, <http://www.nytimes.com/2006/04/07/washington/07leak.html> (discussing I. Lewis Scooter Libby’s testimony that Vice President Cheney has authorized the disclosure in July 2003 of classified prewar intelligence estimates on Iraq).

¹⁹⁷ Yet another recent and telling illustration of flawed secret information concerns the assessment by military analysts in Guantanamo of the threat posed by many of those detained at the prison. See Nitasha Tiku, *Leaked Gitmo Files Reveal Prisoners’ Threat Level Based on Flawed Evidence*, N.Y. MAG., Apr. 25, 2011, http://nymag.com/daily/intel/2011/04/leaked_gitmo_files_reveal_flaw.html (concluding that files released by the anti-secrecy group Wikileaks suggest that military analysts often made basic mistakes in interpreting factual evidence and held as many as 150 innocent people for years).

constitutional politics. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements to become ever more entrenched.