

THE LIMITS OF NATIONAL SECURITY, 48 Am. Crim. L. Rev. 1573

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***1574 I. INTRODUCTION**

The United States' *National Security Strategy* ("NSS"), issued in May 2010, articulates an expansion in U.S. interests that stems from the end of the Cold War. Departing from a policy of industrial growth and military containment in response to geopolitical threats, U.S. national security is now defined in terms of a wide range of potential risks that the country faces.

The NSS, for instance, ties the economy, education, immigration, infrastructure, science and innovation, alternative forms of energy, health care, and reductions in the federal deficit to U.S. national security.¹ It calls for a "seamless coordination among Federal, state, and local governments to prevent, protect against, and respond to threats and natural disasters."² A "whole of government approach" will integrate the skills and capabilities of the country's military and civilian institutions, including, *inter alia*, merging the staffs of the National Security Council *1575 ("NSC") and Homeland Security Council.³ In addition to foreign policy and international military concerns, the NSC will now also focus on trade, travel, organized crime, domestic intelligence gathering and dissemination, terrorism, public health, and natural disasters.⁴

The NSS is not alone in its rather expansive view of U.S. national security.⁵ The *Quadrennial Defense Review* ("QDR"), for example, issued in February 2010, cites threats related to the global commons, cybersecurity, climate change, and energy.⁶ The *Quadrennial Intelligence Community Review* ("QICR"), issued in January 2009, proclaims the dawn of a new era, requiring a "fundamental transformation of the national security establishment."⁷ It identifies seven key variables underlying the unique threats now faced by the United States: political and military, social and cultural, demographic and health, domestic environment, innovation and technology, energy and environment, and economic and financial.⁸

What these and other articulations share in common is a significantly expanded view of what constitutes U.S. national security--one which differs not just from *1576 that which dominated during the Cold War, but also from any point in U.S. history. This is not the first shift in how the country has looked at its security interests. It is, however, by far the most expansive. And it is beginning to find root in the law, with significant constitutional implications.

This Article argues that the current expansion represents the fourth and most troubling epoch in the evolution of the country's approach to national security, one that raises concern about the distribution of power within the U.S. constitutional structure. It suggests that each epoch resulted in alterations to the domestic and foreign affairs structures of the federal government--components generally considered to lie in different realms, but, in fact, equally important in conceptions of U.S. national security.

The Article begins by considering what, exactly, is meant by "national security." It posits a Hamiltonian definition--the laws and policies directed at protecting the national government in its efforts to aid in the common defense, preserve public peace, repel external attacks, regulate commerce, and engage in foreign relations.⁹ National security is thus rooted in concepts directly related to national sovereignty.

The Article then returns to the Founding and suggests that the first epoch, which extended from 1776 to 1898, was marked, primarily, by the drive to Union and, secondarily, by the goals of establishing international independence and building the country's economic strength. The Civil War represented a reversion to Union as the core of American national security, with recourse to international independence and economic growth following the defeat of the Confederate States.

The Spanish-American War brought the first epoch to a close, leading to the second era, from approximately 1898 to 1930, in which U.S. national security expanded to include a formative agenda in the global environment. The United States would no longer be content to react to foreign developments; it would seek to shape the international arena. Domestically, the government sought to limit the growing strength of private sources of power. Tensions between the goals of the first age

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(international independence and economic growth) and those of the second (engagement and dominance over potential rivals for domestic authority) resulted in power struggles between the federal branches of government.

During the third epoch, which reached from the 1930s to 1989, national security became the United States' overriding interest, rendering all other concerns subservient. The economy, education, housing, health care, civil rights--all these became seen through a new lens, gaining for national security a privileged position within the domestic discourse. Glimmers of this epoch first appeared with the country's near-simultaneous entry into World War I and the domestic introduction of *1577 measures meant to counter the threat of totalitarianism. It was during this rise of totalitarianism in the 1930s, however, that the age took hold. World War II and the advent of the Cold War narrowed the focus to one form of threat. Containment of communism-- particularly with respect to the Soviet Union and its expansionist designs-- became the overriding goal. As a matter of foreign policy, the country emphasized military engagement and development aid, while focusing at a domestic level on fostering closer relationships among industry, science, and political institutions. Strides in the domestic civil rights arena also became an important response to Soviet allegations of democratic injustice.

The fourth and most recent epoch in the evolution of U.S. national security emerged in 1989 with the fall of the Berlin Wall. National security dominates the domestic discourse as it did during the third epoch, making it the United States' most powerful institutional engine. Risks, broadly defined, have become folded into the national security framework. Emphasis is now placed on the *effects* that may result should any of the anticipated risks become manifest. The intent of bad actors, either state or non-state actors, matters only within the context of responding to the specific threat. As a practical matter, this means that actor-less threats, such as pandemic disease, are now treated as matters of national security. Under the approach of the fourth epoch, global security--the security interests of other countries and regions--has become intertwined with U.S. national security. The line between foreign and domestic has begun to fade. Moreover, areas outside the traditional national security framework, such as climate change, public health, drugs, and criminal law, have been drawn into the national security infrastructure. Perhaps most significantly, executive branch authorities have rapidly expanded, raising a number of constitutional concerns.

II. DEFINING U.S. NATIONAL SECURITY

The first question in any historical exposition of the United States' approach to national security is: What, exactly, is meant by "national security"?

One approach might be to begin by exploring usage of the term itself. As a historical matter, some scholars argue that such a course may be inadvisable-- not least because the term is primarily a creature of the twentieth century.¹⁰ This is the position taken by Professor Ernest May.¹¹ According to this view, the National Security Act of 1947 signals the beginning of a new age.¹² Professor Harold Koh largely agrees, anchoring modern usage of the term in the National Security Act of 1947.¹³ Thus, he similarly dates the use of the term to the mid-twentieth century *1578 and, specifically, to the start of the Cold War.¹⁴

These claims, however, overlook earlier usage. During the Constitutional Convention, according to James Madison's notes, Oliver Ellsworth remarked that a national government would help to secure national security.¹⁵ This function lay at the core of the new structure of government under the Constitution: the national government could *only* embrace such objects of a more general nature than those pursued by the states.¹⁶ The very purpose of the Convention was to address the shortcomings of the Articles of Confederation, foremost amongst which was its failure to produce security against foreign invasion.¹⁷

Mark Shulman, who provides a thoughtful analysis of the origins of the National Security League, similarly suggests that the positions etched out by May and Koh fall short. He points to debates held at Yale in the 1790s, where Yale undergraduates considered whether "National Security depend[s] on fostering Domestic Industries?"¹⁸ Indeed, throughout the remainder of the eighteenth century and into the nineteenth century, similar discussions marked the contours of America's national interests.¹⁹ By 1853, Franklin Pierce in his *Inaugural Address* discussed national security in the light of the Compromise of 1850.²⁰ One year later, in response to information received that citizens were preparing to send a military expedition to invade Cuba, the President issued a proclamation, warning that the decision to invade would undermine U.S. national security.²¹

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Shortly thereafter, reflecting on the French Revolution, articles appearing in the newspapers tied the *1579 concept of national security to national fraternity.²² During the Civil War, the term “national security” was bandied about in justification for each side’s position--with slavery and the dangerous influences of wealth cited in the North, and northern invasion highlighted by the South, as undermining national security.²³

“National security” is thus not a creature of the twentieth century.²⁴ Despite its appearance throughout history and its use in relation to statutory authorities, however, “national security” is rarely defined. The National Security Act of 1947, for instance, refers to “national security” more than 100 times; yet nowhere does it define the term.²⁵ The Foreign Intelligence Surveillance Act of 1978 similarly refers to “national security” nearly a dozen times in a manner of some consequence.²⁶ It uses the term, for example, in relation to placing matters within the purview of the Foreign Intelligence Surveillance Court (“FISC”), determining who can certify an application to FISC, and authorizing *in camera* and *ex parte* proceedings.²⁷ Attorney General determination of a national security threat allows officials to secretly search and seize property--effectively waiving notice otherwise required under the Fourth Amendment.²⁸ Despite the work being done by this concept, however, no definition is provided. Nor does the omnibus 2001 USA PATRIOT Act define the term--despite more than two dozen references to it and the significant expansion of executive power premised upon matters falling within its purview.²⁹ Myriad other statutory examples present themselves.³⁰

*1580 On the rare occasion statutory definitions appear, the term is understood broadly.³¹ According to the current Classified Information Procedures Act, for instance, national security involves matters related to the “national defense and foreign relations of the United States”--an amorphous description, open to wide interpretation.³² Where statutes provide definitions of the term linked to other activities, those definitions prove similarly broad. In the amended National Security Act, for instance, the term “intelligence related to national security” refers to

all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that--

(A) pertains, as determined consistent with any guidance issued by the President, to more than one United States Government agency; and

(B) that involves--

(i) threats to the United States, its people, property, or interests;

(ii) the development, proliferation, or use of weapons of mass destruction; or

(iii) *any other matter bearing on United States national or homeland security.*³³

*1581 In similar manner, the Federal Information Security Management Act of 2002, which provides government-wide rules for information security, defines “national security system” as any system:

(i) the function, operation, or use of which--

(I) involves intelligence activities;

(II) involves cryptologic activities related to national security;

(III) involves command and control of military forces;

(IV) involves equipment that is an integral part of a weapon or weapons system; or

(V) subject to subparagraph (B), is critical to the direct fulfillment of military or intelligence missions; or

(ii) is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.³⁴

The effect is rather circular: material is classified because it is interpreted by officials as being related to national security, even as national security data is defined as material that has been classified.

Executive branch articulations prove equally broad. Consider the George W. Bush Administration's directive governing the design of the National Security Council: "National security," the document stated, "includes the defense of the United States of America, protection of our constitutional system of government, and the advancement of United States interests around the globe."³⁵ Exactly what constituted national defense was nowhere explained, nor were limits proposed for the U.S. interests in question.

Precise meaning of the term, if anything, has become even more elusive. President George W. Bush's five-page *National Security Presidential Directive 1* referred to "national security" thirty-three times without offering any definition.³⁶ The Obama Administration overwrote Bush's national security presidential directives, replacing them with presidential policy directives.³⁷ *Presidential Policy Directive 1* ("PPD-1"), which addresses the National Security Council, refers to ***1582** "national security" thirty-three times but nowhere defines it.³⁸ The Obama Administration's first *Presidential Study Directive* similarly stopped short of defining the phrase, although it did state that the concept should be thought of coincident with "homeland security."³⁹ The logic stemmed from a broad concept of risk: both "national security" and "homeland security" reflect policies "designed to keep our country secure and our citizens safe."⁴⁰

The Supreme Court, for its part, has recognized national security as a compelling interest, and one with regard to which, in certain settings, deference should be given to the political branches.⁴¹ In *Korematsu v. United States*, for instance, the Court, applying strict scrutiny for the first time, upheld the detention of American citizens: national security proved a compelling government interest.⁴² In *Haig v. Agee*, the Court echoed its earlier decision, stating that it was "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."⁴³ It lay at the core of federal responsibilities--it was the very purpose of the federal government.⁴⁴ In *Holder v. Humanitarian Law Project*, the Court again deferred to the executive branch.⁴⁵ The political and highly variable nature of the interest at stake often underlies such decisions.⁴⁶ This is the consideration at ***1583** the heart of the state secrets privilege.⁴⁷

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Even as it has overtly noted the compelling interest involved in national security matters, the Court has acknowledged that the term is frustratingly broad, giving rise to important constitutional concerns. In *New York Times Co. v. United States*, for example, the Court determined that the government had failed to show that publication of the Pentagon Papers would irreparably harm U.S. national security.⁴⁸ Justice White wrote that the government conceived of “national security” as giving the President the authority to prevent anything that threatens “grave and irreparable” injury to the public interest.⁴⁹ For him, such powers were too sweeping.⁵⁰ Justice Black similarly objected: “The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁵¹ Black continued, “The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”⁵²

Justice Black’s words echo those of other jurists. In *Youngstown Sheet and Tube Co. v. Sawyer*, Justice Jackson noted that the President’s power, at least when turned inward, “is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic”⁵³ Chief Justice Hughes in *De Jonge v. Oregon* in 1937, a case that questioned whether Oregon’s criminal syndicalism statute fell afoul of Fourteenth *1584 Amendment due process, similarly wrote:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion Therein lies the security of the Republic, the very foundation of constitutional government.⁵⁴

Justice O’Connor expressed similar unease in *Hamdi v. Rumsfeld*.⁵⁵ At issue was whether the executive could indefinitely detain a U.S. citizen absent basic due process.⁵⁶ Justice O’Connor wrote: “We recognize that the national security underpinnings of the ‘war on terror,’ although crucially important, are broad and malleable.”⁵⁷

Examining the use of the term, then, while illuminating, fails to reach a more important question: *How, over time, has the United States conceived of its national security interests?* It matters how one thinks about national security, not least because of the tautological risk, which is that if national security is conceived of as primarily economic, political, or military in nature, then one would look at the political, economic, and military laws and policies of the national government in response and find that conceptions of national security depended on the same.

With this caution in mind, I propose to examine the evolution of U.S. national security *as understood by the interests that national security is intended to serve*. That is, I do not adopt a definition based on a specific subject matter, such as foreign relations. Instead, to understand what we mean by “national security” I look to the *object* that is to be secured and the *reason* for its preservation--the purpose for which such object exists.

The former, the object that is to be secured, is the political structure of government. As James E. Baker, Chief Judge of the U.S. Court of Appeals for the Armed Forces, has argued, the reason most definitions center on defense and foreign affairs is precisely because such concepts form the central functions of the State.⁵⁸ At issue is the legitimacy of the governing institutions as intimately linked to their ability to protect the people, preserve the republic, and ensure their own existence--all functions integral to our constitutional design.

But the concept of national security does not end there, for the federal government arises from an underlying *purpose*. One of the strongest articulations comes from Alexander Hamilton, who conceived the purpose of the Union as for “the common defense of the members; the preservation of the public peace as well *1585 against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial with foreign countries.”⁵⁹ If this is the purpose for which our political structures were formed, a fundamental national interest must be to protect the State so that it may pursue these aims.

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Hamilton underscored the importance of military capabilities to the common defense, but he was careful to explain that a broader range of threats may arise:

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.*⁶⁰

For Hamilton, whether there *ought* to be a central government entrusted with acting in the common defense may be an open question.⁶¹ Once answered in the affirmative, however, the central government must be given the powers “requisite to complete execution of its trust.”⁶² In this understanding, it would make little sense to establish a government without providing it with the authority necessary to act on the purposes for which it was created.

For the present discussion, I thus understand national security to be the preservation of the political and constitutional structures in light of the purpose for which they were created. This conception is broader than that historically adopted in international relations or foreign relations, as it extends beyond the exercise of international power.⁶³ It is part of my argument that U.S. national security cannot be understood solely in light of its external components. It must be considered in relation to the political institution of government itself, as influenced by both domestic and international concerns, that allows the institution to protect its ability to act in accordance with the purpose for which it has been created.

This understanding, however, still leaves unanswered where, precisely, one should look in order to determine how the United States has conceived of its *1586 national security interests over time.⁶⁴ For purposes of this Article, I look to the executive branch as a whole, including, *inter alia*, the different institutional arrangements within the executive branch designed to address U.S. national security. I also look to congressional grants of authority, appropriations, and oversight devices as a way to understand how the country has approached the concept of national security over time.⁶⁵

In this framing, executive articulations of U.S. interests take on a central role. The contours of what the executive can do in this area derive from the right of political institutions to defend themselves and the duties these institutions bear to the sovereign who created them--duties that range from protecting the lives and property of citizens, to ensuring the survival of the Constitution. They also reflect the strong role played by the executive branch with regard to the external affairs of the country.⁶⁶

*1587 Thus conceived, national security becomes an articulation of U.S. interests, the object of which is the protection of the American political entity, which is itself ordered by the Constitution. Its aims are thus essentially *political* in nature. The military may be required for the survival of the state as broadly conceived, but it is only one (albeit important) means to the ends.⁶⁷ In a constitutional democracy, there are limits on the form such provisions can take without fundamentally altering the constitutional structure and protection of rights within the state.⁶⁸

III. THE FOUR EPOCHS

The guiding principle that I adopt in looking at the evolution of U.S. national security is to consider the laws and policies directed at protecting the national government in its efforts to aid in the common defense, to preserve public peace, to repel internal and external attacks, to regulate commerce, and to engage in foreign relations. With this framing, four major epochs in U.S. history emerge.⁶⁹ They can be thought of in terms of concentric circles, each building on the basic tenets of the previous age.⁷⁰

The first age takes Union itself, (i.e., the establishment of the political institution of the national government), as a necessary condition of the country’s existence. To speak of national security at that time was to assume the continuation of the political entity. The Union thus represented the primary and most basic national security interest, upon which further national

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objectives might be built. To shore *1588 up the strength of the Union, a secondary aim--that of international independence and economic growth--could then be adopted.

In his *Farewell Address*, President George Washington laid out the guiding principles for this secondary aim, which endured for more than a century.⁷¹ Thus, from a very early date, the national government proved willing to act in support of its commercial interests with whatever diplomatic, legal, and military power it could muster.⁷² But when the integrity of the Union was threatened during the Civil War, retreat to the primary aim-- preservation of the Union--occurred. Following the war, having settled the most serious challenge to the Union, attention returned to establishing international independence and economic growth. The first epoch thus spanned from the establishment of the Union through the end of the Civil War and Restoration.

The 1898 Spanish-American War proved pivotal, as did industrialization, in ushering in the second epoch. The United States began promoting its interests through formative political, military, and economic engagement in the international arena. This epoch can be seen in evolutionary terms because it rested on the security of having attained the primary and secondary interests of the first epoch: first, Union, and second, international independence and economic growth. Thus, where the primary and secondary interests appeared threatened, the country's domestic and international response was to act in defense of such interests.

Tension arose during the second epoch in two key areas: First, U.S. international independence was undermined by the degree to which the United States assumed a more energetic role in the international environment--in defense of its commercial interests. Second, the national government's power was challenged by growth of powerful domestic entities. As a result of these tensions, domestic power struggles ensued.

The third epoch emerged in the 1930s in response to the growth of totalitarianism.⁷³ It witnessed the rapid promotion of national security as the overriding national issue, forcing other concerns into a subservient role. The attack on Pearl Harbor solidified this shift, with the Second World War further focusing American designs. No longer would the nation embrace merely a formative approach internationally, but as a political, economic, and military matter, it would assume *1589 global dominance vis-à-vis the communist threat. This required, as a domestic matter, industrial-scientific-political integration and, as a foreign matter, military containment of the U.S.S.R.⁷⁴ Notably, this period also witnessed burgeoning development aid to countries needing fortification in their resistance to communism.

We currently find ourselves in the fourth epoch. It arrived with the end of the Cold War and has transformed U.S. national security interests from simply limiting the spread of communism and the influence of the former U.S.S.R. (already a broad reading of U.S. global responsibilities), to balancing competing risks; climate change, pandemic disease, drugs, and organized crime thus find themselves in the same domain as economic vitality, energy, nuclear proliferation, biological weapons, and terrorism. National security persists in its position of dominance, constantly expanding to envelop other issues. The attacks of September 11, 2001 acted, much like Pearl Harbor, in vindicating a shift that had already occurred.

The current approach sidelines the importance of intent, emphasizing instead the potential impact of the threat on the country's ability to protect its national institutions. Two effects follow. First, actor-less threats have crept into a domain previously reserved for geopolitical concerns. Second, the relative likelihood entailed by the risks thus considered proves less important in earning them a place in the national security infrastructure, than whether such threats (should they become manifest) have the ability to cause major disruptions in the instrument of government. This age is further characterized by the globalization of American interests in a broad range of areas. These disparate risks are serving to significantly strengthen the federal government, and the executive branch in particular, at great constitutional risk.

A. Protecting the Union: 1776-1898

It would be difficult to find a clearer example of a threat to U.S. national security than the Revolutionary War, which marked the Founding and the United States' immediate efforts to secure its place among nations. The war turned on the question of

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whether the states would be united as an independent political entity. Once the Union was secured from immediate peril, President Washington charted a course that would enable the country to maintain international independence and to focus on economic growth. These twin secondary aims-- international independence and economic growth--became the defining feature of the first epoch, in which the existence of the Union was understood to be a necessary precondition to *1590 any other national interest. The twin aims translated abroad into diplomatic outreach, efforts to expand U.S. trade, and the development of military strength to withstand foreign aggression. At home, consideration turned to repaying war debts, strengthening the economy, and enlarging U.S. territory.

American colonists, of course, had been well aware of the importance of diplomacy and foreign relations in the context of military engagements. Benjamin Franklin had himself attempted to prevent war through secret negotiations with the British in 1774.⁷⁵ Unsuccessful, it quickly became clear that only through obtaining the support of France and Spain would the New World be able to defeat Great Britain.⁷⁶ In November 1775, the Continental Congress thus created the Committee of Secret Correspondence.⁷⁷ From this Committee emerged the Model Treaty, which arranged for the colonists to receive weapons and foreign assistance in return for favorable commercial terms.⁷⁸ Less than eighteen months after its creation, the Continental Congress renamed the Committee as the Committee for Foreign Affairs.⁷⁹ Under the Articles of Confederation, the United States' interests abroad became integrated into the Department of Foreign Affairs, with the first Secretary for Foreign Affairs taking office in August 1781.⁸⁰

Following the Founding, national security concerns did not abate. The Articles of Confederation failed in significant part because the national government lacked the authorities and resources to protect the Union. The country's failure to earn the respect of other nations could hardly be ignored: Hamilton lamented, "We may indeed with propriety be said to have reached almost the last stage of national humiliation."⁸¹ Foreign and domestic debt "contracted in a time of imminent peril for the preservation of our political existence" went unpaid.⁸² Foreign powers neglected to surrender American territories.⁸³ As Hamilton commented, the country could ill protect its national interests: "We have neither troops, nor treasury, nor government."⁸⁴ Absent military might, diplomatic stature, and *1591 commercial success, the country would cease to exist.⁸⁵

The Constitutional Convention thus considered creating a national government with the authority necessary to secure the country against foreign aggression and internal dissolution.⁸⁶ The 1787 Constitution strengthened the national government's control over the military and foreign affairs, as well as over taxation and commerce, thus allowing the government to squarely address its national security interests.⁸⁷ As scholars have long recognized, the great protection against the accretion of too much authority consisted of an intricate structure of separation of powers, checks and balances, federalism, and elections.⁸⁸

Debt threatened the existence of the new nation and undermined the possibility of economic growth. President Washington thus wasted little time in calling on federal troops to suppress the Whiskey Rebellion.⁸⁹ Opposition to paying taxes became synonymous with treason.⁹⁰ The executive branch expanded, with President Washington and Vice President John Adams joined by a Secretary of State, Secretary of the Treasury, Secretary of War, and an Attorney General⁹¹--offices *1592 that emphasized the purpose for which the Union had been sought: foreign relations, economic growth, military strength, and the rule of law.⁹²

In the international arena, President Washington sought to establish American independence.⁹³ When war broke out in 1793 between Britain and France, Washington declared neutrality and warned that any citizen aiding or abetting hostilities against any of the powers involved would be refused U.S. protection.⁹⁴ British troops, in turn, would be required to withdraw from the United States.⁹⁵ Nonetheless, the door to international trade stood open. John Jay, despite the Jeffersonians' misgivings, secured American trade with British colonies in the West Indies.⁹⁶ Soon afterwards, Thomas Pickney's treaty with Spain opened navigation on the Mississippi River.⁹⁷

By the time Washington published his *Farewell Address* in the *Philadelphia Daily American Advertiser* in September 1796, the centrality of the Union in maintaining security was firmly established. "The unity of government," Washington wrote, "which constitutes you one people is ... now dear to you."⁹⁸ He continued, "It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of

that very liberty which you so highly prize.”⁹⁹ Although challenges to the Union would undoubtedly arise, and factions threaten, the Union must be maintained.

Washington urged that in its dealings with foreign nations, the United States be independent, avoiding “permanent, inveterate antipathies against particular nations, and passionate attachments for others.”¹⁰⁰ The United States’ energies should point towards strengthening the U.S. economy:

[T]he great rule of conduct for us in regard to foreign nations is in extending our commercial relations, to have with them as little political connection as possible Europe has a set of primary interests which to us have none; or a *1593 very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.¹⁰¹

By remaining unified and detached from the internecine warfare marking European relations, the time would come “when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.”¹⁰² “*E Pluribus Unum*,” added to U.S. coins about the same time as Washington’s *Farewell Address*,¹⁰³ captured an important element of U.S. national security: the Union itself (“out of many, one”) resting on the economic strength of the country.

1. International Independence and Economic Growth

Washington’s approach to national security, supported by congressional ratification of treaties and the establishment of key executive-branch departments, continued in successive administrations. Central to maintaining American independence was the ability to protect U.S. commerce and to withstand foreign aggression. Towards this end, in 1798, President John Adams appointed Benjamin Stoddert the first Secretary of the Navy, adding another critical post to the federal institutional design.¹⁰⁴

The challenges faced by Stoddert’s new department were substantial: The Continental Navy had been disbanded after the Revolutionary War.¹⁰⁵ Article II of the Constitution, though, authorized Congress to provide and maintain naval forces,¹⁰⁶ leading to the reconstitution of the Navy in 1794,¹⁰⁷—a time in which Barbary Coast corsairs threatened U.S. commerce in the Mediterranean.¹⁰⁸ Responding *1594 to the failure of U.S.-French negotiations in the so-called “Quasi-War” against the corsairs,¹⁰⁹ Congress expanded the Navy’s role by passing a series of bills to enlarge the fleet, culminating in a 1798 statute that established the Department of the Navy.¹¹⁰ Any ambition to build a U.S. battle fleet, however, seemed doomed by the 1800 election of President Thomas Jefferson, who came to office determined to reduce federal expenses.¹¹¹ Jefferson’s expected efforts to limit naval power faltered, however, in the face of growing tension with the corsairs and a crisis with Tripoli.¹¹² Because the United States’ international stature was at stake, Jefferson directed the Navy to assume a more aggressive posture, blockading and bombarding Tripoli and supporting the march of land forces intent on forcing the dey of Tripoli from his throne.¹¹³ The Federalist Adams Administration and the Republican Jefferson Administration thus adopted an approach commensurate with Washington’s course regarding U.S. national security: use of force abroad in defense of U.S. commercial interests—not in support of allied countries embroiled in conflict. The aim was to obtain international independence.

As a domestic matter, Adams’s Federalists, amidst heightened tensions with France, became increasingly alarmed that domestic sympathies for the French revolutionaries could potentially destroy the Union.¹¹⁴ Accordingly, in 1798, Congress passed four bills that came to be known as the Alien and Sedition Acts.¹¹⁵ The Alien Act authorized the President to deport any noncitizen considered “dangerous to the peace and safety of the United States.”¹¹⁶ The Sedition Act took it one step further, seeing in factionalism and malcontent the seeds of disaster.¹¹⁷ Professor Geoffrey Stone carefully discusses this legislation as a historical matter and in relation to the First Amendment.¹¹⁸ To the extent that the legislation was more than just a political tool to undermine the Democratic-Republican Party, it *1595 also can be considered a response to a deep,

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underlying national security concern: the potential threat that the French experiment presented to the bonds of the Union.¹¹⁹

Throughout this time, establishing control over the physical territory of the United States proved equally central to protecting the political institution of government. A strong foreign presence at the nation's borders presented a threat: France (and Spain, for that matter) had the power to block U.S. trade at the port of New Orleans, which would have crippled commercial intercourse west of the Appalachians.¹²⁰ Napoleon's decision to secure New Orleans in 1801 raised further concern, not just about attack, but about the potential for abolitionists to free slaves in the territory, thus prompting rebellion across the southern United States.¹²¹ President Jefferson responded by forcing through the Louisiana Purchase, despite his own constitutional misgivings and strong domestic opposition.¹²² National security was the overriding interest.

Battles along the frontier continued.¹²³ Britain could ill afford further encroachment into its North American trade.¹²⁴ It thus allied with a number of Native American tribes to resist American expansionism.¹²⁵ But the United States had different designs: William Henry Harrison, serving as Governor of the Indiana Territory under Jefferson's direction, sought to take title to Native American lands.¹²⁶ He executed numerous treaties, in the process of which he secured *1596 millions of acres for the United States.¹²⁷

In concert with its support for Native American tribes, Britain began impressing American sailors into service on the high seas¹²⁸--an action at once disdainful and harmful to the United States' international standing.¹²⁹ Great Britain also prosecuted its war with France, in part, by placing restrictions on U.S. commercial vessels.¹³⁰ The standoff regarding the British orders in council, which declared U.S. trade with France to be an act of war, pushed the United States towards active combat.¹³¹

Driven by establishing the country's international independence and developing its economic strength, the decision to go to war was commensurate with the nation's primary and secondary national security interests.¹³² Those pressing for a military response came mostly from the West and South--which were expansionist in design, committed to the country's economic interests, and already concerned*1597 about the alliances between Britain and the Native Americans.¹³³ Despite opposition, the declaration of war against England passed both the House and the Senate.¹³⁴ While the Treaty of Ghent, which brought the conflict to a close in December 1814, meant agreement on *status quo ante bellum*,¹³⁵ Jackson's defeat of the British at the Battle of New Orleans and the fact that the United States had proven willing to militarily protect its commercial interests went some way towards establishing the United States as a force in the international environment.¹³⁶

Commensurate with this experience and the country's twin national security aims, President James Madison's *Second Inaugural Address* reflected on the importance of being able to protect U.S. citizens abroad:

On the issue of the war are staked our national sovereignty on the high seas and the security of an important class of citizens, whose occupations give the proper value to those of every other class. Not to contend for such a stake is to surrender our equality with other powers on the element common to all and to violate the sacred title which every member of the society has to its protection. I need not call into view the unlawfulness of the practice by which our mariners are forced at the will of every cruising officer from their own vessels into foreign ones, nor paint the outrages inseparable from it.¹³⁷

*1598 According to Madison, England had failed to abide by the laws of war.¹³⁸ The United States, however, had acted in accordance with the precepts of international law, reflecting its status as a "civilized nation."¹³⁹

By cementing a stronger centralized government, procuring more money for the military, and securing a stronger role for the federal government in developing the nation's infrastructure, the war was a victory for the Federalists. Nevertheless, it helped to destroy the Federalist Party. Democratic-Republican President James Monroe came to office in a landslide election, defeating Rufus King by an electoral college vote of 183 to 34 in 1816, and securing a second term by defeating John Quincy Adams by a vote of 231 to 1 in 1820.¹⁴⁰

During his *First Inaugural Address*, national security concerns were uppermost in Monroe's mind.¹⁴¹ Mere distance from

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Europe had proven insufficient to establish American independence; U.S. trade required protection.¹⁴² To do this, Monroe concluded that a strong military must be maintained:

To secure us against these dangers our coast and inland frontiers should be fortified, our Army and Navy, regulated upon just principles as to the force of each, be kept in perfect order, and our militia be placed on the best practicable footing. To put our extensive coast in such a state of defense as to secure our *1599 cities and interior from invasion will be attended with expense, but the work when finished will be permanent, and it is fair to presume that a single campaign of invasion by a naval force superior to our own, aided by a few thousand land troops, would expose us to greater expense, without taking into the estimate the loss of property and distress of our citizens, than would be sufficient for this great work. *Our land and naval forces should be moderate, but adequate to the necessary purposes*--the former to garrison and preserve our fortifications and to meet the first invasions of a foreign foe, and, while constituting the elements of a greater force, to preserve the science as well as all the necessary implements of war in a state to be brought into activity in the event of war; the latter, retained within the limits proper in a state of peace, might aid in maintaining the neutrality of the United States with dignity in the wars of other powers and in saving the property of their citizens from spoliation. In time of war, with the enlargement of which the great naval resources of the country render it susceptible, and which should be duly fostered in time of peace, it would contribute essentially, both as an auxiliary of defense and as a powerful engine of annoyance, to diminish the calamities of war and to bring the war to a speedy and honorable termination.¹⁴³

The key to a strong military was the ability to expand the resources available to the government to meet any emergency that might arise.¹⁴⁴

Under Monroe's guidance, the physical territory of the country expanded, in turn enabling economic growth. In 1819, Spain ceded Florida to the United States in return for the cancellation of \$5 million in Spanish debt.¹⁴⁵ New states came into existence: in 1820, Maine entered statehood, followed by Missouri in 1821.¹⁴⁶ As the territory expanded, the question of slavery threatened to divide the Union--triggering the fundamental security interest of the country. The Missouri Compromise, forbidding slavery above 36°30', subsequently found support both north and south of the demarcation, carrying Monroe to an easy victory for his second term.¹⁴⁷

In 1823, Monroe articulated his view of U.S. international interests, pointing out *1600 that the United States had steadfastly avoided engaging in European wars.¹⁴⁸ The key issue for American engagement was intensely personal and rested on self-defense: "It is only when our rights are invaded," Monroe stated, "or seriously menaced that we resent injuries or make preparation for our defense."¹⁴⁹ Monroe went on to suggest that the United States had a more immediate interest in the Western Hemisphere.¹⁵⁰ Thus, according to Monroe, the country would engage in matters of economic importance overseas, but refuse to be drawn into the European battles that ravaged the Continent.¹⁵¹ In South America, however, from which European powers had begun to retreat, the United States would countenance no renewed colonization.¹⁵² Here, the United States asserted a defensive right to respond to European aggression, when it felt its national interests threatened:

We owe it ... to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintain it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.¹⁵³

The Monroe Doctrine ensured that the United States could act internationally free from European restrictions. It was a way of keeping the politics of Europe out of the Americas and thus leaving the United States free to pursue its regional interests.

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American international independence also found root in President John Quincy Adams's articulation of U.S. interests. Military strength, subordinate to civil interests, provided the key.¹⁵⁴ In Adams's *Inaugural Address*, he explained,

Our political creed is ... that the firmest security of peace is the preparation during peace of the defenses of war ... that the military should be kept in strict subordination to the civil power ... that the policy of our country is peace and *1601 the ark of our salvation union are articles of faith upon which we are all now agreed.¹⁵⁵

Washington's policies had proven critical for U.S. national security. His admonition against entanglements abroad rung as important in 1825 as they had some thirty years prior: "If there have been dangerous attachments to one foreign nation and antipathies against another, they have been extinguished. Ten years of peace, at home and abroad, have assuaged the animosities of political contention and blended into harmony the most discordant elements of public opinion."¹⁵⁶

President Andrew Jackson's tenure in office reflected a similar course. For the first (and only) time in U.S. history, the national government was relieved of all debt.¹⁵⁷ The shadow of the Revolutionary War thus dissipated, attention could turn to building the economic engine on which future growth hinged. Jackson vigorously advanced the interests of Georgia, Alabama, and Mississippi in expanding their agricultural base by removing the Cherokee, Choctaw, Chickasaw, and Creek tribes living in their midst.¹⁵⁸ Congress acquiesced to this policy.¹⁵⁹ The Indian Removal Act of 1830 authorized the President to transfer lands west of the Mississippi (areas in what is now Oklahoma and Arkansas) to the tribes in exchange for lands within existing state borders.¹⁶⁰

The importance of unity continued to thread its way through U.S. national security concerns. The Nullification Crisis of 1828-1832 raised the specter of Southern discontent.¹⁶¹ Tariffs on European goods were raised by the national *1602 government in a manner that made them more expensive than Northern wares--leading to charges of extortion.¹⁶² South Carolina protested that Congress had exceeded its constitutional authority.¹⁶³ A second statute followed in 1832.¹⁶⁴ Seen as a case of too little, too late, in November 1832, a South Carolina state convention declared both statutes void.¹⁶⁵ The following month, President Jackson responded with a proclamation, disputing South Carolina's constitutional right to nullify a federal law.¹⁶⁶ Congress supported Jackson's assertion, passing in March 1833 an Act to authorize the President to use force to uphold federal tariffs.¹⁶⁷ As South Carolina prepared for military confrontation, Henry Clay managed to negotiate a compromise bill, which ended the standoff.¹⁶⁸ The incident proved critical in the march to Civil War, but for the moment, national unity was preserved.

In 1837, President Martin Van Buren came to office determined to continue the course set by Washington during the first epoch. Van Buren's opposition to an overly strong military found counterpoise in the need to be able to defend the country against potential foreign aggression. Van Buren commented,

We may not possess, as we should not desire to possess, the extended and ever-ready military organization of other nations; we may occasionally suffer in the outset for the want of it; but among ourselves all doubt upon this great point has ceased, while a salutary experience will prevent a contrary opinion from inviting aggression from abroad.¹⁶⁹

*1603 He articulated the importance of avoiding entangling alliances while pursuing America's economic interests abroad.¹⁷⁰ The legacy was clear:

Our course of foreign policy has been so uniform and intelligible as to constitute a rule of Executive conduct which leaves little to my discretion, unless, indeed, I were willing to run counter to the lights of experience and the known opinions of my constituents. We sedulously cultivate the friendship of all nations as the conditions most compatible with our welfare and the principles of our Government. We decline alliances as adverse to our

peace. We desire commercial relations on equal terms, being ever willing to give a fair equivalent for advantages received. We endeavor to conduct our intercourse with openness and sincerity, promptly avowing our objects and seeking to establish that mutual frankness which is as beneficial in the dealings of nations as of men. We have no disposition and we disclaim all right to meddle in disputes, whether internal or foreign, that may molest other countries, regarding them in their actual state as social communities, and preserving a strict neutrality in all their controversies. Well knowing the tried valor of our people and our exhaustless resources, we neither anticipate nor fear any designed aggression; and in the consciousness of our own just conduct we feel a security that we shall never be called upon to exert our determination never to permit an invasion of our rights without punishment or redress.¹⁷¹

It was for the federal government to maintain a national perspective and to pursue the country's interests in establishing the United States as an independent player on the world stage.¹⁷² It thus fell to state governments to protect and develop local interests and individual welfare.¹⁷³ To the extent that federal initiatives influenced local interests, it was in the interests of the nation as a whole.¹⁷⁴ The extension of U.S. territory had opened up "[n]ew and inexhaustible sources of general prosperity"¹⁷⁵

Nonetheless, two areas pursued by the national government had a strong local impact: The first was the continued removal of the Native Americans-- particularly, the Cherokee--in the process begun under Andrew Jackson. The second was the issue of abolition. Van Buren had come to office amidst mounting friction over the institution of slavery, which he saw as threatening both the Union *1604 and the Constitution.¹⁷⁶ His successor, William Henry Harrison, subsequently reiterated the importance of Union: "Our Confederacy, fellow-citizens, can only be preserved by the same forbearance" that marked the Helvetic Confederacy.¹⁷⁷

The institution of slavery carried not just domestic consequences, but international ones as well. Accordingly, President John Tyler, assuming office within a month of Harrison's inauguration,¹⁷⁸ turned the United States' gaze outward. Trade, once again, provided a focus.¹⁷⁹ In response to Great Britain's detention of U.S. vessels in the African seas, Tyler informed Congress: "Our commercial interests in that region have experienced considerable increase and have become an object of much importance, and it is the duty of this Government to protect them against all improper and vexatious interruption."¹⁸⁰ For Tyler, the fact that such vessels were engaged in the trafficking of human beings, regardless of British¹⁸¹ or Northern sentiments on the matter, was of little import to the question of American independence: "However desirous the United States may be for the suppression of the slave trade, they can not consent to interpolations into the maritime code at the mere will and pleasure of other governments."¹⁸² In order to protect U.S. interests, more resources would have to flow to the Navy.¹⁸³ The question was not one of *1605 aggression against other nations; it was one of. being able to defend U.S. commercial interests:

We look to no foreign conquests, nor do we propose to enter into competition with any other nation for supremacy on the ocean; but it is due not only to the honor but to the security of the people of the United States that no nation should be permitted to invade our waters at pleasure and subject our towns and villages to conflagration or pillage.¹⁸⁴

The request for appropriations was not lightly made; the United States needed money to shore up its national security.¹⁸⁵

Commercial opportunity arose not just in Europe and Africa, but also in Asia. It was during Tyler's tenure that the United States signed its first treaty with China, paving the way for trade with the East.¹⁸⁶ The Treaty of Wanghia, named after the village in which the treaty was signed, extended most-favored nation status to the United States, putting the country on par with the benefits granted to other major powers, such as Great Britain.¹⁸⁷

Domestically, the country's expansion continued. In 1845, Tyler proved willing to go to war with Mexico to obtain Texas.¹⁸⁸ James Knox Polk, who became President in March of 1845, explained that the country's policy of expansion was central to

its national security: “As our population has expanded, the Union has been cemented and strengthened. As our boundaries have been enlarged and our agricultural population has been spread over a large surface, our federative system has acquired additional strength and security.”¹⁸⁹ The following year, the United States settled its dispute with Britain over the Oregon Territory, expanding further *1606 west.¹⁹⁰ And in 1848, the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, gave the United States control over what would become California, New Mexico, Arizona, Nevada, Utah, Wyoming, and parts of Colorado.¹⁹¹

Polk’s position that the land at issue in the Mexican-American War belonged to the United States, and that the war itself had broad support domestically, did not go without controversy. Abraham Lincoln spoke at length in the House of Representatives against further appropriations for the war effort on the grounds that the controversy in question was based on a false claim, and that the House had, despite President Polk’s statements to the contrary, divided on the issue.¹⁹² One of the reasons the war proved divisive was that it brought two fundamental tenets of U.S. policy into conflict: reluctance to engage offensively in international wars on one hand, and on the other, the desire to expand and build the country’s economic strength. The discovery of gold in California in 1848 did little to diminish the strength of the latter interest.

President Zachary Taylor came to office in 1849 determined to continue course set by Washington and adopted by his predecessors. “As American freemen,” he stated, “we can not but sympathize in all efforts to extend the blessings of civil and political liberty, but at the same time we are warned by the admonitions of history and the voice of our own beloved Washington to abstain from entangling alliances with foreign nations.”¹⁹³ Taylor emphasized that neutrality must be maintained, even as the United States sought to engage other countries to bolster trade and to avoid foreign aggression:

In all disputes between conflicting governments it is our interest not less than our duty to remain strictly neutral, while our geographical position, the genius of our institutions and our people, the advancing spirit of civilization, and, above all, the dictates of religion direct us to the cultivation of peaceful and friendly relations with all other powers. It is to be hoped that no international question can now arise which a government confident in its own strength and resolved to protect its own just rights may not settle by wise negotiation; and it *1607 eminently becomes a government like our own, founded on the morality and intelligence of its citizens and upheld by their affections, to exhaust every resort of honorable diplomacy before appealing to arms.¹⁹⁴

Taylor believed it was in the interests of U.S. national security to continue this course.¹⁹⁵ The Clayton-Bulwer Treaty, signed in 1850, ensured that future canal access through Central America would be open to international trade.¹⁹⁶

After President Taylor’s death partway through his term, his Vice President, Millard Fillmore, succeeded him, centering U.S. foreign policy on the rights that each country possessed in the international arena. To Fillmore, such rights placed a duty on other countries.¹⁹⁷ “Nations,” he stated, “like individuals in a state of nature, are equal and independent, possessing certain rights and owing certain duties to each other, arising from their necessary and unavoidable relations; which rights and duties there is no common human authority to protect and enforce.”¹⁹⁸ Nevertheless, such rights and duties were binding in morals, conscience, and honor--despite the absence of an international tribunal to which an injured party could appeal.¹⁹⁹ For Fillmore, the right of self-government strengthened the United States’ decision not to become embroiled in other States’ conflicts:

To maintain a strict neutrality in foreign wars, to cultivate friendly relations, to reciprocate every noble and generous act, and to perform punctually and scrupulously every treaty obligation--these are the duties which we owe to other states, and by the performance of which we best entitle ourselves to like treatment from them; or, if that, in any case, be refused, we can enforce our own rights with justice and a clear conscience.²⁰⁰

Commerce would remain central to U.S. interests abroad; for this reason, the Navy would have to obtain further resources to protect U.S. trade along the Pacific Coast.²⁰¹

Upon coming to office, President Franklin Pierce reiterated the same policies. He proclaimed in his *Inaugural Address*, “Of the complicated European systems of *1608 national polity we have heretofore been independent. From their wars, their tumults, and anxieties we have been, happily, almost entirely exempt.”²⁰² Still, commercial interests beckoned; Pierce continued, “But the vast interests of commerce are common to all mankind, and the advantages of trade and international intercourse must always present a noble field for the moral influence of a great people.”²⁰³ Under Pierce, the United States would begin to focus on trade with the East, and go on to sign a historical trade agreement with Japan.²⁰⁴ The physical expansion of the country remained central to the United States’ economic growth. Pierce explained:

With an experience thus suggestive and cheering, the policy of my Administration will not be controlled by any timid forebodings of evil from expansion. Indeed, it is not to be disguised that our attitude as a nation and our position on the globe render the acquisition of certain possessions not within our jurisdiction eminently important for our protection, if not in the future essential for the preservation of the rights of commerce and the peace of the world.²⁰⁵

Pierce’s actions in office reflected his rhetoric. The Gadsden Purchase, for instance, also known as the Treaty of La Mesilla, soon clarified the southern border with Mexico, in the process adding nearly 30,000 square miles to the United States in southern Arizona and New Mexico.²⁰⁶ The Caribbean similarly became subject to efforts by the United States to extend its reach; a failed effort to purchase Cuba from Spain was followed by the acquisition of a series of uninhabited islands: Navassa Island in the Caribbean Sea, Baker Island in the central Pacific, and the Johnston Atoll in the North Pacific.²⁰⁷ Such expansionism was essential to U.S. national security: “Should [new possessions] be obtained,” Pierce had asserted *1609 during his *Inaugural Address*, “it will be through no grasping spirit, *but with a view to obvious national interest and security*, and in a manner entirely consistent with the strictest observance of national faith.”²⁰⁸ In his view, no new threats would thereby develop, as nothing in the country’s history or position would invite aggression: “[W]e have everything to beckon us to the cultivation of relations of peace and amity with all nations. Purposes, therefore, at once just and pacific will be significantly marked in the conduct of our foreign affairs.”²⁰⁹

But even as the United States engaged in (ostensibly) peaceful expansion within North America, Pierce suggested, the country would reject any efforts by other powers to interfere or colonize the Americas. He reiterated the Monroe Doctrine.²¹⁰ For these purposes, and solely for the reasons outlined, the military would be maintained, primarily as a defensive force.²¹¹

Throughout this time, control over U.S. national security lay within the hands of the national government.²¹² Any interference with that authority would not be tolerated. Thus, in 1854, Pierce responded forcefully to efforts by U.S. citizens to send a military force to Cuba.²¹³ At issue was “*the national security* and the preservation of the public tranquility.”²¹⁴ Foreign relations lay exclusively within the power of the national government.

Responsibilities accompanied American expansion; an effective defense must be constructed to protect the country’s shores. Accordingly, upon assuming office in 1854, President James Buchanan drew attention to the military importance of building a road to the West Coast.²¹⁵ As a constitutional matter, such powers fell *1610 well within Congress’s authority to declare war, raise and support armies, provide and maintain a navy, and call forth the militia to repel invasions.²¹⁶ Such war-making power entailed a corollary duty to protect each of the states against invasion:

In the event of a war with a naval power much stronger than our own we should then have no other available access to the Pacific Coast, because such a power would instantly close the route across the isthmus of Central America. It is impossible to conceive that whilst the Constitution has expressly required Congress to defend all the States it should yet deny to them, by any fair construction, the only possible means by which one of these States can be defended. Besides, the Government, ever since its origin, has been in the constant practice of constructing military roads.²¹⁷

The ability of the national government to command the allegiance of the western territories rested, in part, on the ability of the federal government to adequately perform its duties.²¹⁸

As for foreign relations, Buchanan would adhere to the course set by Washington during the first epoch:

In our intercourse with [the great family of nations] there are some plain principles, approved by our own experience, from which we should never depart. We ought to cultivate peace, commerce, and friendship with all nations, and this not merely as the best means of promoting our own material interests, but in a spirit of Christian benevolence toward our fellow-men, wherever their lot may be cast. Our diplomacy should be direct and frank, neither seeking to obtain more nor accepting less than is our due. We ought to cherish a sacred regard for the independence of all nations, and never attempt to interfere in the domestic concerns of any unless this shall be imperatively required by the great law of self-preservation. To avoid entangling alliances has been a maxim of our policy ever since the days of Washington, and its wisdom's no one will attempt to dispute.²¹⁹

The key to U.S. national security during this time was international independence for the United States. Constructive engagement on matters of diplomacy would help to prevent foreign aggression, while steadfastly refusing to become drawn into European conflicts would ensure the country's self-preservation. Simultaneously, *1611 physical expansion and building stronger commercial ties would help strengthen the economic underpinnings of the country, contributing to American power. Union was a prerequisite to all that followed.

2. Retreat to Union

Abolition continued to mount the national stage. The Union--the very purpose for which the national government was created--came under increasing pressure. Coming off the Compromise of 1850, the uneasy relationship between the North and South threatened to cause a permanent split. Pierce reflected on the threat that had been posed to "national security":

We have been carried in safety through a perilous crisis. Wise counsels, like those which gave us the Constitution, prevailed to uphold it. Let the period be remembered as an admonition, and not as an encouragement, in any section of the Union, to make experiments where experiments are fraught with such fearful hazard.²²⁰

In parallel with the emphasis on Union, national fraternity came to be seen as of paramount importance. Hungarian Louis Kossuth, the first foreign statesman invited to the United States to address a joint session of Congress since the Marquis de Lafayette, brought the matter to the fore.²²¹ Kossuth's upcoming speech caused no small amount of concern, in light of domestic North-South frictions and Kossuth's commitment to democratic ideals.²²² He subsequently wrote in the *New York Times*,

[T]he best I can wish for America is, that, whatever be the ultimate issue of the great crisis in the destinies of humanity, the shadows of which are manifestly rising on the horizon ... the people on the other side of the Atlantic may never again stand in need of assistance from without.²²³

The context of the time was of great import:

Humanity is everywhere in critical throes. I think it clearly indicated that everything is tending towards a speedy consummation of the truth that the principle of national fraternity is more than a philanthropic emotion; *that it is the only true basis of national security*, even for the proudest and most *1612 powerful of nations. France, bereft of all the fruits of three successful revolutions, is an instructive illustration of the truth that popular freedom is not secure, even with the most powerful, without community.²²⁴

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In this articulation, national fraternity intoned integration and unity of purpose and government.

North and South appeared to agree that national fraternity stood in question. What they seemed to disagree about was whence, precisely, the threat to such fraternity derived. In the North, the pursuit of wealth came to be seen as part of the threat. Upon his return to Louisville, the former Secretary of the Treasury, James Guthrie, explained:

It has been said, in reference to individuals, that it is easier to bear the trials of adversity than of prosperity. That which applies to individuals is no less true of nations Our country has passed through the most trying scenes of adversity; *we are now called upon for the first time to withstand the dangerous influences of wealth*. It has grown into a proverb that affluence maddens nations; and an overflowing treasury is a temptation to public plunder that everyone may not resist. I pray and hope confidently that the noble old Ship of State will weather the storm which threatens her *and ride safely into a secure harbor of national security*.²²⁵

Abolitionists also looked to the South's refusal to relinquish the practice of slavery, suggesting that it was this intransigence that threatened the Union as a whole.²²⁶ The *New York Times* carried Reverend Beriah Greene's references to the "institution" of slavery:

Said he, there exists among us a thing which bears the name of an 'institution,' in which all the objects described in the [C]onstitution are ruthlessly trampled underfoot, and divine law utterly repudiated. This 'institution' has attained such a commanding prominence as to exercise a controlling national influences [sic]. It has become the institution. It is the existence of this institution which had called the convention together--which had occasioned wide-spread alarm, and the deepest solicitude for our national security.²²⁷

The South's failure to relinquish slavery posed a threat. For the abolitionist minority, if national security required an end to slavery, then the failure of the country to embrace abolition meant that it was placing slavery above national security.²²⁸

***1613** Like Guthrie and Greene, Abraham Lincoln underscored the role that slavery played in threatening the Union and in denying the country national fraternity. Speaking in 1858, he pointed out that approximately five years earlier, a policy had been initiated with the stated aim of ending slavery.²²⁹ "Under the operation of that policy," Lincoln asserted, "that agitation has not only not ceased, but has constantly augmented. In my opinion, it will not cease, until a crisis shall have been reached and passed."²³⁰ He declared,

"A house divided against itself cannot stand." I believe this government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved--I do not expect the house to fall--but I do expect it will cease to be divided. It will become all one thing, or all the other.²³¹

Danger dwelt not only in the divisions that tore the country in two, but in the appeals to national security. By making such appeals, the controversy involved more than abolition and the newly acquired territories; it implicated the political structure and the constitutional order. The *New York Times* thus begged on Thanksgiving Day, 1859:

We shall be astonished to see how little in our lives we truly owe to ourselves, to our own wit or wisdom, or shrewdness or strength, in comparison with the enormous weight of our obligations to the society in which we have dwelt, to the laws and the civilization which have made our efforts possible, and to that sublime overruling Power It can do us no harm to feel these truths more keenly than ever to-day The United States sorely need a Thanksgiving Day, *that they may measure the tremendous extent of the perils which national success and national vanity, and the insolence of national security, have been preparing for the Republic*. Let us silence

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to-day, for a brief space, the angry pulse of partisan conflict and sectional recriminations; and ask ourselves in all seriousness what the future has in store for us if we continue to act, as for years we have acted, on the theory that nothing can disturb our peace²³²

The real risk in succumbing to such partisan politics was the destruction of the nation itself.

Southern views, unsurprisingly, departed from those of the North. They considered Northern aggression the most serious threat to U.S. national security:

***1614** Invaded in a moment of profound peace--*startled from their dreams of national security* by the advent of a new Peter the Hermit, preaching an eternal crusade against their domestic order and their notions of public law--the people of the South may lawfully and reasonably demand of the North an open repudiation of practical excesses which every sensible man must admit to be equally incompatible with the honor of the Free States and with the peace of the South.²³³

Once again, national security concerns proved paramount--namely, whether the political differences between the North and the South would undermine the underlying precepts of the Union: "No matter what may be the views which one or another Northern man may entertain of Slavery in the abstract," one Southern supporter wrote, "the bare proposition which assumes a right on the part of any Northern man to march with an armed following at his back from Ohio into Kentucky, or from Pennsylvania into Virginia, on a mission of emancipation, is its own immediate refutation."²³⁴

Two weeks prior to Lincoln's inauguration, Jefferson Davis became President of the Confederacy.²³⁵ Lincoln, despite his earlier "House Divided" speech, attempted to diffuse Southern concern:

I ... consider that in the view of the Constitution and the laws the Union is unbroken, and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States ... In doing this there needs to be no bloodshed or violence, and there shall be none unless it be forced upon the national authority. The power confided to me will be used to hold, occupy, and possess the property and places belonging to the government and to collect the duties and imposts; but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere ... So far as possible the people everywhere shall have that sense of perfect security which is most favorable to calm thought and reflection.²³⁶

Nevertheless, Lincoln displayed an iron fist in a velvet glove: "The course here indicated," he continued,

will be followed unless current events and experience shall show a modification or change to be proper, and in every case and exigency my best discretion will be exercised, according to circumstances actually existing and with a view ***1615** and a hope of *a peaceful solution of the national troubles and the restoration of fraternal sympathies and affections*.²³⁷

Fraternalism thus served as the glue that held the Union together. Renouncing the Union left only anarchy and despotism.²³⁸ Lincoln thus emphasized that the Union must be maintained--signaling a retreat to the core national security interests of the Founding.

Throughout the Civil War, preserving the Union provided an overriding national security interest. "Rally for the union," one ad called, "The Peace of this Union must be restored. We must have national security and peace."²³⁹ The People had ordered it thus.²⁴⁰ Protection of the Constitution was therefore a central concern. Accordingly, as President Andrew Johnson took office

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in 1865, he noted,

The best security for the perpetual existence of the States is the “supreme authority” of the Constitution of the United States. The perpetuity of the Constitution brings with it the perpetuity of the States; their mutual relation makes us what we are, and in our political system their connection is indissoluble. The whole can not exist without the parts, nor the parts without the whole. *So long as the Constitution of the United States endures, the States will endure. The destruction of the one is the destruction of the other; the preservation of the one is the preservation of the other.*²⁴¹

The Civil War would serve to preserve the Constitution.

Following the war, the question of what to do with the territory within the limits of the Confederate States immediately presented itself.²⁴² The land could be held under military authority, as derived from the President’s commander-in-chief authorities.²⁴³ But strict military rule offered little by way of security.²⁴⁴ Such an arrangement, according to Andrew Johnson, “would have divided the people into the vanquishers and the vanquished, and would have envenomed hatred rather than have restored affection.”²⁴⁵ It would lack a precise end, and it would entail *1616 considerable expense.²⁴⁶ Instead, security depended upon the restoration of national fraternity: “Peaceful emigration to and from that portion of the country is one of the best means that can be thought of for the restoration of harmony.”²⁴⁷

Commitment to the Constitution, and the constitutional order, would ensure security.²⁴⁸ This approach directly reflected Hamilton’s concern with protecting the political institutions of government in their ability to act on the purpose for which they had been formed. New governments must submit “loyally and heartily to the Constitution and the laws--the laws of the nation and the laws of the States themselves--accepting and obeying faithfully the whole Constitution as it is.”²⁴⁹ The Constitution lay at the core of the common defense. “Under this Constitution,” President James Garfield later reflected, “our people long ago made themselves safe against danger from without and secured for their mariners and flag equality of rights on all the seas.”²⁵⁰ President Grover Cleveland also acknowledged its importance, declaring as he took office:

On this auspicious occasion we may well renew the pledge of our devotion to the Constitution, which, launched by the founders of the Republic and consecrated by their prayers and patriotic devotion, has for almost a century borne the hopes and the aspirations of a great people through prosperity and peace and through the shock of foreign conflicts and the perils of domestic strife and vicissitudes.²⁵¹

This meant respect for the division of powers between the branches, an awareness of the authorities reserved to the States or to the people, and an appreciation for the powers granted to the executive branch. Cleveland vowed to protect and defend the U.S. Constitution--noting that this duty rested not just on the President, but on every patriotic citizen, whatever his occupation.²⁵²

*1617 Throughout his time in office, Cleveland remained cognizant of the importance of the Constitution. In his *Second Inaugural Address*, he explained that the oath of office meant vowing obedience to the document’s commands.²⁵³ The Constitution itself, and the protection of the national government’s power (and the limits thereon), lay at the heart of his duties as President.²⁵⁴ He stated,

I shall to the best of my ability and within my sphere of duty preserve the Constitution by loyally protecting every grant of Federal power it contains, by defending all its restraints when attacked by impatience and restlessness, and by enforcing its limitations and reservations in favor of the States and the people.²⁵⁵

In this manner, during the second epoch, the national security of the country rested on the protection of this Constitution, itself derived from the people and upheld in the interests of the entire nation.

3. *Return to International Independence and Economic Growth*

Having secured the Union at great expense, the country's position in the international arena gradually crept back into the national consciousness. If anything, the Civil War had demonstrated the country's success in achieving international independence. President Andrew Johnson reflected,

Under any circumstances our great extent of territory and variety of climate ... make us singularly independent of the varying policy of foreign powers and protect us against every temptation to "entangling alliances," while at the present moment the reestablishment of harmony and the strength that comes from harmony will be our best security against "nations who feel power and forget right."²⁵⁶

Johnson would seek to promote peace and amity with all foreign nations--from Europe and Asia to Africa and South America--with commerce as the main instrument of intercourse.²⁵⁷ Like Johnson, President Grover Cleveland and subsequent Presidents reiterated their commitment to the course set by Washington *1618 during the first epoch.²⁵⁸ Underlying this policy was a sense not just that the United States needed to increase its economic strength, but that Europe had been waging an economic war against the United States.²⁵⁹ Benjamin Harrison later explained:

To hold in check the development of our commercial marine, to prevent or retard the establishment and growth of manufactures in the States, and so to secure the American market for their shops and the carrying trade for their ships, was the policy of European statesmen, and was pursued with the most selfish vigor.²⁶⁰

The United States, no longer locked in civil war, could direct its energy "to the duty of equipping the young Republic for the defense of its independence by making its people self-dependent."²⁶¹ This meant stamping out "injurious foreign competition."²⁶²

But two problems, stemming from the first epoch, presented themselves: First, tension existed between expansion and the maintenance of a neutral, nonaggressive policy towards other countries. The former pulled the United States in the direction of an outward projection of American strength. The latter required restraint in the international arena. Second, the formation of alternative (i.e., nonpolitical) domestic power-bases challenged the authority of the federal government.

a. Tension Between Expansion and Neutrality

In some areas, the expansionist drive met with little resistance. The Monroe Doctrine, for instance, succeeded in dissuading Russia from further involvement across the Pacific.²⁶³ In October 1867, Russia ceded Alaska, marking a full *1619 retreat.²⁶⁴ But not all efforts to establish American dominance succeeded so easily. Military engagement with Native American tribes in New Mexico and Arizona did not end until Geronimo's surrender in 1886.²⁶⁵ In 1889, tension with Germany over the Samoan Islands resulted in the islands' partition into German and American Samoa.²⁶⁶ The year 1893 witnessed revolution in the Hawaiian Islands.²⁶⁷ In Latin America, the *Baltimore* created friction between the United States and Chile.²⁶⁸ In a special message to Congress, President Harrison requested a formal apology from Chile for the mob attack on American sailors in the True Blue Saloon in Valparaiso.²⁶⁹ Chile backed down and made reparations for the harm suffered.²⁷⁰ The Venezuelan affair of 1895 subsequently gave rise to the first formal invocation of the Monroe Doctrine, when President Grover Cleveland resisted the expansion of British Guiana by informing the United Kingdom that the doctrine was still in force.²⁷¹

*1620 The United States' interests overseas grew so rapidly that a parallel concern kept pace: whether such growth was sustainable or whether it would ultimately undermine U.S. national security. During Grant's tenure as President, for instance, Congress rejected incorporating Santo Domingo into the territory of the Union.²⁷² Of primary concern was the danger

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involved in incorporating non-white peoples--translated at the time as weakening the core of the country through overexpansion.²⁷³ By Garfield's presidency, though, the territory of the United States had expanded to fifty times greater than that of the original thirteen states, and population had increased by more than twenty-fold.²⁷⁴ The center of population steadily moved westward.²⁷⁵

The tension between the United States' expansionist tendencies and its unwillingness to become locked in international conflict came to a head in the Spanish-American War. Reports of the unfolding crisis in Cuba painted a dire picture.²⁷⁶ McKinley had come to office vowing to continue the same approach to international affairs "inaugurated by Washington, keeping [the United States] free from entanglement, either as allies or foes, content to leave undisturbed with them the settlement of their own domestic concerns."²⁷⁷ McKinley wanted "no wars of conquest" and sought to "avoid the temptation of territorial aggression."²⁷⁸ For him, "War should never be entered upon until every agency of peace has failed; peace is preferable to war in almost every contingency."²⁷⁹

The sinking of the *Maine* in Havana, however, tipped McKinley past the point of no return.²⁸⁰ While he gave lip-service to humanitarian concerns, the key issue for McKinley was one of U.S. national security--the continued economic (and physical) strength of the United States:

*1621 The present condition of affairs in Cuba is a constant menace to our peace and entails upon this Government an enormous expense. With such a conflict waged for years in an island so near us and with which our people have such trade and business relations; when the lives and liberty of our citizens are in constant danger and their property destroyed and themselves ruined; where our trading vessels are liable to seizure and are seized at our very door by war ships of a foreign nation; the expeditions of filibustering that we are powerless to prevent altogether ... these and others that I need not mention ... are a constant menace to our peace and compel us to keep on a semi war footing with a nation with which we are at peace.²⁸¹

At stake for McKinley was more than just Cuban independence; at stake was the United States' position in the global arena.

In the 1890s, calls grew for a stronger navy, and Congress passed legislation to allow for the construction of new modern battleships.²⁸² Alfred Thayer Mahan contributed significantly to naval reform.²⁸³ His writings emphasized the importance of sea-power, suggesting that the advent of submarine telegraphs and blockades demanded a robust naval response.²⁸⁴ Mahan postulated a difference between pure defensive war (so-called "passive defense") and defense that relies on attack.²⁸⁵ The latter "may seem to be really offensive war, but it is not; it becomes offensive only when its object of attack is changed from the enemy's fleet to the enemy's country."²⁸⁶ To Mahan, attack on the enemy's country belonged to the Army; attack on the enemy's fleet lay in the domain of the Navy.²⁸⁷ For full defensive capabilities, both were essential.²⁸⁸

Theodore Roosevelt, at age thirty-two, wrote glowingly about Mahan's book:

He never for a moment loses sight of the relations which the struggles by sea bore to the history of the time; and, for the period which he covers, he shows, as no other writer has done, the exact points and the wonderful extent of the influence of the sea power of the various contending nations upon their ultimate triumph or failure, and upon the futures of the mighty races to which they belonged.²⁸⁹

*1622 While the U.S. Navy had proven strong enough during the Civil War, its ability to withstand attack from European powers lay in question.²⁹⁰ "It is true," Roosevelt wrote, "that at the end of four years' warfare we had developed a formidable fleet; but in the event of a European contest, it is not likely that we should be allowed as many weeks before the fatal blow fell."²⁹¹ While public belief in American ingenuity was high, it would be "sheer folly" to rely on it to prevent attack: "Proper forts, with heavy guns, could do much; but our greatest need is the need of a fighting fleet We need a large navy, composed not merely of cruisers, but containing also a full proportion of powerful battleships, able to meet those of any other nation."²⁹²

Eight years later, the United States had the ability to find out in first-hand terms what would happen when the U.S. Navy was pitted against one of the leading European powers. Battles between Spain and the United States raged from the Caribbean to the Pacific Ocean, in the course of which America repeatedly demonstrated its military and naval superiority.²⁹³ In the end, the 1898 Treaty of Paris acknowledged that America was no longer merely a group of loosely affiliated colonies-turned-states, lacking strength and international standing.²⁹⁴ Spain relinquished control over Cuba and ceded to the United States the island of Puerto Rico, all Spanish islands in the West Indies, the island of Guam, and the Philippines.²⁹⁵

The event proved to be a watershed in the history of U.S. national security. The country secured a prominent place on the world stage. It had stood face-to-face with the Spanish Navy and triumphed. Its economic and military power could no longer be ignored. U.S. interests expanded. No longer would the country focus merely on unity or on building international independence. It had obtained both. The economic growth it so jealously sought paid off. The new and immediate question confronting the United States was how to best exercise its power to advantageously shape international affairs. This question pushed the United States from the first epoch and into the second. Its very success in gaining access to more land meant that the country was becoming more intimately familiar with the geopolitics of South America, Central America, and Asia, as well as Europe and Africa, where the country continued to maintain a strong diplomatic and commercial presence.

***1623b. Increasing Number of Domestic Power-Bases**

The second problem that confronted the United States and that helped move the country into the second epoch similarly stemmed from the successes of the first age in shoring up the country's economic strength. To some extent, the problem also related to increasing protections afforded to individuals and groups-- rights central to the constitutional amendments, which over time evolved into their own source of power. In this context, new and expanding domestic economic, political, and religious power-bases began to challenge state and federal authority.

Industrialization brought with it prodigious growth. The 1870s witnessed the extension of railroads into the interior, the creation of iron and steel plants, the production of more coal and oil, the introduction of electricity (leading, eventually, to automation), and new concepts of corporate structure and finance.²⁹⁶ The question became how to mitigate the deleterious consequences of increased mobilization and rapid urbanization.

As a domestic matter, industrialization became a national security concern to the extent that corporate interests usurped the power of the government. From their early days, the railroads attempted to gain access to political levers.²⁹⁷ Successive administrations saw this as putting the republican form of government, founded on the sovereignty of the people, at risk. President Andrew Jackson warned Congress,

In this point of the case the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.²⁹⁸

President Martin Van Buren, following Jackson, remarked that he, too, was convinced of the dangers to which political opinion would be exposed "by any further increase of the already overgrown influence of corporate authorities."²⁹⁹ President Abraham Lincoln later saw the growing power of corporations and the consequent threat to the national government in the aftermath of the Civil War and *1624 remarked:

As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety than ever before, even in the midst of war.³⁰⁰

By the time Republican President Ulysses S. Grant sought a third term, the growing influence of corporate interests had

reached such a height that his party nominated Rutherford B. Hayes instead.³⁰¹ President Grover Cleveland later warned Congress, “Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people’s masters.”³⁰²

It was not just corporate entities that threatened federal authority. Other private power-bases emerged. They too created a challenge for the federal government, as did their interactions with nongovernmental entities. The conflict between labor unions and corporations for instance, prompted the federal government to act over the authority of the states. The legal framework adopted was a national security one, consistent with the country’s actions in war. The confrontation between Eugene Debs’s American Railway Union and the Pullman Palace Car Company provides a vivid example of how the federal government responded to the labor conflict as a threat to national security.³⁰³

During the Panic of 1893, Debs responded to cut wages and a “wildcat” strike (a strike that is unauthorized or uncoordinated by the union) by attempting to directly negotiate with Pullman and, once negotiations failed, formally striking.³⁰⁴ President *1625 Grover Cleveland, over the objection of the Governor of Illinois, sent in federal troops.³⁰⁵ He acted under an 1861 statute that Congress introduced in the context of the Civil War.³⁰⁶ The pertinent section read:

[W]henever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory of the United States, it shall be lawful for the President of the United States to call forth the militia or any or all of the states of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.³⁰⁷

Although the statute required the President to accompany any action with a proclamation, Cleveland failed to do so; instead, he simply authorized the military to put down the strikes.³⁰⁸ John P. Altgeld, the Governor of Illinois, lodged a formal protest: “[I]t is not soldiers that the railroads need so much as it is men to operate trains.”³⁰⁹ The country was not at war. The question was not one of political rebellion. The statute of 1861, Altgeld argued, “authorized the use of federal troops in a state whenever it shall be impracticable to enforce the laws of the United States within such state by the ordinary judicial proceedings. Such a condition does not exist in Illinois.”³¹⁰ The strikes, for Altgeld, should have been a matter of local self-government. “As governor of the state of Illinois,” Altgeld wrote, “I protest against this and ask the immediate withdrawal of the federal troops from active duty in this state.”³¹¹

*1626 President Cleveland saw matters rather differently. He replied the following day:

Federal troops were sent to Chicago in strict accordance with the constitution and laws of the United States, upon the demand of the post-office department, that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that process of the federal courts could not be executed through the ordinary means, and upon abundant proof that conspiracies existed against commerce between the states.³¹²

Cleveland added that the positioning of soldiers was “not only proper but necessary.”³¹³ The immediate constitutional claims stemmed from the national legislature’s authorities under Article I § 8, cl. 7 (post offices) and Article I § 8, cl. 3 (commerce), as well as Article I § 8, cl. 18 (Necessary and Proper Clause) claims for federal jurisdiction. Underlying Cleveland’s claim, however, were a series of legal opinions that suggested constitutional justification rested with the President’s commander-in-chief power and his duty to take care that the laws be faithfully executed. The President’s power and duty bore an intimate

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connection. Former Attorney General William Miller, writing on July 11, 1894 to Attorney General Richard Olney about the President's use of the military to put down the strikes, explained:

That the President has the authority and that it is his duty to use the whole power of the Government for the enforcement of the laws of the United States seems to me to be axiomatic. It is made his duty to take care that the laws be faithfully executed. He is made Commander-in-Chief of the Army and Navy. In my judgment, the power thus conferred is given in order that he may execute the duty thus imposed.³¹⁴

The U.S. Army analysis that followed the Pullman strikes agreed with Miller's position.³¹⁵ It cited *In re Neagle*, which provides, "The power and duty imposed on the President to 'take care that the laws are faithfully executed,' necessarily carries with it all power and authority necessary to accomplish the object sought to be *1627 attained."³¹⁶ The Army found further impetus in the Vesting Clause of Article II, combined with the Take Care Clause.³¹⁷ Support could also be found in Article IV, § 4.³¹⁸ The "United States" could not be limited to just Congress when it was in session--the guarantees in question were "intended to be effective at all times."³¹⁹ The power to provide the protections guaranteed by the Constitution, moreover, by definition requires the power to command--an authority held by the President as Commander in Chief.³²⁰

Altgeld again objected, writing that Cleveland's answer involved startling conclusions and evaded the point at issue: that self-government was as essential as federal supremacy.³²¹ He noted that under the Constitution, "except in times of war, the military shall be subordinate to civil authority."³²² No state of war existed; yet the federal troops ordered into Chicago were neither under the civil authorities nor were they in any way responsible to them for their conduct.³²³ "They are not even acting under the United States marshal or under any federal officer of the state, but are acting directly under military orders issued from military headquarters at Washington, and insofar as these troops act at all it is military government."³²⁴

Altgeld also argued that the opinions of various executive branch officials were meaningless from a perspective of checks on federal authority: "All of these officers are appointed by the executive. Most of them can be removed by him at will. They were not only obliged to do his bidding, but they are in fact a part of the executive."³²⁵ By this logic, any local disturbance might provide an excuse "for an ambitious executive to order out the military forces of all of the states and establish at once a military government."³²⁶ President Cleveland replied that perhaps instead of discussing the matter, those in authority ought to focus on restoring law *1628 and order.³²⁷

The strike got worse. Attorney General Olney realized, days into the military action, that the President had neglected to issue a formal proclamation as required by law.³²⁸ Accordingly, on July 8th, the President issued a statement, warning all those engaged in the strike to desist.³²⁹ "Those who disregard this warning and persist in taking part ... cannot be regarded otherwise than as public enemies."³³⁰ Cleveland stated, moreover, that it may be impossible for the troops to distinguish between those engaged in the strike and mere observers.³³¹ The President advised that those merely curious about the strike remain at home.³³²

The incident provides one of many examples in which the federal government inserted itself into labor union disputes, above the authority of state government and within a national security framework. Underlying such decisions was a fear that the private power-bases would bypass federal authority. Ironically, these very power-bases emerged as a result of the government's success in strengthening the economy during the first epoch.

The question that arose was not just how to deal with individual manifestations of the domestic groups' power, but also what to do about general corporate power over the long-term. Concern grew about the unfair competition created by monopolies, particularly in regard to the railroads.³³³ In 1887, Congress thus passed the Interstate Commerce Act, which established the Interstate Commerce Commission.³³⁴ This body was given the power to investigate and to prosecute companies that violated the law.³³⁵ Corporate power, outside the law, must be curbed, as Benjamin Harrison explained two years later: "If our great corporations would more scrupulously observe their legal limitations and duties, they would have less cause to complain of the unlawful limitations of their rights or of violent interference with their operations."³³⁶

*1629 Concern extended beyond the economic sphere. Political and economic writings challenging the existing order began to emerge, raising questions about whether the laissez-faire economics of Adam Smith and the Democratic-Republican tenets underlying the political system had yielded an optimal system.³³⁷ Special attention was drawn to the ideas of Karl Marx (e.g., his *Economic and Philosophical Manuscripts*, which questioned private property and advocated communism).³³⁸ The anarchist movement drew inspiration from William Goodwin's *An Enquiry Concerning Political Justice*, the anti-statist and anti-authoritarian ideas of Peter Kropotkin and Mikhail Bakunin, and Emma Goodman's demands that workers take matters into their own hands through collective anarchy.³³⁹ The attention drawn by such works and those embracing these theories intensified in the context of serious threats. In assassinating President McKinley, Leon Czolgosz imitated Gaetano Bresci, who had killed King Umberto I of Italy in 1900.³⁴⁰ For President Roosevelt, "When compared with the suppression of anarchy, every other question sinks into insignificance."³⁴¹

The national government would not tolerate challenges to national authority from the economic, political, or religious spheres. Any effort to usurp national power would be stopped. President James Garfield thus reflected on the Mormon Church that, quite apart from its polygamist teachings, it prevented the administration of justice "through ordinary instrumentalities of law."³⁴² No ecclesiastical organization could "be safely permitted to usurp in the smallest degree the functions and powers of the National Government."³⁴³ President William McKinley similarly noted that the purpose for denying vigilantism of any sort was to protect the domestic order:

*1630 The constituted authorities must be cheerfully and vigorously upheld. Lynchings must not be tolerated in a great and civilized country like the United States; courts, not mobs, must execute the penalties of the law. The preservation of public order, the right of discussion, the integrity of courts, and the orderly administration of justice must continue forever the rock of safety upon which our Government securely rests.³⁴⁴

What these perceived threats to national authority shared in common was that they themselves were the product of a successful national security strategy. Yet their very existence presented a threat to the national government. This led, in the second epoch, to an increased emphasis on the dominance of federal power, and direct investment in social and economic concerns previously left in the hands of the states.

B. Formative International Engagement and Domestic Power: 1898-1930**Power: 1898-1930**

The second epoch built on the first age, in that it incorporated the basic tenets of the Founding era: primarily, unity; and secondarily, international independence and economic growth. To these, it added formative international engagement, as well as efforts to counter growing bases of domestic power. To the extent that the two epochs found themselves in tension, the values of the first era dominated.

1. Political, Economic, and Military Concerns

The war of 1898 proved pivotal in the United States' approach to national security. By expanding the perception of what would be required in the service of national interests, it introduced a new epoch in American history. The country proved itself able to compete and hold its own on the world stage. Attention gradually turned to how the United States could have a more formative impact on world affairs. In the political realm, international arbitration took center stage.

Immediately prior to the war, arbitration drew some attention as an instrument of international law--one (of many) tools in the diplomatic chest.³⁴⁵ It brought with it a number of advantages: by participating in international arbitration, the United States could shape, and not merely respond to, the global political environment. Such an approach, moreover, extended American influence beyond bilateral or multilateral agreements on specific issues of dispute. It provided the country with the power to determine how disputes would be handled in the future.

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With the country's outward projection of power, however, came internal conflict. An early effort to craft an international arbitration instrument (signed with Great Britain early in 1897) failed to pass the Senate based on constitutional ***1631** concerns.³⁴⁶ The issue for the Senate was whether the treaty in question was an agreement to enter arbitration, or whether each arbitration would produce a new treaty requiring subsequent Senate approval.³⁴⁷ In 1904 and 1905, though, Secretary of State John Hay negotiated more than ten arbitration treaties.³⁴⁸ Elihu Root, who succeeded Hay in President Theodore Roosevelt's Second Administration, negotiated another forty such treaties.³⁴⁹ In 1913, Secretary of State William Jennings Bryan proposed the further negotiation of "cooling-off treaties."³⁵⁰ By the end of the year, approximately thirty such agreements had been signed.³⁵¹

Support for the use of international instruments to prevent war grew, leading to U.S. participation in the First Hague Conference. The meeting of 1899 resulted in the creation of a permanent court of arbitration, accessible at all times by the party-states.³⁵² The First Hague Conference also produced a convention that prohibited the launching of projectiles and explosives from balloons.³⁵³ The convention codified the behavior of belligerents, including qualifications (§ 1, cl. 1), prisoners of war (§ 1, cl. 2), and treatment of the sick and wounded (§ 1, cl. ***1632** 3).³⁵⁴ It addressed the manner of hostilities, discussing bombardments (§ 2, cl. 1), spies, (§ 2, cl. 2), flags of truce (§ 2, cl. 3), capitulation (§ 2, cl. 4), and armistices (§ 2, cl. 5).³⁵⁵ In addition, the Annex discussed military authority over hostile territory (§ 3), as well as the internment of belligerents and care for the wounded in neutral countries (§ 4).³⁵⁶ These instruments, and the role of the United States in crafting them, demonstrated that the country had come to view what fell within its national security interests more broadly: it now focused on shaping the international environment in which it had obtained independence.

The United States also experimented with becoming an arbiter in international disagreements. The Franco-German conflict over Morocco in the early twentieth century provided one such opportunity.³⁵⁷ As a formal matter, the United States was only nominally involved: a local Moroccan bandit had captured an American citizen, Ion Perdicaris.³⁵⁸ France stood poised to assume control of Morocco.³⁵⁹ Germany opposed France, and sought to negate France's efforts by recognizing the sultanate of Morocco.³⁶⁰ The United States did not have to become involved; however, it subsequently worked to broker an agreement.³⁶¹ Roosevelt himself evinced concern that there might be a war.³⁶² He later reflected,

***1633** I felt in honor bound to try to prevent the war if I could, in the first place, because I should have felt such a war to be a real calamity to civilization; and in the next place, as I was already trying to bring about peace between Russia and Japan, I felt that a new conflict might result in what would literally be a world conflagration; and finally for the sake of France.³⁶³

Ultimately, U.S. plenipotentiaries signed the final agreement with the inclusion of a reservation that exempted the country from any responsibility for the treaty's terms.³⁶⁴

Political affairs presented just one way in which the country could pursue a more aggressive international role. The United States also took steps in the economic realm. Beyond protecting its commercial routes and goods, the country began exploring ways to prevent future threats to U.S. trade.

Following the Spanish-American War, for instance, Spain ceded the Philippines to the United States.³⁶⁵ It was not immediately clear what to do with the islands.³⁶⁶ They provided the United States, though, with territory in Asia, drawing American attention eastward. Accordingly, in 1899, Secretary of State John Hay attempted to open trade with China.³⁶⁷ After making inquiries to Russia, France, Britain, Germany, Italy, and Japan, he announced that trade with China could commence (despite some question as to whether this was actually the case).³⁶⁸ In 1900, Hay issued what has come to be called the Second Open Door Note, which was a request that European powers not use the Boxer Rebellion in China as an excuse to partition the region.³⁶⁹

The United States' economic interests in the second epoch overrode its longstanding aversion to "entangling alliances." Instead, to ensure that U.S. commerce would flow, the United States proved willing to commit its military forces to protect the political structures of other countries. In 1902, Panama separated from ***1634** Columbia and almost immediately offered

the United States a treaty for the Panama Canal.³⁷⁰ Following byzantine negotiations, the United States agreed.³⁷¹ As part of the treaty, the United States vowed to maintain Panama's independence.³⁷² In exchange, Panama agreed to give the United States "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal"³⁷³ The United States' approach in this matter leaned towards the Monroe Doctrine by preventing other countries from interfering in the Americas; however, it also signaled a willingness to form explicit, written "entangling alliances" that could bring the United States to the brink of war.³⁷⁴

As a military matter, Vice President Theodore Roosevelt established a more aggressive position for the United States in the international arena. He favored a proactive stance over a more reactive one, famously stating, "Speak softly and carry a big stick; you will go far."³⁷⁵ Shortly after he uttered his remarks, an assassin struck William McKinley and Roosevelt took the presidency.³⁷⁶ As President, Roosevelt immediately put his words into action negotiating a treaty with Cuba.³⁷⁷ The treaty stipulations, explicitly backed by the land and naval forces of the United States, restricted Cuba's future actions,³⁷⁸ and prevented Cuba from entering into any agreements with any foreign power.³⁷⁹ The treaty also gave the United States the right to intervene in the country to maintain Cuban independence,³⁸⁰ and ratified and validated "all Acts of the United States in Cuba during its military occupancy thereof."³⁸¹

Roosevelt took a similarly aggressive stance towards the disputed boundary separating Alaska and Canada³⁸²--a dispute made all the more important following the discovery of gold in the Klondike in August 1896.³⁸³ Great Britain, having *1635 just fought (and won) the Boer War,³⁸⁴ and cognizant of America's forward-leaning stance, decided not to press its claims and largely conceded.³⁸⁵ Britain supported the form of arbitration selected by the U.S. Administration³⁸⁶--a rather loaded deck, in favor of the United States. Roosevelt appointed Secretary of War Elihu Root, Senator Henry Cabot Lodge of Massachusetts, and former Senator George Turner of Washington as jurists on the arbitration board.³⁸⁷ The sole British commissioner who took part in the exercise sided with the Americans.³⁸⁸ That the exercise was primarily a matter of politics, and not of law, was abundantly clear, as evidenced by the lack of American jurists on the panel.

Policies adopted in Cuba, Panama, China, and Alaska presaged a more aggressive stance towards matters in the Western Hemisphere, and the potential for the United States to perform a type of policing role presented itself. Roosevelt spelled out his position in more detail in his 1904 *State of the Union Address*:

All that this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship. If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly ... to the exercise of an international police power.³⁸⁹

The articulation of Roosevelt's Corollary to the Monroe Doctrine signaled that the United States would begin to involve itself more directly in matters in the Western Hemisphere. The justification for such actions included U.S. interests, but began also to take on an appeal to humanitarian concerns.³⁹⁰ Thus, while attention to crimes and violence perpetrated at home deserved attention, the exercise of *1636 violence on a larger scale, in the international environment, could hardly be ignored:

We have plenty of sins of our own to war against, and under ordinary circumstances we can do more for the general uplifting of humanity by striving with heart and soul to put a stop to civic corruption, to brutal lawlessness and violent race prejudices here at home than by passing resolutions about wrongdoing elsewhere. Nevertheless there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it.³⁹¹

American strength would not come from acting with good will, but from being willing to engage with force, when necessary.

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It was no longer sufficient simply to have peace; it must be seen as a just peace--otherwise, recourse to force might be necessary.³⁹²

The United States' new, more invigorated role on the international stage stemmed from its self-awareness of the power accumulated during the first epoch. "Power," Roosevelt reflected, "invariably means both responsibility and danger."³⁹³ The Founders had faced dangers that no longer presented a threat:

We now face other perils, the very existence of which it was impossible that they should foresee. Modern life is both complex and intense, and the tremendous changes wrought by the extraordinary industrial development of the last half century are felt in every fiber of our social and political being.³⁹⁴

The country thus moved from the defensive posture of the first epoch--wherein the United States sought primarily to ensure the existence of the Union and secondarily to establish international independence and economic strength--to a more aspirational position.³⁹⁵ The domestic picture was not always rosy. But, as *1637 Roosevelt noted in 1905, "[W]hen I feel gloomy about democracy I am positively refreshed by considering the monstrous ineptitude of the ideal absolutism when tried out [in Russia] during the last eighteen months."³⁹⁶

a. Military Might

To take on this new, more formative international role, the United States required a stronger naval force. Gone were the concerns of the Jeffersonians, who feared that building such strength would attract unwanted attention from Great Britain and challenge her rule of the seas.³⁹⁷ In the nineteenth century, Britain had exacted a high toll from the Dutch in response to their audacious efforts to challenge British primacy.³⁹⁸ But by the dawn of the twentieth century, having established the United States' naval credentials by taking on Spain--and winning--doubt about further expanding the nation's naval capacities all but vanished.³⁹⁹

President William Howard Taft came to office determined to continue Roosevelt's program: "My distinguished predecessor," he began, "has in many speeches and messages set out with great force and striking language the necessity for maintaining a strong navy commensurate with the coast line, the governmental resources, and the foreign trade of our Nation."⁴⁰⁰ Taft reiterated the reasons that Roosevelt had presented "in favor of the policy of maintaining a strong navy as the best conservator of our peace with other nations, and the best means of securing respect for the assertion of our rights, the defense of our interests, and the exercise of our influence in international matters."⁴⁰¹ Taft emphasized that even as the United States pursued its interests through shaping international law and forging bilateral treaties, the country must be prepared for hostilities.⁴⁰² Military might, moreover, would increase the country's credibility abroad--not just in Europe, but also with regard to Asia:

In the international controversies that are likely to arise in the Orient growing out of the question of the open door and other issues the United States can maintain her interests intact and can secure respect for her just demands. She *1638 will not be able to do so, however, if it is understood that she never intends to back up her assertion of right and her defense of her interest by anything but mere verbal protest and diplomatic note.⁴⁰³

The Treasury could afford a stronger military presence. A navy, unlike a large standing army, would give the Republic little to fear. And the Spanish-American War had presented the country with an opportunity. Taft explained,

The policy of the United States in the Spanish war and since has given it a position of influence among the nations that it never had before, and should be constantly exerted to securing to its bona fide citizens, whether

native or naturalized, respect for them as such in foreign countries.⁴⁰⁴

The emphasis, as in the first epoch, would be on commerce; but it would be backed with military might to ensure the elimination of trade barriers in Europe, the transfer of goods through the Panama Canal, and the flow of trade with Asia.

b. Secondary Inquiry: From Rule of Law to Type of Law

As a domestic matter, industrialization had created powerful actors who threatened to usurp national authority. Urbanization meant that population centers were growing, with scant attention yet paid to a host of deleterious consequences--such as poor sanitation, growing incidence of disease, and bad working conditions.⁴⁰⁵ Companies were beginning to wield a significant amount of power.⁴⁰⁶ President Woodrow Wilson recognized in his *First Inaugural Address* that the economic success of the country had come at a price:

There has been something crude and heartless and unfeeling in our haste to succeed and be great. Our thought has been "Let every man look out for himself, let every generation look out for itself," while we reared giant machinery which made it impossible that any but those who stood at the levers of control should have a chance to look out for themselves.⁴⁰⁷

Wilson sought to ensure that the government did not become "a facile instrument in the hand of private interests."⁴⁰⁸ It was essentially a battle for domestic power.

The question was not whether the national government needed to protect the rule of law per se--this was a core aspect of U.S. national security in the first epoch. Instead, attention turned to a secondary conversation: what types of laws *1639 were best for society. "The first duty of law," Wilson reflected, "is to keep sound the society it serves. Sanitary laws, pure food laws, and laws determining conditions of labor which individuals are powerless to determine for themselves are intimate parts of the very business of justice and legal efficiency."⁴⁰⁹

Although this era in American history is often discussed in terms of the protection of laborers, what could be missed in observing this period is the role of the federal government in diminishing the strength of corporate entities and bolstering its own power. It took on a more aggressive role in shaping not just international law and global political, economic, and military affairs, but also the political, economic, and social fabric of domestic life-- a role traditionally left in state hands.⁴¹⁰

Wilson's initial decision to stay out of World War I reflected the domestic national security concerns that had been at the heart of the first epoch. Made up of citizens from many different countries, the United States could hardly jump into the battle on one side. To do so risked alienating part of the citizenry and opening lines of schism where national fraternity had, slowly and painstakingly, been nurtured. Wilson observed,

The people of the United States are drawn from many nations, and chiefly from the nations now at war. It is natural and inevitable that there should be the utmost variety of sympathy and desire among them with regard to the issues and circumstances of the conflict. Some will wish one nation, others another, to succeed⁴¹¹

Wilson anticipated that in such circumstances, it would be "easy to excite passion and difficult to allay it."⁴¹² In short, "Such divisions amongst us would be fatal to our peace of mind and might seriously stand in the way of the proper performance of our duty as the one great nation at peace"⁴¹³

National fraternity, however, splintered over the new and emerging power-bases within society. Among the most prominent advocacy groups was the National Security League ("NSL"), an organization formed in 1915 to encourage the United States

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to prepare militarily for engagement in the war.⁴¹⁴ The NSL focused on what it called “patriotic education” and inculcating belief in national military services. *1640⁴¹⁵ It opposed isolationism and sought government regulation of the economy, a unified national defense agency, and, interestingly, an interstate highway system.⁴¹⁶ (The last being seen as necessary for consolidating national control of the domestic arena.) The NSL strongly supported the Espionage Act of 1917 and the Sedition Act of 1918.⁴¹⁷ Despite the group’s embrace of strong federal powers, however, the NSL’s size and its increasing influence generated concern at a federal level.⁴¹⁸ Congress initiated hearings to gain insight into the power structure of the organization, in the process diminishing the NSL’s stature.⁴¹⁹ The hearings directly questioned the NSL’s support for the President during the war effort.⁴²⁰ The government would not tolerate criticism by domestic power-bases, whatever their support for government initiatives might be.⁴²¹

The United States’ decision to involve itself in World War I following the sinking of the *Lusitania* involved defensive considerations--typical of the first epoch in U.S. national security--as well as elements of the formative concerns that mark the second age. The German submarine attack on the *Lusitania* off the coast of Ireland killed 1198--including 128 Americans.⁴²² Germany’s stated goal was to counter the military threat presented by the merchant vessel.⁴²³ A U.S. State *1641 Department investigation later found that the *Lusitania* was carrying both contraband and ammunition-- suggesting, if anything, that the United States was something more than neutral in the course of the war.⁴²⁴

The sinking of the ship called the United States’ international reputation into question, convincing Great Britain that the United States would now enter the war.⁴²⁵ The U.S. Ambassador to the Court of St. James, Walter Hines Page, reported to Secretary of State Robert Lansing:

Official comment is of course reticent. The freely expressed unofficial feeling is that the United States must declare war or forfeit European respect. So far as I know this opinion is universal. If the United States come in, the moral and physical effect will be to bring peace quickly and to give the United States a great influence in ending the war and in so reorganizing the world as to prevent its recurrence.⁴²⁶

The question was thus not just one of international reputation. Equally important was the role that the United States could then play in shaping the new world order: “If the United States submits to German disregard of her citizens’ lives and of her property and of her neutral rights on the sea, the United States will have no voice or influence in settling the war nor in what follows for a long time to come.”⁴²⁷

Herein the two epochs converged: international independence mattered. The sinking of the *Lusitania* demonstrated that the nation was not free to act as it wished internationally. But failure to act would mean that the country would miss an opportunity to shape the global environment in the aftermath of hostilities.

Ambassador Page’s remonstrance failed to win the day, but it proved prescient in pinpointing U.S. interests, which eventually prevailed. President Wilson initially refused to go to war.⁴²⁸ He nonetheless went after Germany with all the diplomatic strength the country could muster, causing Secretary of State William *1642 Jennings Bryan to resign in protest.⁴²⁹ Germany, in response, assured the United States that it would be more careful with regard to neutrals’ rights.⁴³⁰

By January 1917, however, the German position had changed, and a series of incidents shifted the United States’ stance. On January 31, the German Ambassador, Count Johann von Bernstorff, informed the new Secretary of State, Robert Lansing, that Germany would henceforward engage in unlimited warfare.⁴³¹ Believing that its submarine forces were sufficient to win the war, Germany intended to bring all commerce to a halt.⁴³² In March of 1917, the British government intercepted a message from the German Foreign Minister, Arthur Zimmermann, to the German Ambassador in Mexico City.⁴³³ The “Zimmermann Telegram,” as it came to be called, directed the Ambassador to offer U.S. territory to Mexico in return for engagement in the war.⁴³⁴ The chilling message read:

Strictly Secret ... We intend from the first February un-restricted U-boat war to begin stop (.) Together war make stop (.) Together peace stop (.) Generous financial support and understanding our part that Mexico in

Texas comma (,) New Mexico comma (,) ARIZONA former lost territory back conquer stop (.) Settlement in the details. Your Excellency to be left stop (.) You will of the foregoing the President in strictest secrecy inform comma (,) as soon as war's outbreak with United States certain is It will attempted by United States nevertheless neutral to keep stop (.) In the event that this not succeed should comma (,) offer we Mexico on following terms alliance stop (.)⁴³⁵ *1643 American opinion shifted strongly in support of war.⁴³⁶

Upon taking office on March 5, 1917, President Woodrow Wilson gave voice to Ambassador Page's previous concerns. He suggested that the United States could not avoid the impact of world war: "The war inevitably set its mark from the first alike upon our minds, our industries, our commerce, our politics and our social action. To be indifferent to it, or independent of it, was out of the question."⁴³⁷ The United States had been wronged upon the seas, but had not injured in return; instead, the nation's focus had been on "armed neutrality."⁴³⁸ Eventually, however, strong economic interests drew America towards war.⁴³⁹ Wilson went on to articulate a set of principles that built on Washington's articulation of international independence, yet he took it to the next step, calling for engagement to shape the global post-war environment.⁴⁴⁰ Wilson thus embraced the more forward-leaning posture articulated by Roosevelt even as he ensured that the interests of the first epoch remained protected.

Although Wilson ran on a platform of "He Kept Us Out of War" during his reelection campaign, within a month of his second inauguration, he approached Congress to request a formal declaration of war.⁴⁴¹ Wilson appealed to the memory of noncombatants killed in the prosecution of the war, as well as Germany's decision to target international commerce: "The present German submarine warfare against commerce," Wilson argued, "is a warfare against mankind. It is a war against all nations."⁴⁴² The United States' purpose, though, was not solely to *1644 defend its interests. Ambassador Page's remonstrance resurfaced: the object would be to defeat autocratic power "and to set up amongst the really free and self-governed peoples of this world such a concert of purpose and of action as will henceforth ensure the observance of those principles."⁴⁴³ The United States would act upon the international environment.

Wilson went on to lay out exactly what this would look like in a post-war world. Democratic nations would have a crucial role to play: "A steadfast concert for peace can never be maintained except by a partnership of democratic nations. No autocratic government could be trusted to keep faith within it or observe its covenants. It must be a league of honour, a partnership of opinion ..."⁴⁴⁴ U.S. national security depended upon eliminating autocratic governments. That is, the national government could not act to further its basic purpose--the common defense of the members, the preservation of peace against external attacks, the regulation of commerce, and maintenance of political and commercial intercourse with foreign countries--absent a new world order.

The defining feature of this second epoch, built as a concentric circle on the first era, moved the country to a posture of formative engagement. Wilson claimed necessity in the interests of U.S. national security:

We are accepting this challenge of hostile purpose, because we know that in such a government, following such methods, we can never have a friend; and that in the presence of its [an autocratic] organized power, always lying in wait to accomplish we know not what purpose, *there can be no assured security for the democratic governments of the world.*⁴⁴⁵

The fight would not be easy, but it would be instrumental in protecting "the rights and liberties of small nations" and creating "a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free."⁴⁴⁶

Thus, from the beginning of the United States' entry into the war, Wilson made it clear that U.S. national security required the United States to take a prominent role in shaping the global post-war environment. In January 1918, Wilson usurped whatever European initiative there might have been to lead post-war discussions by announcing fourteen points on which the United States would proceed.⁴⁴⁷ A new world order would be created in accordance with U.S. interests: covenants of *1645

peace; absolute freedom of navigation upon the seas; the removal of all economic barriers; reductions in national armaments; diminished colonial claims; evacuation of Russia, Belgium, and France; readjustment of Italy's borders; the break-up of the Austro-Hungarian Empire; evacuation of Rumania, Serbia, and Montenegro; the dismantling of the Ottoman Empire; the establishment of an independent Poland; and the creation of a League of Nations all pointed towards a new world order.

2. *Tension Between the Epochs: Independence v. Engagement*

The Fourteen Points became the basis for U.S. negotiations with Germany. Nevertheless, President Wilson's course could not be totally divorced from the key national security interests of the first epoch. Specifically, international independence, absolutely central to the administrations of Washington, Jefferson, Monroe, and others, stood in tension with Wilson's commitment to a League of Nations. This tension undermined the Paris Peace Treaty when Wilson turned to the Senate for ratification.

The Senators' central concern was whether the United States would be free to determine its own course in the international arena, or whether its actions would be hampered by the League.⁴⁴⁸ Senators proved reluctant to join an organization whose primary interests might be European in character.⁴⁴⁹ Reservations attached to the treaty included, *inter alia*: "The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations--whether members of the league or not--under the provisions of article 10."⁴⁵⁰ The Senate refused to allow any questions relating to the Monroe Doctrine to be submitted to arbitration under the League of Nations.⁴⁵¹ The Senate further objected to potentially footing the bill for an organization with interests (potentially) so different from those of the United States.⁴⁵² All of these exceptions carved out for the country an independent role in the international arena, even as the United States embraced a more active global role.

As Wilson's health failed, President Warren G. Harding came to office in 1921 with the tensions between the two epochs foremost in the public discourse. His *Inaugural Address* lurched between the articulations of national security. On the one hand, he invoked Washington's legacy:

*1646 The recorded progress of our Republic, materially and spiritually, in itself proves the wisdom of the inherited policy of noninvolvement in Old World affairs. Confident of our ability to work out our own destiny, and jealously guarding our right to do so, we seek no part in directing the destinies of the Old World. We do not mean to be entangled. We will accept no responsibility except as our own conscience and judgment, in each instance, may determine⁴⁵³

But the Old World did not have a monopoly on the New World. And in this new global order, the United States would play a more formative role:

We are ready to associate ourselves with the nations of the world, great and small, for conference, for counsel; to seek the expressed views of world opinion; to recommend a way to approximate disarmament and relieve the crushing burdens of military and naval establishments. We elect to participate in suggesting plans for mediation, conciliation, and arbitration, and would gladly join in that expressed conscience of progress, which seeks to clarify and write the laws of international relationship, and establish a world court for the disposition of such justiciable questions as nations are agreed to submit thereto. In expressing aspirations, in seeking practical plans, in translating humanity's new concept of righteousness and justice and its hatred of war into recommended action we are ready most heartily to unite, but every commitment must be made in the exercise of our national sovereignty. Since freedom impelled, and independence inspired, and nationality exalted, a world supergovernment is contrary to everything we cherish and can have no sanction by our Republic. *This is not selfishness, it is sanctity. It is not aloofness, it is security.*⁴⁵⁴

U.S. national security depended upon engagement that stopped short of a "world super-government."⁴⁵⁵ But that very engagement departed from tradition: "We have come to a new realization," Harding commented, "of our place in the world

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and a new appraisal of our Nation by the world.”⁴⁵⁶ America was “ready to encourage, eager to initiate, [and] anxious to participate” in any program “likely to lessen the probability of war.”⁴⁵⁷ The goal was nothing short of “a high place in the moral leadership of civilization”⁴⁵⁸ Engaging in trade for the benefit of the United States would, therefore, no longer be sufficient.

The practical manifestation of this approach came in the form of a series of agreements. The Four-Power Pact would henceforward govern altercations in the *1647 Pacific.⁴⁵⁹ The Kellogg-Briand Pact, initiated by France, quickly bound other major powers to “condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”⁴⁶⁰ The settlement “of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them” would never be sought “except by pacific means.”⁴⁶¹ In 1936, Secretary Hull suggested that the very purpose of the Inter-American Peace Conference was to “banish war from the Western Hemisphere.”⁴⁶²

The League of Nations might be looked to as a solution to international conflict. Indeed, the Lytton Commission (unsuccessfully) attempted to intervene in 1932 when the Japanese Army in Manchuria attacked Chang Hsueh-Liang, allied with Chiang Kai-shek.⁴⁶³ But the failure of international institutions did not mean that the United States’ hands were subsequently tied. The country would continue to protect its economic interests through forward engagement-- militarily if necessary. With the Fourth Marine Regiment stationed in China, the Stimson Doctrine--established by Secretary of State Henry Stimson in diplomatic notes sent to both Japan and China--followed the course first enunciated by John Hay in 1899.⁴⁶⁴ It announced that the U.S. government would not recognize as legally binding any de facto situation, nor any treaty or agreement entered into between Japan and China “which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China.”⁴⁶⁵ Secretary Stimson subsequently sent a letter to the Chairman of the Foreign Relations Committee, noting the two principles invoked by Hay: “(1) equality of commercial opportunity among all nations in dealing with China, and (2) as necessary to that equality the preservation of China’s territorial and administrative integrity.”⁴⁶⁶

In this picture, domestic concerns still mattered. Harding stated, “I wish for an America no less alert in guarding against dangers from within than it is watchful *1648 against enemies from without.”⁴⁶⁷ The concerns that stemmed from industrialization had not abated. “My most reverent prayer for America is for industrial peace, with its rewards, widely and generally distributed, amid the inspirations of equal opportunity.”⁴⁶⁸ Here, the Great Depression may have masked the growing power of corporate entities, but concerns about the role played by business continued--with respect to the munitions industry. In 1936, Senator Gerald P. Nye chaired a Special Committee on the Investigation of the Munitions Industry, which focused on the role played by military companies in the buildup to World War I.⁴⁶⁹ The Committee found “that almost without exception, the American munitions companies investigated have at times resorted to such unusual approaches ... as to constitute, in effect, a form of bribery of foreign governmental officials or of their close friends in order to secure business.”⁴⁷⁰ The Committee further determined, “that not only are such transactions highly unethical, but that they carry within themselves the seeds of disturbance of the peace and stability of those nations in which they take place.”⁴⁷¹ Nye’s Committee charged munitions companies with weakening democratic government and threatening the peace and civic process of nations.

Scholars have looked at this period and suggested that, as a matter of international relations, it is marked by increasing American isolationism. Professor John Lewis Gaddis, for instance, posits that prior to World War II:

[M]ost Americans believed that their country could best protect itself by minimizing political entanglements overseas. Events of 1939-40 persuaded leaders of the Roosevelt Administration that they had been wrong; Pearl Harbor convinced remaining skeptics. From then on, American policy-makers would seek security through involvement, not isolation: to prevent new wars, they believed, the whole system of relations between nations would have to be reformed.⁴⁷²

What is missed in this analysis and similar accounts are, first, the extent to which the United States was already engaged in a

formative role, and, second, the degree to which national security concerns operated at a domestic level.

On the first point, there is certainly no shortage of military interventions in the first three decades of the twentieth century. Salient examples include: three occupations of Cuba; several decade-long occupations of Haiti, Santo Domingo, and Nicaragua (twenty-four years in the last case); intervention in Mexico; *1649 involvement in Venezuela; and military support to the rebellion that led to the creation of Panama in 1904.

As for the second point, this era could equally be looked at through a lens of congressional efforts to restrict executive branch latitude as well as the undue influence of corporate entities within the national security arena. It is not that the United States was not engaged overseas; to the contrary, since the Spanish-American War it had adopted a policy of formative international engagement. The crafting of arbitration agreements, the negotiation of instruments designed to address international conflict, the creation of the League of Nations, and continued efforts to shape trade agreements demonstrated the United States' willingness to shape the international environment. This is distinguishable from the country's reluctance to commit itself to the binding decisions of international bodies.

The battle over the League of Nations has thus widely been interpreted as a symbol of American isolationism. But it can equally be regarded as a product of domestic conflict over the exercise of power with regard to U.S. national security. It is not the only example.

Consider, for instance, the Neutrality Acts, enacted between 1935 and 1937. These statutes undermined President Franklin D. Roosevelt's ability to assist the United Kingdom in the face of German aggression.⁴⁷³ The first such measure, of August 1935, required the President to proclaim any outbreak of war; it also prevented any export of arms, or ammunition to any named belligerent states.⁴⁷⁴ Roosevelt signed the legislation and later invoked it in the Second Italo-Abyssinian War (Italy invaded Ethiopia in October 1935). Nonetheless, he memorialized his objections in a signing statement: "It is the policy of this Government," he wrote, "to avoid being drawn into wars between other nations, but it is a fact that no Congress and no Executive can foresee all possible future situations It is conceivable that ... the inflexible provisions might drag us into war instead of keeping us out."⁴⁷⁵ The President chafed at having his hands tied by Congress. Roosevelt reiterated his commitment to the principles of the first epoch: "The policy of the Government is definitely committed to the maintenance of peace and the avoidance of any entanglements which would lead us into conflict."⁴⁷⁶

Congress continued to insert itself into commercial affairs related to war. In February 1936, the Second Neutrality Act forbade loans to belligerents.⁴⁷⁷ The Third Neutrality Act of January 1937 embargoed shipments to belligerents in the *1650 Spanish Civil War.⁴⁷⁸ The Fourth Neutrality Act, passed in May 1937, allowed for non-munitions trade for two years, as long as the goods were not carried in American ships.⁴⁷⁹ The Fifth Neutrality Act, entered into force after the Second World War had begun, limited all trade with belligerents named by the President via proclamation.⁴⁸⁰

Each of these measures placed Congress in a prominent role with regard to U.S. national security. Each of the measures restricted the executive branch's sphere of influence and freedom of action. And each of the measures granted Congress greater control over the munitions industry.

3. Expanding National Spheres of Influence

During the second epoch, as a matter of national security, direct confrontation between corporate power and state authority generated federal responses couched in a national security framework. One example, provided above, was the use of the military to respond to the Chicago strikes.⁴⁸¹ The federal government overrode state objection to the use of troops, on the grounds that federal interests, powers, and duties required federal action.⁴⁸² Industrialization and urbanization brought more, however, than just direct power confrontations between corporate interests and the federal government. It also brought a host of social and economic concerns, which the states appeared unable to alleviate, following the stock market crash of 1929.⁴⁸³

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The federal government began to respond: Hoover thus marked 1929 with a report on recent social trends.⁴⁸⁴ And Roosevelt's New Deal ushered in a new era.⁴⁸⁵

Between 1930 and 1940, federal involvement in social welfare programs radically expanded.⁴⁸⁶ From merely \$21 million spent on public aid programs in 1913, by 1932, the total federal outlays had risen to \$208 million. By 1939, this number had skyrocketed to \$4.9 *billion*.⁴⁸⁷ Whereas federal public-aid in 1913 and *1651 1923 amounted to less than 1 percent of all governmental expenditures, the proportion increased to 6.5 percent in 1933, and to 27.1 percent in 1939.⁴⁸⁸

Not only did public-aid outlays substantially increase, but the type of public relief provided rapidly expanded. By 1940, public relief no longer consisted solely of providing income to needy persons, but also included: programs ranging from education and vocational guidance to the provision of roads, schools, and other public buildings; public conservation efforts; recreational facilities; expanded nursing and medical assistance; and economic and social assistance programs.⁴⁸⁹ Concepts of need-based assistance broadened. The system no longer responded only to those who were utterly destitute; it anticipated potential problems by investing in social insurance.⁴⁹⁰ By the 1940s, so many changes had occurred that the government agency tasked with anticipating and considering relief programs called for such support to henceforth be termed "public aid."⁴⁹¹

These programs had a significant domestic impact.⁴⁹² In 1942, the National Resources Planning Board found that between 1933 and 1940, ten to twenty-two percent of the total population at any one time depended on socially provided income.⁴⁹³ Public health, education, child welfare services, and public housing became enmeshed in the federal portfolio.

Notably, social security was different from national security. Both were within federal purview. And both received attention. Personal security also rose to the fore, spurring the federal government to become more involved in the criminal law realm. The Eighteenth Amendment played a pivotal role.⁴⁹⁴

The prohibition of alcohol brought with it a booming trade in illegal goods, ushering in the conditions ripe for criminal enterprise. Cosa Nostra, for instance, was present in the United States since the late nineteenth century;⁴⁹⁵ however, it wasn't until Prohibition that it gained significant power in American cities.⁴⁹⁶ Profits from the illegal sale of alcohol became the group's main source of income--significantly overshadowing earnings made from prostitution, gambling, and racketeering schemes.⁴⁹⁷ Small-time gangsters like Al Capone, Meyer Lansky, *1652 and Lucky Luciano built syndicates, in the process modernizing organized crime.⁴⁹⁸ In many areas, police turned a blind eye to the sudden proliferation of speakeasies and alcohol distribution centers--at times themselves benefiting from a slice of the profits.⁴⁹⁹ Detroit became so notorious for this practice that it earned for itself the title, "City on a Still."⁵⁰⁰

Prohibition proved a double-edged sword: not only did it give rise to conditions ripe for abuse, but the manner in which it was enforced left much to be desired. As one account notes, "Over-zealous police and federal agents violated civil rights when searching for and destroying the paraphernalia of alcohol."⁵⁰¹ The frequency of such raids underscored libertarians' concerns about federal government overreaching, heightened all the more because the Eighteenth Amendment was only the second amendment to directly affect the private rights of citizens.⁵⁰² If private rights fell beyond federal authority, efforts to restrict such liberties raised question about the rule of law.

Upon assuming office, President Herbert Hoover underscored the growing concern:

The most malign of all [the] dangers [facing self-government] today is disregard and disobedience of law. Crime is increasing. Confidence in rigid and speedy justice is decreasing. I am not prepared to believe that this indicates any decay in the moral fiber of the American people. I am not prepared to believe that it indicates an impotence of the Federal Government to enforce its laws.⁵⁰³

To remedy the problem, the national government would have to take a more active role. In 1933, Congress passed a new measure to eliminate loopholes in criminal procedure.⁵⁰⁴ President Hoover issued a signing statement coincident with the bill's passage, pointing out that the legislation represented four years of recommendations made by the President and the Attorney General.⁵⁰⁵ It tied directly to his efforts to crack down on crime: "[This legislation] should prevent well-endowed

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*1653 criminals, who have been convicted by juries, from delaying punishment by years of resort to sharp technicalities of judicial procedure. It will," he concluded, "increase the respect for law."⁵⁰⁶

The realm of criminal law therefore laid side-by-side with the national government's concerns about social security, economic security, and national security. Together these issues comprised some of the most important spheres of national influence. The rise of authoritarian governments abroad, however, lent energy to the national security concerns.⁵⁰⁷ For many, the question of national security was not one amongst various competing issues; it was quickly becoming the defining feature of the generation.

William Yandell Elliott, a professor of government at Harvard University, chose this moment to publish a program for U.S. national security.⁵⁰⁸ He called for a constitutional overhaul, in which the executive would be given greater powers and more latitude in the field of foreign relations: "In order to achieve the recovery which will once more afford social and national security," he wrote, "we must go to the roots of our problems: political reform is essential for security at home and abroad."⁵⁰⁹ Subjecting treaties to the scrutiny of the Senate was part of the problem:

We have a national inferiority complex of the most painful type on all questions dealing with foreigners. The result is that by keeping at least one hand of the Executive always handcuffed to a minority of the Senate we make it impossible for our negotiators to deal on equal terms and with foresight. It is, and will remain, impossible to have an intelligence foreign policy until Mr. Roosevelt and his Secretary of State are given freer hands to deal with our foreign problems. This means as much power to negotiate war-debts settlements as to make tariff bargains--with a wide discretionary latitude for concessions.⁵¹⁰

Elliott derided the Senate's refusal to try to act through the League of Nations:

This is again the age of Machiavelli. Japan, Germany, Italy, these countries make small pretense to any other policy than that of craft and might in gaining *1654 national ends. Others who profess peace are pursuing ends that may lead to war. So far the policy of the United States has been to avoid war. But we are unwilling to attempt any participation in a system that would try to guarantee security.⁵¹¹

As a domestic matter, *security trumped economic equality*.⁵¹² For the former, economic vitality and a positive balance of trade would prove essential. Elliott, here, consciously or not, was hearkening back to the first epoch, wherein economic growth proved central. France and Japan, he pointed out, had been most forthright in admitting the importance of economic strength and a positive trade balance: "War must not find them unprepared in industry, raw materials, or food stuffs, any more than in armaments. And as gold and financial power are equally important sinews of war, every state begins to adopt a mercantilist attitude toward its trade balance."⁵¹³ The rejection of foreign capital and sources of supply lay at the heart of U.S. national security.⁵¹⁴ For increasingly complex systems, Elliott hypothesized, more centralized solutions may be required.⁵¹⁵

One year later, Edward Pendleton Herring, also a professor at Harvard University (later President of the American Social Science Research Council), argued an even more extreme position.⁵¹⁶ For Pendleton Herring, democratic countries were losing ground to authoritarian regimes, which were more effective at exploiting new technologies.⁵¹⁷ He argued that if the United States employed sophisticated management science techniques, it could gain a commensurate level of control without relinquishing American values.⁵¹⁸ The country would have to eliminate special interests, instead promoting the state "over and above the purposes of the medley of interests that compose it."⁵¹⁹ His approach was a direct attack on the structure of parallel interests that characterized federal power at the time.

Pendleton Herring, like Elliott, prioritized U.S. national security above other interests: "Air power means that the globe has shrunk. Mechanized warfare means that armies of industry are in conflict The margins of safety that our *1655 democracy

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has known have been cut away.”⁵²⁰ The United States must return to the Founding, “when the flintlock hung over every hearth and the powder horn was kept ready.”⁵²¹ Importantly, Pendleton Herring’s reference to the early years of the country focused not on the *form* U.S. national security had taken at that time—with preservation of the Union a primary matter, and international independence and economic growth as a second—but merely on the *fact* that overriding national security concerns had set the political, economic, and military agendas.

New technologies underscored Pendleton Herring’s concerns: advances in transportation, communication, and the lethality of weapons again created an instable world. Powerful European actors could no longer be kept at bay simply by distance. It was thus not just the passive retention of colonial possessions that was at stake, as it had been at the Founding, but the aggressive posture of autocratic governments, intent on expanding their sphere of influence, that posed a threat. The October Revolution produced a Stalinist regime, bent on global dominance.⁵²² Benito Mussolini’s fascist regime in Italy emphasized military might and embraced expansionism.⁵²³ The rise of the Third Reich from 1933 similarly conveyed military aggression, such as the German government’s decisions to withdraw from the League of Nations, reject the Treaty of Versailles, and engage in rearmament.⁵²⁴

Western governments, including the United States, looked at these developments overseas and debated how to best respond to the threat. Calls by Elliott, Pendleton Herring, and others to centralize the national response, and to take steps towards ever-greater control against autocratic regimes fell on fertile ground. In 1937, Harold Laski, professor of political science at the London School of Economics, and a frequent public lecturer in the United States, gave voice to concern about such shifts in the modern state: “In the seven years since this book was first published the condition of liberty has visibly deteriorated over most of the civilized world At times it seems not improbable that mankind is about to enter a new dark age.”⁵²⁵

Even as authoritarian governments grew in strength, the doctrines embraced by autocratic States abroad diminished support for the other domestic spheres of influence. Eugene Debs, for instance, led the Socialist Party in the United States—a doctrine to which he converted while serving jail time for his role in the *1656 Pullman strikes.⁵²⁶ In 1912, he ran for President on the Socialist ticket, in the process earning more than 900,000 votes—six percent of the votes cast that year.⁵²⁷ He opposed the United States’ involvement in World War I—a position that quickly became seen as a threat to national security. The Espionage Act of 1917, followed by the Sedition Act of 1918, targeted interference with the draft and other wartime policies, as well as any utterance of “disloyal or abusive language” about the government, the Constitution, the U.S. flag, or even the military uniform.⁵²⁸ As Vladimir Lenin and the Bolsheviks seized power in Russia, fear of imminent revolution in America spread.⁵²⁹ The Red Scare soon found Debs, along with nearly 1500 others, imprisoned.⁵³⁰

In light of the fear of communism—particularly as practiced by the U.S.S.R.—that subsequently swept the United States, federal involvement in social and economic security raised the specter of socialism. A sort of heightened awareness of—and concern about—its creeping influence grew. In 1944, Friedrich A. Hayek published *The Road to Serfdom*, warning that federal programs were beginning to assume a socialist character.⁵³¹ Hayek cited the New Deal, as well as the Fair Deal Administrations of Presidents Franklin D. Roosevelt and Harry S. Truman, as examples.⁵³² Social programs gradually fell from favor, sped by the Cold War and the fear generated by McCarthyism.⁵³³

In this manner, government designs on private industry became unpalatable. Instead, where industry might be essential to U.S. national security, a partnership between the United States and private industry provided a more acceptable route. This represented a very different approach than that which had been adopted during the Pullman strikes, when industry and the federal government were at loggerheads. It also presented a very different picture than that in which social and *1657 economic security represented just one of many spheres of national influence. Instead, national security would become dominant, with industry one way to ensure the protection of U.S. interests both at home and overseas. Thus entered the third epoch.

C. The Ascendance of National Security: 1930-1989

Prior to the Second World War, the values of the first epoch resurfaced: primarily, protection of the Union and, secondarily,

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international independence and economic growth. Strains of the second epoch also continued to shape U.S. conceptions of national security. The United States now considered itself a major international player and sought to influence the global course of events, not just through continued insistence on the Monroe Doctrine and Roosevelt's Corollary, but through military engagement. In addition to these basic approaches to U.S. national security, though, a third concentric circle emerged, wherein national security began to dominate other federal spheres of influence. Social and economic security, as well as personal security (as manifested via law enforcement) became subservient to overriding national security interests. Significantly, this shift occurred outside of active military hostilities, cementing the nation into a permanent condition of emergency.

In this context, the federal government could ill afford to alienate corporate interests; instead, it co-opted industry into the national security infrastructure. While not without its own risks, such a move was seen as imperative to counter the threat posed initially by autocratic governments and, later, more directly, by the Soviet Union. For the third epoch took hold not with World War II, but with the early 1930s rise of totalitarianism and fascist corporatism, wherein those holding a monopoly on political power sought to control the evolution of education, science, the economy, and the arts in a manner consistent with the dominant political ideology.⁵³⁴ The linkage between communism and fascism as totalitarian regimes, in the context of aggressor nations, presented an existential threat. World War II acted as a lens, focusing the national security infrastructure on one dominant aim: containment of the U.S.S.R. From the beginning, this epoch was marked by a blurring of the line between foreign and domestic. Threats to the national government could arise from either quarter.

The third epoch instituted a Manichean worldview, wherein "good" fought "bad." The evils of autocracy morphed into the evils of totalitarianism and, finally, Soviet communism. Democracy, in contrast, stood for good. National security became more than protecting the Union and establishing international independence; it became a matter of moral superiority. President Dwight D. Eisenhower thus remarked in his *First Inaugural Address*, "Freedom is pitted against slavery; *1658 lightness against the dark."⁵³⁵ Just over a decade later, Ronald Reagan referred to the threat posed by the Soviet Union: "We are faced with the most evil enemy mankind has known in his long climb from the swamp to the stars. There can be no security anywhere in the free world if there is no fiscal and economic stability within the United States."⁵³⁶ In 1982, Reagan reiterated this worldview, telling the British House of Commons that the "forces of good ultimately rally and triumph over evil."⁵³⁷

Like the second age, the third epoch gave rise to tension with the aims of the first. Specifically, the basic understanding of national security as stemming from the protection of the U.S. Constitution, and the people as sovereign appeared to be violated by actions taken by the executive branch precisely in the name of national security. The McCarthy era and the Church Committee that followed may thus be seen as flip sides of the same coin: both responded to perceived threats to the same underlying U.S. interests. And both, in turn, became seen as a threat to the same. Together, they reflect a remarkably consistent take on the primary aims of U.S. national security that have persisted since the Founding.

1. A New Domestic Order

The rise of totalitarianism in the 1930s shifted American thinking about what steps would have to be taken to ensure U.S. national security. A new domestic order characterized by a stronger military base and an overriding focus on national security concerns emerged.

Having urged Congress to maintain American neutrality, Roosevelt announced one year later that he had forged an executive agreement to trade fifty destroyers for bases in British possessions in the New World.⁵³⁸ "We have," he stated, "certain ideas and ideals of national safety, and we must act to preserve that safety today and to preserve the safety of our children in future years."⁵³⁹ Echoes of the second epoch reverberated: U.S. national security was bound up with the safety of *1659 the Western Hemisphere and the surrounding oceans.⁵⁴⁰ The Monroe Doctrine bore a close relationship to the course set by the Founders, with its essential aim of avoiding European entanglements:

We seek to keep, war from our firesides by keeping war from coming back to the Americas. For that we have

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historic precedent that goes back to the days of the administration of President George Washington It is our national duty to use every effort to keep [the wars on other continents] out of the Americas.⁵⁴¹ Roosevelt considered his decision to trade destroyers for bases in Newfoundland, the islands of Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua, and British Guiana to be the most important action in the reinforcement of the United States' national defense since the Louisiana Purchase: "Then as now," he said, "considerations of safety from overseas attack were fundamental. The value to the Western Hemisphere of these outposts of security is beyond calculation."⁵⁴² The United States could no longer afford to see itself as "remote and isolated and, therefore, secure against the dangers from which no other land is free."⁵⁴³ The decision also completed the process of removing the Caribbean from European influence, in this case removing the world's largest navy from the so-called "American lake."⁵⁴⁴

Rapid mobilization followed. The Army swelled from 174,000 soldiers in 1940 to 1.4 million.⁵⁴⁵ The military began building munitions plants, with 375 major projects completed by the time Congress declared war and another 320 underway.⁵⁴⁶ In 1945, Congress increased defense authorizations to \$17 billion--nine times the amount granted in the previous year.⁵⁴⁷

Expansion of the United States' military intelligence infrastructure and capabilities accompanied the military buildup. Roosevelt created the Office of the Coordinator of Information to ensure that the Army and Navy exchanged information.⁵⁴⁸ Whether this effort was successful is open to question. Nonetheless, as a formal matter, it required that "[t]he several departments and agencies of the government shall make available to the Coordinator of Information all and any *1660 such information and data relating to national security as the Coordinator, with the approval of the President, may from time to time request."⁵⁴⁹ Further reorganization of military intelligence led to the creation of a separate Military Intelligence Service, which included an Administrative Group, an Intelligence Group, a Counterintelligence Group, and an Operations Group.⁵⁵⁰ Increasing emphasis on signals intelligence paralleled broader efforts to disseminate and make use of information thus obtained.⁵⁵¹

The need to obtain more information through intelligence operations was not limited to the overseas arena. Ideas recognized neither distance nor geopolitical borders. "Today's threat to our national security," Roosevelt announced, "is not a matter of military weapons alone. We know of (new) other methods, new methods of attack. The Trojan Horse. The Fifth Column that betrays a nation unprepared for treachery."⁵⁵² According to the President,

Spies, saboteurs and traitors are the actors in this new strategy. With all of these we must and will deal vigorously. But there is an added technique for weakening a nation at its very roots, for disrupting the entire pattern of life of a people. And it is important that we understand it. The method is simple. It is, first, discord, a dissemination of discord The aim ... is to create confusion of counsel, public indecision, political paralysis and eventually, a state of panic.⁵⁵³

The problem, then, was not just overseas: it was inside the country as well. By questioning national policies, foreign agents could sow seeds of discontent:

Singleness of national purpose may be undermined. Men can lose confidence in each other, and therefore lose confidence in the efficacy of their own united action. Faith and courage can yield to doubt and fear. The unity of the state (is) can be so sapped that its strength is destroyed.⁵⁵⁴

This was no idle concern: for Roosevelt, foreign intrigue had been weakening American resolve for the past two years, as agents infiltrated domestic bounds.⁵⁵⁵

***1661a. Re-channeling of Law Enforcement to National Security**

To respond to the domestic threat, Roosevelt instructed the War Department and the Navy to coordinate intelligence

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gathering with the Federal Bureau of Investigation (“FBI”).⁵⁵⁶ The FBI was to be given all data, information, and material relating either directly or indirectly to espionage, counterespionage, or sabotage.⁵⁵⁷ This did not mean that the State Department’s intelligence gathering would cease; to the contrary, in memoranda to Secretary of State Cordell Hull, Roosevelt directed such activities to continue.⁵⁵⁸ However, it did place a priority on the military and law enforcement agencies, with all information subsequently forwarded to the directors of the three organizations.⁵⁵⁹

These shifts demonstrated the growing institutional dominance of national security concerns, particularly with regard to the FBI—an organization hitherto concentrated on personal security and criminal activity.⁵⁶⁰ Henceforward, the Bureau would assume national security responsibilities.⁵⁶¹

State law enforcement interests mirrored those of the federal agency.⁵⁶² The New York City Police Department, for instance, created a special sabotage squad and planned to later expand it to 150 officers.⁵⁶³ Such actions, however, posed a direct threat to the FBI’s control, raising concerns about the federal government’s dominance in the field.⁵⁶⁴ As a result, FBI Director J. Edgar Hoover convinced the Attorney General to draft a document directing police officials to turn over to the FBI “any information obtained pertaining to espionage, counterespionage, sabotage, and neutrality regulations.”⁵⁶⁵ The President subsequently issued an Executive *1662 Order requesting that all law enforcement officers promptly yield the relevant information.⁵⁶⁶ Soon thereafter, Roosevelt proclaimed a national emergency “in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peacetime authorizations.”⁵⁶⁷ He simultaneously issued an Executive Order expanding the number of persons assigned to the FBI to ensure that the Bureau could perform its national security functions.⁵⁶⁸ Although Roosevelt never formally authorized either the FBI or military intelligence to perform domestic intelligence investigations of subversive activities (the written records being limited to espionage, sabotage, and violations of the neutrality regulations), the Church Committee later found that he clearly knew about, and informally approved, the broad subversive investigations being carried out by the Bureau.⁵⁶⁹

Congress acquiesced to the FBI’s expanded role, considering it a necessary response to the national emergency.⁵⁷⁰ The legislature’s attention to the matter extended beyond formally blessing the FBI’s new mandate through appropriations. Immigration Act amendments would have deported individuals for affiliating with Communist groups.⁵⁷¹ In 1939, the Supreme Court ruled that the amendments were not retroactive⁵⁷²—a loophole Congress closed the following year.⁵⁷³ The Smith Act made it a federal crime to advocate for the violent overthrow of the United States government; it also outlawed encouraging military insubordination.⁵⁷⁴ Within four months, more than 4.7 million aliens had been registered under *1663 the statute.⁵⁷⁵ The Commission on Government Security later reported: “From its inception [the Smith Act] was intended to combat and resist the organization of Fascist and communist groups owing allegiance to foreign governments whose operations and activities were clearly contrary and dangerous to the Government of the United States.”⁵⁷⁶

The fact that such a measure had been enacted *outside of actual war* was highly unusual. Harvard law professor Zechariah Chaffee described the statute at the time as incorporating “the most drastic restrictions on freedom of speech ever enacted in the United States during peace.”⁵⁷⁷

While Chaffee was correct, the statute also reflected the evolution of U.S. national security. Specifically, it echoed the Founding generation’s concern about maintaining the government of the United States against attack. Roosevelt consciously hearkened back to the Founding, reinforcing the priority accorded to U.S. national security.⁵⁷⁸ On December 29, 1940, he began his weekly radio address saying,

This is not a fireside chat on war. It is a talk on national security, because the nub of the whole purpose of your President is to keep you now, and your children later, and your grandchildren much later, out of a last-ditch war for the preservation of American independence and all of the things that American independence means to you and to me and to ours.⁵⁷⁹

He postulated that not since Jamestown and Plymouth Rock had such dangers loomed.⁵⁸⁰ Foremost amongst Roosevelt’s concerns was the aggressive nature of the enemy: “[T]he Axis proclaims,” Roosevelt said, “that there can be no ultimate peace between their philosophy of government and our philosophy of government.”⁵⁸¹

This, then, was an even direr situation than that which confronted the Founders. At that time, the primary aim had been to avoid entanglement in European affairs. Now, however, unrestrained aggressor-nations sought to conquer the world. Should America's friends in Europe fail to contain totalitarianism--particularly the racist and fascist regimes of Hitler and Mussolini--a new and terrible era would emerge, "in which the whole world, our hemisphere included, would be run by threats of brute force. [And] to survive in such a world, we would have to convert ourselves permanently into a militaristic power on the basis of war *1664 economy."⁵⁸² Even as he spoke, Roosevelt stated, spies and saboteurs had infiltrated the domestic fabric, seeking to sow seeds of disunity.⁵⁸³

Congress shared the President's concerns. Soon after Roosevelt's address, the Voorhis Act of 1941 required the registration of all "subversive" organizations with foreign attachments that recommended the overthrow of the government.⁵⁸⁴ Passed with minimal debate and even less publicity, the Voorhis Act was incorporated into the Alien Registration Act of 1940.⁵⁸⁵ The Foreign Agents Registration Act of 1938,⁵⁸⁶ in turn, grew out of the investigation of Communist and pro-Nazi organizations by the Special House Committee on Un-American Activities, which conducted its operations between 1935 and 1936.⁵⁸⁷

Collectively, these measures underscored the concern not only that saboteurs had infiltrated U.S. shores, but also that American citizens with disparate political views threatened U.S. national security--the security of the institution of federal government and the constitutional structure safeguarded by the Union. To the extent that a "Fifth Column," as referenced by Attorney General Jackson in 1940 (and used by Roosevelt during his May 26, 1940 fireside chat),⁵⁸⁸ might infiltrate the existing political structures, extraordinary steps had to be taken. Of central importance was the collection of pure as well as preventive intelligence--the former centered on investigations of current threats and the latter on the accumulation of information for use in the event of an emergency or actual war.⁵⁸⁹

Subversive activities, investigations, and surveillance measures implemented by the FBI have been well-documented elsewhere.⁵⁹⁰ It is not the purpose of this Article to re-examine these accounts. For present purposes, the salient question is: What was driving U.S. national security concerns, and what form did U.S. interests take in terms of law and policy? It appears that what was happening at the time was a retreat to the core national security concerns of the first epoch--protecting the existence of the political institutions and the constitutional structure of the national government. What made the third epoch different was the prioritization of core national security concerns in response to political ideology, as opposed to active *1665 military hostility.

It could be argued that during the French Revolution, the Alien and Sedition Acts represented a similar approach in that the country was concerned about the transfer of European revolution within domestic bounds. To some extent, this may have been true; but the centralization, militarization, and expansion of the national security infrastructure in the third epoch significantly overshadowed movement in this direction during the first era. This corresponded to the perceived threat: ideology proved ubiquitous and intimately linked to civil society. Hoover declared in 1940 that those advocating foreign "isms" had "succeeded in boring into every phase of American life, masquerading behind front organizations."⁵⁹¹

b. The Threat of Totalitarianism

At his *Third Inaugural Address*, Roosevelt summarized the dominant national security issues of the ages:

In Washington's day the task of the people was to create and weld together a nation. In Lincoln's day the task of the people was to preserve that Nation from disruption from within. In this day the task of the people is to save that Nation and its institutions from disruption from without.⁵⁹²

The United States again faced an existential threat. As a result, the primary interests of the first epoch returned. Roosevelt

hearkened back to Washington's *First Inaugural Address* in 1789, explaining that democracy itself, and the republican model of government entrusted to the United States, was in danger.⁵⁹³ The liberties the United States would seek would ensure the survival of the political framework on which the country was built. Just a fortnight before his address, Roosevelt laid out the four freedoms,

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression--everywhere in the world. The second is freedom of every person to worship God in his own way--everywhere in the world. The third is freedom from want ...--everywhere in the world. The fourth is freedom from fear--which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be *1666 in a position to commit an act of physical aggression against any neighbor--anywhere in the world.⁵⁹⁴

The *Atlantic Charter* in August 1941 picked up the themes: self-determination; free trade; improved labor standards; an end to "Nazi tyranny," and its replacement with world peace; freedom of navigation on the high seas; and the disarmament of nations threatening aggression.⁵⁹⁵ These would be the aims of the allied nations.⁵⁹⁶ The United States could now count itself amongst the allied countries, for with the Lend-Lease Act of March 1941, the country essentially became an undeclared belligerent.⁵⁹⁷ The statute authorized the Secretary of War to manufacture armaments and then sell, exchange, lease, or lend them to allies.⁵⁹⁸ Carefully calculated to ensure U.S. national security, the statute widened the government's commitments to the allied nations.

c. *The Purpose of the State*

The United States prepared for war. Rapid mobilization was met by statutory language giving the President the latitude to assist allied countries in their battle against totalitarianism. The aggression of autocratic governments threatened the United States. What role, then, ought the federal government perform in responding to such threats?

The answer, for Edward Pendleton Herring, was clear: the very purpose of the federal government was to protect national security.⁵⁹⁹ In 1941, he argued that advances in technology (i.e., airplanes) and political developments (i.e., the expansion of totalitarianism) had converged, presenting a new and existential threat to the United States.⁶⁰⁰ Correspondingly extreme shifts in the American attitude towards government and society would have to follow. The United States must now "give thought to the possibility of adapting our governmental institutions to the maintenance of a powerful military force as part of the normal structure of our society."⁶⁰¹ Americans would simply have to get over their aversion to a militarized state. Even after the emergency passed, emphasis on arms would have to continue: "[T]he Roman phalanx," Pendleton Herring reflected, "was a necessary preliminary to the *Pax Romana*."⁶⁰² The way to deter attack was through *1667 military might.⁶⁰³ For the foreseeable future, the United States would have to maintain a strong army to stave off the totalitarian threat.

Even more controversially, Pendleton Herring called for giving soldiers an influential role in U.S. foreign policy.⁶⁰⁴ In confronting totalitarianism, moreover, the United States would have to become more centralized and its economy standardized.⁶⁰⁵ Arguing (unconvincingly) that no constitutional risks would ensue, Pendleton Herring nevertheless seemed willing to accept the consequences.⁶⁰⁶ He was not alone in calling for a more centralized governmental structure to offset the threat posed by totalitarianism.⁶⁰⁷ But such calls gave rise to concern.

Professor Harold Lasswell, a prominent sociologist at Yale Law School, recognized that Russian communism posed a threat to U.S. national security.⁶⁰⁸ But, he warned, reaction to one danger could create another--namely, a garrison-police state.⁶⁰⁹ Lasswell sketched the contours of such a state: declining access to information, increasing suspicion and intolerance, declining civilian authority, and ascendance of the military.⁶¹⁰ Specialization shifted the emphasis "toward the supremacy of the specialist on violence, the soldier."⁶¹¹ Authority, under this model, would become "dictatorial, governmentalized, centralized, and integrated."⁶¹²

In the midst of this conversation, Pearl Harbor suddenly and violently vindicated Pendleton Herring's position.⁶¹³ Aerial combat meant that the United States could not depend upon its physical distance from other countries to protect itself. Simultaneously, a more centralized structure might allow the country to better coordinate its military, intelligence, and other national security functions. Professor Douglas T. Stuart at Dickinson College wrote, "The fact that America could be *1668 directly attacked from a distance of nearly 4,000 miles did not just 'sweep away old conceptions of national security'; it *established* the concept of national security as the unchallengeable standard against which all future foreign policy decisions were to be made."⁶¹⁴ For Stuart, it prioritized the question of national security, shifting the postwar debate from a fight between different approaches to the question, to an effort to negotiate how to shape American values to its national security interests--the latter being non-negotiable.⁶¹⁵

Although I place more emphasis on the priority accorded national security prior to Pearl Harbor, Stuart's reading with regard to vindicating Pendleton Herring's position is correct. World War II subsequently became a testing ground for the creation of institutions and procedures that would ensure civilian-military cooperation, intelligence-gathering and dissemination, and inter-service policy coordination. The only piece of Pendleton Herring's advocacy that dropped from the picture was control of the economy.⁶¹⁶ As Stuart has noted, removing constraints on corporate entities would be preferable so long as a high level of preparedness could be maintained--with respect to weapons, technology, and scientific advances.⁶¹⁷ To paraphrase Dean Acheson, the Secretary of State at the time, the United States could only afford to be wrong once.⁶¹⁸

The creation of the Joint Chiefs of Staff sought to ensure not just civilian-military cooperation, but inter-service coordination. The British model proved instructive. From December 1941 to January 1942, the United States was in close contact with the United Kingdom.⁶¹⁹ At the Arcadia Conference, the British Chiefs of Staff stood as a unit, offering the Prime Minister a consensus on matters of military importance.⁶²⁰ In these meetings, the Royal Air Force also had a voice.⁶²¹ The first meeting of the U.S. Joint Chiefs of Staff occurred the following month; a Chair was soon added.⁶²² Simultaneously, the military began working with scientists and civilians to develop new and critical technologies, with perhaps the *1669 most prominent example of this being the Manhattan Project.⁶²³ To encourage better interagency cooperation on matters of intelligence, the Office of Strategic Services, placed under the Joint Chiefs of Staff, quickly grew to more than 13,000 people.⁶²⁴

2. Changing International Role: From Authoritarianism to Containment

Accompanying the discussion about the most appropriate domestic political, military, and economic structures, were questions about the United States' role in a post-war order. Henceforward, instead of "trustees," the United States, together with the Soviet Union, Great Britain, and China, would perform global law enforcement functions.⁶²⁵ The development of weapons of mass destruction also changed the calculus: as Gaddis has observed, "The Big Four would remove from the hands of other nations, friendly as well as hostile, all weapons more dangerous than rifles."⁶²⁶ Nuclear weapons secured for the United States a formative role in the international environment. Sheer military might of such magnitude could hardly be ignored.⁶²⁷ The question, though, was in what direction such power would be directed. Here, it was not Pearl Harbor that was dispositive.⁶²⁸ Instead, it was the thread of concern from authoritarianism that became, in the course of World War II, increasingly focused. As Professor Hans Morgenthau, a prominent international relations scholar at the University of Chicago, wrote in 1948, "The modern totalitarian state has been able to fill the gap between government and people ... through the use of democratic symbols, totalitarian control of public opinion, and policies actually or seemingly benefiting the people. Practically all national energies flow into channels chosen by the government."⁶²⁹ Classical realism was on the rise, in direct response to the power plays marking the international environment.

From authoritarianism, the United States' concern narrowed to totalitarian regimes, and, following the war, still more narrowly to communism. Containing its advance became the overriding goal. The communist revolutions had been presaged by political writings. Ideas thus became seen as the precursors to revolutionary action. Resultantly, in the course of the third epoch, the object of *1670 national security became not just limiting the military expansion of the Soviet Union, but preventing the spread of communist and socialist political ideology. This had both international and domestic implications.

World War II had been a battle for democracy, waged against the threat of authoritarianism. The Tripartite Pact of 1940 drew

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together Adolf Hitler, Benito Mussolini, and Emperor Hirohito.⁶³⁰ In a simple ceremony devoid of fanfare, Roosevelt explained in his *Fourth Inaugural Address*, “We Americans of today, together with our allies, are passing through a period of supreme test. It is a test of our courage--of our resolve--of our wisdom--our essential democracy.”⁶³¹ As the war drew to a close, however, the threat was more than just authoritarianism. Totalitarianism generally, and communism in particular, used mechanisms of control to dictate social and cultural affairs.

In February 1946, George F. Kennan, the American *Charge d’Affaires* in Moscow, presented his concerns in an 8000-word telegram to the U.S. Secretary of State.⁶³² Kennan carefully considered the Soviet Union’s post-war outlook, in light of the country’s historical background, its animating political philosophy, the likely course of Soviet foreign policy, and what that outlook would mean for the United States.⁶³³ His conclusions were sobering. Russia, in Kennan’s view, would use the post-war period to increase its power with the aim of achieving a communist world system, coordinated and directed by Moscow.⁶³⁴ Russian hostility towards the United States could not be reduced.⁶³⁵ The two countries’ underlying philosophies and histories lay diametrically opposed, as did the two states’ futures.⁶³⁶

Kennan, writing later for a broader audience, cited the work of Marx and Lenin, and noted the experience of the Russian Revolution:

[I]deology ... taught [the Soviet leadership] that the outside world was hostile and that it was their duty eventually to overthrow the political forces beyond their borders [P]owerful hands of Russian history and tradition reached up to sustain them in this feeling Now it lies in the nature of the mental world of the Soviet leaders, as well as in the character of their ideology, that no *1671 opposition to them can be officially recognized as having any merit or justification whatsoever.⁶³⁷

Russia’s enemy was capitalism. Its quest was absolute power. And for the Soviet Union, the Kremlin appeared infallible. “In these circumstances it is clear that the main element of any United States policy toward the Soviet Union must be that of long-term, patient but firm and vigilant containment of Russian expansive tendencies.”⁶³⁸ Domestically, the United States’ only option would be to strengthen the health and vigor of its own society.⁶³⁹ Kennan explained,

World Communism is like [a] malignant parasite which feeds only on diseased tissue. This is [the] point at which domestic and foreign politics meets. Every courageous and incisive measure to solve internal problems of our own society, to improve self confidence, discipline, morale and community spirit of our own people, is a diplomatic victory over Moscow⁶⁴⁰

Professor John Lewis Gaddis has pointed to late February and early March 1946 as a pivotal time in Soviet-American relations.⁶⁴¹ From the Iranian crisis through the balance of the year, “the United States made no concessions of significance to the Soviet Union.”⁶⁴² Professor Gaddis also made clear that Kennan was not alone in his estimate of how future relations between the two countries would progress.⁶⁴³ The Forrestal Commission, appointed to examine Soviet foreign policy, questioned the degree to which communism had become a national religion; it concluded that to the extent that Soviet leaders adhered to the doctrine, the two countries’ futures lay in opposite directions.⁶⁴⁴

Stalin’s February 1946 speech did little to undermine Kennan’s analysis or to dissuade Americans of the Soviet Union’s intent.⁶⁴⁵ In it, Stalin argued that victory in World War II demonstrated that the Soviet approach was not only viable, but that it was “a better form of organization of society than any non-Soviet social system.”⁶⁴⁶ Victory vindicated the strength of the Soviet military.⁶⁴⁷ Stalin considered communist advances in industry and agriculture as the key to the *1672 country’s success.⁶⁴⁸ He claimed that the immediate future would witness even greater growth, with Russian scientists outstripping “the achievements of science beyond the borders of the country.”⁶⁴⁹ The American Administration considered Stalin’s speech to be a declaration of war.⁶⁵⁰ Democracy and communism, Truman concluded, could never coexist.⁶⁵¹ The Administration went on to portray Soviet-American relations as a clash between two irreconcilable ideologies.⁶⁵²

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Almost immediately, the question of how to contain communism presented itself. Greece and Turkey stood in a precarious position. Seeking assistance from Congress, Truman explained:

The seeds of totalitarian regimes are nurtured by misery and want. They spread and grow in the evil soil of poverty and strife. They reach their full growth when the hope of a people for a better life has died. We must keep that hope alive. The free peoples of the world look to us for support in maintaining their freedoms. If we falter in our leadership, we may endanger the peace of the world--and we shall surely endanger the welfare of our own nation.⁶⁵³

To what lengths was the United States willing to go to prevent communist ideology from taking hold? For Truman, failure to provide funding to the governments in the Mediterranean could lead to the collapse of pro-Western governments throughout Europe.⁶⁵⁴

From that moment, U.S. national security depended on strengthening democratic regimes abroad--a theme that continues today in the fourth epoch. If these states fell to the opposing ideology, the United States' interests would be significantly harmed. In this manner, global containment of the expansion of communist ideology became intimately tied to U.S. national security--itself the most important priority for the United States.

3. Institutional Questions and the National Security Act of 1947

To counter the growing communist threat, two sets of institutional issues confronted the United States: first, what to do about the armed services (in terms of unification and civil/military control); and second, what reforms were necessary to improve interagency communication, to strengthen presidential management of *1673 resources, and to ensure a more efficient national security bureaucracy.⁶⁵⁵ Much of the public's attention at the time was on the former question.⁶⁵⁶ But the second issue proved equally important in cementing the dominance of national security during the third epoch. For both issues, the National Security Act of 1947 ("1947 Act") proved pivotal.

a. National Military Establishment

In enacting the 1947 Act, Congress sought:

To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with national security.⁶⁵⁷

The first question presented with regard to the organization of the armed forces centered on unification.

On December 19, 1945, President Truman released a special message to Congress recommending the establishment of a Department of National Defense, within which ground, sea, and air forces would be combined under a single civilian Secretary of National Defense.⁶⁵⁸ "We would be taking a grave risk with the national security," Truman stated, "if we did not move now to overcome permanently the present imperfections in our defense organization."⁶⁵⁹ While unified command had been important in World War II, it was now imperative:

The boundaries that once separated the Army's battlefield from the Navy's battlefield have been virtually erased. If there is ever going to be another global conflict, it is sure to take place simultaneously on land and sea and in the air, with weapons of ever greater speed and range. Our combat forces must work together in one team as they have never been required to work together in the past⁶⁶⁰

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***1674** In addition to the creation of a single defense department, Truman planned for a Chief of Staff to work with the military commanders of the three coordinate branches in order to advise the Secretary of National Defense, as well as the President, on the most appropriate courses of action.⁶⁶¹ This drive for a single Chief of Staff unsettled the Navy and the Marine Corp and was later abandoned in the Forrestal-Patterson compromise that structured the 1947 Act.⁶⁶²

Truman's proposal reflected a concurrent conversation across the Atlantic; similar questions had beset the United Kingdom since the end of World War I. In 1923, Britain rejected the formation of a united Ministry of Defense, in favor of a Chiefs of Staff Committee, which would coordinate between the services.⁶⁶³ Gradually, however, Britain had progressed towards the creation of one department: In 1936, the United Kingdom created a Minister for the Coordination of Defense--a position initially without a department.⁶⁶⁴ The heads of the three services (the First Lord of the Admiralty for the Royal Navy, the Secretary of State for War for the Army, and the Secretary of State for Air for the Royal Air Force) remained part of the Cabinet.⁶⁶⁵ Upon coming to power, Sir Winston Churchill eliminated the Minister for the Coordination of Defence, creating instead the Minister of Defence, whose job was to coordinate defense efforts and to oversee the Chiefs of Staff Committee.⁶⁶⁶ Churchill himself held the post of Minister of Defence coincident with Prime Minister (a tradition continued by Clement Attlee when he became Prime Minister in July 1945).⁶⁶⁷

Following World War II, Britain, like the United States, struggled with how best to organize its military. In 1946, the government circulated a "White Paper" that rejected unification, stating, "Amalgamation [of land, sea, and air] ... is a step which could not and should not be taken here and now."⁶⁶⁸ Nevertheless, the White ***1675** Paper called for the creation of a new Ministry of Defence ("MOD") with "both the time and the authority to formulate and apply a unified defence policy for the three Services."⁶⁶⁹ MOD would undertake three primary functions: it would determine the allotment of the available resources between the three services; it would settle questions of general administration on which a common policy for the three services was required; and it would administer inter-service organizations, such as the Combined Operations Headquarters and the Joint Intelligence Bureau.⁶⁷⁰ These recommendations quickly became law, leading to the formal establishment of MOD in January 1947.⁶⁷¹ The three existing service ministers, who remained in direct control of ground, sea, and air services, ceased attending cabinet meetings.⁶⁷² Over time, the role of the Minister of Defence expanded.⁶⁷³ Finally, in 1963, the government proposed a unified MOD, with complete authority and responsibility for the armed forces vested in one Secretary of State.⁶⁷⁴ As of April 1, 1964, a Secretary of State for Defence replaced the prior Cabinet position, with responsibility over a new, united Ministry of Defence.⁶⁷⁵

The United Kingdom had emerged from World War II as the United States' strongest ally in Europe. America thus paid attention to its military reorganization. But there were other motives for doing so. The United States had moved into a position of global prominence whence it could address the threat of communism.⁶⁷⁶ Its military structures, however, appeared inadequate for the challenges ahead. It was a tenuous time, with high stakes. And national security had become the most important consideration in U.S. policy. The services began fighting for their institutional independence.⁶⁷⁷

The National Security Act of 1947 provided a solution to the competing inter-service tensions.⁶⁷⁸ The Act created the Department of the Air Force, and merged it, along with the Department of War and the Department of the Navy, into ***1676** a National Military Establishment ("NME").⁶⁷⁹ The Secretary of Defense, like the United Kingdom's Minister of Defence, would provide the general direction for the departments of the Army, Navy, and (newly formed) Air Force.⁶⁸⁰ As the President's principal assistant in matters relating to national security, the Secretary of Defense would be responsible for supervising and coordinating budget estimates for the departments and agencies comprising the NME, as well as minimizing duplication between the services.⁶⁸¹

The second issue in the realm of the armed forces related to civil-military control. On the one hand, there was concern that the military's role in policymaking would be too large.⁶⁸² On the other hand, it seemed important to integrate those in direct command of the military into the decision-making structures.⁶⁸³ The solution came in the form of introducing a (civilian) Secretary of Defense, and placing the Joint Chiefs of Staff on a statutory basis.⁶⁸⁴ The legislation provided them with the authority to prepare strategic plans, provide strategic direction, establish unified commands where required, and give military

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advice to the President and to the Secretary of Defense.⁶⁸⁵ The NME underwent significant changes in 1949 and 1958 via statutory amendments, with further revisions in the interim period through *Reorganization Plan No. 6*.⁶⁸⁶ In 1949, the agency became the Department of Defense.⁶⁸⁷

Importantly, many of the structures adopted during this time tended to restrict the influence of the Department of State. Diplomacy became sidelined. The third epoch is thus distinguished by an increasing militarization of U.S. national security policy. The creation of the NME is one example of the priority accorded to military institutions. Another example is the State-War-Navy Coordinating Committee (“SWNCC”).

***1677** In 1944, Secretary of War Stimson proposed the formation of the SWNCC.⁶⁸⁸ With Secretary of State Cordell Hull ill at the time, however, plans for the SWNCC were put on hold.⁶⁸⁹ Hull’s replacement as acting Secretary of State, Edward Stettinius, Jr., subsequently demanded that the Secretary of State be given greater access to the White House.⁶⁹⁰ Roosevelt agreed to the presence of a State Department liaison between the President and the President’s Chief of Staff.⁶⁹¹ In return, Stettinius agreed to the creation of the SWNCC.⁶⁹² Despite the concession of giving the State Department a direct line to the White House, the SWNCC itself institutionalized military authority at the highest policymaking levels of government.⁶⁹³ It also was weighted towards military interests, with the armed forces obtaining two of the crucial three votes on all matters henceforward considered.⁶⁹⁴ Another example of the sidelining of the State Department and, with it, an emphasis on diplomatic and foreign relations in favor of a military-driven national security policy, can be found in the institutional arrangements related to the National Security Council (“NSC”).

b. Coordination for National Security: The NSC and CIA

The Truman Administration faced numerous institutional challenges in the wake of World War II. Issues associated with military organization have already been discussed. Equally important for U.S. national security were questions that concerned how to obtain, analyze, and disseminate information related to the communist threat. Just as with the momentum created by the founding of the NME, the sections of the 1947 Act focused on the NSC, the Central Intelligence Agency (“CIA”), and other institutions, underscored the priority accorded to national security.⁶⁹⁵

***1678** Under the 1947 Act, the President would chair a new NSC.⁶⁹⁶ The Truman Administration expressed concern that the NSC would become a second cabinet.⁶⁹⁷ The original bill supported this concern: under it, the function of the NSC would have been “to integrate foreign and military policies.”⁶⁹⁸ The final statute adopted a watered-down approach, stating that the purpose of the NSC was merely “to advise the President with respect to the integration of foreign and military policies” related to national security in order to achieve greater interagency cooperation.⁶⁹⁹

The membership of the NSC reflected the priority given to the military in the national security infrastructure. The organization would consist of the President, the Secretary of State, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Chair of the National Security Resources Board (a creature of the NME), and such other officers as designated by the President with the advice and consent of the Senate.⁷⁰⁰ The State Department thus represented only one vote in a sea awash with military interests.

As a substantive matter, emphasis was placed on military solutions to questions of national security. The NSC, in addition to performing such functions as the President might direct, would assess and appraise the objectives, commitments, and risks of the United States in relation to the country’s actual and potential military power, in the interest of national security, and consider policies on matters of common interest to national security departments and agencies.⁷⁰¹

Along with the NSC, the 1947 Act also created the CIA. Calls for such an institution stemmed from the country’s experiences in World War II. Pearl Harbor had caught the country by surprise. Truman later reflected,

I have often thought that if there had been something like co-ordination of information in the government it would have been more difficult, if not impossible, for the Japanese to succeed in the sneak attack at Pearl

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Harbor The war taught us this lesson--that we have to collect intelligence in a manner that would make the information available where it was needed and when it was wanted, in an intelligent and understandable form.⁷⁰²

***1679** The 1947 Act established the CIA with a Director of Central Intelligence ("DCI") as its head.⁷⁰³ It was a political appointment, requiring the advice and consent of the Senate, and its status would be civilian in character: any member of the armed services would be removed from the direct supervision and control of the military for the duration of his or her service as DCI.⁷⁰⁴ The CIA would coordinate, correlate, evaluate, and disseminate intelligence. Furthermore, it would henceforward be required to advise the NSC on intelligence activities relating to U.S. national security.⁷⁰⁵

The statute did not explicitly make accommodation for the CIA to conduct clandestine operations, nor did it directly address counterespionage.⁷⁰⁶ The Act did, however, require the CIA "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."⁷⁰⁷ Such functions and duties had a limit: the statute explicitly deprived the CIA of all police, subpoena, law enforcement, and internal security functions.⁷⁰⁸ Perhaps because of these limitations, it was not until 1976 that the Senate Select Committee on Intelligence was even formed.⁷⁰⁹

Truman initially kept the NSC at arm's length. He objected to Congress directing the executive branch on matters involving national security.⁷¹⁰ After attending the first meeting of the NSC on September 26, 1947, Truman attended only ten of the next fifty-five meetings.⁷¹¹ Truman's decision to delegate his authority to the State Department helped to stave off efforts by Secretary of Defense Forrestal to gain control of the Council.⁷¹² It also, initially, gave the State Department more influence in an organization heavily weighted towards the military.

The NSC quickly took on the role of defining U.S. national security threats. NSC ***1680** 20/4, issued in November 1948, described the nature of the Soviet threat.⁷¹³ This document became the basic statement of the country's primary national security concern: "The gravest threat to the security of the United States within the foreseeable future stems from the hostile designs and formidable power of the U.S.S.R., and from the nature of the Soviet system."⁷¹⁴ Just as containment of the U.S.S.R. presented the overriding national security goal for the United States, the destruction of Western Europe appeared to be the Soviet Union's top priority--one the United States vowed to disrupt.⁷¹⁵ NSC 20/4 cited the continuing danger of war at any time--both military and political warfare.⁷¹⁶ It warned against lapsing into an isolationist foreign policy, which would result in a loss of allies and influence.⁷¹⁷ The United States would have to focus on reducing the power and influence of the Soviet Union to a point where it would no longer constitute a threat to countries' international independence. This objective resonated with the goals of U.S. national security in the first epoch--ensuring for the United States international independence. To accomplish its broader aim, the country would have to maintain a high level of military readiness, ensure internal security against sabotage, subversion, and espionage, and "[k]eep the U.S. public fully informed and cognizant of the threats to our national security so that it will be prepared to support the measures which we must accordingly adopt."⁷¹⁸ In other words, national security would have to be an overriding priority, with the government's articulation accepted--not questioned--by the population. The goal would be the containment of communist Russia.

In his January 1949 *Inaugural Address*, Truman highlighted the priority of national security concerns:

Each period of our national history has had its special challenges. Those that confront us now are as momentous as any in the past. Today marks the beginning not only of a new administration, but of a period that will be eventful, perhaps decisive, for us and for the world.⁷¹⁹

***1681** Communism, Truman continued, "adheres to a false philosophy which purports to offer freedom, security, and greater opportunity to mankind. Misled by this philosophy, many peoples have sacrificed their liberties only to learn to their sorrow that deceit and mockery, poverty and tyranny, are their reward."⁷²⁰ Truman dwelled on the battle that marked this age--the battle between communism and democracy:

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Communism is based on the belief that man is so weak and inadequate that he is unable to govern himself, and therefore requires the rule of strong masters.

Democracy is based on the conviction that man has the moral and intellectual capacity, as well as the inalienable right, to govern himself with reason and justice.

Communism subjects the individual to arrest without lawful cause, punishment without trial, and forced labor as the chattel of the state. It decrees what information he shall receive, what art he shall produce, what leaders he shall follow, and what thoughts he shall think.

Democracy maintains that government is established for the benefit of the individual, and is charged with the responsibility of protecting the rights of the individual and his freedom in the exercise of his abilities.⁷²¹ Consistent with the Founding era, protecting the constitutional order of the country lay at the heart of U.S. national security interests. The third epoch, however, was in full swing. The United States would not only protect its own political order, but would also take responsibility for the entire “free world”:

We are moving on with other nations to build an even stronger structure of international order and justice. We shall have as our partners countries which, no longer solely concerned with the problem of national survival, are now working to improve the standards of living of all their people. We are ready to undertake new projects to strengthen the free world.⁷²²

In this articulation, the seeds of the current, fourth epoch, were sown. The responsibility to fight for the free world rested with the United States.⁷²³ In this battle between good and bad, in the effort to contain communism, the United States must play its role—one consistent with both U.S. interests and the right. The United Nations would play a key role in strengthening “freedom-loving nations against the dangers of aggression.”⁷²⁴ Theories of the democratic peace permeated *1682 his address.⁷²⁵

4. Bureaucratic Evolution

Soviet influence immediately began to expand. In February 1948, communists took power in Czechoslovakia.⁷²⁶ Within a short time, Hungary became a Soviet republic.⁷²⁷ In mid-1948, the first Berlin crisis began.⁷²⁸ By 1949, these worldwide events had further catapulted the institutional conversation forward. Concerted efforts focused on what structures would be most appropriate for countering the threat. The NSC, for instance, created the Intelligence Survey Group (“ISG”) to consider the CIA’s relationship with other agencies.⁷²⁹ Chaired by Allen W. Dulles, the ISG issued a report, which made fifty-six recommendations, many of which excoriated the DCI and CIA.⁷³⁰ The report called for greater coordination between the CIA and FBI.⁷³¹ It recommended greater continuity of service.⁷³² The report also suggested that covert operations and clandestine intelligence-gathering be combined into one organization within the CIA.⁷³³ Although the recommendations were not immediately implemented, in 1952, the report became the framework for a major overhaul of the CIA.⁷³⁴

In a separate effort, the so-called “Eberstadt Report,” prepared at the behest of the first Hoover Commission, similarly addressed the national security infrastructure.⁷³⁵ It focused on continued tensions between the CIA, the military, and the State Department, as well as the lack of cooperation within the intelligence *1683 community.⁷³⁶ Eberstadt, arguing for a more

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prominent role for the CIA,⁷³⁷ called for the integration of covert operations into one office within the CIA, subservient to the NSC.⁷³⁸ During war, oversight would transfer to the Joint Chiefs of Staff.⁷³⁹

The evolution of institutional structures extended beyond the domestic realm and into international military and economic structures. Soviet armies stationed in Central and Eastern Europe prompted the United States and eleven other countries to sign the North Atlantic Treaty.⁷⁴⁰ The first Secretary General of the North Atlantic Treaty Organization (“NATO”), Lord Ismay, famously remarked that the goal was “to keep the Russians out, the Americans in and the Germans down.”⁷⁴¹ In addition to military preparedness, the United States looked to provide economic assistance in the form of aid to countries on the brink of economic ruin.⁷⁴² The concern was that communism would find root in the socio-economic abyss if the United States did not respond. The European Recovery Program extended from July 1948 to June 1951, in the course of which the United States poured some \$13 billion into Europe.⁷⁴³

In support of a stronger international role, the NSC almost immediately began looking at ways to develop its covert-action capabilities. *NSC 4*, and its supplement, *NSC 4-A*, stated that the U.S.S.R. was conducting an intensive propaganda campaign against the United States by way of coordinated psychological, political, and economic measures designed to undermine non-communist elements in countries around the world.⁷⁴⁴ The alleged goal was to weaken and divide world opinion to prevent any effective opposition to Soviet aims. “The present world situation,” *NSC 4* concluded, “requires the immediate strengthening and coordination of all foreign information measures of the U.S. Government designed to influence attitudes in foreign countries in a direction favorable to the attainment of its objectives and to counteract effects of anti-US propaganda.”⁷⁴⁵ The Council *1684 thereafter assigned psychological operations to the CIA.⁷⁴⁶

The State Department, concerned about its diminishing role and the potential that the military would create a second covert action office, pushed for a bright line rule on not just psychological operations, but on covert action more broadly. In June 1948, a new directive, *NSC 10/2*, superseded *NSC 4-A*, granting the DCI control over all covert action, including, but not limited to psychological operations.⁷⁴⁷ It defined such activities as those:

conducted or sponsored by this Government against hostile foreign states or groups or in support of friendly foreign states or groups but which are so planned and executed that any U.S. Government responsibility for them is not evident to unauthorized persons and that if uncovered the U.S. Government can plausibly disclaim any responsibility for them.⁷⁴⁸

The directive envisioned a broad range of activities:

[P]ropaganda; economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberation groups, and support of indigenous anti-[C]ommunist elements in threatened countries of the free world. Such operations should not include armed conflict by recognized military forces, espionage, counterespionage, and cover and deception for military operations.⁷⁴⁹

The domestic bureaucracy had to adjust to meet the threat posed, specifically, by communist Russia.

The problem with the new powers assumed by the NSC and granted to the CIA, however, was that they were not limited to the former Soviet Union.⁷⁵⁰ To the contrary, they were blanket grants of authority. In part, this reflected the global nature of the threat: communism presented the potential for worldwide Soviet domination. Therefore, all countries could be legitimate theatres for U.S. operations. At the same time, the expanded powers could be used for means other than fighting communism. This helped to pave the way for the attachment of a broad range of interests in the fourth epoch.

Despite these institutional changes, rapidly evolving events continued to challenge the sufficiency of U.S. organizational structure. Specifically, in August of *1685 1949, the U.S.S.R. unexpectedly detonated its first atomic bomb.⁷⁵¹ Since October

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1946, intelligence analysts at the CIA's Office of Reports and Estimates had assumed that the Soviet Union would not develop a nuclear weapon until sometime between 1950 and 1953, with stockpiles not developed until 1956.⁷⁵² Although the document stating this conclusion, *ORE 3/I*, noted that "[a]ny report of this nature is at best educated guesswork," it cited the Soviet Union's low industrial potential and limited technological advancement (particularly with regard to precision instruments and electronic controls) to support its claim that the U.S.S.R. would be unable to develop ground-to-ground guided missiles over the next decade.⁷⁵³ This estimate persisted without major changes until "Joe-1" (the U.S. code name for the first Soviet nuclear test) occurred.⁷⁵⁴

The shock of the test reverberated across the American spectrum, driving public discourse as well as decisions at the highest levels of government.⁷⁵⁵ The news became public on September 23, 1949, when Truman announced to the country that the Soviet Union had successfully carried out an atomic explosion.⁷⁵⁶ Three days later, the *New York Times* reported that the incident was "already affecting the political atmosphere" in the United States "very much as the communist coup in Czechoslovakia and the Soviet blockade of Berlin affected it in 1948."⁷⁵⁷ Public fear skyrocketed.⁷⁵⁸ Deep within the executive branch, new initiatives followed: The President, for instance, issued a directive requesting that the Secretary of State and Secretary of Defense "undertake a reexamination of our objectives in peace *1686 and war and of the effect of these objectives on our strategic plans, in the light of the probable fission bomb capability and possible thermonuclear bomb capability of the Soviet Union."⁷⁵⁹

The Soviet detonation of the bomb, however, was not the only shock that autumn. On October 1, 1949, Mao Zedong, leader of the Communist Party in China, prevailed against the Nationalists and assumed control of the country.⁷⁶⁰ The West reeled: the Soviet Union now had a powerful ally in the East, potentially freeing the U.S.S.R. to pursue its designs in Europe.

Within six months of the fall of China, the NSC adopted *NSC 68*, which became a blueprint for the Cold War.⁷⁶¹ This document further cemented national security as *the* overriding national interest. "[T]he Soviet Union, unlike previous aspirants to hegemony," the document reported, "is animated by a new fanatic faith, anti-thetical to our own, and seeks to impose its absolute authority over the rest of the world."⁷⁶² The development of weapons of mass destruction meant that "every individual faces the ever-present possibility of annihilation should the conflict enter the phase of total war."⁷⁶³ *NSC 68* hearkened back to the first epoch in U.S. national security:

The fundamental purpose of the United States is laid down in the Preamble to the Constitution: "... to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." In essence, the fundamental purpose is to assure the integrity and vitality of our free society, which is founded upon the dignity and worth of the individual.⁷⁶⁴

U.S. national security was, precisely the protection of such aims. The absolutism of the Soviet system threatened U.S. interests: The U.S.S.R.'s aim was to subvert and to destroy non-communist states, replacing them with communist regimes.⁷⁶⁵ As the one country that could marshal the resources to counter Russian designs, the *1687 United States was the Soviet Union's number-one enemy.⁷⁶⁶

NSC 68 considered the underlying philosophical conflict between the two countries. Different concepts of freedom and government marked the two regions.⁷⁶⁷ In peace and in war, the Soviet Union challenged the United States. The country would therefore have to make responding to the threat its top priority.⁷⁶⁸ It would be a total war, with all focus placed on preventing the Kremlin from advancing its designs and limiting the spread of communism.⁷⁶⁹ Political, psychological, economic, and military action would be required to contain the Soviet Union. This meant blocking further expansion of Soviet power, exposing the falsities of Soviet pretensions, inducing a retraction of the Kremlin's control and influence, and fostering the seeds of destruction within the Soviet system to where the Kremlin must modify its behavior.⁷⁷⁰

NSC 68 outlined sweeping changes in resource allocation, institutional structures, and foreign and domestic policy.⁷⁷¹ There would have to be a substantial increase in military expenditures, an increase in economic assistance for other countries,

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intensification of political and psychological warfare, the development of internal security and civilian defense programs, and the expansion of the United States' intelligence activities.⁷⁷² It would not be enough, however, merely to increase the national security infrastructure--there would have to be a corresponding *reduction* of federal expenditures for purposes other than defense and foreign assistance.⁷⁷³

In short, national security would have to be the overriding aim of the government. Other programs would become subservient to the country's national security interests.⁷⁷⁴ To pay for this initiative, taxes would have to be increased.⁷⁷⁵ Such would be the price of peace. "The gravest threat to the security of the United States within the foreseeable future," the document concluded, "stems from the hostile designs and formidable power of the U.S.S.R., and from the nature of the Soviet system."⁷⁷⁶

16885. *The Soviet Threat and the Domestic Realm

As national security ascended in importance, other interests became subordinate. Questions related to economic security and public health, for instance, quickly became seen through a national security lens. Thus, in November 1945, even as Truman elaborated upon a proposed "Economic Bill of Rights," which contained "[t]he right to adequate medical care and the opportunity to achieve and enjoy good health," he justified the establishment of a national health care system in terms of national security.⁷⁷⁷ He cited the medical examinations conducted by the Selective Service System during World War II.⁷⁷⁸ As of April 1, 1945, approximately five million male registrants for service had been turned away for health reasons.⁷⁷⁹ Another 1.5 million men had been discharged from the Army and Navy for physical or mental disability--exclusive of injuries sustained in combat--and an equal number had needed to be treated in the armed forces for diseases that pre-existed entry into the military.⁷⁸⁰ "Among the young women who applied for admission to the Women's Army Corps," Truman reported, "there was similar disability. Over one-third of those examined were rejected for physical or mental reasons."⁷⁸¹ The poor state of health care in the United States was impacting the country directly where it most mattered: in the military services.

Public health was not the only sphere to become subservient to national security interests. Law enforcement also took on a new role. Here, the perception of Soviet design as including domestic political subversion stimulated the growth of new institutions, programs, and authorities within the United States. Social and economic concerns were not just sidelined; they themselves became seen as part of the threat, to be countered with the most extreme measures possible. The existence of the country depended upon it. The FBI presents perhaps the best example of how the domestic fabric changed.

a. The Federal Bureau of Investigation

As early as 1946, FBI Director J. Edgar Hoover informed U.S. Attorney General Tom C. Clark that the Bureau "found it necessary to intensify its investigation of Communist Party activities and Soviet espionage cases."⁷⁸² Hoover anticipated the *1689 use of widespread detention in the event of an emergency.⁷⁸³ He encouraged the Administration to undertake a detailed study of what additional legislation would be required to ensure that the proper powers were in place prior to such an event.⁷⁸⁴ The threat, in Hoover's eyes, did not merely come from communism, but from liberalism itself--communism's first assistant.⁷⁸⁵ FBI Assistant Director Ladd explained,

To a large extent the power and influence of the Communist Party in this country, which is out of all proportion to the actual size of the Party, derives from the support which the Party receives from "Liberal" sources and from its connections in the labor unions. The Party earns its support by championing individual causes which are also sponsored by the Liberal elements.⁷⁸⁶

The Emergency Detention Program, which operated from 1946 to 1950, subsequently prepared for the indefinite detention not just of active Communists, but also of individuals who might be sympathetic (or important) to Soviet aims, including individuals involved with organized labor, racial groups and coalitions, nationality groups, youth organizations, education

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and cultural societies, and science and research.⁷⁸⁷ Individuals were rated based on a so-called “Security Index.”⁷⁸⁸ Draft executive orders stood ready to implement the program.⁷⁸⁹ The “Communist Index,” a separate list of individuals potentially subject to indefinite detention, swelled to more than 42,000.⁷⁹⁰

There was a remarkable consistency between the executive and the legislative branches in the priority accorded national security and the corresponding extent to which the domestic national security infrastructure--in terms of institutions, authorities, and funding--would have to expand. For instance, in August 1950, the House Un-American Activities Committee favorably reported H.R. 9490, which, as subsequently amended by both Houses, became the McCarran Internal Security *1690 Act.⁷⁹¹ Title II of the bill embodied one of the most extreme grants of power in American history.⁷⁹² It derived from S. 4130, a bill that sought “to protect the internal security of the United States, [and] to provide for the detention in time of emergency of persons who may commit acts of espionage or sabotage.”⁷⁹³ Considered by supporters as a more effective response to the perceived threat than the House bill simultaneously moving through Congress, opponents considered S. 4130 as a “concentration camp bill,” claiming it to be the most authoritarian instrument to ever be presented on the floor of Congress.⁷⁹⁴ Senator Pat McCarran balked at what he initially viewed as unconstitutional measures threatening to attach themselves to his bill.⁷⁹⁵ Senator Kefauver commented, “We seem to be running over each other in a contest to see who can devise the most ‘anti’ anti-Communist legislation.”⁷⁹⁶ In September 1950 the detention provisions of the Senate instrument were added to the McCarran Bill.⁷⁹⁷ President Truman’s subsequent veto of the bill was based not on the extremity of Title II--to the contrary: that it did not go far enough.⁷⁹⁸ Congress subsequently overrode the veto, passing the McCarran Internal Security Act of 1950.⁷⁹⁹

The final bill limited the FBI’s latitude in indefinitely detaining individuals.⁸⁰⁰ The legislation required that there be “reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage and sabotage” before detention would be permissible.⁸⁰¹ The statute also required hearings, an administrative board review, and appeal to the U.S. Courts of Appeals.⁸⁰²

The scheme outlined in the statute conflicted with Hoover’s plans for detaining individuals considered a threat to national security. But neither the Department of Justice nor the FBI made any plans to bring the detention program into conformity with the statute. To the contrary, Attorney General J. Howard McGrath directed *1691 Hoover to ignore the legislation.⁸⁰³ Moreover, in light of the rapidly expanding list of names and the limited personnel available to ensure that everyone on the list was actually a security risk, Hoover received instruction that “all persons now or hereafter included by the Bureau on the Security Index should be considered subjects for immediate apprehension, thus resolving any possible doubtful cases in favor of the Government in the interests of the national security.”⁸⁰⁴ By 1952, nearly 20,000 names on the Security Index fell outside the standards set forth in the Internal Security Act of 1950.⁸⁰⁵ Nevertheless, for the duration of Attorney General Herbert Brownell’s tenure, 1953 to 1954, the program remained in place.⁸⁰⁶ By the close of 1954, more than 26,000 names graced the list.⁸⁰⁷ National security trumped criminal law norms. Congress did little to push back.⁸⁰⁸

The FBI initiated myriad national security investigations, perceiving threats in every element of civil society. The broadest program for collecting information took the form of COMINFIL, a shorthand name for Communist Infiltration.⁸⁰⁹ Its initial goal was “to focus on the Communist Party’s alleged efforts to penetrate domestic groups,”⁸¹⁰ but in practice, it expanded well beyond to target political activities, legislative activities, domestic administration, civil rights, youth groups, women’s liberation, farming matters, cultural activities, veterans activities, religious organizations, educational institutions, and industry.⁸¹¹ According to the Attorney General, these investigations encompassed “the entire spectrum of the social and labor movement in the country.”⁸¹² By 1960, the FBI had initiated some 432,000 investigations on individuals and groups.⁸¹³ Over the next three years, the FBI opened another 9000 files.⁸¹⁴

Of great concern to the Bureau was the potential for individuals in government service to do even greater harm to the country than ordinary citizens. With this in mind, in 1947, Truman established a Federal Employee Loyalty Program, the basic features of which became folded into Eisenhower’s Federal Employee Security *1692 Program.⁸¹⁵ The key question asked by each agency was whether the acceptance of each applicant for government service would “be clearly consistent with the national security.”⁸¹⁶ What this meant was that where any question existed, government interests prevailed.⁸¹⁷ Considerable variation marked the way in which different departments interpreted these requirements.⁸¹⁸ Crucially, it was administrative

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(not judicial) mechanisms that adjudicated--that is, the decision was being made entirely within Article II agencies. At the most basic level this called into question the level of constitutional protections available. It also cast doubt on the enterprise being undertaken. In other words, it was the administrative agencies themselves that were carrying out the program. It was not, however, for business or economic expertise to which such agencies were looked; instead, they were expected to be experts on ideas.⁸¹⁹

In keeping with the overriding characteristics of the third epoch, concerns about authoritarian regimes--and communism in particular--permeated these federal programs. The standards for determining loyalty derived from membership in, or association with, groups designated on the Attorney General's list as:

[T]otalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.⁸²⁰

The programs evolved into the screening of employees based on their political beliefs.⁸²¹ They also spread well beyond sabotage and espionage to any political idea that might be considered subversive.⁸²²

In some ways, these programs also looked to basic conceptions of U.S. national security representative of the first epoch: the purpose of the Union was to protect the Constitution, which itself framed the political institutions of government. Efforts to undermine the Constitution (or the government) through sowing political ideas thus represented an attack on U.S. national security.

In seeking to prevent political challenge, new initiatives undermined the Constitution itself, creating tension between the object being secured and the institution of the federal government. The Bureau's activities targeted free speech, *1693 freedom of association, privacy, and other rights considered central to constitutional law. Unease surfaced. President Truman, for instance, expressed concern about the risks to constitutional government posed by the Internal Security Act of 1950.⁸²³ At some point, it made little sense to talk about protecting the U.S. Constitution, if the measures being implemented to protect it destroyed its fundamental tenets.

b. Militarization

Under President Eisenhower's stewardship, the NSC--rather than the State Department, which would have been expected to make recommendations on foreign policy--became the main source of major national and international security issues.⁸²⁴ The organization's hierarchical efficiency played a role here in establishing it as the principal national and international security policymaking body.⁸²⁵ Within the NSC, military interests dominated, further sidelining the State Department.⁸²⁶ Eisenhower also developed the NSC's covert operations capabilities, emphasizing in the process not the tools of statecraft, but the cunning of secrecy and military action. The so-called "5412 Committee" (named after *NSC 5412*) met regularly to review and recommend new operations.⁸²⁷

The continued primacy of national security in the domestic realm, and particularly a militarized NSS, was consistent with Eisenhower's background and perspective. In his *Second Inaugural Address*, which he entitled "The Price of Peace," Eisenhower noted that the entire continent of Europe was divided, "[a]nd so, too, is all the world. The divisive force is International Communism and the power that it controls."⁸²⁸ He maintained the Manichean analysis of good versus evil that marked his *First Inaugural Address*:

*1694 The designs of that power, dark in purpose, are clear in practice. It strives to seal forever the fate of those it has enslaved. It strives to break the ties that unite the free. And it strives to capture--to exploit for its own greater power--all forces of change in the world, especially the needs of the hungry and the hopes of the

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oppressed.⁸²⁹

The United States, fighting on the side of right, could take hope from the change sweeping through Europe. The country had a special responsibility to the world: "We recognize," Eisenhower said, "and accept our own deep involvement in the destiny of men everywhere."⁸³⁰

The United States' formative role in the second epoch intensified during the third as the nation proved itself willing to engage in military matters anywhere communism threatened to take hold. Korea, Vietnam, South America--the United States was now willing to use the military in a preemptive role. No longer was the country merely protecting its commercial trade or responding to attack; now it was ready to use its military might in order to shape the global environment. It was in this third epoch that the United States first took on the role of international police. To fuel this engine, the United States required enormous resources, for which a close partnership with science and industry became critical.

When it came time to leave office, Eisenhower took the unusual step of issuing a farewell address--hearkening back to George Washington, who had used his departure to warn the fledgling country of looming risks to its national security.⁸³¹ Eisenhower had taken his oath of office on the bible that Washington had used.⁸³² Like Washington, Eisenhower came from a military background.⁸³³ And, like Washington, Eisenhower evinced concern about too much emphasis on the military; neither man felt mercenary armies ("which have at one time or another subverted the liberties of all-most all the countries they have been raised to defend") could be tolerated.⁸³⁴ For Eisenhower, the great danger to the country may have derived from worldwide communism, but the country's response--the *1695 pairing of military and industrial interests--might shift the conversation away from what was best for the country: "In the councils of government," Eisenhower reflected, "we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."⁸³⁵ For Eisenhower, "The potential for the disastrous rise of misplaced power exists and will persist."⁸³⁶ The United States must never lose sight of the purpose of national security:

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted only an alert and knowledgeable citizenry can compel the proper meshing of huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.⁸³⁷

The strong priority accorded to national security carried a grave risk--namely, the capture of the intellectual, economic, and social fabric of society: "The prospect of domination of the nation's scholars by Federal employment, project allocations, and the power of money," Eisenhower warned, "is ever present--and is gravely to be regarded."⁸³⁸ Therefore, although the country faced a serious external threat, and though national security had been accorded priority, such matters were not without risk.

c. National Security and Civil Rights

In 1944, Swedish economist (and later Nobel Laureate) Karl Gunnar Myrdal published an extensive study of race relations in the United States.⁸³⁹ At nearly 1500 pages (including the index), Myrdal's work provided an exhaustive look at the domestic social structure.⁸⁴⁰ The study had a significant impact on the evolution of racial integration in the United States.⁸⁴¹ It also drew attention to the fact that the United States' efforts to counter fascism and nazism required the country to reject the same within domestic bounds.⁸⁴² "Fascism and nazism," Myrdal wrote, "are based on a racial superiority dogma In fighting fascism *1696 and nazism, America had to stand before the whole world in favor of racial tolerance and cooperation and of racial equality."⁸⁴³

As a matter of national security, much appeared to turn on the United States' ability to portray itself as a democratic country distinguished by liberty and equality--this was precisely what separated the West from totalitarianism. International perception mattered.⁸⁴⁴ Further attention was drawn to the role of propaganda in the Soviet effort to discredit the United

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States.⁸⁴⁵ Failure to address racial disparity would fuel Soviet criticism of the West, giving the U.S.S.R. ammunition to mount its psychological campaign.⁸⁴⁶ It would undermine the United States' role within the western bloc, bringing disrepute on the very ideas that the West claimed as its foundation.⁸⁴⁷ The extent to which the United States appeared hypocritical would diminish American authority and perceptions of veracity across the board.⁸⁴⁸

Accordingly, from 1946 to the mid-1960s, scholars and successive administrations raised concern about the impact of domestic civil rights issues on the United States' international prestige.⁸⁴⁹ Writing in 1950, Harold Lasswell pointed out that Jim Crow laws simply facilitated Soviet propaganda.⁸⁵⁰ Civil rights reform came to be seen as essential to U.S. national security.⁸⁵¹

Professor Mary Dudziak thoughtfully examined the intense international scrutiny that accompanied the civil rights movement in the context of the Cold War.⁸⁵² Her work notes that the international dimension is just that-- one side of a complex, multifaceted movement--and thus does not substitute for a careful examination of the civil rights movement from a domestic perspective.⁸⁵³ But in looking at the international reaction to postwar racial violence and race discrimination, Dudziak found that the Soviet Union was more than willing to take advantage of prominent incidents, leading the Truman Administration to recognize the harmful effects of race discrimination on the country's foreign relations.⁸⁵⁴

***1697** For the Soviet Union, visible instances of American failure to treat its citizens as equals supported its claims regarding the weaknesses of democracy and the conditions in which individuals found themselves in the United States.⁸⁵⁵ Western European powers, in turn, felt that the United States, with such a prominent international role during the Cold War, was made more vulnerable to Soviet allegations because of the United States' domestic race relations.⁸⁵⁶ The claims made against the United States, moreover, redounded to Western democratic norms more generally. Thus, in 1958, the Secretary of the British Labour Party felt the need to note, in response to the pending execution of Jimmy Wilson, an African-American sentenced to death in Alabama for stealing less than two dollars, that it was unfortunate that "those who wish to criticize western liberty and democracy" had been provided with "such suitable ammunition for their propaganda."⁸⁵⁷ Secretary of State John Foster Dulles became involved in the case, and the Governor of Alabama received an average of one thousand letters per day, many of them from overseas.⁸⁵⁸ Dudziak explained,

During the Cold War years, when international perceptions of American democracy were thought to affect the nation's ability to maintain its leadership role, and particularly to ensure that democracy would be appealing to newly independent nations in Asia and Africa, the diplomatic impact of race in America was especially stark.⁸⁵⁹

In short, from 1946 through the mid-1960s, failure to treat all citizens in accordance with basic principles of liberal democracy undermined American claims to a system grounded in concepts of equality and the protection of rights. To the extent that the Soviet Union could exploit these failures, U.S. interests suffered.

Despite the growing concern about the impact of race relations on national security, between 1945 and 1957, Congress repeatedly struck down civil rights bills.⁸⁶⁰ It was not until the Civil Rights Act of 1957, largely focused on voting rights, that the legislature finally passed a civil rights measure, followed by another in 1960.⁸⁶¹ The steady expansion of marches and meetings in the early 1960s, in conjunction with violence in Birmingham and elsewhere, put increasing pressure on Congress to act.

***1698** Lyndon B. Johnson, the Senate Majority Leader from 1955 to 1961, went on to play a key role in driving through the Civil Rights Act of 1964.⁸⁶² His decisive victory over Barry Goldwater in the presidential election of 1964 heralded further support for civil rights and a renewed commitment to national security. Johnson came to office noting: "[O]urs is a time of change--rapid and fantastic change bearing the secrets of nature, multiplying the nations, placing in uncertain hands new weapons for mastery and destruction, shaking old values, and uprooting old ways."⁸⁶³ He went on to frame the constitutional values of the country as an "American covenant," arguing that such covenant had been "[c]onceived in justice, written in liberty, and bound in union"⁸⁶⁴ National security was, precisely, the purpose for which the country had been founded: "In each generation, with toil and tears, we have had to earn our heritage again," he said.⁸⁶⁵ "Underneath the clamor of building

and the rush of our day's pursuits, we are believers in justice and liberty and union, and in our own Union."⁸⁶⁶

6. Hypertrophic Executive Power

With the primacy accorded national security concerns, the corresponding infrastructure enjoyed a period of unprecedented growth. World War II had destroyed any homage to isolationism or appeasement that might otherwise mark U.S. international relations.⁸⁶⁷ But engagement--especially global military, political, and economic engagement--was expensive and required a complex bureaucratic structure to feed and coordinate. The National Security Act of 1947 had created the NME, which quickly became the Department of Defense.⁸⁶⁸ Its authorities and capabilities rapidly expanded.⁸⁶⁹ By 1958, Eisenhower was calling for a comprehensive system of unified command under the direct authority of the Secretary of Defense with the advice and assistance of the Joint Chiefs of Staff, which had taken on new responsibilities.⁸⁷⁰ New legislation created a general *1699 counsel and six additional Assistant Secretaries of Defense ("ASDs").⁸⁷¹ Eisenhower gave the ASDs the authority to give orders to the military departments with written authorization from the Secretary of Defense.⁸⁷² Under the Department of Defense Reorganization Act of 1958, responsibilities of the ASDs for research and engineering transferred to a new Director of Defense Research and Engineering.⁸⁷³ The creation of the Air Force introduced another major entity into the mix, and later statutory amendments expanded the Joint Chiefs of Staff to include the Commandant of the Marine Corps.⁸⁷⁴

The structure of the NSC rapidly expanded. By mid-1952, for instance, the Psychological Strategy Board ("PSB") had become the largest component of the NSC, with a staff of 130 and a budget twice that of the rest of the NSC.⁸⁷⁵ Although the PSB eventually folded,⁸⁷⁶ it set an important precedent for the NSC--namely, its use as a direct instrument of the presidency.⁸⁷⁷ The PSB laid the standard for an even more ambitious Operations Coordinating Board, which Eisenhower used to great effect.⁸⁷⁸ In 1953, *NSC 162/2* replaced *NSC 68*, in the process not only reaffirming containment and deterrence, but also elevating the importance of nuclear weapons and calling for a greater role for covert action, a policy further cemented in *NSC 5412*.⁸⁷⁹ The CIA, for its part, soon incorporated not only intelligence coordination and analysis, but also intelligence gathering and covert operations.⁸⁸⁰ Driving the entire process was the threat of totalitarianism generally. In 1959, Democratic Senator Henry Jackson of Washington explained, "The central issue of our time is this: Can a free society so organize its human and material resources to outperform totalitarianism?"⁸⁸¹ The answer seemed to be a *1700 combination of organizing, reorganizing, and re-reorganizing the national security bureaucracy, expanding authorities, and giving ever more money to the cause.

In this structure, the military gained special status--and funding. In 1949, Congress made approximately twenty percent more in defense appropriations than the previous year.⁸⁸² The Korean War erupted in mid-1950.⁸⁸³ Although active hostilities ended within three years,⁸⁸⁴ by that time, the Cold War had taken hold. Congress initially seemed somewhat hesitant about funding the many initiatives encapsulated by *NSC 68*. But its reluctance proved short lived. Korea appeared to be the beginning of concerted Soviet action, and Congress opened its purse in response.⁸⁸⁵ Secretary of State Dean Acheson later reflected, "Korea saved us."⁸⁸⁶

Following Korea, defense outlays over the next ten years were three times higher than those that marked the late 1940s. From 1947 to 1950, the real annual military spending never went above \$60 billion.⁸⁸⁷ In sharp contrast, after 1952, it never went below \$143 billion--and often was considerably higher (for example, from 1956 to 1965, the average of military appropriations was \$168 billion).⁸⁸⁸ Between 1960 and 1962, spending increased another eleven percent.⁸⁸⁹ The Vietnam War further drove appropriations after 1965.⁸⁹⁰

Between 1972 and 1976, public and congressional frustration about spending and presidential discretion came to the surface--as reflected by diminished appropriations, the introduction of the 1973 War Powers Resolution, and the adoption of the National Emergencies Act of 1976.⁸⁹¹ But after 1978, both the Carter and Reagan Administrations again focused on military outlays.⁸⁹² Between *1701 1978 and 1980, funding increased by \$15.7 billion (10.4%), and between 1980 and 1987, by \$84.4 billion (50.7%).⁸⁹³

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To sustain the primacy of national security as a concern, a significant amount of apprehension about the threats faced had to be present. It was Lasswell who recognized that crises “strengthen[] the plausibility of the military way of thinking.”⁸⁹⁴ Consistency in framing the problems generates more support for military solutions, and as the military gains control, emphasis turns to armaments: “The professional strategist thinks of all the contingencies connected with the use of weapons in war. The result is to emphasize in the minds of all who are exposed to his thinking the most extreme possibilities and the importance of physical weapons.”⁸⁹⁵ Central to this chain was the continuing sense of crisis. Otherwise, as Professor Samuel Huntington observed in 1961, “The longer a given level of military force is apparently adequate for deterrence, the greater is the temptation to assume that a slightly lower level might be equally adequate.”⁸⁹⁶

The ideological climate and the presentation of the threat in moral terms--good versus evil--went some way towards sustaining the emphasis on the military.⁸⁹⁷ Episodic crises also played a role, such as North Korea crossing the 38th parallel and the Soviet Union invading Afghanistan.⁸⁹⁸ At other times, the military infrastructure directed the public’s attention to “gaps” and the attendant dangers thereby created.⁸⁹⁹ The historical record has proven less than kind to such assertions: The 175 Soviet divisions, for instance, that were widely considered the strength of the Red threat following World War II, in fact suffered from lack of equipment and soldiers.⁹⁰⁰ The “bomber gap” in the mid-1950s, “missile gap” between 1958 and 1961, and the subsequent “anti-missile gap” and “first-strike missile gap” all turned out to be false alarms.⁹⁰¹ The public account of the Gulf of Tonkin turned out to be mistaken--despite the use of the incident as a basis to go to war.⁹⁰² Other gaps, from thermonuclear megatonnage to antisubmarine capabilities, became instrumental in generating congressional support for military appropriations. *1702⁹⁰³ The Committee on the Present Danger later announced that the 1970s had been a “decade of neglect,” making the United States vulnerable to Russian aggression.⁹⁰⁴ Professor Robert Higgs, evaluating the Cold War political economy and various additional instances of false alarms, concluded that “the drumbeat succession of such episodes helped to sustain an atmosphere of tension and insecurity that fostered the maintenance of an enormous ongoing arms program.”⁹⁰⁵ Writing in 1955, John Lord O’Brian dubbed the epoch, the “age of anxiety.”⁹⁰⁶

In this mix, the National Security Act of 1947 played a special role. It created a national security elite--specifically, the NSC, the NME (later the Department of Defense), the Joint Chiefs of Staff, the DCI, the CIA, the Air Force, and others who were not just given special powers, but who had a special hold on national security information.⁹⁰⁷ Ted Galen Carpenter, a foreign policy analyst with the Cato Institute, suggested in 1986 that the creation of the CIA did not just provide the executive branch with a potent new foreign policy tool, “[i]t also set in motion a cult of secrecy, a far more pervasive system of classifying information than had ever existed previously, and a growing executive determination to withhold sensitive information from the public and from Congress.”⁹⁰⁸

The projects financed in this secret world remained shielded from the legislature. The “Black Budget” grew from the Manhattan Project and eventually expanded.⁹⁰⁹ By 1989, the Black Budget reached \$36 billion per year.⁹¹⁰ Blanket appropriations masked hundreds of programs from congressional eyes--programs that took on a disproportionate size within the executive branch.⁹¹¹ By 1991, for instance, the Black Budget for less than one dozen secret Air Force programs alone *1703 came to \$2.85 billion-- approximately the same amount it cost to run the entire State Department.⁹¹²

Armed with a rapidly expanding bureaucracy, increasing secrecy, and huge amounts of money, the strength of the executive branch also expanded. In 1960, historian Arthur M. Schlesinger, Jr. coined the term “imperial presidency” to refer to the power being wielded by the executive branch.⁹¹³ His work stemmed from concern that the executive branch in general, and the President in particular, had exceeded constitutional limits.⁹¹⁴

Although Schlesinger tied the growth of the imperial presidency to the New Deal,⁹¹⁵ the impact of the primacy of national security in the third epoch can hardly be ignored. The CIA’s role in Iran (1953), Guatemala (1954), Egypt (1954), Laos (1959), and Cuba (1960 to 1961); the secret bombing of Laos (1964 to 1973); military operations in Cambodia, Thailand, and Vietnam; and the Iran-Contra affair (1985 to 1986) reflected the primacy accorded to national security during the third epoch, as well as the emphasis placed on containing the communist threat. They all also pointed to a radically distended executive branch that was subject only to minimal restrictions from Congress and the courts.

The executive branch was aware of its growing authority and influence--one borne of congressional acquiescence. “[I]n this

past third of a century,” President Richard Nixon commented during his *First Inaugural Address*, “government has passed more laws, spent more money, initiated more programs, than in all our previous history.”⁹¹⁶ Under his watchful eye, Henry Kissinger nearly trebled the staff of the NSC, and later became both Secretary of State and National Security Advisor at the same time.⁹¹⁷ Kissinger continued both positions under President Gerald R. Ford—a man with minimal foreign affairs experience.⁹¹⁸

Ford pressed Congress to give the executive even more latitude. In 1975, he informed a joint session of Congress that “[b]y the Constitution and tradition, the execution of foreign policy is the responsibility of the President.”⁹¹⁹ He argued,

In recent years, under the stress of the Vietnam war, legislative restrictions on the President’s ability to execute foreign policy and military decisions have proliferated As President, I welcome the advice and cooperation of the House and the Senate. But if our foreign policy is to be successful, we cannot rigidly restrict in legislation the ability of the President to act. The conduct of *1704 negotiations is ill-suited to such limitations.

Legislative restrictions, intended for the best motives and purposes, can have the opposite result⁹²⁰

Congress gradually started to push back against the executive. The legislature began to cut funding for operations in South Vietnam, Turkey, Latin America, and elsewhere.⁹²¹ Ford expressed his concern directly to Congress, again using the language of crisis to pressure legislators: “In the conduct of foreign affairs, Presidential initiative and ability to act swiftly in emergencies are essential to our national interest.”⁹²² Ford sought to shore up support for covert operations and the intelligence agencies:

In a world where information is power, a vital element of our national security lies in our intelligence services.

They are essential to our Nation’s security in peace as in war. Americans can be grateful for the important but largely unsung contributions and achievements of the intelligence services of this Nation.⁹²³

To Ford, the Church Committee was harming U.S. interests.⁹²⁴ While the national security system may need to be subject to congressional review, the public nature of the hearings lay beyond the pale.⁹²⁵ It did a disservice to the nation and undermined U.S. intelligence.⁹²⁶ “It ties our hands while our potential enemies operate with secrecy, with skill, and with vast resources. Any investigation must be conducted with maximum discretion and dispatch to avoid crippling a vital national institution.”⁹²⁷ The CIA had been “of maximum importance” to Ford.⁹²⁸ The stakes could not be higher. “The national security budget that I have submitted is the minimum the United States needs in this critical hour.”⁹²⁹

Under President Jimmy Carter, the National Security Advisor became the principal source of U.S. foreign policy. With the State Department relegated to the role of institutional memory (and operations coordinator), the National Security Advisor assumed an enhanced role.⁹³⁰ Zbigniew Brzezinski, a formidable intellectual, took control.⁹³¹

President Ronald Reagan came to office vowing to reduce the size and influence of the federal establishment “and to demand recognition of the distinction between *1705 the powers granted to the Federal Government and those reserved to the States or to the people.”⁹³² Reagan emphasized that it was the states that created the federal government; the federal government had not given birth to the states.⁹³³ Two classes of issues emerged: general social and economic questions resided with the states; the federal government, however, retained total control over national security.⁹³⁴ Reagan further elaborated on this distinction in his *Second Inaugural Address* by explaining that social and medical concerns lay firmly in the realm of state and local government and, therefore, beyond the responsibilities of the federal government.⁹³⁵ “Now,” he continued, “let me turn to a task which is the primary responsibility of National Government—the safety and security of Our people.”⁹³⁶ Reagan’s understanding of federalism closely reflected national security’s third epoch: national security was not just one of many responsibilities of the federal government—it was *the* primary responsibility.

D. Balancing Risk: 1989-2012

During the third epoch, national security became *the* dominant national discourse. The priority accorded to the issue reflected the fact that the existence of the State was a precondition to dialogue. Without the political institutions of government, all other concerns would be moot. National security, moreover, was non-negotiable: the resources required to realize national security simply had to be found. The appeal to national security resonated with American history. At the time of the Founding, and again, with the Civil War, protection of the Union became the overriding aim. During the Cold War, it was thus consistent with the American experience to set national security, grounded in the preservation of federal institutions and the Constitution, as a priority.

With such a strong discourse, difficulty in generating attention for other issues could be substantially lessened by folding them into the national security dialogue. Public focus, institutional power, and mobilization of resources would follow. A symbiotic relationship between national security and other concerns thus developed: to get attention, issues could locate themselves within a national security framework, which, in turn, expanded national security and made the framework even more powerful. With this in mind, it was perhaps inevitable that the national security dialogue expanded, as soon as its primary object of containment--which provided some limit on the object to which the State's authorities and resources were directed--no longer applied.

*1706 Glimmers of the broad, conceptual expansion of national security appeared before the fall of the Berlin Wall. Writing in 1974, for instance, General Maxwell Taylor, former Chairman of the Joint Chiefs of Staff, suggested creating "an expanded National Security Council charged with dealing with all forms of security threats, military and nonmilitary, and having access to all elements of government and to all relevant resources capable of contributing to this broad task."⁹³⁷ He criticized the NSC for failing to deal with environmental and other threats--issues that could only belong to national security under an expanded conceptualization of the term.⁹³⁸ A few years later, Lester Brown, the founder of Worldwatch Institute, warned:

[T]hreats to security may now arise less from the relationship of nation to nation and more from the relationship of man to nature. Dwindling reserves of oil and deterioration of the Earth's biological systems now threaten the security of nations everywhere.⁹³⁹

He thus argued for a broader definition of security--one that also encompassed energy and environmental policy.⁹⁴⁰

It was the end of the Cold War, though, that opened the gates to conceptualizing a multitude of risks as threats to U.S. national security. The fall of the Soviet Union meant that the policy of containment could no longer limit American designs. As the former Soviet republics achieved independence, and East and West Germany moved toward unification, the United States appeared unchallenged in its international position. By the 1990s, the United States had moved to global engagement on economic, military, and political matters. It had also created a massive domestic bureaucracy and forged strong relationships with science and technology, in the process funneling substantial resources to these institutions.

To what object, then, would the existing institutions, resources, and authorities be directed? The defining feature of the fourth epoch quickly became national security threats understood as *anything that presented a potential harm to the United States*. Thus, as noted at the beginning of this Article, the May 2010 NSS considered economic growth, armed conflict, climate change, pandemic disease, terrorism, and organized crime as national security concerns.⁹⁴¹ The *Quadrennial *1707 Defense Review* ("QDR"), *Quadrennial Intelligence Community Review* ("QICR"), and other documents have followed suit.⁹⁴²

The intelligence community now considers a broad range of threats to fall within national security.⁹⁴³ In one scenario called "October Surprise," the community anticipates a significant shift of power to corporations and megacities, "allowing global ills (from climate change to international crime) to spiral out of control."⁹⁴⁴ Under this conception, local power presents a threat to the federal government.⁹⁴⁵ Failure to move beyond "traditional geopolitical threats" to fund the national security infrastructure adequately presents the greatest danger to national security. The envisioned result is worth quoting at length:

[C]limate change causes health crises and environmental threats that challenge weakened government and

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international institutions. Furthermore, porous borders exacerbate health crises and facilitate the spread of international crime. Threats to the U.S. national security environment include natural disasters that cause significant physical destruction and threaten key infrastructure such as power grids, financial systems, and water containment systems. Pandemics threaten public safety, trigger widespread anxiety, and stretch resources. Moreover, the growing social stratification and inequality that results from a “growth at all costs” mentality drives antagonistic “have nots” to challenge government authority and turn increasingly violent. Finally, government spending on defense and intelligence is significantly decreased due to an environment with few traditional geopolitical threats.⁹⁴⁶

The intelligence community flatly rejects traditional geopolitical considerations, choosing instead to conceive threats to U.S. national security as potential risks, which if manifest, would undermine the institution of the national government.⁹⁴⁷

This perspective is not unique to the Director of National Intelligence: every federal agency tasked with intelligence collection was involved in drafting the review.⁹⁴⁸ Based on the scenarios imagined, moreover, the Director of National *1708 Intelligence issued a separate, classified QICR report to discuss potential impact on the missions, operating principles, and capabilities (understood in terms of both authorities and funding) the intelligence community would have to acquire “to manage the range of uncertainties in the future.”⁹⁴⁹

The above documents represent some of the most important formal articulations of U.S. national security. Yet, they are not exhaustive. A host of other reports similarly adopt positions well beyond traditional national security concerns.⁹⁵⁰ Such calls echo outside of the executive branch in quasi-nongovernmental organizations. The Project on National Security Reform (“PNSR”), for instance, funded and supported by corporations, foundations, and Congress, and made up of individuals drawn from private and public entities, has argued that the 1947 national security system is “dangerously out-dated, imbalanced and dysfunctional.”⁹⁵¹ In 2008, PNSR issued a statutorily required report to the President, arguing that the Cold War-era concept of national security no longer applies: “In our view, national security must be conceived as the capacity of the United States to define, defend, and advance its interests and principles in the world.”⁹⁵² For PSNR, the objectives of U.S. national security policy now include, *inter alia*, the ability “[t]o maintain security against massive societal disruption as a result of *1709 natural forces, including pandemics, natural disasters, and climate change.”⁹⁵³ The report highlights the foundations of national power as integral to U.S. national security interests: “[s]ound economic policy, energy security, robust physical and human infrastructures including our health and education systems, especially in the sciences and engineering.”⁹⁵⁴ These power-bases, the report claims, are as essential to U.S. national security as are weapons and wealth.⁹⁵⁵

Such broad policy articulations are now finding root in law. By statutory definition, as previously noted, “intelligence related to national security” has expanded to include all threats “to the United States, its people, property, or interests”⁹⁵⁶ Stripped of what minimal limitations had been set by the object of national security in the third epoch--containment of the U.S.S.R. and the spread of communist ideology--a broad range of risks to the country now fall within the national security rubric.

Two critical aspects of this broad articulation of U.S. national security deserve notice. First, it sidelines the function of intent by incorporating actor-less threats. This approach sits uneasily in a domestic political structure built on adversarial intent. Second, it sidesteps the likelihood that such risks will actually become manifest; the mere fact that such threats could occur is sufficient to drive the country to action. An infinite number of risks may therefore be placed within the existing framework.

Climate change, drug trafficking, pandemic disease, and organized crime, amongst other areas, have quickly become intimately linked to U.S. national security. A brief examination of each area reveals three points of convergence. First, each emerged during the Cold War and attempted to attach to the national security framework but did not gather momentum until the war’s end, at which time government institutions and resources became available. Second, reflecting the power and focus of the national security dialogue, new developments in each area led to a rapid expansion in the reach of the executive branch and, specifically, in the federal national security infrastructure. Third, none of the areas identified have an end point; instead, they merely reflect ongoing problems, suggesting the indefinite expansion of executive authority generally and the national security infrastructure in particular. The consequences are borne in the rapidly shifting constitutional structure of the United

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States.

1. Climate Change

Maxwell Taylor's call in 1974 to expand the NSC's responsibilities was one of many efforts to attach environmental concerns to the national security dialogue.⁹⁵⁷ *1710 Three principle arguments connected environmental matters generally, and climate change specifically, to U.S. national security: First, that limited access to natural resources would foment intra and interstate conflict and insecurity. Second, that war and armaments contribute to environmental degradation. Third, that changes in the environment pose an existential threat to the United States.

The first argument--that environmental scarcity might lead to conflict--was certainly not a new one. In 1798, the English scholar Thomas Malthus argued "that the power of population is indefinitely greater than the power of the earth to produce subsistence for man."⁹⁵⁸ The resulting imbalance between the need of human beings for sustenance and the amount of food available would lead to hunger, disease, and war.⁹⁵⁹ Concern about the impact of environmental factors in driving countries to war continued: In 1948, environmentalist Fairfield Osborn asked, "When will it be openly recognized that one of the principal cause[s] of the aggressive attitudes of individual nations and of much of the present discord among groups of nations is traceable to diminishing productive lands and to increasing population pressures?"⁹⁶⁰ Professor Ted Robert Gurr of the University of Maryland later suggested that environmental changes could harm economic growth, underscore social tension, and lead to insurgencies.⁹⁶¹

A variation on this theme anticipated that a country with environmental scarcity would not only experience greater internal conflict, but would also adopt a more aggressive posture internationally, thus presenting a threat to regional stability and, ultimately, U.S. national security. In 1977, Dr. William Ophuls, a former member of the U.S. Foreign Service, predicted that poor nations would confront richer nations for a greater share of the world's wealth, as global environmental damages increased disparity between North and South.⁹⁶² Three years later, Professor Robert Heilbroner, a prominent economist, expressed similar concern.⁹⁶³

Environmentally created insecurity, however, would not just arise from military aggression. Refugee flows, and associated immigration concerns related to environmental disasters, could undermine a host country's stability.⁹⁶⁴ Changing ethnic constituencies, public health concerns, and management of the sheer number of *1711 individuals seeking refuge could bring an entirely different set of concerns--all of which went to questions of national security.⁹⁶⁵

The second argument considered the impact of war, military operations, and munitions on the environment--suggesting in the process a circular relationship between the damage inflicted by the State and the resulting security threats. Like the first argument, it was not a novel concern.⁹⁶⁶ Efforts to focus attention on the matter continued throughout the third epoch: In 1976, for instance, Arthur Westing considered the ecological consequences of the Second Indochina War.⁹⁶⁷ He followed this in 1977 with a book that considered the impact of weapons of mass destruction and their impact on the environment.⁹⁶⁸ Yet a third volume focused on how warfare damaged the environment.⁹⁶⁹ Other scholars picked up this theme.⁹⁷⁰

The third argument began to draw out environmental concerns as an existential threat: access to food, water, energy, and other resources; economic decline; massive disruptions in services; and alteration in the balance of power between States all threatened state sovereignty and, potentially, the United States' existence. Accordingly, in 1988, Professor Paul R. Ehrlich, a prominent biologist at Stanford University, and Anne Ehrlich, a research scientist in biological sciences, issued a warning at Pugwash, an annual conference founded in 1957 with the aim of bringing influential scholars together to reduce the danger of armed conflict.⁹⁷¹ Their address was titled: *The Environmental Dimensions of National Security*, and *1712 was followed by a publication of the same name.⁹⁷² Worldwatch Institute similarly announced in its *State of the World 1988*: "For four decades, security has been defined largely in ideological terms The threat posed by continuing environmental deterioration is no longer a hypothetical one."⁹⁷³ One author in the study noted, "Threats to human security are now seen much more in environmental and economic terms and less in political ones."⁹⁷⁴

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These arguments culminated in calls to redefine the term “security,” expanding its understanding beyond traditional geopolitical concerns.⁹⁷⁵ Richard Ullman, for instance, suggested that security must be understood to include any threat that had the ability to quickly degrade the quality of life of the state’s inhabitants, or that narrowed the choices available to people and organizations.⁹⁷⁶ Such a broad conception of security could include environmental concerns and geopolitical threats, as well as broader security issues.⁹⁷⁷

This entire discussion predates the fall of the Berlin Wall, in the wake of which security studies went into free fall. The question was whether conventional understandings of security were still relevant.⁹⁷⁸ Writing in *Foreign Affairs*, Jessica Tuchman Mathews, former Director of the Office of Global Issues at the NSC, suggested, “The 1990s will demand a redefinition of what constitutes national security.”⁹⁷⁹ For Mathews, the 1970s were marked by an expanding emphasis on economics, but “[g]lobal developments now suggest the need for another analogous, broadening definition of national security to include resource, environmental and demographic issues.”⁹⁸⁰ Her central concern stemmed from challenges to State power: “Environmental strains that transcend national borders are already beginning to break down the sacred boundaries of national sovereignty.”⁹⁸¹ Secretary of State James Baker, seeking funding from Congress, similarly argued, “Traditional concepts of what constitutes a threat to national and *1713 global security need to be updated and extended to such divergent concerns as environmental degradation, narcotics trafficking, and terrorism.”⁹⁸² The potential for State collapse became a clarion call: Robert Kaplan, writing in the *Atlantic Monthly*, suggested, “It is time to understand ‘the environment’ for what it is: *the* national-security issue of the early twenty-first century.”⁹⁸³

Calling for an expansion in traditional understandings of security, articles linking environmental concerns to national security flooded the literature. For the most part, the documents expounded upon the three major arguments that predated the fall of the Berlin Wall.⁹⁸⁴ New case studies highlighted the relationship between environmental scarcity and violent conflict.⁹⁸⁵ Prominent think-tanks and nongovernmental organizations picked up similar themes.⁹⁸⁶ *Survival* dedicated an entire issue to nonmilitary aspects of national security, including articles on *1714 demographic shifts, energy and resources, and climate and ecology.⁹⁸⁷ It was not only environmental scientists sounding the toll: Articles appeared in the *Bulletin of Atomic Scientists*, for instance, underscoring the concern about the relationship between the environment and national security.⁹⁸⁸ The discussion spilled over into the popular literature.⁹⁸⁹

Most relevant to the emphasis of this Article, such concerns soon echoed in the political realm. In 1989, Al Gore noted that “the environment is becoming a matter of national security—an issue that directly and imminently menaces the interests of the state or the welfare of the people.”⁹⁹⁰ The following year Senator Sam Nunn, Chair of the Armed Services Committee, explained:

[A] new and different threat to our national security is emerging--the destruction of our environment. The defense establishment has a clear stake in countering this growing threat. I believe that one of our key national security objectives must be to reverse the accelerating pace of environmental destruction around the globe.⁹⁹¹

Importantly, there was very little pushback on this expanding concept of national security.⁹⁹² In part, this reflected the mutual interests of the various interest groups involved: Security studies, broadly focused on Soviet-American *1715 concerns, could turn to a new area. Environmentalists captured attention and resources for their concerns. And the national security establishment could continue to sustain its institutional strength, even as it branched out into new areas.

As a practical matter, the incorporation of climate change into the concept of national security was not merely cosmetic. Real changes to institutions, institutional relationships, and authorities followed.⁹⁹³ In this regard, climate change did not merely represent a parallel interest to national security, for which alternative framing could be adopted. Instead, it became embedded in the heart of the existing national security framework--such as the country’s national security strategies, the organization of the NSC, the authorities and programs initiated by, the intelligence community, and the like.

The existing framework, however, was created with a different object in mind; it emphasized the State generally--and the national government in particular-- as the central player. It strongly favored military interests. It was primed to expand

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executive authority. It involved layers of secrecy that diminished the ability of the legislature and the people to conduct oversight. It entailed close relationships between government and industry. Instead of changing the national security structure, climate change became subsumed into the existing framework. One of the best examples of this comes from the evolution of the NSS.

a. Origins of the NSS

In 1986, the Goldwater-Nichols Defense Reorganization Act required the President to report to Congress on the United States' national security strategy.⁹⁹⁴ The concern at the time was not that the United States lacked a grand strategy--containment of the former Soviet Union had acted in this role for the previous four decades. Instead, the issue was whether the United States' national security strategy was sufficiently focused on specific objectives, whether it was coherent, the degree to which it integrated different seats of power, and the anticipated time horizon.⁹⁹⁵

Accordingly, the legislation required classified and unclassified annual reports to be provided to Congress, with newly elected Presidents required to submit the same within 150 days of taking office.⁹⁹⁶ Such reports must address five points:

(1) The worldwide interests, goals, and objectives of the United States that are vital to the national security of the United States.

***1716** (2) The foreign policy, worldwide commitments, and national defense capabilities of the United States necessary to deter aggression and to implement the national security strategy of the United States.

(3) The proposed short-term and long-term uses of the political, economic, military, and other elements of the national power of the United States to protect or promote the interests and achieve the goals and objectives

(4) The adequacy of the capabilities of the United States to carry out the national security strategy of the United States, including an evaluation of the balance among the capabilities of all elements of the national power of the United States to support the implementation of the national security strategy.

(5) Such other information as may be necessary to help inform Congress on matters relating to the national security strategy of the United States.⁹⁹⁷

In practice, these reports have often not been submitted on schedule, and in some cases, were not submitted at all.⁹⁹⁸ Resultantly, in the twenty-five years that have elapsed since Congress passed the legislation, only some fifteen such reports have been issued: The Second Reagan Administration submitted two (in 1987 and 1988).⁹⁹⁹ The George H.W. Bush Administration provided three reports (in 1990, 1991, and 1993).¹⁰⁰⁰ The Clinton Administration prepared seven (in 1994, 1995, 1996, 1997, 1998, and 2000).¹⁰⁰¹ The George W. Bush Administration submitted only two (in 2002 and 2006).¹⁰⁰² And the Obama Administration, to date, has only submitted one (in 2010).¹⁰⁰³ Despite the staccato nature of these documents, they nonetheless provide insight into the changing nature of national security in the fourth epoch.

The first NSS Report was issued by the Second Reagan Administration in 1987.¹⁰⁰⁴ In the wake of the Goldwater-Nichols Act, the Reagan Administration had only a small amount of time in which to draft the strategy.¹⁰⁰⁵ The final document adopted

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language that basically reflected the thinking of the third epoch.¹⁰⁰⁶ Its two major sections focused on foreign policy and defense, mirroring the Republican Party's embrace of military instruments-- almost to the exclusion *1717 of other sources of power.¹⁰⁰⁷ U.S. policy continued to target the Soviet Union.¹⁰⁰⁸ Merely halting the advance of communism or freezing the current political boundaries would be insufficient.¹⁰⁰⁹ The document took on an aggressive stance, noting as one of its objectives, "to contain and *reverse* the expansion of Soviet control and military presence throughout the world, and to increase the costs of Soviet support and use of proxy, terrorist, and subversive forces."¹⁰¹⁰ The NSC, which had become the dominant policymaking body within the executive branch, would provide the key to integrating the government's approach; by 1987, it had produced more than 250 classified national security decision directives, which guided the Administration's policies.¹⁰¹¹ The NSS anticipated that the NSC would take steps "to encourage and strongly support aid, trade, and investment programs that promote economic development and the growth of humane, social, and political orders in the Third World."¹⁰¹²

In 1988, the Reagan Administration continued its emphasis on containment of the U.S.S.R.¹⁰¹³ An integrated strategy would include economic, as well as military, concerns.¹⁰¹⁴ The Administration began to focus on specific regions of the world, for which an integrated strategy would be required.¹⁰¹⁵

The George H.W. Bush Administration came to power amidst a rapidly changing geopolitical climate. An internal review of the national security infrastructure, friction over the nomination of John Tower as Secretary of Defense, and the changing international environment delayed publication of the NSS.¹⁰¹⁶ When it was finally released in 1990, the NSS embraced the changes in Eastern Europe, but nonetheless presented a cautious approach to the future.¹⁰¹⁷

Global political change continued apace, which delayed the Bush Administration's second NSS. War loomed in the Middle East as Iraq invaded Kuwait.¹⁰¹⁸ Between March 11, 1990 and December 25, 1991, all fifteen former republics of the Soviet Union became independent.¹⁰¹⁹ The dissolution of the Warsaw Pact, and *1718 new treaties on armaments between the United States and Russia, again detracted from the preparation of the NSS.¹⁰²⁰

When it was finally published in 1991, the Bush Administration's second NSS again emphasized a military approach.¹⁰²¹ There was some innovation within this broader framing (e.g., regional conflict would now become the organizing principle for U.S. military capabilities, nuclear deterrence would have to evolve, and focus on non-proliferation and arms control would need to intensify).¹⁰²² But military might still trumped other considerations.¹⁰²³ Consistent with previous articulations, economic strength was also considered integral to U.S. national security.¹⁰²⁴

The final NSS of the Bush Administration was released in January 1993-- immediately prior to Clinton taking office.¹⁰²⁵ The document essentially highlighted the accomplishments of the past twelve years of Republican stewardship and laid down markers on which Clinton's future record would be judged.¹⁰²⁶ The content itself closely reflected the strategies of the third epoch, emphasizing collective engagement and democratic peace.¹⁰²⁷

b. The NSS in the Fourth Epoch

Just how diffuse national security goals would become in the fourth epoch was almost immediately seen in the Clinton Administration--the first post-Cold War presidency. President Clinton acknowledged, "The world is no longer divided into two hostile camps."¹⁰²⁸ What, then, would provide the focus for U.S. national security?

The interests of the third epoch lingered. In June 1994, eighteen months into the Clinton Administration, the executive branch laid out its first strategy: "engagement and enlargement," which echoed the goals of previous administrations.¹⁰²⁹ Subsequent documents sustained this focus; according to the 1995 NSS, for instance, the Administration's central goals were "to sustain our security with military forces that are ready to fight," "to bolster America's economic revitalization," *1719 and "to promote democracy abroad."¹⁰³⁰ The document invoked the democratic peace theory that had been so influential in the third epoch, stating that "our national security strategy is based on enlarging the community of market democracies and containing a range of threats to our nation, our allies, and our interests."¹⁰³¹

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But the Clinton Administration also went considerably beyond the concepts that marked the third age. The preface to the 1995 NSS explained that the end of the Cold War had fundamentally changed U.S. security imperatives:

The central security challenge of the past half century--the threat of communist expansion--is gone. The dangers we face today are more diverse. Ethnic conflict is spreading and rogue states pose a serious danger to regional stability in many corners of the globe. The proliferation of weapons of mass destruction represents a major challenge to our security. *Large scale environmental degradation, exacerbated by rapid population growth, threatens to undermine political stability in many countries and regions.*¹⁰³²

Ethnic conflict, rogue states, and environmental degradation constituted new threats to national security. Nonetheless, the same historical and ideological framework from the third epoch--protecting the United States as a domestic entity, conceived by the Founders and enshrined in the Constitution--still applied during this "new era": "[T]he same idea that was under attack three times this Century--first by imperialism and then by fascism and communism-- remains under attack today, but on many fronts at once."¹⁰³³

The national security infrastructure adopted by the Clinton Administration reflected the diverse nature of threats that were rapidly being folded into national security, which made it more difficult for the executive agencies to reach agreement on the NSS. Colonel Don Snider, who had helped prepare the 1988 NSS as a member of the NSC, lamented that the (resulting) unwieldy structure brought so many different parties to the table that it made integration difficult.¹⁰³⁴

***1720** Unwieldy or not, the structure would have to evolve to take account of new risks: "We have identified a new security agenda that addresses contemporary threats such as the proliferation of nuclear, chemical and biological weapons, terrorism, and international crime."¹⁰³⁵ Nonproliferation; weapons of mass destruction; trafficking in drugs, arms, and human beings; cybersecurity; and climate change all presented challenges.¹⁰³⁶

Our new security agenda recognizes that in a global age, threats to America do not simply come from determined enemies and deadly weapons. Our efforts to curb global warming through the Kyoto protocol are vital to protect America from a future of rising sea levels and economic disruption.¹⁰³⁷

By folding these new concerns directly into the national security strategy, the Clinton Administration began a process of re-tooling the existing system to address the emergent issues.

Despite its overriding focus on matters of national security--or perhaps, in some sense, because of it--the first George W. Bush Administration only submitted one NSS.¹⁰³⁸ The very first line of that document put another nail in the coffin of the third epoch: "The great struggles of the twentieth century between liberty and totalitarianism," it began, "ended with a decisive victory for the forces of freedom."¹⁰³⁹ The United States had emerged from the Cold War as a powerful country: "Today, the United States enjoys a position of unparalleled military strength and great economic and political influence."¹⁰⁴⁰ The object of U.S. national security was nothing less than world peace.¹⁰⁴¹

In a world that is safe, people will be able to make their own lives better. We will defend the peace by fighting terrorists and tyrants. We will preserve the peace by building good relations among the great powers. We will extend the peace by encouraging free and open societies on every continent.¹⁰⁴²

Terrorism, in a post-9/11 environment, figured largely in the calculation.¹⁰⁴³ Also emphasized were matters relating to the environment.¹⁰⁴⁴ The United States ***1721** would incorporate environmental concerns directly into its trade negotiations.¹⁰⁴⁵ The document explained: "Economic growth should be accompanied by global efforts to stabilize greenhouse gas concentrations associated with this growth, containing them at a level that prevents dangerous human interference with the global climate."¹⁰⁴⁶ The goal would be to reduce U.S. greenhouse gas emissions by eighteen percent over the next decade.¹⁰⁴⁷

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To accomplish this aim, the country would remain committed to the basic United Nations Framework Convention for international cooperation, obtain agreements with key industries to cut greenhouse gas emission, develop standards for measuring and registering reductions, promote renewable energy production as well as nuclear power, increase spending on research into new conservation technologies, and help developing countries to head off emissions.¹⁰⁴⁸ Shared health and environmental threats would provide a further basis for bilateral negotiations.¹⁰⁴⁹

In 2006, the *National Security Strategy* took on a different overtone: “My fellow Americans, America is at war,” it began.¹⁰⁵⁰ The document continued, “This is a wartime national security strategy required by the grave challenge we face--the rise of terrorism fueled by an aggressive ideology of hatred and murder.”¹⁰⁵¹ Militant Islamic radicalism had replaced communism as the primary concern.¹⁰⁵² But unlike the third epoch, when all portions of the national security infrastructure had pointed to the primary object, other issues persisted: Energy security and clean development mattered. These issues linked, in turn, to reducing poverty and diminishing pollution.¹⁰⁵³ The United States was therefore working “with other major nations on the most effective measures to protect the environment.”¹⁰⁵⁴ With China, the United States would “work to increase our cooperation to combat disease pandemics and reverse environmental degradation.”¹⁰⁵⁵ Environmental damage, regardless of the presence or intent of any actors involved, presented a national security threat:

Environmental destruction, whether caused by human behavior or cataclysmic mega-disasters such as floods, hurricanes, earthquakes, or tsunamis ... may overwhelm the capacity of local authorities to respond, and may even overtax national militaries, requiring a larger international response. These challenges are not traditional national security concerns, such as the conflict of *1722 arms or ideologies. But if left unaddressed they can threaten national security.¹⁰⁵⁶

Like the NSS, the Bush Administration’s *National Defense Strategy* (“NDS”) reflected the new threat.¹⁰⁵⁷ The NDS introduced new categorizations of global security challenges: “traditional,” “irregular,” “catastrophic,” and “disruptive.”¹⁰⁵⁸ The 2008 NDS provides an expanded definition of potential security challenges, including space and cyber threats, natural disasters, pandemic diseases, and competition for resources.¹⁰⁵⁹

The Obama Administration expanded further upon the vision set by the preceding administrations. The one and only NSS issued to date calls “for a comprehensive range of national actions” based on “a broad conception of what constitutes our national security.”¹⁰⁶⁰ Almost every element of domestic and foreign policy plays some role. The document emphasizes the importance of greater economic strength, deficit reduction, better education, clean energy, scientific advances, and the development of new technologies, weapons systems, armed conflict, and diplomatic activity.¹⁰⁶¹

In this mix, the environment plays a key role: “Dependence upon fossil fuels,” the strategy states, “constrains our options and pollutes our environment. Climate change and pandemic disease threaten the security of regions and the health and safety of the American people. Failing states,” in turn, “breed conflict and endanger regional and global security.”¹⁰⁶² Global warming and climate variation could result in unprecedented levels of chaos. “The danger from climate change,” the NSS asserts, “is real, urgent, and severe. The change wrought by a warming planet will lead to new conflicts over refugees and resources; new suffering from drought and famine; catastrophic natural disasters; and the degradation of land across the globe.”¹⁰⁶³ To respond to this threat, the United States would have to develop clean energy, encourage sustainable development, negotiate reductions in emissions, and focus on science and technology.¹⁰⁶⁴ U.S. interests in the Arctic region almost entirely revolved around similar environmental concerns.¹⁰⁶⁵

***1723c. Expansion of the Traditional Framing**

Critically, the expansion of the national security discourse to include nontraditional threats was not merely a surface change. It influenced federal law and policy and gave rise to new institutions, institutional relationships, and authorities. Equally important is the fact that climate change and other nontraditional threats were not relegated to a parallel sphere. Instead, concern about climate change, pandemic disease, terrorism, crime, and other issues was adhered directly to the existing

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national security infrastructure, resulting in its further expansion. The NSC, for instance, became tasked with looking at global climate change, with a subgroup developed specifically to focus on this area.¹⁰⁶⁶ The CIA introduced new initiatives focused on gathering and analyzing information about shifting natural resources.¹⁰⁶⁷ In 2008, the National Intelligence Council released *Global Trends 2025*, in which increased scarcity and global competition for resources are predicted to undermine U.S. security.¹⁰⁶⁸

Along with these shifts, the military assumed a new role. The Bush Administration explained:

Preparing for and managing [environmental destruction, whether caused by human behavior or cataclysmic mega-disasters such as floods, hurricanes, earthquakes, or tsunamis] requires the full exercise of national power, up to and including traditional security instruments. For example, the U.S. military provided critical logistical support in the response to the Southeast Asian tsunami and the South Asian earthquake until U.N. and civilian humanitarian responders could relieve the military of these vital duties.¹⁰⁶⁹

To manage these threats, the military would have to expand and be given access to even more resources.

The specific arguments for a stronger military role have come to be articulated in three principal ways, which demonstrate how the initial environmental dialogue has translated into the national security infrastructure: the relationship between limited access to natural resources and conflict, the changing nature of the military's mission and its capabilities, and the role of environmental changes in undermining nuclear and conventional arms control. Each deserves brief discussion.

The first argument relates to the relationship between environmental degradation and violence. This divides into various sub-concerns, including the concern that increasing scarcity of natural resources elsewhere may result in intrastate violence and potential state collapse.¹⁰⁷⁰ A variation on this sub-concern posits that scarcity of resources may foment conflict between states, leading to regional instability.¹⁰⁷¹ This sub-concern, which received early attention from the NSC, logically flowed from efforts to gain a better understanding of regions where democratic states might be encouraged to resist communist encroachment.¹⁰⁷² Following the Cold War, attention turned to other potential generators of instability--such as access to energy, food, and water.¹⁰⁷³ In 1994, the CIA began funding the Political Instability Task Force, a panel of scholars that focused on the question of political crises around the world.¹⁰⁷⁴ The project grew from the work of Professor Ted Robert Gurr and generated five major reports on regional instability from 1955 to 2005.¹⁰⁷⁵

The second argument relates to how climate change could affect the military's mission and its capabilities.¹⁰⁷⁶ As articulated by the U.S. Army War College, the chief concern here is that climate change will influence where, when, why, and how the U.S. military operates.¹⁰⁷⁷ Navigation of the seas and territorial claims present a particular concern. Russia's decision to claim ownership of some 1.2 million square kilometers of the Arctic, for instance, came to epitomize this new era--as did the Canadian response.¹⁰⁷⁸ (The Canadian Prime Minister almost immediately stated that he intended to increase the country's military presence in the Arctic--a decision with additional military implications in light of the navigability of the Northwest Passage.¹⁰⁷⁹) Further affecting the military's mission and capabilities is the potential for mass migrations and the spread of disease--and what role the military would play in such circumstances.¹⁰⁸⁰

The third argument for a stronger military role relates to how environmental factors might undermine arms control.¹⁰⁸¹ A report commissioned by the Office of Net Assessment at the Department of Defense suggests that in a world of diminished resources, "warfare would define human life."¹⁰⁸² The globe would become a world of warring states, within which armaments would rapidly spread: "[N]uclear arms proliferation," one study suggests, "is inevitable ... China, India, Pakistan, Japan, South Korea, Great Britain, France, and Germany will all have nuclear weapons capability, as will Israel, Iran, Egypt, and North Korea."¹⁰⁸³ In part because of the proliferation of arms and the increased firepower available, disruption and conflict could become "endemic features of life."¹⁰⁸⁴ The United Nations and other nongovernmental organizations will be affected.¹⁰⁸⁵

Doomsday predictions like these made some, but not tremendous, headway--until 2005. On August 29 of that year, Hurricane

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Katrina hit the Gulf Coast of the United States.¹⁰⁸⁶ In addition to widespread devastation of businesses and homes throughout the southern United States, the levee system outside New Orleans *1726 failed.¹⁰⁸⁷ Submerged, New Orleans became marked by civil unrest, some looting, and a perceived breakdown of local government.¹⁰⁸⁸ The military had to be brought in to help restore order.¹⁰⁸⁹

The incident proved pivotal in backing claims as to the civil, military, and political implications of climate change. Not only was specialized equipment necessary, but the incident also raised the ultimate question of the federal government's political legitimacy. The Bush Administration appeared slow to respond, dramatically undermining its status. Environmental writers almost immediately began citing Katrina as a demonstration of why climate change should be considered as a threat to national security.¹⁰⁹⁰ The resource allocation carrot could hardly be overlooked: "The sooner the national governments recognize climate change as the national security issue that it is," one writer opined, "the faster it will receive the intellectual, financial, and diplomatic resources it merits."¹⁰⁹¹ Ignored in this analysis was the corresponding power and institutional growth that would have to accompany further expansion of the national security infrastructure.

The defense community responded to growing climate concerns. In 2005, the Department of Defense's Defense Threat Reduction Agency ("DTRA") Advanced Systems and Concepts Office commissioned a study based on the premise "that there is a need for an integrated, multi-disciplinary academic commitment to countering new and emerging security threats."¹⁰⁹² The initiative anticipated the need to generate new thinking on how the military could respond to global climate change.¹⁰⁹³ Two years later, the U.S. Army War College sponsored a conference titled: *The National Security Implications of Global Climate Change*.¹⁰⁹⁴ By 2007, military and non-military reports within the national security community began highlighting the severe national security challenges posed by climate change and, correspondingly, the need for an enhanced role for the military. One of the most *1727 prominent reports was signed by eleven military leaders from the Army, Air Force, Navy, and Marines, whose credibility was firmly grounded in their long experience in national security.¹⁰⁹⁵ "Global climate change," the final report argues, "presents a new and very different type of national security challenge."¹⁰⁹⁶ The language directly ties climate change to U.S. national security--and military--interests:

The nature and pace of climate changes being observed today and the consequences projected by the consensus scientific opinion are grave and pose equally grave implications for our national security. Moving beyond the arguments of cause and effect, it is important that the U.S. military begin planning to address these potentially devastating effects. The consequences of climate change can affect the organization, training, equipping, and planning of the military services. The U.S. military has a clear obligation to determine the potential impacts of climate change on its ability to execute its missions in support of national security objectives.¹⁰⁹⁷

In other words, "Projected climate change poses a serious threat to America's national security."¹⁰⁹⁸ In addition to natural and humanitarian disasters on a completely unprecedented scale: "The consequences will likely foster political instability where societal demands exceed the capacity of governments to cope."¹⁰⁹⁹

The members of the study recommended that the United States fully integrate the consequences of climate change into the country's national security and national defense strategies.¹¹⁰⁰ This meant the intelligence community should begin incorporating the consequences of climate change into its national intelligence estimate.¹¹⁰¹ The NSS should directly address the question, with specific guidance to military planners "to assess risks to current and future missions caused by projected climate change."¹¹⁰² The next *Quadrennial Defense Review* ("QDR") should look at the capabilities of the U.S. military and respond to any potential consequences; specifically, "preparedness for natural disasters from extreme *1728 weather events, pandemic disease events, and other related missions."¹¹⁰³ The group recommended that the Department of Defense ("DOD") enhance its operational capability by accelerating business processes and innovative technologies, which could, in turn, improve U.S. combat power through energy efficiency.¹¹⁰⁴ And the group called for the DOD to conduct an assessment of the impact of global warming on its worldwide military installations.¹¹⁰⁵

Although many members of the study were retired from active duty or no longer held positions within the defense infrastructure, their call for an expanded military role was echoed by those serving in office.¹¹⁰⁶ In July 2008, Secretary of

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Defense Robert Gates highlighted concern that “over the next twenty years and more certain pressures--population, resource, energy, climate, economic, and environmental--could combine with rapid cultural, social, and technological change to produce new sources of deprivation, rage, and instability.”¹¹⁰⁷ Simultaneously, he noted the military’s growing role in civil society in Iraq and Afghanistan, and growing concern about the “creeping ‘militarization’” of U.S. foreign policy: “This,” he concluded, “is not an entirely unreasonable sentiment.”¹¹⁰⁸ But in the event of contingency situations or natural disasters, the U.S. military was likely to be on the front line of defense.¹¹⁰⁹ Like Gates, Undersecretary of Defense for Policy, Michele Flournoy, underscored the threat posed by climate change.¹¹¹⁰ Outlining DOD’s approach to the QDR, Flournoy focused on five threats: globalization, climate change, the coming youth bulge in the Mideast, increasing competition for natural resources, and the spread of destabilizing technologies.¹¹¹¹

Congress largely supported the expansion of national security to include climate change. In January 2009, former Senator John Warner of Virginia--who had served as a marine in Korea, then served as both Undersecretary and Secretary of the Navy, and who in 2007 co-sponsored the first carbon cap-and-trade bill to leave committee--spoke to the Senate Foreign Relations Committee.¹¹¹² He explained:

Leading military, intelligence, and security experts have publicly spoken out that if left unchecked, global warming could increase instability and lead to conflict in already fragile regions of the world. If we ignore these facts, we do *1729 so at the peril of our national security and increase the risk to those in uniform who serve our Nation. It is for this reason that I firmly believe the United States must take a leadership role in reducing greenhouse gas emissions. Other nations are moving ahead and the United States must join and step to the forefront.¹¹¹³

Framed as a national security concern, climate change could afford no opposition. Congress would undermine U.S. national security by not acting in this realm. To this end, the Senate Foreign Relations Committee, like the Senate Armed Services Committee, would have to take appropriate steps.

Calls to expand and reorient military capabilities in light of global warming arise not only from military and civilian personnel within the defense establishment. In 2007, yet another study came to a similar conclusion.¹¹¹⁴ Participating in the study’s discussions were scientists, scholars, and civilian political leaders, such as Leon Fuerth (former National Security Advisor to Vice President Al Gore), John Podesta (former Chief of Staff for President Bill Clinton), and James Woolsey (former Director of the CIA).¹¹¹⁵ The report paints a rather dire picture:

The United States can expect that climate change will exacerbate already existing north-south tensions, dramatically increase global migration both inside and between nations (including into the United States), spur more serious public health problems, heighten interstate tension and possibly conflict over resources, challenge the institutions of global governance, cause potentially destabilizing domestic political and social repercussions, and stir unpredictable shifts in the global balance of power, particularly where China is concerned. The state of humanity could be altered in ways that create strong moral dilemmas for those charged with wielding national power, and also in ways that may either erode or enhance America’s place in the world.¹¹¹⁶

To the study’s participants, current definitions of “national security” appeared “woefully inadequate to convey the ways in which State authorities might break down in a worst case climate change scenario.”¹¹¹⁷ Disease, uncontrolled migration, crop failure, loss of access to clean water, and other concerns are likely to overwhelm the traditional instruments of national security--specifically, the military--as well as other elements of State power and authority.¹¹¹⁸

The study considered three scenarios: expected, severe, and catastrophic climate change.¹¹¹⁹ It found that for even the first scenario--an expected increase of *1730 average global temperature by 1.3 degrees Celsius by 2040--substantial national security implications existed (e.g., heightened internal and cross-border tensions caused by large-scale migrations; conflict sparked by resource scarcity; increased disease with economic consequences; and geopolitical reordering).¹¹²⁰ With respect to

severe climate change--understood as an average global temperature increase of 2.6 degrees Celsius--the study found more severe consequences: It predicted pandemic disease and significant stresses on internal state cohesion,

including in the United States, both as a result of a dramatic rise in migration and changes in agricultural patterns and water availability Armed conflict between nations over resources, such as the Nile and its tributaries, is likely and nuclear war is possible. The social consequences range from increased religious fervor to outright chaos.¹¹²¹

In the catastrophic scenario--an average global temperature increase of 5.6 degrees Celsius by 2100--the group found "strong and surprising intersections between the two great security threats of the day--global climate change and international terrorism waged by Islamist extremists."¹¹²² For the group, global warming, although couched as one pressing national security concern among many, clearly stood as the most important.¹¹²³

In this dialogue, the catastrophic nature of climate change has been touted as justification for considering environmental degradation as a national security threat. Perhaps one of the most salient examples comes from the *Bulletin of the Atomic Scientists*.¹¹²⁴ In January 2007, the same year as the two above-mentioned *1731 reports, the *Bulletin* moved the minute hand of its doomsday clock two minutes closer to midnight.¹¹²⁵ The grounds on which it did so related to the environment:

The dangers posed by climate change are nearly as dire as those posed by nuclear weapons. The effects may be less dramatic in the short term than the destruction that could be wrought by nuclear explosions, but over the next three to four decades climate change could cause irremediable harm to the habitats upon which human societies depend for survival.¹¹²⁶

The *Bulletin* continued,

Global warming poses a dire threat to human civilization that is second only to nuclear weapons. Through flooding and desertification, climate change threatens the habitats and agricultural resources that societies depend upon for survival. As such, climate change is also likely to contribute to mass migrations and even to wars over arable land, water, and other natural resources.¹¹²⁷

Stephen Hawking, a world-famous professor of mathematics at the University of Cambridge and a member of the *Bulletin's* Board of Sponsors, explained,

As scientists, we understand the dangers of nuclear weapons and their devastating effects, and we are learning how human activities and technologies are affecting climate systems in ways that may forever change life on Earth. As citizens of the world, we have a duty to alert the public to the unnecessary risks that we live with every day, and to the perils we foresee if governments and societies do not take action now to render nuclear weapons obsolete and to prevent further climate change.¹¹²⁸

The *Bulletin's* decision to include climate change in its calculation of the most pressing issues facing not only the United States, but also humanity, reflects an approach to security that looks at the potential manifestation of the threat, devoid of any individual actor's intent. This is security as human security, on a massive scale. Like nuclear weapons, such threats undermine state sovereignty, and require a central, militarized response.

It would be inappropriate to end this brief discussion of the securitization of climate change without noting that there is something circular--self-perpetuating--about the military being seen as the solution. Even as the U.S. Army War College pointed to the national security system "as a driver of solutions," it recognized that the military was a major part of the

problem-- the DOD is “the nation’s single *1732 largest emitter of carbon dioxide.”¹¹²⁹ If this statement is accurate, it is more than a little ironic that the United States’ solution to climate change is to increase the might of the institution that contributes so significantly to the problem, in the process ensuring the protection of its institutional interests.

2. Biodefense

Like climate change, concern about the proliferation of weapons of mass destruction, and biological weapons specifically, predates the end of the Cold War.¹¹³⁰ Over the past two decades, however, the conversation about biological weapons has shifted from one focused on their development, acquisition, and use to one of “biodefense,” which pairs the threats posed by naturally occurring pandemic disease and biologically engineered weapons. Both concerns have, in turn, become folded into the national security framework.¹¹³¹

The origins of the biodefense concern are rooted in manmade weapons. The end of the Cold War heralded concern that rogue states, or non-state actors would gain access to biological agents.¹¹³² Senators Sam Nunn, Richard Lugar, and Pete Dominici quickly expanded the Cooperative Threat Reduction (“CTR”) program to restrict the flow of information and materials from the former Soviet republics.¹¹³³ The model to be adopted was one of traditional national security: the Pentagon would assume lead responsibility for protecting the country from the proliferation of weapons.¹¹³⁴

Despite the advances made by CTR, isolated incidents indicated that non-state actors were beginning to develop an interest in biological agents. In 1995, for instance, Aum Shinrikyo--a Japanese religious group--unsettled policymakers when it released sarin nerve gas on the Tokyo subway, killing twelve people.¹¹³⁵ A few years later, Larry Wayne Harris, an American citizen, obtained plague and *1733 anthrax bacterium for the purpose of disseminating the biological agents on U.S. soil.¹¹³⁶

These incidents represented a broader trend. Before 1997, the FBI conducted approximately a dozen annual investigations into efforts by domestic entities to develop, obtain, or use weapons of mass destruction; in 1997, the FBI initiated more than seventy such investigations.¹¹³⁷ In 1998, it opened more than 180 cases.¹¹³⁸ While a significant number of these turned out to be hoaxes, there were enough cases of actual attempts to raise concern.¹¹³⁹ By January 1999, the Monterey Institute for International Studies had recorded a total of more than 400 similar instances in which non-state actors had tried to obtain or use weapons of mass destruction.¹¹⁴⁰ Al Qaeda’s stated intent of developing similar weapons, in conjunction with the anthrax mailings in autumn of 2001, augmented concern.¹¹⁴¹

In conjunction with growing concern about the proliferation of biological weapons, the threat posed by naturally occurring diseases received increasing attention. Three outbreaks accelerated the conversation. The first, known as influenza subtype H5N1 (“Bird Flu”), erupted in Hong Kong in 1997.¹¹⁴² Although H5N1 only killed six people in the Hong Kong outbreak, the virus has since been able to spread, becoming both epizootic and panzootic, with mutations dramatically increasing the patterns of mortality.¹¹⁴³ The disease has been compared to the Spanish flu, also avian in origin, which swept the globe between 1918 and 1919.¹¹⁴⁴ More than 1 billion worldwide fell ill from the 1918 outbreak, with between 50 and 100 million people dying from the disease or related conditions. *1734¹¹⁴⁵ What has caused alarm is that the mortality rate of recent avian flu outbreaks--almost sixty percent--is substantially higher than the Spanish flu, which had a mortality rate of about five percent.¹¹⁴⁶

The second disease outbreak that spurred biodefense efforts--the 2003 outbreak of severe acute respiratory syndrome (“SARS”) in southern China--reflected a similar lack of human agency in its creation and a correspondingly high level of mortality.¹¹⁴⁷ Aided by a small group of accidental “superspreaders,” the disease became global within days of its first appearance.¹¹⁴⁸ Approximately 8000 people in twenty-nine different countries contracted the disease, 800 of whom died.¹¹⁴⁹

The third incident stemmed from a June 2009 outbreak of another influenza subtype, known as H1N1 (“Swine Flu”).¹¹⁵⁰ Although the pandemic proved less devastating than initially predicted, the discussion surrounding the disease raised significant alarm about the potential impact of naturally occurring diseases.¹¹⁵¹

As with climate change, the threat of pandemic disease became incorporated into the existing national security infrastructure. In 2000, the National Intelligence Council released an estimate focused on the threat of global infectious disease and its implications for the United States.¹¹⁵² The DTRA's Advanced Systems and Concepts Office, founded to concentrate on the threat of weapons of mass destruction, considered, as an aspect of its national security program, the largescale containment of individuals infected with highly contagious disease in a large *1735 metropolitan area.¹¹⁵³ The military elite began calling for the QDR to address U.S. military capabilities with regard to pandemic disease.¹¹⁵⁴ The Bush Administration expressly included pandemic disease in its NDS.¹¹⁵⁵ In its NSS, the Obama Administration similarly highlighted the importance of responding to pandemic disease--as a national security concern.¹¹⁵⁶ According to the Obama Administration's NSS, disease outbreaks "can quickly evolve into a multinational health crisis that causes millions to suffer, as well as spark major disruptions to travel and trade."¹¹⁵⁷

Mimicking climate change, the biodefense discourse carried with it actual changes to institutional design, institutional relationships, and authorities. Many of these alterations linked the threat posed by both engineered weapons and naturally occurring outbreaks. The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, for instance, addressed both bioengineered weapons and naturally occurring outbreaks within a national security rubric.¹¹⁵⁸ The Homeland Security Act of 2002 created the Department of Homeland Security ("DHS"), whose primary mission is to prevent further attacks within the United States, to reduce the domestic vulnerability to terrorist attacks, and to assist in recovery from the same.¹¹⁵⁹ DHS, however, continues to view its role in considerably more expansive terms. Its website states that "[i]n the event of a terrorist attack, natural disaster or other large-scale emergency, the Department of Homeland Security will ... assume[] primary responsibility for ensuring that emergency response professionals are prepared"¹¹⁶⁰ DHS, through its *National Response Plan* underscored the dual role to be played by the Department: to help "in the important homeland security mission of preventing terrorist attacks within the United States; reducing the vulnerability to all natural and man-made hazards; and minimizing the damage and assisting in the recovery from any type of incident that occurs."¹¹⁶¹ *Homeland Security Presidential Directive 10* suggested that the traditional public health approach could no longer form the basis for the State's response to the threat.¹¹⁶² Health care providers and public health officials were to be considered part of the national security infrastructure--on the very front lines of *1736 defense.¹¹⁶³ A new biodefense program would therefore combine and strengthen the federal government's ability to respond to both biological weapons and naturally occurring disease.¹¹⁶⁴

DHS and the White House, when presenting the *2007 National Strategy for Pandemic Influenza*, explained that the federal government intended to link the two concerns: "We at DHS are focused on multi-use institutions that we can put into place for whatever emergencies arise."¹¹⁶⁵ The association between pandemic disease and biological weapons was not an accident; the very reason that the government released the pandemic design was to redefine public health as a national security priority.¹¹⁶⁶ The Centers for Disease Control and Prevention, proposing broader authorities for itself, explained: "Stopping an outbreak--whether it is naturally occurring or intentionally caused-- requires the use of the most rapid and effective public health tools available."¹¹⁶⁷ Myriad further examples present themselves.

Like the climate change dialogue, the folding of public health into the national security structure has resulted in an expanded role for traditional national security institutions and, in particular, for the armed forces. To some extent, looking to the military as a key player derives from the biological weapons component of the threat. The military has sophisticated ways to identify agents and to respond to protect individuals who might be exposed.¹¹⁶⁸ It may have access to a broader range of vaccines, antibiotics, and prophylactic measures than civilian agencies. It has knowledge about shielding devices and familiarity with how to protect individuals before and after exposure.¹¹⁶⁹ As with climate change, the involvement of the military also stems from institutional capabilities, should the potential threat become manifest. The military may be the only institution with the necessary technology, resources, manpower, and command and control devices to organize response to a debilitating crisis on a massive scale.

Accordingly, even as it enacted the Homeland Security Act of 2002, Congress explained that the military could be used in the event of any national emergency, *1737 including natural disasters.¹¹⁷⁰ *Homeland Security Presidential Directive 10* considers the armed forces to be essential to the country's ability to defend itself against disease.¹¹⁷¹ Following Hurricane Katrina, Congress explicitly granted the authority to the military to respond in the event of pandemic disease.¹¹⁷² The Defense Authorization Act of 2007 renamed the Insurrection Act as "Enforcement of the Laws to Restore Public Order."¹¹⁷³ The new

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language gave the President the ability to make use of the armed forces in the event of “natural disaster, *epidemic*, or *other serious public health emergency*, terrorist attack or incident, or other condition”--without any contact or collaboration with state officials.¹¹⁷⁴ The new measure quickly earned the wrath of state governors and, eventually, was repealed.¹¹⁷⁵ But the incident illustrated a shift in the view of the military’s role in responding to pandemic disease. Now, use of title 32 troops and title 10 forces to respond to naturally occurring outbreaks of disease enjoys broad support.¹¹⁷⁶

At some level, the confluence of pandemic disease and biological weapons makes sense: both entail viral or bacteriological threats. Similar institutions would likely be the first to become aware of the existence of the threat--regardless of whether manufactured or naturally occurring. At the onset, it may be impossible to tell the difference. Moreover, such diseases may require the same response and may be equally devastating.

But the collapse of these two areas within the national security and military infrastructure drains attention and resources away from civilian institutions, which have a broader perspective on the evolution of public health. The relationship between these institutions and the public is completely different than that which *1738 persists with respect to the highly secretive, non-transparent, coercive entities that mark the national security domain.

3. Drugs

The climate change dialogue was initially driven largely by liberal, progressive forces eager to generate attention on what was perceived as a pressing concern. The collapse between pandemic disease and biological weapons, and the refraining of both within the national security dialogue, can be seen as led by national security institutions themselves: entities previously concerned with the containment of communism generally, and the U.S.S.R. in particular, turned to proliferation and, from that, to pandemic disease. In contrast, the incorporation of drugs and then crime into the national security infrastructure can be seen largely as a function of the conservative movement. Together these examples demonstrate a remarkable confluence that has generated an ever-expanding view of the field.

Like climate change and biological weapons, concern about drug trafficking predates the start of the fourth epoch. Between 1930 and 1970, the federal government introduced a range of provisions aimed at preventing drug abuse on an ad hoc basis.¹¹⁷⁷ It was not until the Controlled Substances Act of 1970 that Congress brought the disparate provisions under one umbrella.¹¹⁷⁸ Administrative efforts to attack the drug problem swiftly followed. The 1970s, for instance, witnessed the formation of the Special Action Office for Drug Abuse Prevention,¹¹⁷⁹ the Commission on Marihuana and Drug Abuse,¹¹⁸⁰ the Strategy Council on Drug Abuse,¹¹⁸¹ a Cabinet Committee on International Narcotics Control,¹¹⁸² and the Special Action Office for Drug Abuse Prevention.¹¹⁸³ Emphasis was on reducing the demand for drugs and ensuring the existence and operation of adequate treatment programs; on both fronts, the federal government sought to lead the way.¹¹⁸⁴ President Nixon declared “all-out global war on the drug menace.”¹¹⁸⁵ Considering drug abuse to be “one of the most vicious and corrosive forces attacking the foundations of American society,” Nixon asserted, “We must fight it with all the resources at our command.”¹¹⁸⁶ This required a “unified *1739 command” and allocation of significant resources to the effort. In 1969, the federal government spent \$36 million fighting drugs; by 1974, it was spending \$257 million per year, an amount still considered deficient.¹¹⁸⁷

In the 1980s, the government’s approach to the subject matter shifted: it became more punitive, with a growing emphasis on law enforcement and interdiction.¹¹⁸⁸ Users themselves became the problem, and the criminal law--not social welfare programs--became the solution.¹¹⁸⁹ With this shift came the question of resources. During the third epoch, national security had achieved preeminence among other concerns, and the nation’s resources were allocated accordingly. The military had grown to a point where the armed forces could assist law enforcement.¹¹⁹⁰ Thus, when President Reagan declared war on drugs in 1982,¹¹⁹¹ Congress was ready to pass new legislation, allowing the military to support law enforcement in the war by providing training, intelligence, and equipment.¹¹⁹² With this new framing, drugs quickly became enveloped into the national security infrastructure.

In 1986, Reagan issued a new national security decision directive entitled *Narcotics and National Security*.¹¹⁹³ Expanding

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global narcotics regimes threatened U.S. national security.¹¹⁹⁴ The framework in which that threat was presented was consistent with the framework of the third epoch-- containment of the threat posed by communism to democratic states:

Of primary concern are those nations with a flourishing narcotics industry, where a combination of international criminal trafficking organizations, rural insurgents, and urban terrorists can undermine the stability of the local government; corrupt efforts to curb drug crop production, processing, and distribution; and distort public perception of the narcotics issue in such a way that it becomes part of an anti-U.S. or anti-Western debate.

***1740** While these problems are endemic to most nations plagued by narcotics, their effects are particularly insidious for the democratic states of the Western Hemisphere.¹¹⁹⁵

For Reagan, the narcotics trade (or narco-trafficking) threatened “the integrity of democratic governments by corrupting political and judicial institutions.”¹¹⁹⁶ Drug organizations, moreover, had taken over foreign media outlets, reducing the ability of friendly regimes to publicly cooperate with the United States in its counter-narcotics operations.¹¹⁹⁷ Reagan recognized the links between drug trafficking, illicit arms sales, and terrorism, even as he also noted that several nations themselves were involved in the drug trade.¹¹⁹⁸ Of paramount importance was the threat posed to democracy.¹¹⁹⁹ The DOD, CIA, State Department, and others were to immediately incorporate counter-narcotics into their purview.¹²⁰⁰

The tumultuous events that marked the ending of the Cold War in 1989 ushered in a new opportunity. The drug war, like climate change, stood poised and ready to take advantage of the new environment. President George H.W. Bush announced on September 6, 1989 that he was significantly escalating the war on drugs.¹²⁰¹ Restricting the flow of cocaine into the United States had become a “major foreign policy objective.”¹²⁰²

The rationale of the third epoch continued to dominate, but it expanded. The question was not merely one of preventing drugs from flowing into the United States. Bush evinced concern that the drug trade could potentially destabilize friendly governments.¹²⁰³ “[I]t is,” he suggested, “imperative for our own well-being and the development of democratic and economically stable governments around the world that this problem be dealt with aggressively.”¹²⁰⁴ The United States would focus on the Western Hemisphere and, in particular, the Andean drug cartels; initial emphasis on Colombia could later be expanded to Peru and ***1741** Bolivia.¹²⁰⁵ The DOD, the CIA, and the State Department would work in parallel with the White House to ensure progress on this front.¹²⁰⁶

The war was not limited to military--or paramilitary--operations. Law enforcement continued to play a role. Bush sent a request to Congress for an additional \$1.5 billion that would be used to enlarge the criminal justice system to address the flow of drugs inside the United States.¹²⁰⁷ But the framing clearly involved the broader threat to U.S. interests; “Drugs,” the *National Drug Control Strategy* declared, “are a major threat to our national security.”¹²⁰⁸

Like the environmental discourse, following the fall of the Berlin Wall, the war on drugs became enveloped in the national security conceptualization. A slew of academic articles challenged traditional concepts of security and considered the application of the national security framework to narco-trafficking.¹²⁰⁹ The military had already been involved in a support capacity. The question was one of U.S. national security--in response to which the existing infrastructure and substantial resources could be directed. By 1993, the federal government was spending some \$12 billion per year.¹²¹⁰ President Clinton explained, “[T]he United States considers the operations of international criminal narcotics syndicates as a national security threat requiring an extraordinary and coordinated response by civilian and military agencies involved in national security”¹²¹¹ Like his predecessor, Clinton focused on Andean drug trafficking.¹²¹² The United States would seek to destroy organizations engaged in narco-trafficking.¹²¹³ Domestically, emphasis would again be placed on drug treatment.¹²¹⁴

***1742** Two years after announcing his policy with regard to Central and South America, Clinton issued *Presidential Decision Directive No. 44: Heroin Control Policy* (“PDD-44”), apparently couching his Administration’s heroin strategy in a rubric

comprised of diplomacy, international law, and law enforcement.¹²¹⁵ The Administration described the directive's major tenets, which included, *inter alia*, implementing and coordinating international law enforcement efforts, focusing on regions linked to the U.S. market, and using diplomatic and public channels to focus international awareness on the growing heroin threat.¹²¹⁶ Jane Becker, the Principal Deputy Assistant Secretary at the Bureau of International Narcotics and Law Enforcement Affairs labeled "international heroin control" as a "major foreign policy objective."¹²¹⁷ According to Becker, PDD-44 directed the Bureau to: "Work through diplomatic and public channels to boost international awareness of the growing heroin threat ... [and] [b]ring law enforcement efforts to bear against the principal organizations that are involved in heroin production, processing, distribution, and transit."¹²¹⁸

Despite the continued focus on narco-trafficking, the suggested movement towards treatment and rehabilitation immediately raised hackles in Congress. The Republican-controlled legislature demanded that Anthony Lake, the National Security Advisor, come before it "to discuss the status of the drug war."¹²¹⁹ Of great concern was "restoring the drug war's effectiveness and re-elevating drugs as a national security issue."¹²²⁰ Clinton went on to include drugs in his NSS.¹²²¹ Emphasis centered on the flow of illicit drugs into the United States.¹²²² Throughout this time, the military maintained various powers that allowed it to interact with local, state, and federal law enforcement organizations in the domestic counter-narcotics effort.¹²²³ By October 2010, the drug war had become firmly *1743 enmeshed in the national security infrastructure.¹²²⁴

4. Crime

Like climate change, biodefense, and the drug war, the war on crime predates the end of the Cold War. Attorney General Robert Kennedy's war on organized crime was followed by President Lyndon B. Johnson's war on "crime and disorder."¹²²⁵ Johnson appointed the President's Commission on Law Enforcement and the Administration of Justice, with the aim of creating a bipartisan approach to the problem of rising crime.¹²²⁶ In his 1968 *State of the Union Address*, Johnson urged Congress to "help the cities and the States in their war on crime to the full extent of its resources and its constitutional authority."¹²²⁷ Richard Nixon subsequently proceeded to conduct a war between "peace forces" and the "criminal forces," or the enemy within, as emphasis shifted to eliminating crime by incapacitating those engaged in it.¹²²⁸

To some extent, labeling criminal law reform as "war" merely reflected the dominance of the national security discourse during the third epoch. States were tasked with developing "battle plans" for reducing crime as a precursor for federal funding.¹²²⁹ Sure enough, within a few years of proclaiming a war on crime, the issue sat atop the domestic agenda.¹²³⁰ But due to the dominance of the primary national security aim--namely Soviet containment-- the movement against crime initially gathered only limited momentum. The National Crime Commission of 1967 and its successor, the Law Enforcement Assistance Administration ("LEAA") Commission on Standards and Goals of 1973, produced few results.¹²³¹ The failure of these bodies led Gerald Caplan, of the National Institute on Law Enforcement and Criminal Justice, to point out that in the decade since the war on crime had begun, the United States had become subject to more crime than *1744 anywhere else in the world and *significantly* more than it had suffered in 1964.¹²³²

Following the Cold War, however, crime was folded directly into the national security infrastructure. Transnational and organized crime generated substantial notice. This led to significant alterations in the criminal justice system as a whole because, while the target may have been criminal syndicates, the primacy of national security reverberated through every level of government. Opposition to new proposals roughly translated into being "soft" on crime--a label uncomfortably close to being pro-criminal, and therefore, a position no politically elected representative could adopt. This war on crime shared one of the chief characteristics of the more traditional approaches to national security: The burden of persuasion shifted to those resisting new measures to demonstrate that the new measures' introduction would *not* lead to greater security or would *not* lead to more crime. Either would be a very difficult case to make.

a. The War on Crime

New measures rapidly proliferated within the national security rhetoric.¹²³³ As one commentator later noted,

The war on crime has been fought on many fronts, and with many weapons. Most dramatically, it has brought us the resurgence of capital punishment as a measure for the permanent incapacitation of violent predators. Less dramatically, but more pervasively, Draconian laws combating the plague of violent recidivism have pursued a similar strategy of incapacitation.¹²³⁴

In 1996, the Antiterrorism and Effective Death Penalty Act, introduced in the wake of the Oklahoma City bombing, limited habeas corpus for ordinary crime.¹²³⁵ Scholars considered this stance to have been largely driven by a war mentality with regard to crime—one with many different, substantive impacts on the practice of criminal law.¹²³⁶ “The right to counsel,” one practicing attorney concluded, “is being altered, warped, or limited, depending upon one’s perspective.”¹²³⁷ The attorney, Albert Krieger, continued: “The question that the practicing criminal defense lawyer must ask is whether the independence that has been the rod and the staff of the advocate has been, and continues to be, eroded by our times, our *1745 troubles, our fears.”¹²³⁸ Myriad dangers, ranging from conspiracy and money laundering charges to obstruction of justice charges, awaited the criminal defense attorney in a system marked by steadily expanding powers, lowered standards, and few to withstand the tide.¹²³⁹

Other scholars followed suit, arguing that the war on crime had eroded many of the most basic protections in the criminal law system:

As representatives of both political parties compete to show which is the toughest on crime, the criminal justice systems in the United States have become so result-oriented that little attention is paid to the fairness and reliability of the process which leads to those results.¹²⁴⁰

A key problem among those associated with shifting due process standards was the war’s impact on equal justice for individuals from non-white ethnic backgrounds or living at lower socio-economic standards.¹²⁴¹ The reach of these changes into society was substantial: approximately one-third of all African-American men between the ages of eighteen and thirty found themselves under supervision.¹²⁴² Professor Stephen Bright estimated that by the turn of the century, half of all black men would be in prison, probation, jail, or on parole.¹²⁴³

In terms of sheer numbers, it would be hard overestimate the war on crime’s impact on society. In 1970, the prison and jail population registered approximately 300,000 inmates.¹²⁴⁴ By 2001, more than 2,000,000 were held in facilities, with another 4,000,000 under some form of penal control including parole and probation—some three percent of all American adults.¹²⁴⁵ By 2008, scholars, writing about the pyrrhic war of the preceding three decades, noted that “the society-altering impact of this war reaches far beyond flat numbers.”¹²⁴⁶ They suggested that a fundamental transformation had occurred:

The war’s impact has been most devastating on those individuals swept up by ... incarceration ... but it is not confined to them. This impact has instead extended to how society views governance, reshaping not only a wide range of social institutions but also the way we conceive of ourselves. The very concept of policing has changed, as has the place of crime in electoral politics; *1746 increasingly, too, schooling, public health, and social welfare overlap with the criminal justice system.¹²⁴⁷

Myriad examples of ways in which crime became central to the national security infrastructure present themselves. The military, the intelligence community, the NSC, and other traditional instruments are now directed towards crime: DTRA’s Advanced Systems and Concepts Office, for instance, has begun to consider assisting law enforcement through developing high-technology crime-fighting as one of its central aims.¹²⁴⁸ DOD, through the Defense Advanced Research Projects Agency (“DARPA”), holds meetings and organizes workshops to discuss technology research, development, and “deployment” that could help to reduce crime.¹²⁴⁹ The juxtaposition of the military focus and the expanded emphasis on criminal matters is striking. DTRA explained,

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As a mission-driven organization tasked with integrating and focusing capabilities to address threats to national security, the Department of Defense has a vested interest in improving the functional performance of the national security enterprise in order to respond to the challenges imposed by threats today and in the future.¹²⁵⁰ In this conception, the key stakeholders include “state and local law enforcement agencies.”¹²⁵¹

DTRA is not alone in its attention to organized crime as an element of national security. By the time George W. Bush took office in 2001, the NSC included policy-coordinating committees focused not only on drug control, infectious disease, and biodefense, but also on organized crime.¹²⁵²

The Obama Administration has also focused on crime, suggesting that global criminal networks “foment insecurity abroad and bring people and goods across our own borders that threaten our people.”¹²⁵³ For the Obama Administration, homeland security, synonymous with national security, is grounded in ordinary law enforcement and, as such, focuses on both individual criminals and criminal organizations.¹²⁵⁴ The issue further implicates U.S. foreign policy, which will henceforward be based in part on “an aggressive and affirmative development agenda and commensurate resources” that would strengthen regional partners and *1747 help the United States to counter global criminal networks.¹²⁵⁵ Because crime is classified as one of many threats with no borders (along with climate change and pandemic disease), such international cooperation is vital to U.S. success.¹²⁵⁶

b. The “Muddy Waters” Problem

The strongest argument put forward for including organized crime in the national security infrastructure relates to what I consider a “muddy waters” problem: i.e., terrorism, drugs, and crime are not always easily distinguished and, in fact, often reflect different aspects of the same phenomenon. One aspect of this is illustrated by the expansion of the Foreign Intelligence Surveillance Act of 1978 (“FISA”) to the criminal realm.¹²⁵⁷

The entire purpose of enacting FISA was to preserve a distinction between criminal law and national security concerns.¹²⁵⁸ Following the attacks of September 11, however, that wall was deliberately removed.¹²⁵⁹ This brought with it broader application of FISA—one, which was determined in 2002 to be legitimate, even where the primary aim of the investigation in question was criminal in nature.¹²⁶⁰

The nexus between terrorism, foreign intelligence, and criminal activity similarly reflected in the phenomenon of narco-terrorists. Drug Enforcement Agency Administrator William Asa Hutchinson explained to Congress that this intersection undermines U.S. national security.¹²⁶¹ Hutchinson defined the class of narco-terrorism as one “in which terrorist groups, or associated individuals, participate directly or indirectly in the cultivation, manufacture, transportation, or distribution of controlled substances and the monies derived from these activities.”¹²⁶² He cited as examples: Cocaine trafficked by the Revolutionary Armed Forces of Colombia (“FARC”), opium production in Afghanistan (overseen by the Taliban), the methamphetamine and heroin trafficking efforts of the United Wa State Army in Burma, trafficking conducted by the Kurdistan Workers Party (“PKK”) in southeastern Turkey, and Sendero Luminoso’s “revolutionary tax” on *1748 coca farmers in Peru.¹²⁶³ Hutchinson’s recognition of the links between different threats, and the subsequent issues raised for States, reflects in the international environment. Since 1998, when the United Nations (in a special session of the General Assembly) adopted a political declaration expressing concern about the growing links between drugs, crime, and terrorism, international instruments have recognized the link between drug production/trafficking and terrorism.¹²⁶⁴

One of the reasons terrorism, drugs, and crime are considered within the national security realm is because of the challenge each poses to state sovereignty. Each can essentially create an alternative form of coercive power, which operates outside legal and political structures. Organizations can use the massive assets generated from illegal drug trafficking to infiltrate the political structures. Where unsuccessful, violence can be used in place of economic inducements, in the process rendering legal structures obsolete.

FARC, for instance, is believed to earn between \$500 and \$600 million per year from illegal drug trafficking.¹²⁶⁵ The group controls a significant portion of the worldwide market: according to the U.S. Department of Justice, FARC supplies more than fifty percent of the global cocaine supply.¹²⁶⁶ At its height, according to U.S. Southern Command, FARC boasted 17,500 fighters who carried out a systemic campaign of violence and intimidation.¹²⁶⁷ The Colombian Minister of Justice, Guillermo Plazas Alcid, underscored the challenge posed to state sovereignty.¹²⁶⁸ For Alcid,

Illicit drug traffic menaced the health and well-being of individuals, spread corruption, abetted criminal conspiracy and subverted public order. It threatened the sovereignty and security of States and disrupted the economic social and cultural structure of society. In particular circumstances, it generated or supported other serious forms of organized crime.¹²⁶⁹

***1749** So not only is there a link between terrorism, drugs, and crime, but in some situations, the presence of such activities gives rise to other forms of criminal activity. The attendant power held by individuals outside of the state structure threatens state sovereignty.

Increasingly, the types of weapons and equipment employed by such criminal organizations replicates the type of devices used by the State. In November 2006, for instance, the U.S. Coast Guard seized its first semi-submersible vessel ninety miles off the Pacific coast of Costa Rica.¹²⁷⁰ Labeled “Bigfoot-1,” rumors about the existence of vessels like it had circulated for years, but none had been captured.¹²⁷¹ By 2007, more than forty such sea craft had been spotted, with three times that number identified the following year.¹²⁷² The forty- to eighty-foot vessels, built by Columbian drug cartels, are capable of carrying up to four people and between four to twelve metric tons of cocaine.¹²⁷³ “What worries me,” reflected Admiral Jim Stavridis, Commander, U.S. Southern Command, “is if you can move that much cocaine, what else can you put in that semi-submersible. Can you put a weapon of mass destruction in it?”¹²⁷⁴

Drug cartels are not the only non-state actors to try to acquire such vessels. Police recently discovered the next generation of fully submersible vessels in Ecuador, apparently linked to FARC.¹²⁷⁵ The 100-foot long, air-conditioned craft ***1750** could carry up to 10 tons of cargo.¹²⁷⁶ The Sea Tigers, a unit within the Liberation Tigers of Tamil Eelam (“LTTE”), appears also to have developed at least three semi-submersibles in Sri Lanka.¹²⁷⁷ The State Department lists both FARC and the LTTE as foreign terrorist organizations.¹²⁷⁸

Like the groups themselves, these vessels straddle the intersection of criminal law, anti-drug statutes, and national security. They represent a world where the lines are increasingly blurred. And they show the tension between a national security system based on intent-analysis--where the institutional and legal framework is determined by the individual engaged in illegal activity-- and one increasingly based on the act itself, including its risks and consequences.

The result of the shift to a risk-based approach has been the steady expansion of the national security infrastructure. The Navy, for example, is rumored to be using P-3s (anti-submarine and maritime surveillance aircraft) and anti-submarine warfare against civilian targets off shore.¹²⁷⁹ U.S. Southern Command explains, “Illegal activities associated with illicit trafficking ... [represent] a significant threat to security and stability in the Western Hemisphere.”¹²⁸⁰

Transnational crime falls firmly within the Joint Interagency Task Force’s purview. Technically, its role is to support law enforcement agencies, who undertake the actual interdictions--boarding, search, seizures and arrests.¹²⁸¹ But how ought the military respond when a submarine enters U.S. waters? The traditional mode of engagement is for the military to identify the actor and/or the actor’s intent.¹²⁸² Thus, if a bomber enters U.S. airspace, the convention is to try to contact the aircraft, either via the airwaves or by sending up planes to intercept it. But with a submarine, even if it could be sighted from the air, how do you know who controls it without getting it to the surface? Should the sub be treated as a civilian vessel or as a potential state actor?

Even if law enforcement agencies do take over, are they really still law enforcement agencies? Customs and Border

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Protection (“CBP”) Office of Air and *1751 Marine has tactical teams that use Blackhawk helicopters.¹²⁸³ The agency has deployed predator drones along the southern border¹²⁸⁴-- where significantly weaker Fourth Amendment protections apply.¹²⁸⁵ Similarly less constrained by Fourth Amendment considerations, Immigration and Customs Enforcement (“ICE”) officers may carry more sizeable weapons than typical police forces. Does it make sense to think about CBP, ICE, or DHS as a law enforcement organization at all--when they actually appear to be rapidly morphing into interior paramilitary institutions?

The muddy waters problem extends beyond the terrorism-drugs-crime nexus to include environmental concerns and biodefense. In 2000, for instance, the National Intelligence Council issued a paper linking environmental changes to pandemic disease.¹²⁸⁶ Eco-terrorism further blurs the distinction; it involves “the violent destruction of property perpetrated by the radical fringes of environmental groups in the name of saving the environment from further human encroachment and destruction.”¹²⁸⁷ Groups such as Earth First! thus cross lines that might otherwise mark the federal response.¹²⁸⁸

What these categories--climate change, biodefense, drugs, and crime-- demonstrate is that U.S. national security, in expanding beyond the interests of the third epoch, is now confronting an intricate relationship between potential threats. This relationship makes it difficult to draw bureaucratic lines and to prioritize different areas. In some ways, it represents a Weberian bureaucracy run amok: While professionalization and specialization has occurred, and hierarchies have been established, jurisdictional areas are not clearly defined. The result is a constant state of friction between administrative agencies. The problem is that the placement of the bureaucracy within the national security framework demands ever greater resources and authorities, with significant constitutional consequences.

IV. CONSTITUTIONAL CRISIS

As the fourth epoch has taken hold, there have been few efforts to limit the expansion of national security. Part of the reason for this is that the question has *1752 changed. No longer is the country asking what needs to be done to limit the spread of totalitarian ideologies--already an extremely broad question. Instead, the most important question now driving U.S. national security is *what potential threats does the United States face?* This question eliminates intent from the equation. It sidesteps the likelihood of such risks actually occurring. The mere fact that such threats might become manifest is sufficient to drive the country to action. Making the question even more expansive is the fact that these threats have no end. They are really just persistent problems, requiring a continual effort to counter their impact on the United States.

Thus stripped of limits, an infinite number of risks may be placed in the national security framework. Climate change could destabilize countries and entire regions, sending refugees flooding across U.S. borders, threatening the provision of domestic services. Pandemic influenza could cause massive social disruption. Drug trafficking and criminal syndicates could undermine governmental structures. Myriad further concerns present themselves: damage to information infrastructure through cyber attacks, for instance, could bring government, commerce, and education to a halt. Contamination of water supplies or the release of noxious substances into the air could cause widespread devastation, for which the national government lacks the resources necessary to respond effectively. The list continues.

But why now? Such concerns have existed for decades. Why is it that we are now experiencing the broadening of national security to include so many different risks? This Article suggests that the answer lies in history and a deeper understanding of the evolution of U.S. national security.

The first epoch was shaped by powerful forces: foremost, the protection of the Union; following that, international independence and economic growth. During the second epoch the federal government adopted a more aggressive role at home and overseas, looking to shape the environment and head off challenges to its sovereignty. The third epoch brought with it the primacy of the national security dialogue over competing concerns. A rapidly expanding infrastructure, attended by secrecy, and a close relationship with industry, provided the engine of growth. The opportunity to use this infrastructure to drive other concerns was not lost on those with different interests. It was not until the fall of the Berlin Wall, however, that institutional attention could be focused on nonconventional threats. From that point forward, interests began competing for attention by adhering to the existing national security infrastructure.

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The evolution of national security in this manner carries with it constitutional and legal concerns. These are rooted in the underlying grafting of potential risks to the national security infrastructure. The national security system was created solely to protect federal institutions. Its object, then, is preservation of the State itself. Broader concepts of security do not change this object. Nor do they alter the fabric of the discussion. National security still points towards the federal government. It is synonymous with State security and, as such, it is a very different animal *1753 from individual security or environmental security. National security, moreover, involves extraordinary measures, hypertrophic executive power, secrecy, and minimal restrictions on resources. It suggests that there ought to be no opponents--that, to oppose the policies lacks moral or political credibility. By crafting issues as national security, the impression is conveyed that they are both urgent and existential and, therefore, should be discussed outside the ordinary course of political debate and scrutiny. Expanding the realm of national security changes the relationship of citizens to the State. It does this by inserting secret functions of government, such as intelligence collection and analysis, and military capabilities and authorities, into a range of social relations.

The national security interests of the Founders centered on protection of the Union, the constitutional structure of the state, and the national government as the institutional representation of the people as sovereign. But it is not now the protection of the people's sovereignty that is the primary aim of federal activity. Instead, it is the federal government's sovereignty, which, through secret mechanisms and a greatly enlarged administrative capacity, is being secured as *against* the people. The resulting constitutional implications make the fourth epoch fundamentally different from those that preceded it.

At some point, the effort to attach issues to national security is simply blatant opportunism. Thus, Senator Barbara Mikulski of Maryland, a member of the Health, Education, Labor, and Pensions Committee, recently considered counterfeit prescription drugs entering the United States.¹²⁸⁹ During the Senate hearing, she asked, "[A]re we moving with [a] sense of urgency? Has this been escalated to a homeland security issue? Is this the top of anyone's agenda?"¹²⁹⁰ The underlying assumption is that as soon as the issue becomes couched as a security concern, it rockets to the top of the political agenda. "For any of us who value safety and efficacy," Mikulski added, "this has to be elevated to a national security, homeland security and criminal level."¹²⁹¹

From the inside, such blatant opportunism may appear harmless. In light of limited bandwidth, the way to get attention is to make an issue appear larger than perhaps it really is. But the effects of these provisions are not harmless. They carry significant structural implications.

As a constitutional matter, the shift to the national security discourse diminishes the role that Congress performs through its oversight function. The number of committees responsible for "national security" has rapidly proliferated to include *1754 nearly every Senate and House committee.¹²⁹² This means that no single committee has a complete picture of national security. Nor is any single committee held responsible, to the electorate, for such oversight. Overlapping responsibilities allow legislators to take credit for keeping the country safe, and apportion blame for any failures. For those committees given authority to oversee discreet executive actions, strong political pressures demand that the legislators not hamstring the executive branch on issues of security.¹²⁹³

Even where the executive acts outside the law, congressional oversight is limited. The National Security Agency's illegal wiretapping serves as a clear example. Despite the Bush Administration's disregard for legislative restrictions on the wiretapping of U.S. citizens,¹²⁹⁴ Congress retroactively legalized the Administration's actions on grounds that it involved sensitive issues.¹²⁹⁵ National security, for that matter, entails a significant amount of secrecy, such that Congress may not even be aware of what is happening. When Congress is aware of executive actions, legislators may be prevented from bringing certain information to light via classification, which is itself an executive decision.

Congress's ability to act with regard to authorization, at the outset, is similarly narrow. The burden rests on those opposing national security measures to demonstrate that failing to enact such measures will not undermine the country's safety--a nearly impossible burden of proof. For those measures with a significant impact on civil rights, there may be an effort to include a sunset provision, essentially providing an expiration date. But temporary powers rarely turn out to be so limited; instead, they become a baseline on which further authorities are *1755 built.¹²⁹⁶ Similar concerns accompany the legislature's

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ability to withstand the drive to expansion via appropriations.

The judiciary, in turn, is unsuited for playing a stronger role in the area of national security. The political question doctrine, which permeates foreign affairs, becomes all the more ubiquitous with the expansion of national security and the increasingly blurred lines between the different risks faced by the country. Claims to judicial institutional incompetence, often pushed by an executive branch eager to protect its interests, find sympathetic ears in a judiciary loath to make determinations on matters involving the security of the United States. Judges, who lack bureaucratic support, resources, information, and training in the area, are reluctant to second-guess the executive branch. The state secrets doctrine further restricts private citizens' ability to gain access to the executive's actions, as exceptions to the Freedom of Information Act specifically carve out national security matters.¹²⁹⁷

The executive branch's continued expansion of its national security portfolio is concerning in light of the political nature of such structures. Shortly before he died in 1954, Justice Robert Jackson, having served as Attorney General during the great expansion of the FBI's purview into national security in the third epoch, wrote:

I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized national police All that is necessary is to have a national police competent to investigate all manner of offenses, and then, in the parlance of the streets, it will have enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies. Even those who are supposed to supervise it are likely to fear it. I believe that the safeguard of our liberty lies in limiting any national policing or investigative organization, first of all to a small number of strictly federal offenses, and second to nonpolitical ones. The fact that we may have confidence in the administration of a federal investigative agency under its existing head does not mean that it may not revert again to the days when the Department of Justice was headed by men to whom the investigative power was a weapon to be used for their own purposes.¹²⁹⁸

If national security is understood as any potential threat to the United States, then it necessarily includes political threats. Together with rapid expansions in power, considerable resources, and minimal checks on the exercise of such authorities, the equation should give one pause.

***1756** One excuse often given for the rapid expansion of the national security state is that the country is facing a new era in which new rules apply.¹²⁹⁹ Even this assertion, however, is not new. Throughout the third epoch, for instance, a running theme in inaugural addresses was the novelty of the circumstances in which each new administration found itself. In 1949, Truman suggested the uniqueness of each period in U.S. history, and that the challenges his Administration faced were thus unprecedented.¹³⁰⁰ Eisenhower noted that the "time of tempest" had swept the continents of the earth.¹³⁰¹ The new era pitted freedom against slavery, lightness against dark.¹³⁰² For Kennedy, the world was very different from the Founding.¹³⁰³ "The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life."¹³⁰⁴ For LB J, the present was distinguished by "rapid and fantastic change."¹³⁰⁵ George H.W. Bush made similar claims, as did Bill Clinton, George W. Bush, and, now, Barack Obama.¹³⁰⁶

Reasonable minds may differ on whether the threats faced by the country today are any greater than those that existed in previous decades. Perhaps less controversial, however, is the observation that the basic understanding of what constitutes a national security threat has changed. So have executive institutions, relationships, and authorities--with constitutional implications. In 1928, Justice Brandeis remarked, "The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding."¹³⁰⁷ In developing a deeper understanding of the evolution of conceptions of U.S. national security, perhaps stronger resistance to such encroachments may ensue.

Footnotes

^{a1} Associate Professor of Law, Georgetown Law. Thanks to John Benton, Ziad Haider, and Todd Venie for helping to obtain many of the documents used in this Article. I am grateful to Lucy Chester, Aziz Huq, Peter Katzenstein, Aaron O'Connell, Aziz Rana, Mike Seidman, Marc Sorel, David Super, Bob Turner, Steve Vladeck and Don Wallace for their thoughtful comments on earlier drafts. Members of both the Cornell Law Foreign Relations Colloquium and the Georgetown Law Foreign Relations Colloquium provided excellent feedback. Special thanks as well to Sarah Kelly-Kilgore and the editors of the *American Criminal Law Review* for their extraordinary assistance in editing this Article. It is much appreciated. © 2012, Laura K. Donohue.

¹ PRESIDENT BARACK OBAMA, NATIONAL SECURITY STRATEGY 2, 29-30 (2010) [hereinafter OBAMA NSS], http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (discussing immigration as a component of human capital); *see also id.* at 9-10 (calling for the integration of homeland security and national security staff).

² *Id.* at 2.

³ *Id.* at 14.

⁴ *Id.*

⁵ Critics of the NSS as a meaningful document may correctly argue that its immediate object is policy, not law, and even then that it is subject to significant limitations (such as failing to establish priorities, consider fiscal limits, assign duties to agencies, or synchronize related documents). But such claims would overlook the importance of the NSS. For one, it derives from a legislative mandate. *See* 50 U.S.C. § 404a (2006). Via amendments to the National Security Act of 1947, Congress has required the President to submit an annual report, coincident with the budget, detailing the country's approach to national security. *Id.* The statute requires that the President address: (1) worldwide interests, goals, and objectives vital to U.S. national security; (2) foreign policy, worldwide commitments, and national defense capabilities necessary to deter aggression and implement U.S. national security; (3) proposed short- and long-term uses of U.S. political, economic, and military power; (4) the adequacy of U.S. capabilities to carry out the NSS; and (5) additional information that may be necessary to keep Congress informed of matters related to U.S. national security. *Id.* In a constitutional sense, the report thus lies at the intersection of executive and legislative authorities: the former in an executive and foreign affairs capacity, and the latter in providing for the common defense and general welfare of the country. As a practical matter, moreover, the NSS accomplishes a number of important aims. As noted by the Congressional Research Service ("CRS"), by articulating a strategy, the NSS informs domestic and foreign audiences of the country's strategic intent. *See* CATHERINE DALE, CONG. RESEARCH SERV., RL 34505, NATIONAL SECURITY STRATEGY: LEGISLATIVE MANDATES, EXECUTION TO DATE, AND CONSIDERATIONS FOR CONGRESS 2 (2008) [hereinafter DALE, NSS], http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL34505_07282008.pdf. By linking the country's goals and the approaches designed to meet them, it helps to justify the executive's requests for authorization and appropriations from Congress and, in turn, Congress's decision to grant executive requests. By offering prioritized objectives, moreover, the NSS provides guidance to departments and agencies to use in their internal processes for budgeting, planning, and operations, as well as organizing, training, and equipping their personnel. *Id.* The NSS anchors the most important policy documents in the field--the QUADRENNIAL DEFENSE REVIEW ("QDR"), the NATIONAL DEFENSE STRATEGY ("NDS"), the NATIONAL MILITARY STRATEGY ("NMS"), QUADRENNIAL INTELLIGENCE COMMUNITY REVIEW ("QICR"), and the QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW ("QDDR").

⁶ DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW AND BALLISTIC MISSILE DEFENSE REVIEW 5 (2010), <http://www.defense.gov/news/d2010usdprolloutbrief.pdf>.





⁷ OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, QUADRENNIAL INTELLIGENCE COMMUNITY REVIEW: SCENARIOS: ALTERNATIVE FUTURES THE IC COULD FACE 4 (2009) [hereinafter QICR], <http://www.fas.org/irp/dni/qicr.pdf>.

⁸ *Id.* at 5-6.

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- ⁹ THE FEDERALIST NO. 23 (Alexander Hamilton) (“The principal purposes to be answered by union are these--the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.”), *available at* [http:// www.constitution.org/fed/federa23.htm](http://www.constitution.org/fed/federa23.htm).
- ¹⁰ *See, e.g.*, Ernest R. May, *National Security in American History*, in *RETHINKING AMERICA’S SECURITY: BEYOND COLD WAR TO NEW WORLD ORDER* 95 (Graham Allison & Gregory F. Treverton eds., 1991).
- ¹¹ *See id.*
- ¹² *See* National Security Act of 1947, ch. 15, 61 Stat. 496.
- ¹³ *See* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN CONTRA AFFAIR*, 67 (1990); National Security Act of 1947, ch. 15, 61 Stat. 496. For thoughtful treatment of the impact of the National Security Act of 1947 and the evolution of associated authorities, see DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* (2008) and AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* (1999).
- ¹⁴ *See* KOH, *supra* note 13, at 67.
- ¹⁵ JAMES MADISON, *Saturday, June 30*, in *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (1787), *available at* [http:// teachingamericanhistory.org/convention/debates/0630.html](http://teachingamericanhistory.org/convention/debates/0630.html) (transcribing remarks of Mr. Oliver Ellsworth).
- ¹⁶ *Id.*
- ¹⁷ JAMES MADISON, *Monday, May 14th, 1787 and Friday 25 of May*, in *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, *supra* note 15, *available at* <http://teachingamericanhistory.org/convention/debates/0514.html> (transcribing remarks of Mr. Edmund J. Randolph).
- ¹⁸ W. W. ROSTOW, *HOW IT ALL BEGAN: ORIGINS OF THE MODERN ECONOMY* 191 (1975); Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 *DICK. L. REV.* 289, 291 (2000).
- ¹⁹ *See, e.g.*, Victor S. Clark, *The Influence of Manufactures Upon Political Sentiment in the United States from 1820-1860*, 22 *AM. HIST. REV.* 58, 58, 63 (1916) (explaining how political leaders, such as Thomas Jefferson and John C. Calhoun, framed debates about protecting domestic manufactures in national security terms).
- ²⁰ *See* President Franklin Pierce, Inaugural Address (Mar. 4, 1853), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 115, 122 (Bicentennial ed. 1989) [hereinafter *INAUGURAL ADDRESSES*] (highlighting the threat to “national security” presented by the conflict over slavery and suggesting, “We have been carried in safety through a perilous crisis. Wise counsels, like those which gave us the Constitution, prevailed to uphold it. Let the period be remembered as an admonition, and not as an encouragement, in any section of the Union, to make experiments where experiments are fraught with such fearful hazard.”).

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- ²¹ See *Invasion of Cuba--The President's Proclamation*, N.Y. DAILY TIMES, June 1, 1854, at 1 (stating the government claims a right and duty to interfere with the proposed invasion to protect the "honor of its flag, the rights of its citizens, the national security and the preservation of the public tranquility").
- ²² See L. Kossuth, *Letters from L. Kossuth: American Interference in European Affairs--Prospects of Revolution The Peace Question*, &c, N.Y. DAILY TIMES, Jan. 21, 1856, at 4 ("[T]he principle of national fraternity is more than a philanthropic emotion ... it is the only true basis of national security").
- ²³ See, e.g., *The Republican Party and Our Relations with Mexico*, N.Y. TIMES, Mar. 29, 1860, at 2; *Sympathy with the South*, N.Y. TIMES, Dec. 10, 1859, at 4; *The Am. Abolition Soc'y, The Anniversaries*, N.Y. DAILY TIMES, May 15, 1857, at 1; *Ex-Secretary Guthrie's Return to Louisville--His Address*, N.Y. DAILY TIMES, Mar. 27, 1857, at 2.
- ²⁴ See *supra* note 10 and accompanying text.
- ²⁵ See National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at  50 U.S.C. § 401 (2006)).
- ²⁶ Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1846).
- ²⁷ See, e.g., 50 U.S.C. § 1803(e) (2006 & Supp. 2010) ("[T]he court ... shall adopt and, consistent with the protection of national security, publish procedures for the review of petitions");  50 U.S.C. § 1804(a)(6) (2006 & Supp. 2010) ("a certification [by] an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense ..."); 50 U.S.C. § 1806(f) (2006 & Supp. 2008) ("[T]he United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary"); see also 50 U.S.C. § 1845(f) (2006) (similar to 1806(f)).
- ²⁸ 50 U.S.C. § 1825(b) (2006 & Supp. 2008).
- ²⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-52 (codified at  8 U.S.C. § 1226(a)). Of particular note is section 505: Miscellaneous National Security Authorities, which significantly expands "National Security Letters" to include a broader range of information and organizations from which information can be obtained via administrative subpoena absent prior judicial approval. See *id.* at § 505.
- ³⁰ See, e.g.,  8 U.S.C. § 1226a (2006) (giving the Attorney General the authority to detain an alien where the Attorney General has reasonable grounds to believe that the alien "is engaged in any ... activity that endangers the national security of the United States," without defining what constitutes "national security"); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (referring to items related to the national security interests of the United States, as well as the authority to exclude posting contractual or other information when necessary to protect national security, without specifying what precisely is meant by the term); Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524 (allocating funding for "activities related to national security" without specifying the meaning of the term); Enhanced Partnership with Pakistan Act of 2009, Pub. L. No. 111-73, 123 Stat. 2060 (giving the Secretary of State the authority to waive certain limitations where the Secretary determines and certifies "that it is in the national security interests of the United States to do so," without defining the term); Department of the Interior--Appropriation, Pub. L. No. 111-88, 123 Stat. 2904 (2009) (requiring "An assessment of any risk to the national security of the United States or its citizens," without specifying what is meant by national security); Supplemental Appropriations Act, Pub. L.

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No. 111-212, 124 Stat. 2302 (2010) (authorizing the President to access additional funding for assistance to Afghanistan, Iraq, and Pakistan, where he finds and certifies “that exercising the authority of this section is necessary to protect the national security interests of the United States” but not defining the term); National Aeronautics and Space Act Pub. L. No. 111-314, 124 Stat. 3328 (2010) (“The Administrator shall establish such security requirements, restrictions, and safeguards as the Administrator deems necessary in the interest of the national security,” without defining the term).

³¹ See generally JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES (2007) (discussing the Classified Information Procedures Act, the Department of Defense’s definition of national security, and NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 1).

³² Classified Information Procedures Act § 1(b), 18 U.S.C. app. 3 (2006). This approach reflects the U.S. Department of Defense’s DICTIONARY OF MILITARY AND ASSOCIATED TERMS, which similarly defines “national security” as: “A collective term encompassing both national defense and foreign relations of the United States.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 232 (2010), [http:// www.dtic.mil/doctrine/new_pubs/jpl_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jpl_02.pdf).

³³ 50 U.S.C.A. § 401a(5) (2012) (emphasis added).

³⁴ Federal Information Security Management Act of 2002, Pub. L. 107-347, § 201, 116 Stat. 2947 (2002) (codified at 44 U.S.C. § 3542(b)(2)(A)).

³⁵ GEORGE W. BUSH, NSPD-1, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 1: ORGANIZATION OF THE NATIONAL SECURITY COUNCIL SYSTEM (2001). In 2003, Executive Order 13,292 expanded the concept of “national security” established in Executive Order 12,958 to include “information relating to defense against transnational terrorism.” Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003), available at [http:// www.archives.gov/isoo/policy-documents/eo-12958-amendment.html](http://www.archives.gov/isoo/policy-documents/eo-12958-amendment.html) (amending Executive Order 12,958).

³⁶ See *id.*

³⁷ See generally BARACK OBAMA, PPD-1, PRESIDENTIAL POLICY DIRECTIVE 1: ORGANIZATION OF THE NATIONAL SECURITY COUNCIL SYSTEM 5 (2009), [http:// www.fas.org/irp/offdocs/ppd/ppd-1.pdf](http://www.fas.org/irp/offdocs/ppd/ppd-1.pdf) (“This document is the first in a series of Presidential Policy Directives that, along with Presidential Study Directives, shall replace National Security Presidential Directives as instruments for communicating presidential decisions about national security policies of the United States.”).


³⁸ See *id.*



³⁹ See BARACK OBAMA, PSD-1, PRESIDENTIAL STUDY DIRECTIVE 1: ORGANIZING FOR HOMELAND SECURITY AND COUNTERTERRORISM 1-2 (2009), [http:// www.fas.org/irp/offdocs/psd/psd-1.pdf](http://www.fas.org/irp/offdocs/psd/psd-1.pdf) (“[C]onceptually and functionally, [national security and homeland security] should be thought of together rather than separately.”).



⁴⁰ *Id.* at 2.


⁴¹ Even as he denied President Truman the authority to seize steel mills on U.S. soil, for instance, Justice Jackson wrote in *Youngstown Sheet & Tube Co. v. Sawyer*, “I should indulge the widest latitude of interpretation to sustain [the President’s]

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exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”  343 U.S. 579, 645 (1952).

42  [Korematsu v. United States](#), 323 U.S. 214, 223 (1944) (“[Korematsu was excluded from the Military Area] ... because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures”); *cf.*  [Hirabayashi v. United States](#), 320 U.S. 81, 114 (1943) (“[Citizens of a particular racial group] ... though subject to requirements of national security and military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.” (Douglas, J., concurring)); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991) (discussing *Korematsu* and the origins of strict scrutiny). Although these cases are almost universally condemned, they demonstrate the seriousness with which the judiciary views matters of national security.



43  [Haig v. Agee](#), 453 U.S. 280, 307 (1981) (quoting  [Aptheker v. Sec’y of State](#), 378 U.S. 500, 509 (1964)).

44 *See, e.g.*,  [Youngstown](#), 343 U.S. at 662 (Clark, J., concurring) (concluding the President’s grant of authority is extensive precisely because of the ultimate responsibility to protect the security of the nation).

45  [Holder v. Humanitarian Law Project](#), 130 S. Ct. 2705 (2010).


46 *See, e.g.*,  *id.* at 2711 (“[R]espect for the Government’s factual conclusions is appropriate in light of the courts’ lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of certain conduct can be difficult to assess, and conclusions must often be based on informed judgment rather than concrete evidence.”);  [Ashcroft v. al-Kidd](#), 131 S. Ct. 2074, 2087 (2011) (“The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security.”);  [Winter v. Natural Res. Def. Council, Inc.](#), 555 U.S. 7, 18 (2008) (according deference to the President after explicitly finding: “The President determined that continuation of the exercises as limited by the Navy was ‘essential to national security.’”);  [Boumediene v. Bush](#), 553 U.S. 723, 802 (2008) (“All that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.”) (Roberts, C.J., dissenting);  [Hamdan v. Rumsfeld](#), 548 U.S. 557, 679 (2006) (“As I explained in *Hamdi v. Rumsfeld* ... the structural advantages attendant to the Executive Branch—namely, the decisiveness, ‘activity, secrecy, and dispatch’ that flow from the Executive’s ‘unity,’ ... led the Founders to conclude that the ‘President has primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.’”) (Thomas, J., dissenting) (internal citations omitted);  [Dep’t of Navy v. Egan](#), 484 U.S. 518, 530 (1988) (“[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”).

47 *See, e.g.*, [Gen. Dynamics Corp. v. United States](#), 131 S. Ct. 1900, 1905 (2011) (“We have recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.”); *see also* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010) [hereinafter Donohue, *The Shadow of State Secrets*].

48  [N.Y. Times Co. v. United States](#), 403 U.S. 713 (1971) (per curiam). The Government had argued in its brief that, despite the First Amendment, “[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.” Brief for the  [United States at 13-14](#), *N.Y. Times Co.*,

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403 U.S. 713 (Nos. 1873, 1885).

⁴⁹ See  *N.Y. Times Co.*, 403 U.S. at 732 (White, J., concurring) (“The Government’s position is simply stated: ... the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens ‘grave and irreparable’ injury to the public interest”).

⁵⁰ See *id.* (“At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press.”).

⁵¹ *Id.* at 719 (Black, J., concurring).

⁵² *Id.*

⁵³  343 U.S. 579, 645 (1952).

⁵⁴  299 U.S. 353, 365 (1937).

⁵⁵  542 U.S. 507 (2004).

⁵⁶ See *id.*

⁵⁷ *Id.* at 520.

⁵⁸ See BAKER, *supra* note 31, at 19.

⁵⁹ THE FEDERALIST NO. 23 (Alexander Hamilton), available at [http:// www.constitution.org/fed/federa23.htm](http://www.constitution.org/fed/federa23.htm).

⁶⁰ *Id.* (emphasis in original).

⁶¹ See *id.*

⁶² *Id.*

⁶³ Prior to the end of the Cold War, the international relations field did not spend an inordinate amount of time debating what was meant by national security. Instead, the emphasis was almost entirely on military force, with minimal work being done by the term itself. David A. Baldwin, *The Concept of Security*, REV. INT’L STUD. 5, 9, 23 (1997), <http://tau.ac.il/~daniel/pdf/37.pdf>. This led to a rather weak conceptualization of what was meant by national security. See generally BARRY BUZAN, PEOPLE, STATES AND FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA (2nd ed. 1991). Until the end of the Cold War, articles that looked more carefully at the term itself proved few and far apart. See, e.g., Arnold Wolfers, “National Security” as an Ambiguous Symbol, 67 POL. SCI. Q. 483 (1952); Baldwin, *supra*, at 5-10.

⁶⁴ It makes little sense to look broadly at the individuals making up the country to ascertain the approach; there would be as many opinions and variations as there are people. So one is forced to consider the collective-- this is inherent in our concept of the people as sovereign. Representative institutions (both state and federal) and the constitutional design thus become the manifestation of U.S. national security interests. Here, the Constitution divides the authorities that constitute the purpose of national government among the federal branches. It is not always clear where the demarcations lie. This was precisely the intent of the Founders. According to Hamilton, the executive branch had a particular role to play in regard to some of the areas central to how I have defined national security--such as in defense of the nation, preserving public peace, repelling external attacks, and engaging in foreign relations. *See* THE FEDERALIST NO. 70 (Alexander Hamilton). The concept of an energetic executive is taken to an extreme by proponents of what Professors Lawrence Lessig and Cass Sunstein refer to as a strong version of a unitary executive. *See* Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1165, 1165 (1992). This concept of the executive branch is not without its critics. *See, e.g.,* Karl Manheim & Allan Ides, *The Unitary Executive*, L.A. LAWYER, Sept. 2006, at 24. Professors David Barron and Martin Lederman, for instance, acknowledge that there may be a compelling case to be made for a unitary and energetic executive in the realm of the armed forces--an area central to common defense and national security. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008). But even here, the original understanding of the President's authority as Commander in Chief did not preclude other branches from playing a role in war making. *Id.* at 696. As an empirical matter, the legislature has often assumed an active role in setting the terms of battle, as well as the conduct and organization of the armed forces. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--A Constitutional History*, 121 HARV. L. REV. 941, 947 (2008) ("Throughout its history, Congress has in effect rejected the idea that '[w]ar is too difficult to plan for with fixed, antecedent legislative rules,' and has even tried to manage the conduct of particular wars once they were under way by enacting statutes that were, in effect, attempts to second-guess or pretermitt the President's judgments. If anything, the congressional willingness to enact such laws has only increased during the very period in which the abdication paradigm has taken hold.").

⁶⁵ For the legislative branch, statutory instruments and legislative resolutions offer at least a majoritarian perspective.

⁶⁶ As a constitutional matter, the President is granted considerable foreign affairs authorities in U.S. CONST. art. II, § 1 (executive power); U.S. CONST. art. II, § 2, cl. 1 (commander-in-chief authorities); and U.S. CONST. art. II, § 3 (power to recognize foreign governments). The President's strong role with regard to foreign affairs has been further recognized by the other branches. *See, e.g.,* 6 ANNALS OF CONG. 613 (1800) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."); *United States v. Curtiss-Wright*, 299 U.S. 304, 319 (1936) ("Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."); *id.* ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility, and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.") (internal citations omitted). In addition to being granted the power to raise funds to "provide for the common Defense and general welfare," Congress's role with regard to defense and foreign affairs can be found in U.S. CONST. art. I, § 8, cl. 10-16, as well as the Necessary and Proper Clause in U.S. CONST. art. I, § 8, cl. 18.

⁶⁷ This articulation helps to explain why there is a pull towards a Machiavellian conception of national security, in which *raison d'état* may be invoked in justification for a wide range of measures.

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- ⁶⁸ I recognize that such an understanding embraces constitutionalism, opening the door to arguments that national security ought not to depend on constitutional framing.
- ⁶⁹ Whilst any survey of U.S. history runs the risk of gross oversimplification, I nevertheless here attempt to sketch out the dominant shifts that mark the evolution of U.S. national security from the Founding to the present day. The purpose is to attempt to convey a sense of the evolution of history as informed by the country's national security interests.
- ⁷⁰ Although exceptions to the linear progression of U.S. interests can be found, there does appear to be a general trajectory towards further expanding what might be considered the United States' core national security interests.
- ⁷¹ See President George Washington, Farewell Address to the People of the United States (Sept. 19, 1796), *reprinted in* S. Doc. No. 106-21, at 6 (2d Sess. 2000) [hereinafter Washington, Farewell Address], <http://www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf>.
- ⁷² For a catalog of every military intervention in support of U.S. commercial interests, see WILLIAM APPLEMAN WILLIAMS, *EMPIRE AS A WAY OF LIFE: AN ESSAY ON THE CAUSES AND CHARACTER OF AMERICA'S PRESENT PREDICAMENT ALONG WITH A FEW THOUGHTS ABOUT AN ALTERNATIVE* (1st ed. 1980).
- ⁷³ I reject 1941 as the start of this new era. Part of my argument is that such a demarcation fails to give sufficient weight to the impact of the growth of totalitarianism, and rather too much to the impact of the attack on Pearl Harbor. While it is certainly true that Pearl Harbor further solidified the preeminence of the national security dialogue, it was part of a much broader sweep, the momentum of which stemmed from a response to totalitarian ideology.
- ⁷⁴ In dividing history into these epochs, I depart from the traditional International Relations model, which equates foreign policy with national security and thus focuses on three periods: non-intervention through World War I, followed by the rise of the country to a position of hegemony in the course of World War II, and merging into the Cold War. GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: US FOREIGN RELATIONS SINCE 1776*, at 6-7 (2008). The central debates stem from the realist school in opposition to the legacies of Wilsonian progressivism.
- ⁷⁵ Office of the Historian, *A Short History of the Department of State*, U.S. DEPARTMENT OF ST., <http://history.state.gov/departmenthistory/short-history/foundations> (last visited Oct. 17, 2011) [hereinafter *Short History*].
- ⁷⁶ *Id.*
- ⁷⁷ Office of the Historian, *Secret Committee of Correspondence/Committee for Foreign Affairs, 1775-1777*, U.S. DEPARTMENT OF ST., <http://history.state.gov/milestones/1776-1783/SecretCommittee> (last visited Mar. 14, 2012) [hereinafter *Secret Committee*]. Benjamin Franklin, Benjamin Harrison, Thomas Johnson, John Dickinson, and John Jay served on the Committee, with Robert Morris joining soon thereafter. *Id.*
- ⁷⁸ Office of the Historian, *The Model Treaty, 1776*, U.S. DEPARTMENT OF ST., <http://history.state.gov/milestones/1776-1783/ModelTreaty> (last visited Mar. 14, 2012).
- ⁷⁹ See *Secret Committee*, *supra* note 77.
- ⁸⁰ See ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 5 (authorizing the establishment of "such other committees and

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civil officers as may be necessary for managing the general affairs of the United States”); *Short History*, *supra* note 75.

⁸¹ THE FEDERALIST NO. 15 (Alexander Hamilton).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ THE FEDERALIST NO. 1 (Alexander Hamilton).

⁸⁶ THE FEDERALIST NO. 2 (John Jay).

⁸⁷ *See id.* Foreign affairs divided between the President and the legislature, with the former granted the executive power, the authority to make treaties (with the advice and consent of two-thirds of the Senate), the power to appoint ambassadors and other ministers, and the authority to receive ambassadors. U.S. CONST. art. II, § 1 (Vesting Clause); U.S. CONST. art. II, § 2, cl. 2 (Treaty Clause); U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause); U.S. CONST. art. II, § 3, cl. 3 (Receiving foreign representatives). The President was also apportioned the authorities of Commander in Chief of the Army and Navy, and of the militia, “when called into the actual Service of the United States.” U.S. CONST. art. II, § 2, cl. 1. Congress, in contrast, obtained the power to lay and collect taxes to pay off the national debt and to provide for the common defense and general welfare of the country—an authority central to perceptions of U.S. national security. U.S. CONST. art. I, § 8, cl. 1. In a similar fashion, the legislature obtained the authority to borrow money and regulate commerce with both foreign nations and among the states. U.S. CONST. art. I, § 8, cl. 2; *see also* U.S. CONST. art. I, § 8, cl. 3. It was given broad authority over the production of money. U.S. CONST. art. I, § 8, cl. 5. The authority to define and punish piracies and offenses was accompanied by the authority to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. U.S. CONST. art. I, § 8, cl. 10 (piracy and offences against the laws of nations); U.S. CONST. art. I, § 8, cl. 11 (power to declare war). Congress could raise and support the army in two-year increments, it could provide and maintain a navy, and it could make rules for the government and regulation of the land and naval forces. U.S. CONST. art. I, § 8, cl. 12 (raise and support armies); U.S. CONST. art. I, § 8, cl. 13 (provide and maintain a navy); U.S. CONST. art. I, § 8, cl. 14 (rules for government and regulation of the land and naval forces). Congress could also call forth the militia in the event of insurrection or foreign invasion. U.S. CONST. art. I, § 8, cl. 15 (calling forth the militia); U.S. CONST. art. I, § 8, cl. 16 (organizing, arming, and disciplining the militia). The Constitution further delegated to the legislature the authority “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” U.S. CONST. art. I, § 8, cl. 17.

⁸⁸ *See* THE FEDERALIST NO. 51 (James Madison).

⁸⁹ THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 212 (1986).

⁹⁰ Richard A. Ifft, *Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism During the Whiskey Insurrection*, in *THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES* 172 (Steven R. Boyd ed., 1985).


⁹¹ George Washington Presidential \$1 Coin—First President, 1789-1797, U.S. MINT, [http://www.usmint.gov/mint_programs/\\$1coin/index.cfm?_action=Washington](http://www.usmint.gov/mint_programs/$1coin/index.cfm?_action=Washington) (last visited Mar. 4, 2012) (“In 1791, President Washington presided over the Nation’s first recorded Cabinet meeting, which included Alexander Hamilton as the United States’

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first Secretary of the Treasury and Thomas Jefferson as the first Secretary of State.”).

- ⁹² For a full list of cabinet officers who served during the Washington Administration, see *George Washington*, PRESIDENTS OF THE U.S. (POTUS), [http:// www.ipl.org/div/potus/gwashington.html](http://www.ipl.org/div/potus/gwashington.html) (last visited Mar. 4, 2012).
- ⁹³ Washington, Farewell Address, *supra* note 71 (“Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens) the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.”).
- ⁹⁴ President George Washington, Proclamation of Neutrality (Apr. 22, 1793), *available at* <http://odur.let.rug.nl/usa/D/1776-1800/foreignpolicy/neutr.htm>.
- ⁹⁵ Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. II, Nov. 19, 1794, 8 Stat. 116.
- ⁹⁶ *Id.* at art. XII.
- ⁹⁷ Treaty of Friendship, Limits, and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138, *available at* http://avalon.law.yale.edu/18th_century/sp1795.asp.
- ⁹⁸ Washington, Farewell Address, *supra* note 71.
- ⁹⁹ *Id.*
- ¹⁰⁰ *Id.* at 23.
- ¹⁰¹ *Id.* at 26.
- ¹⁰² *Id.* at 27.
- ¹⁰³ *Coins & Medals, FAQs*, U.S. MINT, [http:// www.usmint.gov/faqs/circulating_coins/#anchor16](http://www.usmint.gov/faqs/circulating_coins/#anchor16) (last visited Mar. 4, 2012) (“The motto ‘E Pluribus Unum’ was first used on our coinage in 1795, when the reverse of the half-eagle (\$5 gold) coin presented the main features of the Great Seal of the United States on the scroll of which this inscription belongs.”).
- ¹⁰⁴ *See John Adams*, PRESIDENTS OF THE U.S. (POTUS), [http:// www.ipl.org/div/potus/jadams.html](http://www.ipl.org/div/potus/jadams.html) (last visited Mar. 4, 2012).
- ¹⁰⁵ Michael A. Palmer, *The Navy: The Continental Period, 1775-1890*, NAVAL HIST. CENTER, <http://www.history.navy.mil/history/history2.htm> (last visited Oct. 17, 2011).
- ¹⁰⁶ U.S. CONST. art. I, § 8, cl. 13; Naval Act of 1794, ch. 12, 1 Stat. 350.
- ¹⁰⁷ *See* HOWARD H. PECKHAM, THE WAR FOR INDEPENDENCE, A MILITARY HISTORY (1958); Palmer, *supra* note 105.

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- ¹⁰⁸ See Naval Hist'l Ctr., *The Reestablishment of the Navy, 1787-1801: Historical Overview and Select Bibliography*, DEPARTMENT OF THE NAVY, [http:// www.history.navy.mil/biblio/biblio4/biblic4a.htm](http://www.history.navy.mil/biblio/biblio4/biblic4a.htm) (last visited Mar. 4, 2012) ("The clear necessity of defending the nation's seaborne commerce finally moved Congress to create a naval force in the spring of 1794 [A] source of genuine danger to American commerce came from corsairs of North Africa's Barbary Coast."); Palmer, *supra* note 105 ("Two years after the end of the war, the money-poor Congress sold off the last ship of the Continental navy, the frigate *Alliance*"). The first forty-four-gun frigates to be built, the largest ships in the U.S. fleet, were to be called the *Constitution*, the *United States*, and the *President*--apropos of the United States' underlying national security concerns. Palmer, *supra* note 105.
- ¹⁰⁹ The failure of the French negotiations rested in part on the so-called "XYZ Affair," in which three unnamed agents demanded \$10 million from the Americans before the French government would negotiate. See Palmer, *supra* note 105.
- ¹¹⁰ Act of Apr. 30, 1798, ch. 35, 1 Stat. 553 (repealed 1947).
- ¹¹¹ Palmer, *supra* note 105 ("Stoddert's hopes of building a U.S. battle fleet were doomed by the election of President Thomas Jefferson in 1800").
- ¹¹² See *id.*
- ¹¹³ See *id.*
- ¹¹⁴ See, e.g., GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 28-29 (2004).
- ¹¹⁵ Naturalization Act of 1798, ch. 54, 1 Stat. 566; An Act Concerning Aliens (Alien Act), ch. 58, 1 Stat. 570 (1798); An Act Respecting Alien Enemies (Alien Enemies Act), ch. 66, 1 Stat. 577 (1798); Sedition Act of 1798, ch. 74, 1 Stat. 596.
- ¹¹⁶ Alien Act,  § 1.
- ¹¹⁷ See Sedition Act, § 2 (criminalizing the publication of any "false, scandalous, and malicious writing" against Congress or the President).
- ¹¹⁸ See STONE, *supra* note 114, at 31.
- ¹¹⁹ See, e.g., *id.* at 26.
- ¹²⁰ In 1763, France had ceded New Orleans and land west of the Mississippi to Spain. HERRING, *supra* note 74, at 102. In 1800, Spain secretly transferred New Orleans back to the French, retaining Spanish rule until power formally transferred. Preliminary and Secret Treaty between the French Republic and His Catholic Majesty the King of Spain, Concerning the Aggrandizement of His Royal Highness the Infant Duke of Parma in Italy and the Retrocession of Louisiana, Fr.-Spain, art. 4, Oct. 1, 1800, available at [http:// avalon.law.yale.edu/19th_century/ildefens.asp](http://avalon.law.yale.edu/19th_century/ildefens.asp).
- ¹²¹ HERRING, *supra* note 74, at 100.

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- ¹²² Treaty between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, 2 Stat. 245, *available at* <http://www.loc.gov/rr/program/bib/ourdocs/Louisiana.html>. For more exposition of the historical context, see HERRING, *supra* note 74, at 100; WALTER NUGENT, *HABITS OF EMPIRE: A HISTORY OF AMERICAN EXPANSIONISM* 65-68 (2009); Letter from President Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), *available at* <http://www.let.rug.nl/usa/P/tj3/writings/brf/jefl159.htm> (discussing possibility of Louisiana Purchase).
- ¹²³ SAMUEL JONES BURR, *THE LIFE AND TIMES OF WILLIAM HENRY HARRISON* 78-79 (1840) (“The British traders carried on an extensive and profitable business with the Indians, and jealous of the increasing population of the new country, pains were taken to prejudice the minds of the savages against our government. The traders were stimulated to this proceeding by their home government, for England could not even yet reconcile the idea of the United States remaining a free country, and preparatory to another war, was anxious to enlist the savage tribes in her favor.”).
- ¹²⁴ *See id.*
- ¹²⁵ *Id.*
- ¹²⁶ *Id.* at 80 (“Mr. Jefferson appointed Governor Harrison, sole commissioner for treating with the Indians. Here his time was wholly occupied and he and the disbursement of large sums of money, appropriated by Congress for annuities to the tribes and for purchasing lands. He conducted this trust with great discreetness, and acquired an uncommon influence over the Indians.”).
- ¹²⁷ *Id.* (“His administration is declared to have been nearly a succession of treaties, by one of which he secured to the United States fifty one millions of acres of the richest country in the west, and the most valuable mineral region in the Union.”). His actions met with resistance. *See id.* at 149-67, 237-39 (describing the so-called “Indian Wars”); *see also* Ctr. of Mil. History, *U.S. Army Campaigns: Indian Wars*, U.S. ARMY, http://www.history.army.mil/html/reference/army_flag/iw.html (last updated Nov. 19, 2010) [hereinafter *Indian Wars*]. In 1811, for instance, he fought a confederation of British-backed tribes at Tippecanoe, near Indianapolis. *See* BURR, *supra* note 123, at 149-67, 237-39; *see also Indian Wars, supra*. British support for the tribes did not stop with the Shawnee—who had been attempting to build a confederacy in the Northwest. *See Indian Wars, supra* (“In 1804[,] Tecumseh, a Shawnee, and his medicine man brother, the Prophet, with British backing, began serious efforts to form a new Indian confederacy in the Northwest.”). They allied, for instance, with the Upper Creeks in another campaign that centered on the question of American expansion. *See id.* (“[The Tippecanoe] victory did not solve the Indian problems in the Northwest. The tribes of the area were to make common cause with the British in the War of 1812.”). Note that Britain later supported the Seminole during the First Seminole War. *Id.*
- ¹²⁸ *See* Palmer, *supra* note 105 (“American sailors ... some as the result of the efforts of British press gangs, served in the men-of-war of the Royal Navy.”); 2 HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* 529-31 (1986).
- ¹²⁹ This fact was not lost on the British. *See* ADAMS, *supra* note 128, at 963-64. The British newspaper, *The Morning Post*, for instance, opined, “though the British Government ... may, however irritated by her conduct, display magnanimous forbearance toward so insignificant a Power as America, they will not ... suffer our proud sovereignty of the ocean to be mutilated by any invasion of its just rights and prerogatives [T]he sovereignty of the seas in the hands of Great Britain is an established, legitimate sovereignty.” *Id.* The paper also wrote, “A few short months of war would convince these desperate politicians of the folly of measuring the strength of a rising, but still infant and puny, nation with the colossal power of the British empire.” *Id.* at 964.
- ¹³⁰ *Cf.* SIR ROBERT PHILLIMORE, 3 *COMMENTARIES UPON INTERNATIONAL LAW* 211 (2d ed. 1857) (opining that the British restrictions on U.S. trade violated international law: “In [the order to engage in retaliatory measures against French allies or any state that had submitted to Napoleon’s restrictions] the British Government, in their turn, enunciated a proposition false in fact, and bad in law. It may be some palliation that the measure was retaliatory, but it is not, according to the rules of eternal right and

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justice, a defence [sic]. The truth is, that France was the first wrong-doer--Great Britain the second.”).

¹³¹ For a discussion of the British orders in council, see Tom Holmberg, *The Acts, Orders in Council, &c. of Great Britain [on Trade], 1793-1812*, RES. SUBJECTS: GOV'T & POL., http://www.napoleon-series.org/research/government/british/decrees/c_britdecreesl.html (last visited Mar. 4, 2012).

¹³² Note that the so-called “neutral rights” violations were actually lifted before the war started, but word of the reprieve did not reach American shores before a formal declaration of war.

¹³³ 12TH CONG., H.R. JOURNAL (1812) (recounting votes of those opposed as representing regions in the South and West).

¹³⁴ 24 ANNALS OF CONG. 755(1812) (Declaration of War between Great Britain and the United States).

¹³⁵ See Treaty of Peace and Amity Between His Britannic Majesty and the United States of America, U.S.-Gr. Brit, Dec. 24, 1814, 8 Stat. 218(1814), available at http://avalon.law.yale.edu/19th_century/ghent.asp (returning territories near Lakes Superior and Michigan, in Maine, and on the Pacific Coast to the United States in exchange for the return of American-held areas of upper Canada to Britain).

¹³⁶ See AN EXPOSITION OF THE CAUSES AND CHARACTER OF THE WAR, 13 ANNALS OF CONG. 1416 (1814), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=028/llac028.db&recNum=705>.

¹³⁷ President James Madison, Second Inaugural Address (Mar. 4, 1813), in INAUGURAL ADDRESSES, *supra* note 20, at 30. In articulating the basic precepts of U.S. national security over time, I draw, *inter alia*, from the inaugural addresses of successive Presidents. These statements often reflect the prevailing threats of the times as well as each administration’s intended course of action. As President Rutherford B. Hayes acknowledged in his own address, the purpose of the speech is “to announce some of the leading principles, on the subjects that now chiefly engage the public attention, by which it is my desire to be guided in the discharge of those duties.” President Rutherford B. Hayes, Inaugural Address (Mar. 5, 1877), in INAUGURAL ADDRESSES, *supra* note 20, at 153-59. Hayes spoke specifically to “the motives which should animate us, and to suggest certain important ends to be attained in accordance with our institutions and essential to the welfare of our country.” *Id.* As President William Taft explained, “The office of an inaugural address is to give a summary outline of the main policies of the new administration, so far as they can be anticipated.” President William Taft, Inaugural Address (Mar. 4, 1909), in INAUGURAL ADDRESSES, *supra* note 20, at 213-26. As President Herbert Hoover expressed, the inaugural provides the President with the opportunity to “express simply and directly the opinions [held] concerning some of the matters of present importance.” President Herbert Hoover, Inaugural Address (Mar. 4, 1929), in INAUGURAL ADDRESSES, *supra* note 20, at 257-68. National security routinely figures largely in the inaugural addresses--not least, perhaps, because the speech follows upon the public taking of an oath, signifying a mutual and public covenant to protect the country and the Constitution. President Benjamin Harrison explained: The officer covenants to serve the whole body of the people by a faithful execution of the laws, so that they may be the unfailing defense and security of those who respect and observe them, and that neither wealth, station, nor the power of combinations shall be able to evade their just penalties or to wrest them from a beneficent public purpose to serve the ends of cruelty or selfishness. President Benjamin Harrison, Inaugural Address (Mar. 4, 1889), in INAUGURAL ADDRESSES, *supra* note 20, at 79-98. Thus, while the addresses are by no means exclusive, they are at least probative of the central issues being faced and the manner in which each successive administration seeks to respond. I thus use them in concert with other historical documents, to chart the evolution of the United States’ approach to its national security.

¹³⁸ See Madison, *supra* note 137, at 30.

¹³⁹ *Id.* at 29-31 (“As the war was just in its origin and necessary and noble in its objects, we can reflect with a proud satisfaction that in carrying it on no principle of justice or honor, no usage of civilized nations, no precept of courtesy or humanity, have been

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infringed. The war has been waged on our part with scrupulous regard to all these obligations, and in a spirit of liberality which was never surpassed. How little has been the effect of this example on the conduct of the enemy! They have retained as prisoners of war citizens of the United States not liable to be so considered under the usages of war. They have refused to consider as prisoners of war, and threatened to punish as traitors and deserters, persons emigrating without restraint to the United States").

¹⁴⁰ *James Monroe*, PRESIDENTS OF THE U.S. (POTUS), [http:// www.ipl.org/div/potus/jmonroe.html](http://www.ipl.org/div/potus/jmonroe.html) (last visited Mar. 4, 2012).

¹⁴¹ See President James Monroe, First Inaugural Address (Mar. 4, 1817) [hereinafter Monroe, First Inaugural Address], *in* INAUGURAL ADDRESSES, *supra* note 20, at 33-41 ("Dangers from abroad are not less deserving of attention. Experiencing the fortune of other nations, the United States may be again involved in war, and it may in that event be the object of the adverse party to upset our Government, to break our Union, and demolish us as a nation. Our distance from Europe and the just, moderate, and pacific policy of our Government may form some security against these dangers, but they ought to be anticipated and guarded against. Many of our citizens are engaged in commerce and navigation, and all of them are in a certain degree dependent on their prosperous state. Many are engaged in the fisheries. These interests are exposed to invasion in the wars between other powers, and we should disregard the faithful admonition of experience if we did not expect it. We must support our rights or lose our character, and with it, perhaps, our liberties. A people who fail to do it can scarcely be said to hold a place among independent nations. National honor is national property of the highest value. The sentiment in the mind of every citizen is national strength. It ought therefore to be cherished.").

¹⁴² See *id.*

¹⁴³ *Id.* at 37-38.

¹⁴⁴ *Id.* at 39 ("The great amount of our revenue and the flourishing state of the Treasury are a full proof of the competency of the national resources for any emergency, as they are of the willingness of our fellow-citizens to bear the burdens which the public necessities require.").

¹⁴⁵ Treaty of Amity, Settlement and Limits Between the United States of America, and his Catholic Majesty (Adams-Onís Treaty of 1819), U.S.-Spain, arts. 2-9, 11, Feb. 22, 1819, *available at* [http:// www.tamu.edu/faculty/ccbn/dewitt/adamonis.htm](http://www.tamu.edu/faculty/ccbn/dewitt/adamonis.htm).

¹⁴⁶ *Statehood Dates*, 50STATES.COM (Apr. 1998), [http:// www.50states.com/statehood.htm](http://www.50states.com/statehood.htm).

¹⁴⁷ Monroe received 231 electoral votes to John Quincy Adams's 1 vote in the 1820 elections. *James Monroe*, *supra* note 140; see generally ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA (2007) (describing the soberness engendered by the near loss of Union and the consequent relief that greeted the Missouri Compromise).

¹⁴⁸ See President James Monroe, Seventh Annual Message to Congress (Dec. 2, 1823), *in* RECORDS OF THE UNITED STATES SENATE, 1789-1990, *available at* <http://www.ourdocuments.gov/doc.php?doc=23&page=transcript>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ("With the movements in this hemisphere we are of necessity more immediately connected, and by cause which must be obvious to all enlightened and impartial observers.").

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151 *See id.*

152 *See id.*

153 *Id.*

154 *See* John Quincy Adams, Inaugural Address (Mar. 4, 1825), in INAUGURAL ADDRESSES, *supra* note 20, at 53-60.

155 *Id.*

156 *Id.*

157 *Andrew Jackson*, PRESIDENTS OF THE U.S. (POTUS), [http:// www.ipl.org/div/potus/ajackson.html](http://www.ipl.org/div/potus/ajackson.html) (last visited Mar. 4, 2012) (stating that in 1835 the United States became free of debt).

158 *Jacksonian Democracy: Indian Removal, Period: 1820-1860*, DIGITAL HIST., http://www.digitalhistory.uh.edu/database/article_display.cfm?HHID=638 (last updated Mar. 15, 2012).

159 *See* Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).

160 *See id.*; *see also* *Removal of the Indians*, N. AM. REV., Jan. 1830, at 62-121, available at <http://digital.library.cornell.edu/cgi/t/text/pageviewer-idx?c=nora;cc=nora;rgn=full%20text;idno=nora0030-1;view=image;seq=68;node=nora0030-1%3A1;page=root;size=50>; *Removal of the Indians*, N. AM. REV., Oct. 1830, at 396-442, available at <http://digital.library.cornell.edu/cgi/t/text/pageviewer-idx?c=nora;cc=nora;rgn=full%20text;idno=nora0031-2;didno=nora0031-2;view=image;seq=00404;node=nora0031-2%3A1>. The Treaty of New Echota, for instance, granted the Cherokee Nation land in what is now Oklahoma, as well as \$5 million in compensation for property and relocation expenses in exchange for their lands. Treaty with the Cherokee (Treaty of New Echota), Dec. 29, 1835, 7 Stat. 478, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES, TREATIES (Charles J. Kappler ed., 1904), available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/che0439.htm>. The United States also promised respect for their political autonomy in future. *Id.* The Treaty, however, which was not sanctioned by the Cherokee national government, passed the U.S. Senate by only one vote. *Id.* When a number of Cherokees subsequently refused to relocate, the U.S. Army was brought in to force them to walk what has come to be known as the Trail of Tears, during which between four and five thousand Cherokees died. *See generally* TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS (2002); THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS (Theda Perdue & Michael D. Green eds., 1995).

161 *See Nullification Crisis of 1828 to 1834*, in THE SOUTH CAROLINA ENCYCLOPEDIA (Walter Edgar ed., 2006), available at [http:// sc150civilwar.palmettohistory.org/edu/crisis/Nullification1828-1834.htm](http://sc150civilwar.palmettohistory.org/edu/crisis/Nullification1828-1834.htm).

162 Tariff of 1828, ch. 55, 4 Stat. 270; *see also* WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-1836, at 142-43 (1st ed. 1965); JOHN NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION: A BIOGRAPHY 129, 135 (1988).

163 JOHN C CALHOUN, EXPOSITION AND PROTEST, REPORTED BY THE SPECIAL COMMITTEE OF THE HOUSE OF REPRESENTATIVES, ON THE TARIFF, READ AND ORDERED TO BE PRINTED, DEC. 19TH 1828 (SOUTH CAROLINA

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EXPOSITION AND PROTEST) (D.W. Sims 1829), <http://www.teachingushistory.org/documents/expositionandprotest.pdf>.

¹⁶⁴ Tariff of 1832, ch. 227, 4 Stat. 583.

¹⁶⁵ SOUTH CAROLINA ORDINANCE OF NULLIFICATION (Nov. 24, 1832), *available at* http://avalon.law.yale.edu/19th_century/ordnull.asp (stating that the tariff acts of 1828 and 1832 “are unauthorized by the constitution of the United States, and violate the true meaning and intent thereof and are null, void, and no law, nor binding upon this State”).

¹⁶⁶ President Andrew Jackson, Proclamation Concerning the Ordinance of South Carolina, on the Subject of the Tariff (Dec. 10, 1832), *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=004/lled004.db&recNum=593>.

¹⁶⁷ Act of March 2, 1833, ch. 57, 4 Stat. 632.

¹⁶⁸ *See* The Compromise Act, ch. 55, 4 Stat. 629 (1833) (amending several 1832 acts that imposed duties on imports).

¹⁶⁹ President Martin Van Buren, Inaugural Address (Mar. 4, 1837), *in* INAUGURAL ADDRESSES, *supra* note 20, at 74.

¹⁷⁰ *See id.* at 77.

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.* at 74. (“While the Federal Government has successfully performed its appropriate functions in relation to foreign affairs and concerns evidently national, that of every State has remarkably improved in protecting and developing local interests and individual welfare; and if the vibrations of authority have occasionally tended too much toward one or the other, it is unquestionably certain that the ultimate operation of the entire system has been to strengthen all the existing institutions and to elevate our whole country in prosperity and renown.”).

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.,* MARTIN VAN BUREN, THE AUTOBIOGRAPHY OF MARTIN VAN BUREN 132-38 (noting that following the Revolution, “The spread of slavery and the increase of slave States was a source and the only source from which trouble was apprehended ...”, yet objecting to the more recent efforts of abolitionists to challenge the South: “Disguise the matter as we may such agitation must, in light of reason and justice, be regarded as alike offensive to the spirit and derogatory to the memories of the Revolution.”); *see also* EDWARD L. WIDMER, MARTIN VAN BUREN 115-22 (providing a somewhat cynical reading of Van Buren’s refusal to take a strong stand on the issue, tying it to political self-interest as well as the fractious nature of the issue for the Union).

¹⁷⁷ President William Henry Harrison, Inaugural Address (Mar. 4, 1841), *in* INAUGURAL ADDRESSES, *supra* note 20, at 92.

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- ¹⁷⁸ See *John Tyler*, PRESIDENTS OF THE U.S. (POTUS), [http:// www.ipl.org/div/potus/jtyler.html](http://www.ipl.org/div/potus/jtyler.html) (last visited Mar. 4, 2012) (providing dates of President John Tyler's term in office).
- ¹⁷⁹ See President John Tyler, First Annual Message to Congress (Dec. 7, 1841), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29483#axzzlWo2idoeG> (discussing the importance of protecting U.S. commercial interests in the African region).
- ¹⁸⁰ *Id.*
- ¹⁸¹ In 1807, the Slave Trade Act, 47 Geo. 3, c. 36 abolished slave trade in the British Empire; in 1833, the Slavery Abolition Act, 3 & 4 Will. 4, 4 Will. 4, c. 73 abolished slavery itself.
- ¹⁸² Tyler, *supra* note 179. Tyler continued:
American citizens prosecuting a lawful commerce in the African seas under the flag of their country are not responsible for the abuse or unlawful use of that flag by others; nor can they rightfully on account of any such alleged abuses be interrupted, molested, or detained while on the ocean, and if thus molested and detained while pursuing honest voyages in the usual way and violating no law themselves they are unquestionably entitled to indemnity This Government will not cease to urge upon that of Great Britain full and ample remuneration for all losses, whether arising from detention or otherwise, to which American citizens have heretofore been or may hereafter be subjected by the exercise of rights which this Government can not recognize as legitimate and proper.
Id.
- ¹⁸³ *Id.* ("The report of the Secretary of the Navy will place you in possession of the present condition of that important arm of the national defense. Every effort will be made to add to its efficiency, and I can not too strongly urge upon you liberal appropriations to that branch of the public service. Inducements of the weightiest character exist for the adoption of this course of policy. Our extended and otherwise exposed maritime frontier calls for protection, to the furnishing of which an efficient naval force is indispensable.").
- ¹⁸⁴ *Id.*
- ¹⁸⁵ *Id.* ("Economy in all branches of the public service is due from all the public agents to the people, but parsimony alone would suggest the withholding of the necessary means for the protection of our domestic firesides from invasion and our national honor from disgrace. I would most earnestly recommend to Congress to abstain from all appropriations for objects not absolutely necessary; but I take upon myself, without a moment of hesitancy, all the responsibility of recommending the increase and prompt equipment of that gallant Navy which has lighted up every sea with its victories and spread an imperishable glory over the country.").
- ¹⁸⁶ See Ping Chia Kuo, *Caleb Cushing and the Treaty of Wanghia, 1844*, 5 J. MODERN HIST. 34, 34-54 (1933); Richard E. Welch, *Caleb Cushing's Chinese Mission and the Treaty of Wanghia: A Review*, 58 OR. HIST. Q. 328, 342 (1957).
- ¹⁸⁷ See Treaty of Peace, Amity and Commerce (Treaty of Wanghia), U.S.-China, July 3, 1844, 8 Stat. 592.
- ¹⁸⁸ Office of the Historian, *Milestones: 1830-1860: The Annexation of Texas, the Mexican-American War, and the Treaty of Guadalupe-Hidalgo, 1845-1848*, U.S. DEPARTMENT OF ST., <http://history.state.gov/milestones/1830-1860/TexasAnnexation> (last visited Mar. 4, 2012).

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- ¹⁸⁹ President James K. Polk, Inaugural Address (Mar. 4, 1845), in *INAUGURAL ADDRESSES*, *supra* note 20, at 99-110.
- ¹⁹⁰ Treaty with Great Britain, In Regard to Limits Westward of the Rocky Mountains (Oregon Treaty of 1846), U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869, *available at* http://www.oregontrackers.com/OregonTreaty_of_1846.html.
- ¹⁹¹ *See* Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.
- ¹⁹² Abraham Lincoln, Speech Against Mexican War (Jan. 12, 1848), in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 26-27 (Roy P. Basler ed., 1974) (“When the war began, it was my opinion that all those who, because of knowing too little, or because of knowing too much, could not conscientiously approve the conduct of the President, in the beginning of it, should, nevertheless, as good citizens and patriots, remain silent on that point, at least till the war should be ended [But upon examination I formed] the impression, that taking for true, all the President states as facts, he falls far short of proving his justification; and that the President would have gone farther with his proof, if it had not been for the small matter, that the truth would not permit him.”).
- ¹⁹³ President Zachary Taylor, Inaugural Address (Mar. 5, 1849), in *INAUGURAL ADDRESSES*, *supra* note 20, at 111-14.
- ¹⁹⁴ *Id.* at 113.
- ¹⁹⁵ *Id.* (“In the conduct of our foreign relations I shall conform to these views, as I believe them essential to the best interests and the true honor of the country.”).
- ¹⁹⁶ Convention Between the United States of America and Her Britannic Majesty (Clayton-Bulwer Treaty), U.S.-Gr. Brit., Apr. 19, 1850, 9 Stat. 995.
- ¹⁹⁷ *See* President Millard Fillmore, First Annual Message to Congress (Dec. 2, 1850), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=29491&st=fillmore&stl=#axzzlWo2idoeG>.
- ¹⁹⁸ *Id.*
- ¹⁹⁹ *Id.*
- ²⁰⁰ *Id.*
- ²⁰¹ *See id.* (“I invite your attention to the view of our present naval establishment and resources presented in the report of the Secretary of the Navy, and the suggestions therein made for its improvement, together with the naval policy recommended for the security of our Pacific Coast and the protection and extension of our commerce with eastern Asia. Our facilities for a larger participation in the trade of the East, by means of our recent settlements on the shores of the Pacific, are too obvious to be overlooked or disregarded.”).
- ²⁰² Pierce, *supra* note 20, at 115-24.


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203 *Id.*

204 Treaty of Amity and Commerce, U.S.-Japan, July 29, 1858, 12 Stat. 1051 [hereinafter Harris Treaty].

205 Pierce, *supra* note 20.

206 Gadsden Purchase Treaty (Treaty of La Mesilla), U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031, *available at* http://avalon.law.yale.edu/19th_century/mx1853.asp.

207 For thoughtful discussion of the failure of the United States to obtain Cuba from Spain through diplomatic channels, see generally AMOS ASCHBACH ETTINGER, *THE MISSION TO SPAIN OF PIERRE SOULE, 1853-1855: A STUDY IN THE CUBAN DIPLOMACY OF THE UNITED STATES* (1932). Navassa Island, Baker Island, and the Johnston Atoll, were all claimed under the terms of the Guano Islands Act, Aug. 18, 1856, 11 Stat. 119,  *ch. 164, § 1* (codified at 48 U.S.C. §§ 1411-19), which provides in pertinent part:

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

On November 18, 1857, an American sea captain, Peter Duncan, claimed Navassa under the Act for the United States. David P. Billington, Jr., *Note on the Legal History of Navassa Island*, DAVID P. BILLINGTON.NET, <http://www.davidpbillington.net/legal.html> (last visited Mar. 4, 2012). The Secretary of State replied on December 8, 1859, formally recognizing Navassa Island. *Id.* For confirmation of the other acquisitions, see *U.S. Territorial Acquisitions*, U.S. HIST., <http://www.u-s-history.com/pages/h1049.html> (last visited Feb. 27, 2012). The Guano Act continues to be in effect. See 48 U.S.C. §§ 1411-19 (2006).

208 Pierce, *supra* note 20, at 118 (emphasis added).

209 *Id.*

210 *Id.* at 119 (“The rights, security, and repose of this Confederacy reject the idea of interference or colonization on this side of the ocean by any foreign power beyond present jurisdiction as utterly inadmissible.”).

211 *Id.* at 119-20 (“The opportunities of observation furnished by my brief experience as a soldier confirmed in my own mind the opinion, entertained and acted upon by others from the formation of the Government, that the maintenance of large standing armies in our country would be not only dangerous, but unnecessary. They also illustrated the importance--I might well say the absolute necessity--of the military science and practical skill furnished in such an eminent degree by the institution which has made your Army what it is, under the discipline and instruction of officers not more distinguished for their solid attainments, gallantry, and devotion to the public service than for unobtrusive bearing and high moral tone. The Army as organized must be the nucleus around which in every time of need the strength of your military power, the sure bulwark of your defense--a national militia-- may be readily formed into a well-disciplined and efficient organization. And the skill and self-devotion of the Navy assure you that you may take the performance of the past as a pledge for the future, and may confidently expect that the flag which has waved its untarnished folds over every sea will still float in undiminished honor.”).

212 *See id.*

213 President Franklin Pierce, *Anticipated Invasion of Cuba-- President's Proclamation*, N.Y. DAILY TIMES, June 1, 1854, at 1.

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214 *Id.* (emphasis added).

215 See President James Buchanan, Inaugural Address (Mar. 4, 1857), in *INAUGURAL ADDRESSES*, *supra* note 20, at 130.

216 See U.S. CONST. art. I, § 8, cl. 11 (declare war); U.S. CONST. art. I, § 8, cl. 12 (raise and support armies); U.S. CONST. art. I, § 8, cl. 13 (provide and maintain a navy); U.S. CONST. art. I, § 8, cl. 15 (providing for calling forth the militia).

217 Buchanan, *supra* note 215, at 130.

218 *Id.* at 130-31 (“It might also be wise to consider whether the love for the Union which now animates our fellow-citizens on the Pacific Coast may not be impaired by our neglect or refusal to provide for them, in their remote and isolated condition, the only means by which the power of the States on this side of the Rocky Mountains can reach them in sufficient time to ‘protect’ them ‘against invasion.’”).

219 *Id.*

220 Pierce, *supra* note 20, at 115-24.

221 See *About Louis Kossuth*, AM. HUNGARIAN FED’N, [http:// www.americanhungarianfederation.org/news_kossuth.htm#about](http://www.americanhungarianfederation.org/news_kossuth.htm#about) (last visited Mar. 4, 2012) (“Kossuth was the first foreign Statesman officially invited to the US since the Marquis de Lafayette.”); cf. JOHN P. KAMINSKI, *LAFAYETTE: THE BOY GENERAL* 100 (2007) (discussing Lafayette’s appearance before Congress). On December 11, 1784, Lafayette became the first foreigner to address Congress. *Id.*

222 *About Louis Kossuth*, AM. HUNGARIAN FED’N, [http:// www.americanhungarianfederation.org/news_kossuth.htm#about](http://www.americanhungarianfederation.org/news_kossuth.htm#about) (last visited Mar. 15, 2012).

223 L. Kossuth, *American Interference in European Affairs--Prospects of Revolution The Peace Question, & Number 25*, N.Y. DAILY TIMES, Jan. 8, 1856, at 4.

224 *Id.* (emphasis added).

225 (Former) Secretary of Treasury James Guthrie’s Return to Louisville--His Address, N.Y. DAILY TIMES, Mar. 27, 1857, at 2 (emphasis added).

226 See *The Anniversaries, The Am. Abolition Soc’y*, N.Y. DAILY TIMES, May 15, 1857, at 1.

227 *Id.*

228 *The Republican Party and Our Relations with Mexico*, N.Y. DAILY TIMES, Mar. 29, 1960, at 2 (“The Republican Party is old enough, and has in it the conditions pre-requisite for a foreign as well as domestic policy; and while we are sure that none would be adopted for the regulation of our intercourse with our neighbors on this continent, which was not bottomed on the principles of

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humanity and justice, we are equally sure that, if that is wanting, the opposite policy of the Democracy--that which makes commerce, national security and humanity secondary to ... the extension of the area of slave territory--will prevail. For that reason, if for no other, we urge upon the Republican Senators ... the necessity for a careful survey of Mexican affairs.”).

229 See JOHN SIMPSON PENMAN, THE IRRESISTIBLE MOVEMENT OF DEMOCRACY 125 (1923).

230 Abraham Lincoln, Address to the Illinois Republican Party Convention (House Divided Speech) (June 16, 1858), *available at* [http:// www.historyplace.com/lincoln/divided.htm](http://www.historyplace.com/lincoln/divided.htm).

231 *Id.*

232 *Thanksgiving Day*, N. Y. DAILY TIMES, NOV. 24, 1859, at 4 (emphasis added).

233 *Sympathy with the South*, N.Y. DAILY TIMES, Dec. 10, 1859, at 4 (emphasis added).

234 *Id.*

235 Jefferson Davis delivered his *Inaugural Address* for the Confederacy on Feb. 18, 1861. President Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), *available at* http://avalon.law.yale.edu/19th_century/csa_csainau.asp. President Abraham Lincoln’s inauguration was held on Mar. 4, 1861. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* INAUGURAL ADDRESSES, *supra* note 20, 133-41.

236 Lincoln, *supra* note 235, at 136-37.

237 *Id.* at 137 (emphasis added).

238 *Id.* at 138 (“A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism.”).

239 *Display Ad 2--No Title*, N.Y. DAILY TIMES, 1861, at 5 (“Assembly to support the Union, ‘By order of 50,000 citizens’”).

240 *Id.*

241 President Andrew Johnson, First Annual Message (Dec. 4, 1865) [hereinafter Andrew Johnson, First Annual Message], *available at* [http:// www.presidency.ucsb.edu/ws/index.php?pid=29506#axzzlWo2idoeG](http://www.presidency.ucsb.edu/ws/index.php?pid=29506#axzzlWo2idoeG) (emphasis added).

242 See *id.* (“Whether the territory within the limit of [Confederate] States should be held as conquered territory, under military authority emanating from the President as the head of the Army, was the first question that presented itself for decision.”).

243 *Id.*

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- ²⁴⁴ See *id.* (“The willful use of such powers, if continued through a period of years, would have endangered the purity of the general administration and the liberties of the States which remained loyal.”).
- ²⁴⁵ *Id.*
- ²⁴⁶ *Id.* (“Once established, no precise limit to their continuance was conceivable. They would have occasioned an incalculable and exhausting expense.”).
- ²⁴⁷ *Id.*
- ²⁴⁸ President Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), *in* INAUGURAL ADDRESSES, *supra* note 20, at 145-48. Ulysses S. Grant turned all focus during his first term to restoring harmony, ensuring public credit, and re-engaging commerce. See President Ulysses S. Grant, Second Inaugural Address (Mar. 4, 1873) [hereinafter Grant, Second Inaugural Address], *in* INAUGURAL ADDRESSES, *supra* note 20, at 149-52. By his second term, the states “lately at war with the General Government” had been “[h]appily rehabilitated,” with no executive control exercised in any of them “that would not be exercised in any other State under like circumstances.” *Id.* at 150.
- ²⁴⁹ Hayes, *supra* note 137, at 155.
- ²⁵⁰ President James Garfield, Inaugural Address (Mar. 4, 1881), *in* INAUGURAL ADDRESSES, *supra* note 20, at 162.
- ²⁵¹ President Grover Cleveland, First Inaugural Address (Mar. 4, 1885) [hereinafter Cleveland, First Inaugural Address], *in* INAUGURAL ADDRESSES, *supra* note 20, at 170.
- ²⁵² *Id.* at 171 (“[H]e who takes the oath today to preserve, protect, and defend the Constitution of the United States only assumes the solemn obligation which every patriotic citizen--on the farm, in the workshop, in the busy marts of trade, and everywhere--should share with him. The Constitution which prescribes his oath, my countrymen, is yours; the Government you have chosen him to administer for a time is yours; the suffrage which executes the will of freemen is yours; the laws and the entire scheme of our civil rule, from the town meeting to the State capitals and the national capital, is yours.”).
- ²⁵³ President Grover Cleveland, Second Inaugural Address (Mar. 4, 1893), *in* INAUGURAL ADDRESSES, *supra* note 20, at 187, 192.
- ²⁵⁴ See *id.*
- ²⁵⁵ *Id.*
- ²⁵⁶ Andrew Johnson, First Annual Message, *supra* note 241.
- ²⁵⁷ *Id.* (“Our relations with the Emperor of China, so recent in their origin, are most friendly. Our commerce with his dominions is receiving new developments, and it is very pleasing to find that the Government of that great Empire manifests satisfaction with our policy and reposes just confidence in the fairness which marks our intercourse. The unbroken harmony between the United States and the Emperor of Russia is receiving a new support from an enterprise designed to carry telegraphic lines across the continent of Asia, through his dominions, and so to connect us with all Europe by a new channel of intercourse. Our commerce with South America is about to receive encouragement by a direct line of mail steamships to the rising Empire of Brazil A hope

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is entertained that our commerce with the rich and populous countries that border the Mediterranean Sea may be largely increased. Nothing will be wanting on the part of this Government to extend the protection of our flag over the enterprise of our fellow-citizens.”).

- 258 See, e.g., Cleveland, First Inaugural Address, *supra* note 251, at 172 (“The genius of our institutions, the needs of our people in their home life, and the attention which is demanded for the settlement and development of the resources of our vast territory dictate the scrupulous avoidance of any departure from that foreign policy commended by the history, the traditions, and the prosperity of our Republic. It is the policy of independence, favored by our position and defended by our known love of justice and by our power. It is the policy of peace suitable to our interests. It is the policy of neutrality, rejecting any share in foreign broils and ambitions upon other continents and repelling their intrusion here. It is the policy of Monroe and of Washington and Jefferson-- ‘Peace, commerce, and honest friendship with all nations; entangling alliance with none.’”); Harrison, *supra* note 137, at 180-81 (“We have happily maintained a policy of avoiding all interference with European affairs Our citizens domiciled for purposes of trade in all countries and in many of the islands of the sea demand and will have our adequate care in their personal and commercial rights.”).
- 259 See Harrison, *supra* note 137, at 177 (describing the efforts of European statesmen to prevent the United States’ economic growth).
- 260 *Id.*
- 261 *Id.*
- 262 *Id.*
- 263 JAY SEXTON, THE MONROE DOCTRINE: EMPIRE AND NATION IN NINETEENTH-CENTURY AMERICA 49, 53, 57 (2011).
- 264 Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, U.S.-Russ., art. I, Mar. 20, 1867, XV Stat. 539-41.
- 265 ODIE B. FAULK, THE GERONIMO CAMPAIGN 132-51 (1969).
- 266 See Letter from Thomas F. Bayard, to George H. Pendleton, Am. Minister in Berlin (Jan. 17, 1888), in 2 FOREIGN RELATIONS OF THE UNITED STATES: 1888, at 595-608 (1889) (discussing partition of the Samoan Islands).
- 267 See Letter from John L. Stevens, to John W. Foster, Sec’y of State (Nov. 20, 1892), in 2 FOREIGN RELATIONS OF THE UNITED STATES: 1894, app. II, at 383-88 (1895) (discussing Hawaiian Revolution of 1893).
- 268 Letter from Patrick Egan to James G. Blaine, Sec’y of State (Oct. 22, 1891), in 2 FOREIGN RELATIONS OF THE UNITED STATES: 1891, at 210 (1892).
- 269 President Benjamin Harrison, Message to Congress (Jan. 25, 1892), reprinted in 9 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 223-26 (James D. Richardson ed., 1898) (“In submitting these papers to Congress for that grave and patriotic consideration which the questions involved demand I desire to say that I am of the opinion that the demands made of Chile by this Government should be adhered to and enforced. If the dignity as well as the prestige and influence of the United States are not to be wholly sacrificed, we must protect those who in foreign ports display the flag or wear the colors of this

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Government against insult, brutality, and death inflicted in resentment of the acts of their Government and not for any fault of their own. It has been my desire in every way to cultivate friendly and intimate relations with all the Governments of this hemisphere It must, however, be understood that this Government, while exercising the utmost forbearance toward weaker powers, will extend its strong and adequate protection to its citizens, to its officers, and to its humblest sailor when made the victims of wantonness and cruelty in resentment not of their personal misconduct, but of the official acts of their Government”).

270 *Id.* at 227.

271 Letter from Richard Olney, Sec’y of State, to Thomas F. Bayard, U.S. Ambassador in London (July 20, 1895), in 1 FOREIGN RELATIONS OF THE UNITED STATES: 1895, at 545-58 (1896) (“By the frequent interposition of its good offices at the instance of Venezuela, by constantly urging and promoting the restoration of diplomatic relations between the two countries, by pressing for the arbitration of the disputed boundary [between Great Britain and Venezuela], by offering to act as arbitrator, by expressing its grave concern whenever new alleged instances of British aggression upon Venezuelan territory have been brought to its notice, the Government of the United States has made it clear to Great Britain and to the world that the controversy is one in which both its honor and its interests are involved and the continuance of which it can not regard with indifference That America is in no part open to colonization, though the proposition was not universally admitted at the time of its first enunciation, has long been universally conceded. We are now concerned, therefore, only with that other practical application of the Monroe doctrine the disregard of which by an European power is deemed an act of unfriendliness towards the United States The rule in question has but a single purpose and object. It is that no European power or combination of European powers shall forcibly deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies The states of America, South as well as North, by geographical proximity, by natural sympathy, by similarity of governmental constitutions, are friends and allies, commercially and politically, of the United States. To allow the subjugation of any of them by an European power is, of course, to completely reverse that situation and signifies the loss of all the advantages incident to their natural relations with us.”).

272 Grant, Second Inaugural Address, *supra* note 248, at 150.

273 *Id.*

274 Garfield, *supra* note 250, at 162.

275 Harrison, *supra* note 137, at 175-86.

276 55 CONG. REC. 2916, 2916-19 (quoting Senator Proctor, “Conditions [confronting Cuban refugees] are unmentionable Torn from their homes, with foul earth, foul air, foul water, and foul food or none, what wonder that one-half have died and that one-quarter of the living are so diseased that they can not be saved Little children are still walking about with arms and chest terribly emaciated, eyes swollen, and abdomen bloated to three times the natural size. The physicians say these cases are hopeless. Deaths in the streets have not been uncommon.” Proctor continued, “[O]ut of a population of 1,600,000, two hundred thousand had died within these Spanish forts, practically prison walls, within a few months past from actual starvation and diseases caused by insufficient and improper food.”).

277 President William McKinley, First Inaugural Address (Mar. 4, 1897), in INAUGURAL ADDRESSES, *supra* note 20, at 199 (hereinafter McKinley, First Inaugural Address).

278 *Id.* at 200.

279 *Id.*

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- ²⁸⁰ Naval History and Heritage Command, *The Destruction of USS Maine*, DEPARTMENT OF THE NAVY, <http://www.history.navy.mil/faqs/faq71-l.htm> (last visited Mar. 4, 2012).
- ²⁸¹ 9 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, *supra* note 269, at 147-48.
- ²⁸² *See* Navy Act of 1890, ch., 640, 26 Stat. 189.
- ²⁸³ *See, e.g.*, Fred W. Gaudlip, Vision to Victory--Space, Mahan, and Mitchell: The Role of the Visionary in Cross-Organizational Innovation 8-9 (2001), <http://www.au.af.mil/au/awc/awcgate/saas/gaudlip.pdf> (unpublished M.A. thesis, School of Advanced Airpower Studies, Air University (United States Air Force)).
- ²⁸⁴ For a collection of his writings, see MAHAN ON NAVAL WARFARE: SELECTIONS FROM THE WRITINGS OF REAR ADMIRAL ALFRED T. MAHAN (1999).
- ²⁸⁵ *See* ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY: 1660-1783, at 81-88 (1890) (hereinafter MAHAN, THE INFLUENCE OF SEA POWER).
- ²⁸⁶ *Id.* at 87 n.1.
- ²⁸⁷ *Id.*
- ²⁸⁸ *Id.*
- ²⁸⁹ Theodore Roosevelt, *Books Reviewed: Captain A.T. Mahan: THE INFLUENCE OF SEA POWER UPON HISTORY: 1660-1783*, 66 ATLANTIC MONTHLY 563, 564 (1890).
- ²⁹⁰ *Id.*
- ²⁹¹ *Id.* at 567.
- ²⁹² *Id.*
- ²⁹³ For a thoughtful treatment of the causes, consequences, and conduct of the Spanish American War, see CRUCIBLE OF EMPIRE: THE SPANISH-AMERICAN WAR AND ITS AFTERMATH (James C. Bradford ed., 1993).
- ²⁹⁴ *See* Treaty of Peace, U.S.-Spain, art. I-III, Dec. 10, 1898, 30 Stat. 1754.
- ²⁹⁵ *Id.*
- ²⁹⁶ *See generally* ALLAN NEVINS, THE EMERGENCE OF MODERN AMERICA, 1865-1878 (1941) (discussing how agriculture

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gave way to industry in the post-bellum period); ANDREW CARNEGIE, THE EMPIRE OF BUSINESS 291-302 (1903) (discussing the management of railroads); *History of the United States: Continued, Page 5*, INT'L WORLD HISTORY PROJECT, http://history-world.org/history_of_the_united_states5.htm (last visited Mar. 15, 2012) ("Corporations introduced new styles of management, or business organization. The railroads, which needed to manage crews, fuel, repairs, and train schedules over large areas, were the first to develop new management techniques.").

297 MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901, at 348-56 (1962).

298 President Andrew Jackson, Fifth Annual Message to Congress (Dec. 3, 1833), in 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 269, at 30.

299 President Martin Van Buren, First Annual Message to Congress (Dec. 5, 1837), in 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 269, at 381.

300 Letter from President Abraham Lincoln to Col. William F. Elkins (Nov. 21, 1864), in ARCHER H. SHAW, THE LINCOLN ENCYCLOPEDIA 40 (1950).

301 HANS LOUIS TREFOUSSE, RUTHERFORD B. HAYES 58 (2002) ("The year 1872 saw the Liberal Republicans' revolt against the Grant administration, provoked by its efforts to annex the Dominican Republic, its failure to carry out civil service reforms, and its dependence on corrupt political machines."); YANEK MIECZKOWSKI, THE ROUTLEDGE HISTORICAL ATLAS OF PRESIDENTIAL ELECTIONS 61, 63 (2001) ("A large contingent of Republicans was disillusioned with the Grant scandals These disgruntled 'Liberal Republicans' were high-minded, erudite men who wanted reform and believed that government deserved better men than Grant and his ilk. Decrying 'Grantism,' a term that became synonymous with graft and corruption, they broke away ... the election of 1876 turned out to be the most drawn-out in American history Ulysses S. Grant ... wanted to run for a third term, but the Republicans would not hear of it Grant's sorry record of scandals would have made him a liability for the Republicans. What they needed was a man of unimpeachable integrity The country was offended by the corruption of the Grant administration.").

302 President Grover Cleveland, Annual Address to Congress (Dec. 3, 1888).



303 Letter from John Altgeld, Governor, Ill., to Grover Cleveland, President of the U.S. (July 6, 1894), in THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895, at 84 (2d ed. 1895) [hereinafter THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895], available at <http://hdl.handle.net/2027/mdp.39015026439961?urlappend=%3Bseq=90.85> (referencing the first federal military interference in a labor dispute).

304 See Theresa Ann Case, *Labor Upheaval on the Nation's Railroads, 1877-1922*, in THE ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY, 490-94 (Aaron Brenner, Benjamin Day & Immanuel Ness eds., 2009).

305 *Id.* at 492 ("By July 10, nearly 2,000 troops were in Chicago to aid the railroads in restoring freight traffic Soldiers were also sent to Los Angeles, Raton (New Mexico), Trinidad (Colorado), and many other towns to enforce the approximately 100 orders against the ARU and other unions engaged in the strike.").

306 See Law of July 29, 1861, ch. 25, 12 Stat. 281 (revising the basic laws of 1795 and 1807 dealing with the domestic use of the military to respond to civil disorder).

307 *Id.*

- ³⁰⁸ See *id.* (“[W]henver, in the judgment of the President, it may be necessary to use military force hereby directed to be employed and called forth by him, the President shall forthwith, by proclamation, command such insurgents to disperse and retire peaceably to their respective abodes, within a limited time.”); *The Pullman Boycott*, in *THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895*, *supra* note 303, at 84-85 (discussing the chronology of events and President Cleveland’s actions); see also G. NORMAN LIEBER, *THE USE OF THE ARMY IN AID OF THE CIVIL POWER* 27 (1898) (noting that President Cleveland used the military before issuing the proclamation).
- ³⁰⁹ Letter from John Altgeld, Governor, Ill., to President Grover Cleveland (July 5, 1894), in *THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895*, *supra* note 303, at 83.
- ³¹⁰ *Id.*
- ³¹¹ *Id.* (“Each community should govern itself so long as it can and is ready and able to enforce the law, and it is in harmony with this fundamental principle that the statute authorizing the president to send troops into states must be construed. Especially is this so in matters relating to the exercise of the police power and the preservation of law and order. To absolutely ignore a local government in matters of this kind when the local government is ready to furnish assistance needed and is amply able to enforce the law, not only insults the people of this state by imputing to them an inability to govern themselves or an unwillingness to enforce the law, but is in violation of a basic principle of our institutions. The question of federal supremacy is in no way involved.”).
- ³¹² Letter from Grover Cleveland, President of the U.S., to John P. Altgeld, Governor, Ill. (July 5, 1894), in *THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895*, *supra* note 303, at 83.
- ³¹³ *Id.*
- ³¹⁴ Letter from William H.H. Miller, Ex-Att’y Gen., to Richard Olney, Att’y Gen. (July 11, 1894), in LIEBER, *supra* note 308, at 15 n.1.
- ³¹⁵ See LIEBER, *supra* note 308, at 37 (discussing how the Take Care Clause supports presidential power).
- ³¹⁶ In re  Neagle, 39 F. 833, 859-60 (C.C.N.D. Cal. 1889), *aff’d sub nom.*  *Cunningham v. Neagle*, 135 U.S. 1 (1890); see also LIEBER, *supra* note 308, at 40 n.2, 55 (“The President’s constitutional duty to take care that the laws are faithfully executed must be carried out by the means placed in his hands by or under the Constitution.”).
- ³¹⁷ See Miller, *supra* note 314; see also U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art. II, § 3, cl. 4.
- ³¹⁸ See U.S. CONST. art. IV, § 4, cl. 2 (“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.”); see also LIEBER, *supra* note 308, at 29.
- ³¹⁹ LIEBER, *supra* note 308, at 32 (“[I]t can not be said, nor would it be practicable, nor as to the guaranty against domestic violence historically true, that the guaranties against invasion and domestic violence are exclusively in the hands of Congress. To hold that would be to destroy the value of these guarantees. They are not limited in time to the sessions of Congress, but are intended to be effective at all times. Who, then, is to furnish the guaranty when Congress is not in session?”).

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320 See U.S. CONST. art. II, § 2, cl. 1.

321 Letter from John P. Altgeld, Governor, Ill., to Grover Cleveland, President of the U.S. (July 6, 1894), in THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895, *supra* note 303, at 84.

322 *Id.*

323 See *id.*

324 *Id.*

325 *Id.*

326 *Id.*

327 Letter from President Grover Cleveland to John P. Altgeld, Governor, Ill. (July 6, 1894), in THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895, *supra* note 303, at 84.

328 See Case, *supra* note 304, at 493.

329 See President Grover Cleveland, Proclamation (July 8, 1894) [hereinafter Cleveland, Proclamation], http://darrow.law.umn.edu/documents/Proclamations_Pres_Cleveland_1894.pdf.

330 *Id.*

331 *Id.*

332 See *id.*

333 Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1038 (1988).

334 An Act to Regulate Commerce (Interstate Commerce Act), ch. 104, 24 Stat. 379 (1887) (prior to 1935 amendment).

335 See *id.*

336 Harrison, *supra* note 137.

337 See, e.g., Richard T. Ely, *Past and Present Political Economy*, in JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORY AND POLITICAL SCIENCE (1884) (questioning the premise that individuals are solely motivated by self interest and suggesting that the laissez-faire system had failed). The year after Ely published his treatise, the American Economics Association formed in

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concurrence with a statement of principles drafted by Ely: “While we recognize the necessity of individual initiative in industrial life, we hold that the doctrine of laissez faire is unsafe in politics and unsound in morals; and that it suggests an inadequate explanation of the relations between the state and the citizens.” NANCY COHEN, *THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865-1914*, at 165 (2002).

338 See, e.g., Karl Marx, *Third Manuscript: Private Property and Communism*, in *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* (Martin Milligan trans., Progress Publishers 1959) (1932), available at <http://www.marxists.org/archive/marx/works/download/pdf/Economic-Philosophic-Manuscripts-1844.pdf>.

339 See generally ALEX BUTTERWORTH, *THE WORLD THAT NEVER WAS: A TRUE STORY OF DREAMERS, SCHEMERS, ANARCHISTS, AND SECRET AGENTS* (2011).

340 See Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777 (1955); Leon Czolgosz (1873-1901) and President William McKinley, 14 September 1901, INT’L INST. OF SOC. HIST., <http://www.iisg.nl/collections/anarchist-assaults/czolgosz.php> (last updated Aug. 23, 2011).

341 Brian Doherty, *The First War on Terror: What the Fight Against Anarchism Tells Us About the Fight Against Radical Islam*, REASON MAG., Jan. 2011, <http://reason.com/archives/2010/12/17/the-first-war-on-terror/singlepage> (reviewing BUTTERWORTH, *supra* note 339).

342 Garfield, *supra* note 250.

343 *Id.*

344 McKinley, First Inaugural Address, *supra* note 277, at 198.

345 See Office of the Historian, *Biographies of the Secretaries of State: William Jennings Bryan*, U.S. DEPARTMENT OF ST., <http://history.state.gov/departmenthistory/people/bryan-william-jennings> (last visited Feb. 19, 2012) (discussing Bryan’s accomplishment of negotiating peace treaties through arbitration).

346 The Senate vote on the Arbitration Treaty with Great Britain registered forty-three in favor and twenty-six against, leaving it three votes shy of the two-thirds majority required to ratify treaties. See S. JOURNAL, 30TH CONG, 55 SESS. (1897).

347 Treaty, U.S.-Gr. Brit., Jan. 11, 1897 (not ratified), *reprinted in* FOREIGN RELATIONS OF THE UNITED STATES: 1896, at 238-40 (1897).

348 Under Hay’s guidance, the United States reached arbitration agreements with France, Switzerland, Germany, Portugal, Great Britain, Italy, Spain, Austria-Hungary, Mexico, and Sweden and Norway. *Arbitration, Mediation, and Conciliation--The Hague Peace Conferences*, ENCYCLOPEDIA OF THE NEW AM. NATION, <http://www.americanforeignrelations.com/A-D/Arbitration-Mediation-and-Conciliation-The-hague-peace-conferences.html#b> (last visited Mar. 15, 2012). See *Arbitration Treaty: United States and Portugal*, THE ARGUS (Melbourne, Vict.), Nov. 25, 1905, at 5, available at <http://trove.nla.gov.au/ndp/del/article/10352137>; *Britain and America: Arbitration Treaty*, THE ADVERTISER (Adelaide, S. Austl.), Nov. 2, 1904, at 7, available at <http://trove.nla.gov.au/ndp/del/article/5029296>; *Anglo-American Arbitration*, THE MERCURY (Hobart, Tas.), Nov. 2, 1904, at 3, available at <http://trove.nla.gov.au/ndp/del/article/9390758?searchTerm=an%20anglo-american%20arbitration&searchLimits=>.

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- 349 Taft initiated a new set of treaties in August 1911, beginning with agreements with France and Great Britain. U.S. DEPARTMENT OF ST., PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS 189-97, 247-73 (1911), *available at* <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1911>. Complex documents, the Senate quickly made mincemeat out of them before Taft formally withdrew them. John P. Campbell, *Taft, Roosevelt, and the Arbitration Treaties of 1911*, 53 J. AM. HIST. 279, 287 (1966); *see also The Nobel Peace Prize 1912: Elihu Root*, THE OFFICIAL WEB SITE OF THE NOBEL PRIZE (Mar. 8, 2012), [http://www.nobelprize.org/nobel_prizes/peace/laureates/1912/root.html? print=1](http://www.nobelprize.org/nobel_prizes/peace/laureates/1912/root.html?print=1) (crediting Root with negotiating forty reciprocal arbitration treaties).
- 350 *See William Jennings Bryan, WOODROW WILSON HOUSE*, <http://www.woodrowwilsonhouse.org/timeline/ImageDisplay.asp?ID=13> (last visited Oct. 26, 2011); *see also* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ADDRESS OF THE PRESIDENT TO CONGRESS 8(1913), *available at* <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1913> ("The parties hereto agree that all questions of whatever character and nature, in dispute between them, shall, when diplomatic efforts fail, be submitted for investigation and report to an international commission (the composition to be agreed upon); and the contracting parties agree not to declare war or begin hostilities until such investigation is made and report submitted.").
- 351 *William Jennings Bryan, supra* note 350.
- 352 *See* First Peace Conference of The Hague, art. 20, 21, 24, July 29, 1899, 32 Stat. 1839.
- 353 *See id.*
- 354 *See id.*
- 355 *See id.*
- 356 *See id.* The Second Hague Conference, which met in 1907, was much less successful in forging international agreement. John Q. Barrett, *The Path from the 1907 Hague Conference to Nuremberg and Forward*, in PROCEEDINGS OF THE FIRST INTERNATIONAL HUMANITARIAN LAW DIALOGS 9-54 (Elizabeth Andersen & David M. Crane eds., 2008), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cts=1331217635677&ved=0CFoQFjAI&url=http%3A%2F%2Fwww.stjohns.edu%2Fdownload.axd%2Ffa3a7110f759c41c3a5c456e6265996c3.pdf%3Fd%3DHague%2520ASIL%25201ecmre&ei=ZsNYT8raOc6F0QGAhZi5Dw&usq=AFQjCNHgiUA5SVgq7tBWhQmlOLpfK2PeA&sig2=ZrXz0EYEcxzKeTVyrZsPKQ>. In part, this was due to looming tensions that would lead to the First World War. *See id.* Roosevelt, concerned about Japan's posture, sent a fleet to the Far East. *See* Mike McKinley, Naval History and Heritage Command, *The Cruise of the Great White Fleet*, DEPARTMENT OF THE NAVY, http://www.history.navy.mil/library/online/gwf_cruise.htm (last visited Mar. 4, 2012). The United States sponsored only a minor convention, which came to be known as the Porter Resolution (named for the U.S. ambassador to France, General Horace Porter). *See* W. Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration*, 73 LAW & CONTEMP. PROBS. 335, 340. The resolution narrowly required that the party-states not use armed force to recover monies owed from another country, unless the other country refused arbitration or blocked efforts to obtain a compromise. *See* THE SECOND HAGUE PEACE CONFERENCE, S. DOC. NO. 60-433 (1st Sess. 1908) (discussing the results of the Convention).
- 357 *See* Eugene Staley, *Mannesmann Mining Interests and the Franco-German Conflict over Morocco*, 40 J. OF POL. ECON. 52, 52 (1932) (discussing the international crisis that resulted from the Morocco crisis).

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- ³⁵⁸ See generally Paul Baepler, *Rewriting the Barbary Captivity Narrative: The Perdicaris Affair and the Last Barbary Pirate*, 24 PROSPECTS 177-211 (1999). Perdicaris's captivity was later recounted by John Millius in his 1975 film, THE WIND AND THE LION (Warner Brothers 1975).
- ³⁵⁹ Staley, *supra* note 357.
- ³⁶⁰ *Id.*
- ³⁶¹ See *Morocco: Diplomatic Intrigues Under Roosevelt*, U.S. HIST., <http://www.u-s-history.com/pages/h889.html> (last visited Mar. 7, 2012).
- ³⁶² Letter from President Theodore Roosevelt to Whitelaw Reid, Ambassador (Apr. 28, 1906), in 5 LETTERS OF THEODORE ROOSEVELT 240 (Elting E. Morison et al. eds., 1951) [hereinafter LETTERS OF THEODORE ROOSEVELT].
- ³⁶³ *Id.*
- ³⁶⁴ General Act of the International Conference of Algeciras, Apr. 7, 1906, 34 Stat. 2905 ("The Government of the United States of America, having no political interest in Morocco and no desire or purpose having animated it to take part in this conference other than to secure for all peoples the widest equality of trade and privilege with Morocco ... declares that, in acquiescing in the regulations and declarations of the conference ... it does so without assuming obligation or responsibility for the enforcement thereof.").
- ³⁶⁵ See Treaty of Peace, U.S.-Spain, art. 1-3, Dec. 10, 1898, 30 Stat. 1754.
- ³⁶⁶ President William McKinley, Second Inaugural Address (Mar. 4, 1901), in INAUGURAL ADDRESSES, *supra* note 20, at 203-08 (raising question of what to do about the Philippines).
- ³⁶⁷ See, e.g., Letter from John Hay to the U.S. Ambassador in St. Petersburg (Sept. 6, 1899), in FOREIGN RELATIONS OF THE UNITED STATES: 1899, at 140-42 (1901).
- ³⁶⁸ See *id.*
- ³⁶⁹ Letter from John Hay to American Representatives in Major Capitals (July 3, 1900), in FOREIGN RELATIONS OF THE UNITED STATES: 1901 app. at 12 (1902) ("[T]he policy of the Government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire."). U.S. policy towards China over the next four decades, though, proved somewhat irregular: unwilling to back up its claims with force, the United States' economic advance and retreat proved sensitive to interstate politics.
- ³⁷⁰ See Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty), U.S.-Pan., Nov. 18, 1903, 33 Stat. 2234.
- ³⁷¹ See *id.*

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372 *See id.*

373 *Id.* at art. 2.

374 *See* Mark T. Gilderhus, *The Monroe Doctrine: Meanings and Implications*, 36 PRESIDENTIAL STUD. Q. 5, 5-16(2006).

375 Letter from Theodore Roosevelt, Gov., to Henry L. Sprague (Jan. 26, 1900), available at <http://www.loc.gov/exhibits/treasures/trml39.html>.

376 *Theodore Roosevelt 1901-1909*, WHITE HOUSE, [http:// www.whitehouse.gov/about/presidents/theodoreroosevelt](http://www.whitehouse.gov/about/presidents/theodoreroosevelt) (last visited Oct. 25, 2011).

377 *See* Permanent Treaty with the United States, U.S.-Cuba, 33 Stat. 2248, reprinted in 6 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1116-19 (Charles I. Bevans ed., 1968).

378 *Id.* at 1116.

379 *Id.* at art. 1.

380 *Id.* at art. 3.

381 *Id.* at art. 4.

382 *See* F. W. Gibson, *The Alaskan Boundary Dispute*, 24 REP. ANN. MEETING CAN. HIST. ASS'N 25, 34 (1945) (describing Roosevelt's open willingness to use force if necessary for a favorable outcome).

383 *Id.* at 26.

384 *The Boer War*, NAT'L ARCHIVES AUSTL., [http:// www.naa.gov.au/collection/fact-sheets/fs67.aspx](http://www.naa.gov.au/collection/fact-sheets/fs67.aspx) (last visited Oct. 28, 2011).

385 *See* Gibson, *supra* note 382, at 32-33 (noting the presence of American troops on the boundary contributed to Britain agreeing to arbitration).

386 *Id.* at 33.

387 *Id.*

388 Letter from President Theodore Roosevelt to Arthur Lee (Dec. 7, 1903), in 3 LETTERS OF THEODORE ROOSEVELT, *supra* note 362, at 665-66.

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- 389 President Theodore Roosevelt, State of the Union Address (Dec. 6, 1904), in 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS: 1790-1966, at 2134 (Fred L. Israel ed., 1966); *see also id.* at 2134-35.
- 390 *Id.* at 2135 (“In asserting the Monroe Doctrine, in taking such steps as we have taken in regard to Cuba, Venezuela, and Panama, and in endeavoring to circumscribe the theater of war in the Far East, and to secure the open door in China, we have acted in our own interest as well as in the interest of humanity at large.”)
- 391 *Id.*
- 392 President Theodore Roosevelt, Inaugural Address (Mar. 4, 1905) [hereinafter Theodore Roosevelt, Inaugural Address], in INAUGURAL ADDRESSES, *supra* note 20, at 209-12 (“We wish peace, but we wish the peace of justice, the peace of righteousness. We wish it because we think it is right and not because we are afraid.”).
- 393 *Id.*
- 394 *Id.*
- 395 Starting in the 1890s, navalists became convinced of the need for a canal to protect U.S. commercial interests and to unite the U.S. fleets on the two coasts in the event of war. *See, e.g.*, MAHAN, INFLUENCE OF SEA POWER, *supra* note 285, at 26 (emphasizing the importance of being able to quickly move the fleet to shift power, thus underscoring the importance of the Isthmian Canal). The Caribbean would become an “American lake,” around which subservience to European powers would not be tolerated. Epharaim R. McLean, *The Caribbean--An American Lake*, 67 U.S. NAVAL INST. PROCEEDINGS 947-60 (1941). It was time for the United States to use its strength to shape international political, economic, and military matters: “Upon the success of our experiment ... much depends, not only as regards our own welfare, but as regards the welfare of mankind. If we fail, the cause of free self-government throughout the world will rock to its foundations, and therefore our responsibility is heavy, to ourselves, to the world as it is to-day, and to the generations yet unborn.” Theodore Roosevelt, Inaugural Address, *supra* note 392, at 209-12.
- 396 Letter from President Theodore Roosevelt to Cecil Spring “Springy” Rice (July 24, 1905), in 3 LETTERS OF THEODORE ROOSEVELT, *supra* note 362, at 1283-86.
- 397 Julia H. Macleod, *Jefferson and the Navy: A Defense*, 8 HUNTINGTON LIBR. Q. 153, 153 (1945) (discussing the widespread criticism of “Jeffersonian policy” regarding the Navy).
- 398 ARTHUR HERMAN, TO RULE THE WAVES: HOW THE BRITISH NAVY SHAPED THE MODERN WORLD 441-70 (2004).
- 399 *See American President: A Reference Resource*, MILLER CENTER, <http://millercenter.org/president/roosevelt/essays/biography/5> (last visited Mar. 10, 2012) (discussing Roosevelt’s increased use of the military and his belief that a strong military was the key to national defense).
- 400 Taft, *supra* note 137, at 213-26.
- 401 *Id.* at 217-18.

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- 402 *Id.* at 218 (“[W]e should be blind to existing conditions and should allow ourselves to become foolish idealists if we did not realize that, with all the nations of the world armed and prepared for war, we must be ourselves in a similar condition, in order to prevent other nations from taking advantage of us and of our inability to defend our interests and assert our rights with a strong hand.”).
- 403 *Id.*
- 404 *Id.*
- 405 BRUCE S. JANSSON, THE RELUCTANT WELFARE STATE: ENGAGING HISTORY TO ADVANCE SOCIAL WORK PRACTICE IN CONTEMPORARY SOCIETY 98 (2009).
- 406 *See* President Woodrow Wilson, First Inaugural Address (Mar. 4, 1913), *in* INAUGURAL ADDRESSES, *supra* note 20, at 229.
- 407 *Id.*
- 408 *Id.*
- 409 *Id.* at 230.
- 410 *See* 1 6A AM. JUR. 2D *Constitutional Law* § 336 (describing the police power of the states).
- 411 WOODROW WILSON, AMERICAN NEUTRALITY: AN APPEAL BY THE PRESIDENT OF THE UNITED STATES TO THE CITIZENS OF THE REPUBLIC, REQUESTING THEIR ASSISTANCE IN MAINTAINING A STATE OF NEUTRALITY DURING THE PRESENT EUROPEAN WAR (DECLARATION OFF NEUTRALITY), S. Doc. No. 63-566, at 3-4 (1914).
- 412 *Id.*
- 413 *Id.*
- 414 *See To Investigate and Make Report as to the Officers, Membership, Financial Support, Expenditures, General Character, Activities, and Purposes of the National Security League, a Corporation of New York, and of Any Associated Organizations: Hearing on H.R. 469 and H.R. 476 Before a Special Comm. of the H.R., 65th Cong. 4-5 (1918) [hereinafter 1918 Hearing]; see also To Investigate and Make Report as to the Officers, Membership, Financial Support, Expenditures, General Character, Activities, and Purposes of the National Security League, a Corporation of New York, and of Any Associated Organizations: Hearing on H.R. 469 and H. R. 476 Before a Special Comm. of the H.R., 65th Cong. (1919) [hereinafter 1919 Hearing].*
- 415 1919 Hearing, *supra* note 414; 1918 Hearing, *supra* note 414.
- 416 1918 Hearing, *supra* note 414.
- 417 *See id.*

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- 418 *Id.* at 102-03 (estimating the NSL's membership in 1918 at some 85,000 people). The NSL declared bankruptcy in 1939. JOHN CARVER EDWARDS, PATRIOTS IN PINSTripES: MEN OF THE NATIONAL SECURITY LEAGUE 137 (1982). In 1940, the organization burned its archives. *Id.* For review of some of the few remaining primary documents providing details on the inner workings of the NSL, see generally ARTHUR L. FROTHINGHAM, HANDBOOK OF WAR FACTS AND PEACE PROBLEMS (PATRIOTISM THROUGH EDUCATION ORGANIZED EDUCATION SERIES) (1919); ALBERT BUSHNELL HART, AMERICA AT WAR: A HANDBOOK OF PATRIOTIC EDUCATION REFERENCES (1918).
- 419 *See, e.g.*, 1919 Hearing, *supra* note 414; 1918 Hearing, *supra* note 414.
- 420 1918 Hearing, *supra* note 414, at 516 (questioning whether the NSL was criticizing the President during the war).
- 421 The Espionage Act of 1917 and the Sedition Act of 1918 themselves can be seen as further attempts by Congress to shore up national power in the context of war.
- 422 Niall Ferguson, *Sinking Globalization*, FOREIGN AFF., Mar.-Apr. 2005, available at <http://www.foreignaffairs.com/articles/60622/niall-ferguson/sinking-globalization>.
- 423 FOREIGN MINISTER GOTTLIEB VON JAGOW, THE SINKING OF THE LUSITANIA--OFFICIAL GERMAN RESPONSE (1915), available at http://www.firstworldwar.com/source/lusitania_germanresponse.htm ("The Government of the United States proceeds on the assumption that the *Lusitania* is to be considered as an ordinary unarmed merchant vessel. The Imperial Government begs in this connection to point out that the *Lusitania* was one of the largest and fastest English commerce steamers, constructed with Government funds as auxiliary cruisers, and is expressly included in the navy list published by the British Admiralty. It is, moreover, known to the Imperial Government from reliable information furnished by its officials and neutral passengers that for some time practically all the more valuable English merchant vessels have been provided with guns, ammunition and other weapons, and reinforced with a crew specially practiced in manning guns. According to reports at hand here, the *Lusitania* when she left New York undoubtedly had guns on board which were mounted under decks and masked In taking them on board in spite of this the company quite deliberately tried to use the lives of American citizens as protection for the ammunition carried, and violated the clear provisions of American laws which expressly prohibit, and provide punishment for, the carrying of passengers on ships which have explosives on board.").
- 424 *See* Letter from A.J. Peters, Ass't. Sec'y of the Treasury, to Robert Lansing, Counselor of the U.S. Dep't of State (May 8, 1915), in 2 POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR 307-08 (Carlton Savage, ed. 1934) [hereinafter POLICY OF THE UNITED STATES].
- 425 *See* Letter from Walter Hines Page, Ambassador, to Robert Lansing, Counselor of the U.S. Dep't of State (May 8, 1915), in 2 POLICY OF THE UNITED STATES, *supra* note 424, at 308-09.
- 426 *Id.*
- 427 *Id.*
- 428 It was not until April 2, 1917 that President Woodrow Wilson called on Congress to declare war upon Germany--nearly two years after the sinking of the *Lusitania*. President Woodrow Wilson, Speech to Congress (Apr. 2, 1917), available at <http://www.firstworldwar.com/source/usawardeclaration.htm>. Four days after Wilson's speech, the United States formally entered the war. Joint Resolution Declaring that a State of War Exists Between the Imperial German Government and the Government and the People of the United States and Making Provision to Prosecute the Same (Apr. 6, 1917), available at <http://www.firstworldwar.com/source/usofficialawardeclaration.htm>; *see also* BURTON JESSE HENDRICK ET AL., 2 THE LIFE

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AND LETTERS OF WALTER H. PAGE 48-49 (1922) (expressing frustration with the American inaction following the *Lusitania* incident).

429 LAWRENCE W. LEVINE, DEFENDER OF THE FAITH: WILLIAM JENNINGS BRYAN, THE LAST DECADE: 1915-1925, at 14-16 (1987). Bryan wrote in his resignation letter,
Obedient to your sense of duty and actuated by the highest motives, you have prepared for transmission to the German Government a note in which I cannot join without violating what I deem to be an obligation to my country, and the issue involved is of such moment that to remain a member of the Cabinet would be as unfair to you as it would be to the cause which is nearest my heart, namely, the prevention of war
Id. at 16.

430 *See* Letter from Johann von Bernstorff, Ger. Ambassador, to William Jennings Bryan, Sec’y of State (Sept. 1, 1915), in 2 POLICY OF THE UNITED STATES, *supra* note 424, at 378 (“Liners will not be sunk by our submarines without warning and without safety of the lives of noncombatants, provided that the liners do not try to escape or offer resistance.”).

431 *See* Diplomatic Note from Johann von Bernstorff, Ger. Ambassador, to Robert Lansing, Sec’y of State (Jan. 31, 1917), *available at* [http:// www.firstworldwar.com/source/uboot_bernstorff.htm](http://www.firstworldwar.com/source/uboot_bernstorff.htm) (“[T]he Imperial Government-- in order to serve the welfare of mankind in a higher sense and not to wrong its own people--is now compelled to continue the fight for existence, again forced upon it, with the full employment of all the weapons which are at its disposal.”).

432 *See id.*; Theobald von Bethmann-Hollweg, Address to the Reichstag on German Policy of Unrestricted U-boat Warfare (Jan. 31, 1917), *available at* http://www.firstworldwar.com/source/uboot_bethmann.htm (“[T]he most important fact of all is that the number of our submarines has very considerably increased as compared with last spring, and thereby a firm basis has been created for success.”).

433 *See generally* BARBARA W. TUCHMAN, THE ZIMMERMANN TELEGRAM 201 (1958) (quoting the text in full).

434 *See id.*

435 *Id.*

436 *See id.*

437 President Woodrow Wilson, Second Inaugural Address (Mar. 5, 1917), in INAUGURAL ADDRESSES, *supra* note 20, at 232-36.

438 *Id.* (“We have been obliged to arm ourselves to make good our claim to a certain minimum of right and of freedom of action. We stand firm in armed neutrality since it seems that in no other way we can demonstrate what it is we insist upon and cannot forget.”).

439 *Id.* (“Our own fortunes as a nation are involved whether we would have it so or not.”).

440 *Id.* (“That all nations are equally interested in the peace of the world and in the political stability of free peoples, and equally responsible for their maintenance; that the essential principle of peace is the actual equality of nations in all matters of right or privilege; that peace cannot securely or justly rest upon an armed balance of power; that governments derive all their just powers from the consent of the governed and that no other powers should be supported by the common thought, purpose or power of the family of nations; that the seas should be equally free and safe for the use of all peoples, under rules set up by common agreement

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and consent, and that, so far as practicable, they should be accessible to all upon equal terms; that national armaments shall be limited to the necessities of national order and domestic safety; that the community of interest and of power upon which peace must henceforth depend imposes upon each nation the duty of seeing to it that all influences proceeding from its own citizens meant to encourage or assist revolution in other states should be sternly and effectually suppressed and prevented.”).

441 55 CONG. REC. 101, 103 (1917) (quoting President Woodrow Wilson) (“With a profound sense of the solemn and even tragical character of the step I am taking and of the grave responsibilities which it involves, but in unhesitating obedience to what I deem my constitutional duty, I advise that the Congress declare the recent course of the Imperial German Government to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put the country in a more thorough state of defense but also to exert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war.”).

442 *Id.*

443 *Id.*

444 *Id.* at 104.

445 *Id.* (emphasis added).

446 *Id.*

447 President Woodrow Wilson, President Wilson’s Fourteen Points Delivered in Joint Session (Jan. 8, 1918). The contours of the points raised by Wilson have been exhaustively studied and carefully discussed elsewhere. For our present purposes, the key point is that the Wilson Administration’s approach to the question of national security--its effort to play a more active role in shaping international relations--expanded beyond the concentric circles of the first epoch.

448 *See* 58 CONG. REC. 493, 502-03 (1919) (quoting Sen. Johnson).

449 *Accord id.*

450 58 CONG. REC. 8767, 8777 (1919) (Reservation 2).

451 *See id.* (Reservation 5). *But see* League of Nations Covenant, art. 21, *available at* http://avalon.law.yale.edu/20th_century/leagcov.asp (stating “Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.”).

452 58 CONG. REC. 8767, 8777 (Reservation 9) (“The United States shall not be obligated to contribute to any expenses of the league of nations, or of the secretariat, or of any commission, etc.”).

453 President Warren G. Harding, Inaugural Address (Mar. 4, 1921), *in* INAUGURAL ADDRESSES, *supra* note 20, at 238.

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454 *Id.* at 239 (emphasis added).

455 *See id.*

456 *Id.*

457 *Id.*

458 *Id.*

459 *See* 1 FOREIGN RELATIONS OF THE UNITED STATES: 1922, at 35 (1938) (signed by Japan, the United States, the United Kingdom, and France).

460 Treaty Between the United States and Other Powers Providing for the Reunification of War as an Instrument of National Policy (Kellogg-Briand Pact), art. I, Aug. 27, 1928, 46 Stat. 2343 (1929).

461 *Id.* at art. II.

462 U.S. DEP'T OF STATE, PEACE AND WAR: UNITED STATES FOREIGN POLICY 1931-1941, at 41 (1943) [hereinafter U.S. DEP'T OF STATE, PEACE AND WAR], available at <http://www.ibiblio.org/pha/paw/index.html>.

463 *See* T.A. Bisson, *The United States in the Pacific: A Survey of the Relations of the United States with Pacific Countries from September 1, 1931 to September 1, 1932*, 5 PACIFIC AFF. 1047, 1048 (1932).

464 Arnold D. McNair, *The Stimson Doctrine of Non-Recognition: A Note on Its Legal Aspects*, 14 BRIT. Y.B. INT'L L. 65, 65 (1933).

465 *Id.* *See also* Telegram from Sec'y of State, to Ambassador in Japan (Jan. 7, 1932), in 1 FOREIGN RELATIONS OF THE UNITED STATES: JAPAN, 1931-1941, at 76 (1943).

466 Telegram from Sec'y of State, to the Consul Gen. at Shanghai (Feb. 24, 1932), in 1 FOREIGN RELATIONS OF THE UNITED STATES: JAPAN, 1931-1941, *supra* note 465, at 83-87.

467 Harding, *supra* note 453, at 237-46.

468 *Id.*

469 *See* STAFF OF S. COMM. ON INVESTIGATION OF THE MUNITIONS INDUS., S. DOC. NO. 74-944, pt. 8, at 3 (1936).

470 *Id.*

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471 *Id.* at 4.

472 JOHN LEWIS GADDIS, THE UNITED STATES AND THE ORIGINS OF THE COLD WAR 1941-17, at 353-54 (1972) [hereinafter GADDIS, ORIGINS OF THE COLD WAR].

473 Quincy Wright, *Repeal of the Neutrality Act*, 36 AM. J. OF INT'L L. 8, 8-23 (1942).

474 Neutrality Act of Aug. 31, 1935, ch. 837, 49 Stat. 1081 (codified as amended at 22 U.S.C. § 441 note (2006)).


475 President Franklin D. Roosevelt, *Presidential Statement on Approval of Neutrality Legislation, August 31, 1935*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 345-46 (1935).

476 *Id.* at 346.

477 Extending and Amending the Joint Resolution (Neutrality Act of Feb. 29, 1936), ch. 106, 49 Stat. 1152 (current version at 22 U.S.C. § 441 note (2006)).

478 81 CONG. REC. 61, 74-80 (1937).

479 Joint Resolution (Neutrality Act of May 1, 1937), ch. 146, 50 Stat. 121 (current version at 22 U.S.C. § 441 note (2006)).

480 Joint Resolution (Neutrality Act of November 4, 1939), ch. 2, 54 Stat. 4 (codified as amended in scattered sections of 22 U.S.C. §§ 441- 57, *supp. II*) (repealing sections of the 1939 Neutrality Act).

481 *See supra* Part III.A.3.b.

482 *See id.*; *see also* Cleveland, Proclamation, *supra* note 329.

483 *See* RONALD SNELL, STATE FINANCE IN THE GREAT DEPRESSION 4 (2009), <http://www.ncsl.org/print/fiscal/STATEFINANCEGREATDEPRESSION.pdf>.

484 *See* PRESIDENT'S RESEARCH COMM. ON SOC. TRENDS, RECENT SOCIAL TRENDS IN THE UNITED STATES 3 (1933).

485 *See* President Franklin Roosevelt, Address (May 7, 1933), *available at* <http://www.mhrcc.org/fdr/chat2.html> (discussing efforts of the New Deal).

486 NAT'L RES. PLANNING BD., SECURITY, WORK, AND RELIEF POLICIES 7 (1942), <http://www.ssa.gov/history/reports/NRPB/NRPBChapter1.pdf> ("The years 1930 to 1940 witnessed a vast expansion of governmental activity in providing income to needy or presumably needy persons, which will undoubtedly stand out as a major social development of our times.").

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487 *Id.* at 7-8.

488 *Id.* at 8.

489 *Id.*

490 *Id.*

491 *Id.* at 9 (emphasis added).

492 Legislation, for instance, cemented many of the changes into domestic law. *See, e.g.*, Social Security Act (Old Age Pension Act), Act of Aug. 14, 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

493 *Id.* at 7.

494 *See*  U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

495 DAVID CRITCHLEY, THE ORIGIN OF ORGANIZED CRIME IN AMERICA: THE NEW YORK CITY MAFIA, 1891-1931, at 39 (2009).

496 *Id.* at 138-39.

497 *See generally* EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA (1996); EDWARD BUTTS, OUTLAWS OF THE LAKES: BOOTLEGGING AND SMUGGLING FROM COLONIAL TIMES TO PROHIBITION 109 (2004).

498 DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 365-66 (2010); *see also* David Oshinsky, *Temperance to Excess*, N.Y. TIMES, May 21, 2010, at BR20, available at <http://www.nytimes.com/2010/05/23/books/review/Oshinsky-t.html?pagewanted=all>.

499 *See* MICHAEL NEWTON, THE ENCYCLOPEDIA OF AMERICAN LAW ENFORCEMENT 99 (2007).

500 *Id.*

501 *Notes on the Amendments to the U.S. Constitution*, U.S. CONST. ONLINE, <http://www.usconstitution.net/const.html#Am18> (last visited Mar. 15, 2012).

502 The other notable amendment with a direct impact on private rights was the Thirteenth Amendment, which abolished slavery and gave Congress the power to pass legislation preventing slavery and involuntary servitude. U.S. CONST. amend. XIII.

503 Hoover, *supra* note 137, at 257-68.

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- ⁵⁰⁴ Act of Feb. 24, 1933, ch. 119, 47 Stat. 904 (giving the Supreme Court the authority to prescribe rules of practice and procedure in criminal cases) (repealed 1988).
- ⁵⁰⁵ See President Herbert Hoover, Presidential Statement on Signing an Act on Reform of Criminal Procedures in Federal Courts (Feb. 25, 1933), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=23438#axzz1pILWZj3L>.
- ⁵⁰⁶ *Id.*
- ⁵⁰⁷ I use the term “authoritarian” to denote regimes in which single entities hold a monopoly on political power. This type of political structure can be distinguished from “totalitarianism,” in which other spheres, such as education, science, and the arts, become controlled by the individual or group holding a monopoly on political power, consistent with a formally recognized ideological perspective. Concerns about the latter form of political and social organization emerged with growing efforts to find parallels between communism and fascism. See LOWELL BARRINGTON ET AL., *COMPARATIVE POLITICS: STRUCTURES AND CHOICES* 195-97 (Carolyn Merrill et al. eds., 2009).
- ⁵⁰⁸ See WILLIAM YANDELL ELLIOTT, *THE NEED FOR CONSTITUTIONAL REFORM: A PROGRAM FOR NATIONAL SECURITY* 11 (1st ed. 1935) (noting that an essential theme of the year 1935 was the need to reflect on the status of our government).
- ⁵⁰⁹ *Id.* at 10.
- ⁵¹⁰ *Id.* at 246-47.
- ⁵¹¹ *Id.* at 272.
- ⁵¹² See *id.* at 17, 19 (“The catchword of the new era has become not *equality* but *security*. In an age where surplus rather than scarcity governs economic life, security to the masses means economic adequacy of livelihood.”).
- ⁵¹³ *Id.* at 21.
- ⁵¹⁴ ELLIOTT, *supra* note 508, at 142.
- ⁵¹⁵ *Id.* at 202.
- ⁵¹⁶ See Christopher Lehmann-Haupt, *Pendleton Herring, 100, Pioneer in Political Science*, N.Y. TIMES (Aug. 21, 2004), <http://www.nytimes.com/2004/08/21/nyregion/pendleton-herring-100-pioneer-in-politicalscience.html>.
- ⁵¹⁷ Cf. STUART, *supra* note 13, at 5 (“[A]uthoritarian regimes were gaining enormous economic and political advantages over democracies by their exploitation of modern technologies of communication and transportation.”).
- ⁵¹⁸ *Id.* (“[M]anagement science could help America to replicate the efficiencies of totalitarian governments without doing violence to

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our democratic values.”).

519 EDWARD PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 380 (1936).

520 EDWARD PENDLETON HERRING, THE IMPACT OF WAR 15-16 (1941) [hereinafter PENDLETON HERRING, IMPACT OF WAR].

521 *Id.* at 12.

522 *See* JOSEPH STALIN, THE OCTOBER REVOLUTION: A COLLECTION OF ARTICLES AND SPEECHES 15-16 (1934).

523 *See generally* CHRISTOPHER HIBBERT, IL DUCE: THE LIFE OF BENITO MUSSOLINI 21-109 (1962).

524 MICHAEL BURLEIGH, THE THIRD REICH: A NEW HISTORY 791 (discussing withdrawal from the League of Nations); *id.* at 46-50 (discussing the perceived iniquities of the Versailles treaty); *id.* at 681 (rearmament).

525 HAROLD J. LASKI, LIBERTY IN THE MODERN STATE 11 (1937); *see also* STUART, *supra* note 13, at 19.

526 Debs formally announced his conversion to socialism while in jail on January 1, 1897. There is evidence, however, that he was thinking about the issue months prior to that announcement. Letter from Eugene V. Debs to Henry Demarest Lloyd (Feb. 1, 1896), in GENTLE REBEL: LETTERS OF EUGENE V. DEBS 23 (James Robert Constantine ed., 1995); *see also* Eugene V. Debs, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/154766/Eugene-V-Debs> (last visited Mar. 12, 2012).

527 Debs received 901,551 votes; Taft received 3,486,242; Roosevelt gained 4,122,721 votes; and Wilson obtained 6,296,284 votes. Dave Leip’s Atlas of U.S. Presidential Elections, 1912 Presidential General Election Results, NAT’L ELECTION RESULTS, <http://www.uselectionatlas.org/RESULTS/national.php?f=0&year=1912> (last visited Mar. 10, 2012). Debs, however, did not win any electoral votes. *Id.*

528 Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217; Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553.

529 In February 1917, the Bolsheviks seized power in Russia. LEON TROTSKY, 2 THE HISTORY OF THE RUSSIAN REVOLUTION (1932), available at [http:// www.marxists.org/archive/trotsky/1930/hrr/ch07.htm](http://www.marxists.org/archive/trotsky/1930/hrr/ch07.htm).

530 Debs’s imprisonment and the clemency proposals by Attorney General A. Mitchell Palmer are discussed in careful detail in ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, at 211-25 (1955).

531 *See generally* F.A. HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS (1944) (Bruce Caldwell ed., 2007).

532 *Id.* at 124-33.

533 *See* Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1069, 1270 n.6

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(1997) (discussing the end of New Deal programs).

534 In this manner, totalitarianism can be distinguished from authoritarian regimes. *See supra*, note 507.

535 President Dwight D. Eisenhower, First Inaugural Address (Jan. 20, 1953) [hereinafter Eisenhower, First Inaugural Address], *in* INAUGURAL ADDRESSES, *supra* note 20, at 293-99.

536 President Ronald Reagan, A Time for Choosing Speech (Oct. 27, 1964), *available at* <http://www.fordham.edu/halsall/mod/1964reaganl.html>.

537 President Ronald Reagan, Address to Members of the British Parliament (June 8, 1982), *available at* <http://www.reagan.utexas.edu/archives/speeches/1982/60882a.htm> (“We’re approaching the end of a bloody century plagued by a terrible political invention-- totalitarianism. Optimism comes less easily today, not because democracy is less vigorous, but because democracy’s enemies have refined their instruments of repression. Yet optimism is in order because day by day democracy is proving itself to be a not at all fragile flower.”). Note that this framing persisted into the fourth epoch, with regard to terrorism.

538 In July 1940, Germany had destroyed eleven British destroyers, prompting British Prime Minister Winston Churchill to request assistance from the United States. In March 1941, the Lend-Lease Act subsequently expanded the type of aid the United States could give the United Kingdom. *See* Lend-Lease Act, Pub. L. No. 77-11, 55 Stat. 31 (1941). For a general discussion of the Lend-Lease Act and its role in British-American relations, see *infra* note 597 and accompanying text.

539 U.S. DEP’T OF STATE, PEACE AND WAR, *supra* note 462, at 483-86.

540 *See supra* notes 157-58 and accompanying text.

541 U.S. DEP’T OF STATE, PEACE AND WAR, *supra* note 462, at 483-86.

542 Message from President Franklin D. Roosevelt to the Congress (Sept. 3, 1940), *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 475, at 391-92.

543 President Franklin D. Roosevelt, Fireside Chat on National Defense (May 26, 1940) [hereinafter Franklin D. Roosevelt, Fireside Chat on National Defense], *available at* <http://www.mhrcc.org/fdr/chat15.html>.

544 *Cf. Campaign Summaries of World War 2: British and Commonwealth Navies at the Beginning and End of World War 2*, NAVAL HIST., <http://www.naval-history.net/WW2CampaignRoyalNavy.htm> (last visited Mar. 10, 2012) (stating that the British Royal Navy was the largest in the world through 1940).

545 STUART, *supra* note 13, at 32.


546 *Id.*

547 *Id.* at 31.

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- 548 Exec. Order No. 9182, 7 Fed. Reg. 4467 (June 13, 1942).
- 549 STUART, *supra* note 13, at 60 (citing KERMIT ROOSEVELT, WAR RETORT OF THE O.S.S. 8 (1976)).
- 550 See JOHN PATRICK FINNEGAN, *World War II: Military Intelligence at the Center*, in MILITARY INTELLIGENCE 64 (1998); *Records of the War Department General and Special Staffs*, NAT'L ARCHIVES (1995), available at <http://www.archives.gov/research/guide-fed-records/groups/165.html> (discussing effective date of the Military Intelligence Service).
- 551 FINNEGAN, *supra* note 550, at 60-68 (dissemination); *id.* at 78-81 (signals intelligence).
- 552 President Franklin Roosevelt, Address of the President Delivered by Radio from the White House (May 26, 1940) (hereinafter Franklin Roosevelt, Radio Chat), available at <http://docs.fdrlibrary.marist.edu/052640.html>.
- 553 *Id.*
- 554 *Id.*
- 555 *Id.*; see also STUART, *supra* note 13, at 31.
- 556 SELECT COMM. TO STUDY GOV'T OPERATIONS, 3 SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, pt. 3, at 403 (1976) S. REP. NO. 94-755, pt. 3, at 403 (1976) [hereinafter S. REP. NO. 94-755S. REP. NO. 94-755] (quoting Confidential Memorandum of the President (June 26, 1939), available at http://www.aarclibrary.org/publib/contents/church/contents_church_reports_book3.htm ("It is my desire that the investigation of all espionage, counterespionage, and sabotage matters be controlled and handled by the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Division of the War Department, and the Office of Naval Intelligence in the Navy Department. The directors of these three agencies are to function as a committee to coordinate their activities.")).
- 557 *Id.*
- 558 See, e.g., Draft Memorandum, President Franklin Delano Roosevelt to Secretary of State Cordell Hull and Under Secretary of State Sumner Welles (Dec. 1, 1941) (directing the State Department to obtain information about the Japanese troop movement and military preparations), <http://www.fdrlibrary.marist.edu/archives/pdfs/pearlharbor.pdf>.
- 559 *Id.*
- 560 See *A Brief History of the FBI*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/brief-history/brief-history> (last visited Oct. 26, 2011).
- 561 See *id.*

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- ⁵⁶² See S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 403-04.
- ⁵⁶³ *Id.*
- ⁵⁶⁴ See *id.* (noting Hoover's concern that private citizens were more likely to report information concerning sabotage to the New York City Police Department's well-publicized special sabotage squad than to the FBI).
- ⁵⁶⁵ *Id.* at 404 (quoting Memorandum from J. Edgar Hoover, Dir., Fed. Bureau of Investigations, to the Att'y Gen. (Sept. 6, 1939)). President Roosevelt continued to renew the Attorney General's call for cooperation from local law enforcement during the war. See, e.g., *id.* at 406 (quoting President Franklin D. Roosevelt, Statement on Police Cooperation (Jan. 8, 1943)).
- ⁵⁶⁶ *Id.* Note that although the order is referred to as an "Executive" order, it lacks the formal numbering of executive orders and, instead, appears to be more of a public statement, which was subsequently picked up by the press and widely reported.
- ⁵⁶⁷ Proclamation No. 2352, 54 Stat. 2643 (1939).
- ⁵⁶⁸ Exec. Order No. 8247, 4 Fed. Reg. 3864 (Sept. 12, 1939).
- ⁵⁶⁹ S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 405.
- ⁵⁷⁰ See, e.g., *Emergency Supplemental Appropriation Bill for 1940: Hearing on H.R. 7805 Before the Subcomm. of the S. Comm. on Appropriations*, 76th Cong. 302-307 (1939); *Department of Justice Appropriation Bill for 1941: Hearing on H.R. 8319 Before the Subcomm. of the H. Comm. on Appropriations*, 76th Cong. 151 (1940); *Departments of State, Commerce, and Justice Appropriation Bill for 1941: Hearing on H.R. 8319 Before the Subcomm. of the S. Comm. on Appropriations*, 76th Cong. 75 (1941).
- ⁵⁷¹ Immigration Act of 1918, ch. 186, 40 Stat. 1012 (1918) (codified as amended at 8 U.S.C. § 137) (repealed 1952).
- ⁵⁷²  *Kessler v. Strecker*, 307 U.S. 22, 30 (1939) ("[W]e are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what time, he was a member of the described organization."); see also *Deportation of Aliens: Hearing on H.R. 4860 Before the Subcomm. of the Comm. on Immigration*, 76th Cong. 2 (1940) (discussing Supreme Court decision).
- ⁵⁷³ See Alien Registration Act of 1940 (Smith Act), 18 U.S.C. §§ 2385, 2387 (1940). For further discussion of amendments to the Act reflecting national security concerns, see *To Amend the Nationality Act of 1940: Hearing on H. R. 6250 Before the Subcomm. of the Comm. on Immigration*, 77th Cong. 23 (1942).
- ⁵⁷⁴ See §§ 2385, 2387.
- ⁵⁷⁵ *Alien Registration Act*, SPARTACUS EDUC, [http:// www.spartacus.schoolnet.co.uk/AJSAalien.h](http://www.spartacus.schoolnet.co.uk/AJSAalien.h) (last visited Feb. 21, 2012).
- ⁵⁷⁶ COMM. ON GOV'T SEC, REPORT OF THE COMMISSION ON GOVERNMENT SECURITY 621 (1957), available at <http://>

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www.archive.org/details/reportofcommissi1957unit.

577 ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 439-41 (1941).

578 *See* Franklin D. Roosevelt, Fireside Chat on National Security, *supra* note 543, at 633.

579 *Id*

580 *See id.*

581 *Id.* at 634.

582 *Id.* at 635.

583 *Id.*

584 Voorhis Act, 18 U.S.C. § 2386 (1941).

585 Alien Registration Act of 1940 (Smith Act), 18 U.S.C. §§ 2385, 2387.

586 Foreign Agents Registration Act (FARA) of 1938, 22 U.S.C. §§611-621.

587 *See generally* JOHN WILLIAM MCCORMACK, INVESTIGATION OF NAZI AND OTHER PROPAGANDA, H.R. REP. NO. 74-153 (1935) H.R. REP. NO. 74-153 (1935).

588 Robert H. Jackson, *Our Government Is Prepared Against the Fifth Column*, 29 SURVEY GRAPHIC 545 (1940), available at [http:// www.roberthjackson.org/the-man/bibliography/our-government-is-prepared-against-the-fifth-column/](http://www.roberthjackson.org/the-man/bibliography/our-government-is-prepared-against-the-fifth-column/); Franklin Roosevelt, Radio Chat, *supra* note 552.

589 *See* S. REP. NO. 94-755 S. REP. NO. 94-755, *supra* note 556, at 412-13.

590 LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 249 (2008). Targets range from Communist groups, Socialist parties, and fascist organizations, to civil rights leaders, civil liberties organizations, nationalist movements, the women's movement, and individuals opposed to the war effort. *See, e.g., id.*; STONE, *supra* note 114.

591 S. REP. NO. 94-755 S. REP. NO. 94-755, *supra* note 556, at 414-15 (citing J. Edgar Hoover, Dir., Fed. Bureau of Investigation, Remarks at the Federal-State Conference on Law Enforcement Problems of National Defense (Aug. 5-6, 1940)).

592 President Franklin D. Roosevelt, Third Inaugural Address (Jan. 20, 1941), in INAUGURAL ADDRESSES, *supra* note 20, at 279-82.

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⁵⁹³ *Id.* at 282 (quoting President George Washington, First Inaugural Address (Apr. 3, 1789) (“The preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered ... deeply, ... finally, staked on the experiment intrusted [sic] to the hands of the American people.”)).

⁵⁹⁴ U.S. DEP’T OF STATE, PEACE AND WAR, *supra* note 462, at 611.

⁵⁹⁵ Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 U.S.T. 1603, ^{55 U.S.T. 1603}, reprinted in FOREIGN RELATIONS OF THE UNITED STATES: 1941, at 368-69 (1958).

⁵⁹⁶ *Id.*

⁵⁹⁷ See Lend-Lease Act, Pub. L. No. 77-11, § 3(a), 55 Stat. 31 (1941).

⁵⁹⁸ *Id.*

⁵⁹⁹ See *supra* notes 516-521 and accompanying text.

⁶⁰⁰ PENDLETON HERRING, IMPACT OF WAR, *supra* note 520.

⁶⁰¹ *Id.* at 2.

⁶⁰² *Id.* at 243.

⁶⁰³ *Id.*

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.* at 263.

⁶⁰⁷ See, e.g., Donald P. Steury, *Origins of the CIA’s Analysis of the Soviet Union*, CENT. INTELLIGENCE AGENCY (Mar. 16, 2007, 9:03 AM), [https:// www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/booksand-monographs/watching-the-bear-essays-on-cias-analysis-of-the-soviet-union/articleOl.html](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/booksand-monographs/watching-the-bear-essays-on-cias-analysis-of-the-soviet-union/articleOl.html); *infra* notes 614, 618 and accompanying text (incorporating the views of numerous individuals and calling for greater centralization).

⁶⁰⁸ See generally Harold Lasswell, *The Garrison State*, 46 AM. J. OF SOC. 455 (1941).

⁶⁰⁹ *id.*

⁶¹⁰ See generally *id.*

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611 *Id.* at 455.

612 *Id.* Lasswell's calls became more urgent following World War II. *See* HAROLD LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950).

613 President's Request to Congress for a Declaration of War, in 2 FOREIGN RELATIONS OF THE UNITED STATES: JAPAN, 1931-1941, at 793-94 (1943); *see also* STUART, *supra* note 13, at 40 ("Pearl Harbor seemed to confirm all of the major elements of Herring's prewar national security argument: America's new situation geostrategic vulnerability; the need for military preparedness before a war breaks out; the unique threat posed by dictatorships; and the need to both expand and centralize the US government in order to remain competitive.").

614 STUART, *supra* note 13, at 2 (emphasis in original).

615 *Id.* at 3.

616 *But see* COMM. ON RECORDS OF WAR ADMIN., THE UNITED STATES AT WAR: DEVELOPMENT AND ADMINISTRATION OF THE WAR PROGRAM BY THE FEDERAL GOVERNMENT (1946), *available at* <http://www.ibiblio.org/hyperwar/ATO/Admin/WarProgram/index.html>; R. ELBERTON SMITH, THE ARMY AND ECONOMIC MOBILIZATION 40-45 (U.S. Army Ctr. of Military History 1991) (1959), http://www.history.army.mil/html/books/001/1-7/CMH_Pub_1-7.pdf (discussing the War Department's establishment of its own Industrial College, and the Army and Navy Industrial Mobilization Plans); *see also* MARK SKINNER WATSON, CHIEF OF STAFF: PREWAR PLANS AND PREPARATIONS 35 (1950) (discussing Forrestal's consideration of the Army Navy Munitions Board as a key element in mobilization).

617 STUART, *supra* note 13, at 7.

618 John Gaddis Smith, *Dean Acheson*, in 16 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 14 (Robert H. Ferrell & Samuel F. Bemis eds., 1972).

619 STUART, *supra* note 13, at 52.

620 *Id.*

621 *Id.* at 53-54.

622 *Id.*

623 *Id.* at 58-59.

624 *Id.* at 63.

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- ⁶²⁵ See Tom Bethell, *Chiang Kai-Shek and the Struggle for China*, HOOVER INST. STAN. UNIV. (2007), <http://www.hoover.org/publications/hover-digest/article/5835> (discussing when Kai-Shek became a member of the “Big Four” Allied powers during World War II).
- ⁶²⁶ GADDIS, ORIGINS OF THE COLD WAR, *supra* note 472, at 24-25.
- ⁶²⁷ *Id.* at 253 (quoting President Harry S. Truman as describing nuclear weapons as “the Number One problem of the world”).
- ⁶²⁸ Again, I disagree with both Gaddis and Stuart about the instrumental role of Pearl Harbor. While extremely important in shaping Americans’ concept of security, the aim of the national security infrastructure was in many senses determined in the 1930s, with World War II merely focusing the country further along the same lines.
- ⁶²⁹ HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 103 (1948).
- ⁶³⁰ See Treaty of Peace (Tripartite Pact), Japan-Ger.-It., Sept. 27, 1940.
- ⁶³¹ President Franklin D. Roosevelt, Fourth Inaugural Address (Jan. 20, 1945), *available at* <http://www.bartleby.com/124/pres52.html>.
- ⁶³² See Telegram from George F. Kennan, *Charge d’Affaires* in Moscow, to James Byrnes, Sec’y of State (Feb. 22, 1946) [hereinafter Long Telegram], http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/6-6.pdf (misidentifying recipient as Byrnes’s successor in office, George C. Marshall).
- ⁶³³ *See id.*
- ⁶³⁴ *See id.*
- ⁶³⁵ *See id.* (“In summary, we have here a political force committed fanatically to the belief that with US there can be no permanent *modus vivendi* [,] that it is desirable and necessary that the internal harmony of our society be disrupted, our traditional way of life be destroyed, the international authority of our state be broken, if Soviet power is to be secure.”).
- ⁶³⁶ *Id.*
- ⁶³⁷ George F. Kennan, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 569 (1947).
- ⁶³⁸ *Id.*
- ⁶³⁹ *See id.*
- ⁶⁴⁰ Long Telegram, *supra* note 632; *see also* Kennan, *supra* note 637, at 569 (reiterating many of the same points).
- ⁶⁴¹ *See* GADDIS, ORIGINS OF THE COLD WAR, *supra* note 472, at 312.

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642 *Id.* at 316.

643 *Id.* at 299.

644 *Id.*

645 Joseph Stalin, Speech at a Meeting of Voters of the Stalin Electoral District (Feb. 9, 1946), in SPEECHES DELIVERED AT MEETINGS OF VOTERS OF THE STALIN ELECTORAL DISTRICT, MOSCOW: DECEMBER 11, 1937 AND FEBRUARY 9, 1946 (1950), available at <http://www.marx2mao.com/Stalin/SS46.html>.

646 *Id.* at 27.

647 *Id.* at 28-29.

648 *Id.* at 21-38.

649 *Id.* at 39-42.

650 GADDIS, ORIGINS OF THE COLD WAR, *supra* note 472, at 300.

651 *Id.*


652 *See id.* at 317 (arguing that this approach ended up locking the United States into a pattern of response, limiting successive administrations' ability to be flexible with regard to the Soviet Union).

653 President Harry Truman, Special Message to the Congress on Greece and Turkey: The Truman Doctrine (Mar. 12, 1945), in 1947 PUB. PAPERS 176, 180, available at <http://quod.lib.umi.edu/p/potus/4728447.1947.001/216?rgn=full+text;view=image>.

654 *Cf. id.* (“[W]e may endanger the peace of the world”).

655 STUART, *supra* note 13, at 73-74; *see also* Letter from James Forrestal to F. Eberstadt (June 19, 1945), in S. COMM. ON NAVAL AFF., RETORT TO HON. JAMES FORRESTAL, SECRETARY OF THE NAVY, ON UNIFICATION OF THE WAR AND NAVY DEPARTMENTS AND POSTWAR ORGANIZATION FOR NATIONAL SECURITY 1 (1945).

656 *See, e.g.,* President Harry Truman, Special Message to the Congress Recommending the Establishment of a Department of National Defense (Dec. 19, 1945) [hereinafter Truman, Recommending the Establishment of Department of Defense], in 1945 PUB. PAPERS 546, 546-560, available at <http://quod.lib.umich.edu/p/potus/4728442.1945.001/586?rgn=full+text;view=image>; Letter from James Forrestal to F. Eberstadt, *supra* note 655; Editorial, *Nimitz v. Eisenhower*, WASH. POST, NOV. 19, 1945, at 8.

657 National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at  50 U.S.C. § 401 (2006)).

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658 Truman, Recommending the Establishment of Department of Defense, *supra* note 656, at 546-60.

659 *Id.*

660 *Id.*

661 *Id.* (“There should be three coordinated branches of the Department of National Defense: one for the land forces, one for the naval forces, and one for the air forces, each under an Assistant Secretary. The Navy should, of course, retain its own carrier, ship, and water-based aviation, which has proved so necessary for efficient fleet operation. And, of course, the Marine Corps should be continued as an integral part of the Navy.”).

662 STUART, *supra* note 13, at 96-126.

663 CORELLI BARNETT, BRITAIN AND HER ARMY, 1509-1970, at 362 (1970).

664 Resultantly, Thomas Inskip, the first to hold this post, was placed in an almost impossible position vis-à-vis the Services. For thoughtful discussion of these dynamics, see Sean Greenwood, *Sir Thomas Inskip as Minister for the Coordination of Defence, 1936-39*, in GOVERNMENT AND THE ARMED FORCES IN BRITAIN, 1856-1990, at 155-90 (Paul Smith ed., 1996).

665 *Id.*

666 Alex Danchev, *Waltzing with Winston: Civil-Military Relations in the Second World War*, in *id.* at 191-216.

667 *Id.* at 199 (quoting Churchill, “The key-change which occurred on my taking over was of course the supervision and direction of the Chiefs of Staff Committee by a Minister of Defence with undefined powers. As this Minister was also the Prime Minister, he had all the rights inherent in that office ...”) (citation omitted); JERRY HARDMAN BROOKSHIRE, CLEMENT ATTLEE 189 (1995) (“Upon becoming Prime Minister, [Attlee] also assumed Churchill’s position as Minister of Defence, presiding over the Chiefs of Staff committee and the Defence committee.”).

668 STUART, *supra* note 13, at 99.

669 *Id.*

670 *Id.*

671 See *Records of the Ministry of Defence, Admin History, 1808-2011*, U.K. NAT’L ARCHIVES, <http://www.nationalarchives.gov.uk/catalogue/DisplayCatalogueDetails.asp?CATID=76&CATLN=1&FullDetails=True&j=1> (last visited Mar. 10, 2012).

672 See *id.*

673 See *id.*

674 *See id.*

675 *See id.*; *see also* GOVERNMENT AND THE ARMED FORCES IN BRITAIN, 1856-1990, *supra* note 664; DAVID BUTLER & GARETH BUTLER, TWENTIETH CENTURY BRITISH POLITICAL FACTS 1900-2000 (8th ed. 2000).

676 It was clear that the country had a strong military: in addition to helping to win World War II, the United States possessed nuclear weapons. *See Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS'N, <http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat> (last visited Mar. 10, 2012) (discussing the United States' early monopoly on nuclear weaponry).

677 For detailed accounts of the inter-service tensions, see generally GADDIS, ORIGINS OF THE COLD WAR, *supra* note 472; STUART, *supra* note 13.

678 National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at [50 U.S.C. § 401 \(2006\)](#)).

679 *Id.*

680 *Id.*

681 *Id.*

682 *Id.*; *see also* STUART, *supra* note 13.

683 National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at [50 U.S.C. § 401 \(2006\)](#)).

684 *Id.*

685 *Id.*

686 *See* National Security Act Amendments of 1949, ch. 412, 63 Stat. 578 (codified as amended at [50 U.S.C. §§ 408, 412](#)) (renaming the NME the Department of Defense; adding a Deputy Secretary and the Chair of the Joint Chiefs, and converting the special assistants to the title Assistant Secretary of Defense); Department of Defense Reorganization Act of 1958, Pub. L. 85-599, 72 Stat. 514 (codified as amended at [10 U.S.C. § 716](#)) (abolishing the Assistant Secretary of Defense for Research and Engineering) and transferring the functions to the new Director of Defense Research and Engineering); REORGANIZATION PLAN NO. 6 OF 1953 (abolishing the statutory boards and positions in the Office of the Secretary of Defense and transferring the functions to the Secretary of Defense; establishing a General Counsel; adding six new Assistant Secretaries of Defense, bringing the total to nine).


687 *See* National Security Act Amendments of 1949, ch. 412, 63 Stat. 578.

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- 688 Letter from Henry L. Stimson and James Forrestal, U.S. Sec'ys of War and Navy, to Edward R. Stettinius, U.S. Sec'y of State (Dec. 1, 1944), in 1 FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1944, at 1466-70 (1966), available at <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=turn&id=FRUS.FRUS1944v01&entity=FRUS.FRUS1944v01.p1482&isize=text>.
- 689 See STUART, *supra* note 13, at 117.
- 690 *Id.*
- 691 *Id.*
- 692 *Id.*
- 693 *Id.* at 118 (attributing to the SWNCC a greater impact on the role of the military in Washington, DC than it has previously been given and writing, "By filling a decision making vacuum in the latter stages of the war and the immediate postwar era, the SWNCC contributed significantly to the institutionalization of military authority at the highest levels of the policymaking community.").
- 694 See ALAN F. CIAMPORCERO, THE STATE-WAR-NAVY COORDINATING COMMITTEE AND THE BEGINNING OF THE COLD WAR 43 (1980) (pointing out that the two-to-one vote in favor of the military itself demonstrates supremacy of the military position).
- 695 The 1947 National Security Act also created the National Security Resources Board, the Munitions Board, and the Research & Development Board. Each of these eventually collapsed. See, e.g., LASSWELL, *supra* note 612, at 51, 55 (discussing the National Security Resources Board, and describing its collapse). I thus focus in this Article on the NME, the NSC, and the CIA as the most enduring aspects of the legislation.
- 696 National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at [50 U.S.C. § 401 \(2006\)](#)).
- 697 See IVO H. DAALDER & I.M. DESTLER, IN THE SHADOW OF THE OVAL OFFICE 4 (2009).
- 698 STUART, *supra* note 13, at 130.
- 699 National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at [50 U.S.C. § 401 \(2006\)](#)).
- 700 *Id.*
- 701 *Id.*; see also Office of the Historian, *History of the National Security Council, 1947-1997*, U.S. DEPARTMENT OF ST. (Aug. 1997) [hereinafter Office of the Historian, *History of the National Security Council, 1947-1997*], <http://www.fas.org/irp/offdocs/NSChistory.htm>. The legislation envisioned a staff headed by a civilian executive secretary. National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at [50 U.S.C. § 401 \(2006\)](#)). There was no provision made, at the outset, for a national security adviser. See *id.*

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702 HARRY S. TRUMAN, 2 MEMOIRS BY HARRY S. TRUMAN: YEARS OF TRIAL AND HOPE 56 (1965), *quoted in* STUART, *supra* note 13, at 132.

703 *See* National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at  50 U.S.C. § 401 (2006)).

704 *Id.*

705 *Id.* at § 102(d)(1).

706 *See id.*

707 *Id.* at § 102(e).

708 *Id.* at § 102(d)(3).

709 The purpose of the Senate Select Committee, created in 1976, was to “oversee and make continuing studies of the intelligence activities and programs of the United States Government,” to “submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs,” and to “provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.” *Overview of the S. Select Comm. on Intelligence: Responsibilities and Activities*, S. SELECT COMM. ON INTELLIGENCE, <http://intelligence.senate.gov/about.html> (last visited Feb. 24, 2012). It grew directly from the Church Hearings and concerns about the lack of oversight over intelligence agencies. *Id.*

710 Office of the Historian, *History of the National Security Council, 1947-1997*, *supra* note 701, at 4.

711 *Id.*

712 *Id.*

713 NAT’L SEC. COUNCIL, DIRECTIVE 20/4: U.S. OBJECTIVES WITH RESPECT TO THE USSR TO COUNTER SOVIET THREATS TO U.S. SECURITY, *in* 1 FOREIGN RELATIONS OF THE UNITED STATES 663-69 (1948) [hereinafter NSC 20/4], *available at* <http://www.mtholyoke.edu/acad/intrel/coldwar/nsc20-4.htm>.

714 *Id.*

715 *Id.* (“Communist ideology and Soviet behavior clearly demonstrate that the ultimate objective of the leaders of the USSR is the domination of the world. Soviet leaders hold that the Soviet communist party is the militant vanguard of the world proletariat in its rise to political power, and that the USSR, base of the world communist movement, will not be safe until the non-communist nations have been so reduced in strength and numbers that communist influence is dominant throughout the world. The immediate goal of top priority since the recent war has been the political conquest of western Europe. The resistance of the United States is recognized by the USSR as a major obstacle to the attainment of these goals.”).

716 *See id.*

717 *See id.*

718 *Id.* at 21.

719 President Harry Truman, Inaugural Address (Jan. 20, 1949) [hereinafter Truman, Inaugural Address], in INAUGURAL ADDRESSES, *supra* note 20, at 286.

720 *Id.*

721 *Id.*

722 *Id.*

723 *See id.*

724 *Id.*

725 *See id.*

726 ROBIN H.E. SHEPHERD, CZECHOSLOVAKIA: THE VELVET REVOLUTION AND BEYOND 22 (2000).

727 1948 *Selected Events*, CENTER FOR DEMOCRACY AND THE RULE OF LAW, STAN. UNIV., <http://www-cdr.stanford.edu/petrie/1948.html> (last visited Feb. 10, 2012).

728 U.S. DEP'T OF STATE, THE BERLIN CRISIS: A REPORT ON THE MOSCOW DISCUSSIONS 1 (1948), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/berlin_airlift/large/moscowtalk/ba132-9.htm ("On March 30, 1948, ... the Soviet Deputy Military Governor, General Dratvin, stated in a letter to the United States Military Government that supplementary provisions regarding communications between the Soviet and US zones of occupation in Germany would go into effect on April 1, 1948."). Provisions drafted by the Soviet government included limitations on movement between the Western and Soviet zones of Berlin. *See id.*

729 STUART, *supra* note 13, at 261.

730 *See* INTELLIGENCE SURVEY GRP., THE CENTRAL INTELLIGENCE AGENCY AND NATIONAL ORGANIZATION FOR INTELLIGENCE: A REPORT TO THE NATIONAL SECURITY COUNCIL (1949) [hereinafter Dulles-Jackson-Correa Report]; *see also* Dulles-Jackson-Correa Report, 1949, in THE CENTRAL INTELLIGENCE AGENCY: HISTORY AND DOCUMENTS 134-42 (William M. Leary ed., 1984) [hereinafter HISTORY AND DOCUMENTS] (declassified version of the report, with some information still not available).

731 Dulles-Jackson-Correa Report, *supra* note 730; *see also* RICHARD A. BEST, PROPOSALS FOR INTELLIGENCE REORGANIZATION, 1949-2004, at 6 (2004), <http://www.fas.org/irp/crs/RL32500.pdf>.

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⁷³² See Dulles-Jackson-Correa Report, *supra* note 730.

⁷³³ BEST, *supra* note 731, at 7.

⁷³⁴ HISTORY AND DOCUMENTS, *supra* note 730, at 5.

⁷³⁵ See generally THE COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, TASK FORCE REPORT ON NATIONAL SECURITY ORGANIZATION (1949) [hereinafter Eberstadt Report]. Note that the Commission on Organization of the Executive Branch of the Government (alternatively known as the First Hoover Commission), was established pursuant to the Lodge-Brown Act of 1947, Pub. L. No. 80-162.

⁷³⁶ *Id.*

⁷³⁷ ARTHUR B. DARLING, THE CENTRAL INTELLIGENCE AGENCY: AN INSTRUMENT OF GOVERNMENT, TO 1950, at 293 (1990).

⁷³⁸ See Eberstadt Report, *supra* note 735.

⁷³⁹ *Id.* at 8.

⁷⁴⁰ See *Responding to Change: Alliance Origins*, WHAT IS NATO: AN INTRODUCTION TO THE TRANSATLANTIC ALLIANCE 11 (2011), [http:// www.nato.int/welcome/brochure_WhatIsNATO_en.pdf](http://www.nato.int/welcome/brochure_WhatIsNATO_en.pdf) ("In 1949, when ideological clashes between East and West were gaining momentum, ten Western European states, the United States and Canada signed the North Atlantic Treaty.").

⁷⁴¹ DAVID JAMES SMITH, THE BALTIC STATES: ESTONIA, LATVIA AND LITHUANIA 145 (2002).

⁷⁴² See, e.g., HADLEY ARKES, BUREAUCRACY, THE MARSHALL PLAN, AND THE NATIONAL INTEREST (1972).

⁷⁴³ Economic Cooperation Act of 1948, Pub. L. No. 80-472; see also ARKES, *supra* note 742. The *New York Times* later credited the Czechoslovak coup as "a major, perhaps a decisive, factor in the Congressional acceptance of the European Recovery Program." James Reston, *Soviet Atom News Held Aid to Truman in Pushing Aims*, N.Y. TIMES, Sept. 26, 1949, at 3.

⁷⁴⁴ See NAT'L SEC. COUNCIL, DIRECTIVE 4: COORDINATION OF FOREIGN INFORMATION MEASURES (1947) [hereinafter NSC 4]; NAT'L SEC. COUNCIL, DIRECTIVE 4-A: PSYCHOLOGICAL OPERATIONS (1947) [hereinafter NSC 4-A].

⁷⁴⁵ NSC 4, *supra* note 744.

⁷⁴⁶ See *id.*

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- ⁷⁴⁷ See NAT'L SEC. COUNCIL, DIRECTIVE ON OFFICE OF SPECIAL PROJECTS (1948) [hereinafter NSC 10/2], available at http://www.state.gov/www/about_state/history/intel/290_300.html.
- ⁷⁴⁸ *Id.*
- ⁷⁴⁹ *Id.*; see also CIA COLD WAR RECORDS: THE CIA UNDER HARRY TRUMAN 213-16 (Michael Warner ed., 1994) [hereinafter CIA COLD WAR RECORDS] (quoting NSC 10/2 in full). Although undated, this directive was approved by the National Security Council at its June 17 meeting and the final text, incorporating changes made at the meeting, was circulated to members by the Executive Secretary under a June 18 note. See *id.*
- ⁷⁵⁰ See NSC 10/2, *supra* note 747; CIA COLD WAR RECORDS, *supra* note 749.
- ⁷⁵¹ DAVID HOLLOWAY, STALIN AND THE BOMB: THE SOVIET UNION AND ATOMIC ENERGY, 1939-1956, at 266-67 (1994) (noting that the design of the device also closely mimicked that of the United States' plutonium weapon); see CENT. INTELLIGENCE GRP., SOVIET CAPABILITIES FOR THE DEVELOPMENT AND PRODUCTION OF CERTAIN TYPES OF WEAPONS AND EQUIPMENT (ORE 3/1) 1 (1946), www.foia.cia.gov/docs/DOC_0000256604/DOC_0000256604.pdf.
- ⁷⁵² See HOLLOWAY, *supra* note 751.
- ⁷⁵³ *Id.*
- ⁷⁵⁴ Donald P. Steury, *How the CIA Missed Stalin's Bomb: Dissecting Soviet Analysis, 1946-1950*, CENT. INTELLIGENCE AGENCY (June 26, 2008), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol49nol/html_files/stalins_bomb_3.html.
- ⁷⁵⁵ See, e.g., *id.* (citing CIA historian Woodrow J. Kuhns' conclusion that the CIA's Office of Reports and Estimates helped "calm" Western nerves "in those early, fearful years of the Cold War"); *The American Experience: Race for the Superbomb* (PBS television broadcast Jan. 11, 1999).
- ⁷⁵⁶ *Statement by President Truman, Sept. 23, 1949*, DEP'T ST. BULL., Oct. 3, 1949, at 487, available at http://avalon.law.yale.edu/20th_century/decad244.asp ("We have evidence that within recent weeks an atomic explosion occurred in the U.S.S.R.").
- ⁷⁵⁷ Reston, *supra* note 743. The paper prophesied: "[W]hatever the eventual military significance of Russia's progress in the field of atomic energy, the political significance of that progress is already evident. It will create vast new problems overseas for the United States Government." *Id.*
- ⁷⁵⁸ See *Living Under a Mushroom Cloud: Fear and Hope in the Atomic Age, Atomic Fiction*, THE WIS. HIST. MUSEUM, <http://www.wisconsinhistory.org/museum/atomic/fear.asp> (last visited Feb. 24, 2012). Immediately, an incessant stream of films began depicting the horrors that would ensue from Soviet atomic power: THE RED MENACE (1949); I WAS A COMMUNIST FOR THE FBI (1951); 1000 YEARS FROM NOW (1952); INVASION USA (1952); THE THIEF (1952); MY SON JOHN (1952); THE BEAST FROM 20,000 FATHOMS (1953); KISS ME DEADLY (1955); and THE DAY THE WORLD ENDED (1956). *Id.*
- ⁷⁵⁹ An excerpt of the President's Directive of January 31, 1950, which led to the creation of NSC 68, was included in NSC 68. See NAT'L SEC. COUNCIL, DIRECTIVE 68: UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL

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SECURITY (1950) [hereinafter NSC 68], *available at* <http://www.fas.org/irp/offdocs/nsc-hst/nsc-68.htm>.

⁷⁶⁰ *A Day that Shook the World: Mao's Communists Take Over in China*, THE INDEP. (Oct. 1, 2011), <http://www.independent.co.uk/life-style/history/a-day-that-shook-the-world-maos-communists-take-over-inchina-2234547.html>.

⁷⁶¹ *See* NSC 68, *supra* note 759.

⁷⁶² *Id.*

⁷⁶³ *Id.*

⁷⁶⁴ *Id.*

⁷⁶⁵ *See id.* (“The fundamental design of those who control the Soviet Union ... is to retain and solidify their absolute power The design, therefore, calls for the complete subversion or forcible destruction of the machinery of government and structure of society in the countries of the non-Soviet world and their replacement by an apparatus and structure subservient to and controlled from the Kremlin.”).

⁷⁶⁶ *See id.* (“The United States, as the principal center of power in the non-Soviet world and the bulwark of opposition to Soviet expansion, is the principal enemy whose integrity and vitality must be subverted or destroyed”).

⁷⁶⁷ *See id.*

⁷⁶⁸ *See id.* (“[T]he Kremlin’s challenge to the United States ... encompasses both peace and war and our objectives in peace and war must take account of it.”).

⁷⁶⁹ *See id.* (“The issues that face us are momentous, involving the fulfillment or destruction not only of this Republic but of civilization itself.”).

⁷⁷⁰ *See id.*

⁷⁷¹ *See id.*

⁷⁷² *See id.*

⁷⁷³ *See id.*

⁷⁷⁴ *See id.*

⁷⁷⁵ *See id.*

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776 *Id.*

777 President Harry S. Truman, Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period (Sept. 6, 1945), in 1945 PUB. PAPERS 263-80, available at [http:// name.umdl.umich.edu/4728442.1945.001](http://name.umdl.umich.edu/4728442.1945.001) (recommending the Economic Bill of Rights in a Special Message to the Congress).




778 President Harry S. Truman, Special Message to the Congress Recommending a Comprehensive Health Program (Nov. 19, 1945), in 1945 PUB. PAPERS 475-76, available at <http://name.umdl.umich.edu/4728442.1945.001>.

779 *Id.*

780 *Id.*

781 *Id.*

782 S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 430 (citing Personal and Confidential Memorandum from J. Edgar Hoover, Dir., Fed. Bureau of Investigation, to Tom. C. Clark, U.S. Att’y Gen. (Mar. 8, 1946)).

783 *See id.*;  [Yates v. United States](#), 354 U.S. 298, 325 (1957) (holding that the district court did not give a proper instruction to the jury when it did not explain that advocacy under the Smith Act has to include urging of forcible overthrow), *overruled on other grounds by*  [Burks v. United States](#), 437 U.S. 1 (1978). *But see*  [Communist Party v. Subversive Activities Control Bd.](#), 367 U.S. 1, 115 (1961) (upholding the registration requirement under the Subversive Activities Control Board as consistent with the First Amendment).

784 S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 430 (citing Personal and Confidential Memorandum from J. Edgar Hoover, Dir., Fed. Bureau of Investigation, to Tom. C. Clark, U.S. Att’y Gen. (Mar. 8, 1946)).

785 *See id.* (detailing the FBI’s approval of Ladd’s recommendations to counteract the possibility of a flood of propaganda from “Lefist and so-called Liberal sources”).

786 *Id.* (citing Memorandum from D. Milton Ladd, Assistant Dir., Fed. Bureau of Investigation, to J. Edgar Hoover, Dir., Fed. Bureau of Investigation (Feb. 27, 1946)). Note that Ladd added, without any apparent irony, “[I]n truth, Communism is the most reactionary, intolerant and bigoted force in existence” *Id.*

787 *See id.* at 436-38.

788 *See id.* Nearly 10,000 native-born citizens were included on the Security Index list. *Id.* at 441. At the outbreak of the Korean War, the number of individuals on the list further expanded to nearly 14,000 people. *Id.*

789 *Id.* at 439.

790 *Id.* at 442.

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- 791 Cornelius P. Cotter & J. Malcolm Smith, *An American Paradox: The Emergency Detention Act of 1950*, 19 J. POL. 20,21(1957).
- 792 *Id.*
- 793 S. 4130, 81st Cong. (1950). This bill was itself modeled after Britain's Defense Regulation 18B, which was used during World War II to detain individuals considered a threat to national security. Cotter & Smith, *supra* note 791, at 21-22 (noting additionally that "The bill's framers had a copy of the Regulation before them"). The bill was sponsored by Democratic Senators Harley M. Kilgore (WV), Paul Douglas (IL), Hubert Humphrey (MN), Herbert Lehman (NY), Frank Graham (NC), Estes Kefauver (TN), and William Benton (CT), with Representatives John Carrol (D-NJ), Helen Gahagan Douglas (D-CA), and Jacob J. Javits (R-NY) subsequently introducing a similar measure in the House. *Id.* at 26-27.
- 794 *Id.* at 24.
- 795 *Id.* at 27.
- 796 96 CONG. REC. 14,439 (1950), *cited in* Cotter & Smith, *supra* note 791, at 27.
- 797 Cotter & Smith, *supra* note 791, at 29.
- 798 *Id.* at 30.
- 799 *See* Internal Security Act of 1950, Pub. L. No. 81-831, § 103, 64 Stat. 987 (repealed 1971).
- 800 *See id.*
- 801 *Id.*
- 802 *Id.*
- 803 *See* ATHAN G. THEOHARIS, *THE FBI: A COMPREHENSIVE REFERENCE GUIDE* 151 (1999).
- 804 S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 442 (citing Memorandum from Peyton Ford, Deputy Att'y Gen., to J. Edgar Hoover, Dir., Fed. Bureau of Investigation (Dec. 7, 1950)).
- 805 *Id.* at 445 (citing Memorandum from D. Milton Ladd, Assistant Dir., Fed. Bureau of Investigation, to J. Edgar Hoover, Dir., Fed. Bureau of Investigation (Nov. 13, 1952)).
- 806 *Id.*
- 807 *Id.* at 446.

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808 *See id.*

809 *Id.*

810 *Id.*

811 *Id.* at 442 (citing Memorandum from Peyton Ford, Deputy Att’y Gen., to J. Edgar Hoover, Dir., Fed. Bureau of Investigation (Dec. 7, 1950)); *id.* at 449 (citing FED. BUREAU OF INVESTIGATION, MANUAL, § 87, 5-11 (1960)).

812 *Id.* (citing U.S. ATT’Y GEN., ANNUAL REPORT OF THE ATTORNEY GENERAL FOR FISCAL YEAR 1955, at 195 (1955)).

813 *Id.* at 451 (citing Memorandum from Fed. Bureau of Investigation to S. Select Comm. (Oct. 6, 1975)).

814 *Id.*

815 Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 25, 1947); Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 29, 1953).

816 *See id.*

817 *See id.*

818 *See* M. S. Livingston, *Science and Security*, 300 AM. ACAD. POL. & SOC. SCI. 4 (1955).

819 For further comment on this point see JOHN LORD O’BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 32-33 (1955).

820 18 Fed. Reg. 2489 (1953).

821 *See* S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 448.

822 *See supra* note 567-69 and accompanying text.

823 *See* S. REP. NO. 94-755S. REP. NO. 94-755, *supra* note 556, at 428.

824 Office of the Historian, *History of the National Security Council, 1947-1997*, *supra* note 701. It is perhaps unsurprising that the Secretary of State at the time, John Foster Dulles, bore an antipathy towards the NSC. *See id.* (“Secretary of State Dulles ... had reservations about the NSC system. He was the strongest personality in the Eisenhower Cabinet and jealously guarded his role as principal adviser to the President on foreign policy.”).

825 *Id.*

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- ⁸²⁶ See *id.* The NSC was organized along hierarchical command structures. The Departments of State and Defense would produce draft recommendations on specific topics, look for points of consensus, forward the report to the planning board and then to the full Council, which met every Thursday morning. *Id.* Once a decision was reached, the report would go to the Operations Coordinating Board for implementation. *Id.* Note that the Operations Coordinating Board was established pursuant to Exec. Order No. 10483, 18 Fed. Reg. 5379 (1953). See CODY M. BROWN, THE NATIONAL SECURITY COUNCIL: A LEGAL HISTORY OF THE PRESIDENT'S MOST POWERFUL ADVISERS 18 (2008), <http://pnsr.org/data/images/the%20national%20security%20council.pdf>.
- ⁸²⁷ BROWN, *supra* note 826, at 7. Similar committees were later named “303,” “40,” and “Special Coordination Committee.” *Id.* at 29.
- ⁸²⁸ President Dwight D. Eisenhower, Second Inaugural Address (Jan. 21, 1957), in INAUGURAL ADDRESSES, *supra* note 20, at 300-04.
- ⁸²⁹ *Id.*
- ⁸³⁰ *Id.*
- ⁸³¹ See Washington, Farewell Address, *supra* note 71.
- ⁸³² President Dwight D. Eisenhower, 1953, J. CONG. COMM. ON INAUGURAL CEREMONIES, <http://inaugural.senate.gov/history/chronology/ddeisenhower1953.cfm> (last visited Dec. 30, 2011).
- ⁸³³ See, e.g., Army Years, EISENHOWER PRESIDENTIAL LIBRARY AND MUSEUM, http://www.eisenhower.utexas.edu/all_about_ike/army_years.html (last visited Feb. 24, 2012).
- ⁸³⁴ See George Washington, *Sentiments on a Peace Establishment, May 2, 1783, Writings* 26: 374-76, 388-91, in 3 THE FOUNDERS’ CONSTITUTION 128-29 (Phillip B. Kurland & Ralph Lerner eds., 1987) (“Altho’ a large standing Army in time of Peace hath ever been considered dangerous to the liberties of a Country, yet a few Troops, under certain circumstances, are not only safe, but indispensably necessary. Fortunately for us our relative situation requires but few. The same circumstances which so effectually retarded, and in the end conspired to defeat the attempts of Britain to subdue us, will now powerfully tend to render us secure. Our distance from the European States in a great degree frees us of apprehension, from their numerous regular forces and the Insults and dangers which are to be dreaded from their Ambition. But, if our danger from those powers was more imminent, yet we are too poor to maintain a standing Army adequate to our defence, and was our Country more populous and rich, still it could not be done without great oppression of the people.”).
- ⁸³⁵ President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at <http://www.ourdocuments.gov/doc.php?doc=90&page=transcript>.
- ⁸³⁶ *Id.*
- ⁸³⁷ *Id.*
- ⁸³⁸ *Id.*

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⁸³⁹ See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944); see also GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 8 (2006) (discussing Myrdal's appointment by Rockefeller and the subsequent study).

⁸⁴⁰ See MYRDAL, *supra* note 839.

⁸⁴¹ See ROBERTS & KLIBANOFF, *supra* note 839.

⁸⁴² See MYRDAL, *supra* note 839, at 1004.

⁸⁴³ *Id.*

⁸⁴⁴ See, e.g., NSC 68, *supra* note 759.

⁸⁴⁵ See Long Telegram, *supra* note 632 (devoting one section of the telegram to transcription of the Soviet propaganda directed against the United States).

⁸⁴⁶ See *id.*

⁸⁴⁷ See *id.*

⁸⁴⁸ See *id.*

⁸⁴⁹ MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 5 (2000).

⁸⁵⁰ LASSWELL, *supra* note 612, at 51, 55 ("Two of the chief points of attack against the United States in foreign countries, for instance, are the alleged inherent instability of our economic system and the prevalence of discrimination against colored peoples. Whatever measures are taken at home to maintain high levels of productive employment and to reduce discrimination also strengthen our position abroad.").

⁸⁵¹ See *id.*

⁸⁵² DUDZIAK, *supra* note 849.

⁸⁵³ See *id.* at 13-14.

⁸⁵⁴ *Id.* at 14, 18-46.

⁸⁵⁵ See, e.g., *id.* at 12-15, 35, 196 (reprinting Soviet publication *Krokodil's* cartoon of an African-American student being stopped by police from entering an American university while background segregationist protesters hold up racist signs).

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856 *See id.* at 34-36.

857 *Id.* at 5.

858 *Id.* at 5-6.

859 *Id.* at 6.

860 *See, e.g.*, H.R. 29, 80th Cong. (1947); C.P. Trussel, *Civil Rights Debate Is Blocked in Senate*, N.Y. TIMES, July 25, 1956, at 1; William S. White, *Civil Rights Bills Have Slim Chance*, N.Y. TIMES, May 9, 1948, at 1.

861 Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634; Civil Rights Act of 1960, Pub. L. 86-449, 74 Stat. 86.

862 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

863 President Lyndon B. Johnson, Inaugural Address (Jan. 20, 1965) [hereinafter Lyndon B. Johnson, Inaugural Address], in INAUGURAL ADDRESSES, *supra* note 20, at 310.

864 *Id.*

865 *Id.* at 312.

866 *Id.*

867 *See* BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 202 (1992) (charting high public support for NATO, military aid, and U.S. troops in Europe between 1948 and 1956).

868 *See* National Security Act Amendments of 1949, ch. 412, 63 Stat. 578 (codified as amended at 50 U.S.C. §§ 408, 412) (renaming the NME the Department of Defense, adding a Deputy Secretary and the Chair of the Joint Chiefs, and converting the special assistants to the title Assistant Secretary of Defense).

869 *See supra* note 686-703 and accompanying text; Reorganization Plan No. 1 of 1956, 102 CONG. REC. 7449; *see also* President Dwight D. Eisenhower, Special Message to the Congress Transmitting Reorganization Plan 1 of 1956 (May 16, 1956), *available at* <http://www.presidency.ucsb.edu/ws/?pid=10489#axzzllzvXalRO>.

870 Reorganization Plan 6 of 1953, 67 Stat. 638; *see also* President Dwight D. Eisenhower, Special Message to the Congress Transmitting Reorganization Plan 6 of 1953 Concerning the Department of Defense (Apr. 30, 1953), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=9831#axzzllzvXalRO>.

871 *Id.*

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- ⁸⁷² Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, 72 Stat. 514; *see also* STUART, *supra* note 13, at 227.
- ⁸⁷³ Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, 72 Stat. 514; *see also* Def. Research & Eng'g, *A History of the Office of the Director of Defense Research and Engineering*, DEPARTMENT OF DEF., http://www.dod.mil/ddre/ddre_history.htm (last visited Feb. 23, 2012).
- ⁸⁷⁴ Douglas-Mansfield Act of 1952, Pub. L. No. 82-416, 61 Stat. 502.
- ⁸⁷⁵ STUART, *supra* note 13, at 240. Key documents in the development of psychological warfare include 1948's NSC 10/2 (authorizing a comprehensive program of clandestine warfare against the Soviet Union, including, *inter alia*, psychological warfare) and 1950's NSC 59/1: FOREIGN INFORMATION PROGRAM AND PSYCHOLOGICAL WARFARE PLANNING (establishing federal organization of psychological warfare operations).
- ⁸⁷⁶ STUART, *supra* note 13, at 240.
- ⁸⁷⁷ *Id.*
- ⁸⁷⁸ *Id.*
- ⁸⁷⁹ BROWN, *supra* note 826, at 22-23.
- ⁸⁸⁰ Expansion began with Walter Bedell Smith's stewardship in 1950. STUART, *supra* note 13, at 265. As DO, Smith developed the CIA's own independent research and analysis functions. *Id.* at 265-66. He created the Office of Research and Reports ("ORR"), which generated its own intelligence. *Id.* at 266. Cueing off the Dulles-Jackson-Correa Report, the CIA began incorporating economic intelligence regarding the U.S.S.R., and drawing on new science and technology. *Id.* at 263. As the CIA's Directorate of Intelligence grew in size, it acquired more influence. In a major coup, the CIA took over U-2 reconnaissance aircraft--considered "as much a victory for the covert side of the CIA as it was for the analytical side." *Id.* at 267-68.
- ⁸⁸¹ *Id.* at 252.
- ⁸⁸² U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 1114(1975).
- ⁸⁸³ *See Overview of Korean War Battles/Offensives*, THE KOREAN WAR, <http://www.korean-war.com/TimeLine/KoreanWarOverview.html> (last visited Dec. 30, 2011).
- ⁸⁸⁴ *See id.*
- ⁸⁸⁵ *See* WALTER ISAACSON & EVAN THOMAS, THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE 513 (1986) (describing how the North Korean attack of South Korea led Congress to triple the defense and international security budget).
- ⁸⁸⁶ *See id.*; *see also* MARTIN WALKER, THE COLD WAR: A HISTORY 77 (1995).

- ⁸⁸⁷ Robert Higgs, *The Cold War Economy: Opportunity Costs, Ideology, and the Politics of Crisis*, 31 EXPLORATIONS IN ECON. HIST. 283, 286-88 (1994), http://www.colorado.edu/ibs/eb/alston/econ8534/SectionXII/Higgs,_The_Cold_War_Economy.pdf.
- ⁸⁸⁸ *Id.* at 289.
- ⁸⁸⁹ *Id.*
- ⁸⁹⁰ *Id.*
- ⁸⁹¹ *See id.* at 289-90 (“The bulk of the military entrenchment during the period 1972 to 1976 reflected public and congressional revulsion against defense costs and presidential discretion, as evidenced by passage of the War Powers Resolution in 1973 and the National Emergencies Act in 1976”).
- ⁸⁹² *See id.* at 290 (describing the Carter and Reagan Administrations’ focus on military outlays after 1978 as “obvious”).
- ⁸⁹³ *Id.* at 290 (outlays expressed in 1982 dollars). Thus, over the nine-year period from 1978 to 1980, annual military appropriations increased by a total of more than \$ 100 billion. *Id.* In total, over the entire Cold War period (1948 to 1989), military purchases hit \$7051 billion--approximately \$16.4 trillion in 2011 dollars. *Id.* at 291 (outlays expressed in 1982 dollars).
- ⁸⁹⁴ LASSWELL, *supra* note 612, at 26.
- ⁸⁹⁵ *Id.* at 27.
- ⁸⁹⁶ SAMUEL HUNTINGTON, *THE COMMON DEFENSE: STRATEGIC PROGRAMS IN NATIONAL POLITICS* 205 (1961).
- ⁸⁹⁷ *See* Higgs, *supra* note 887, at 300-01.
- ⁸⁹⁸ *Id.* at 301.
- ⁸⁹⁹ *Id.* (citing HUNTINGTON, *supra* note 896, at 428-29).
- ⁹⁰⁰ EDWARD A. KOLODZIEJ, *UNCOMMON DEFENSE AND CONGRESS, 1945-1963*, at 77 (1966); *see also* ISAACSON & THOMAS, *supra* note 885, at 503.
- ⁹⁰¹ Higgs, *supra* note 887, at 301.
- ⁹⁰² *See id.* (“[T]he American people received an almost wholly fictitious account of an incident in the Gulf of Tonkin in 1964, after which Congress gave its blessing to what soon became a major war.”).
- ⁹⁰³ *See id.* at 301-02.

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904 *Id.*

905 *Id.* at 302.

906 O'BRIAN, *supra* note 819, at 3.

907 *See* National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 495 (current version at [50 U.S.C. § 401 \(2006\)](#)).

908 Ted Galen Carpenter, *Cato Institute Policy Analysis No. 71: Global Interventionism and a New Imperial Presidency*, CATO INST. (1986), <http://www.cato.org/pubs/pas/pa071.pdf>.

909 TIM WEINER, BLANK CHECK: THE PENTAGON'S BLACK BUDGET 5 (1990).

910 *Id.* at 16.

911 *See id.* at 16-17. Weiner reported that most of Congress had no idea about the size and scope of the Black Budget--including some members of the House Armed Services Committee. *Id.* ("This issue wasn't being debated openly. Discussing the workings of the black world on the floor of the Congress may be deemed tantamount to an act of treason, and a member who does so runs the risk of being censured or expelled. The same set of national-security laws that allowed the black budget's existence silenced public debate on specific weapons or specific dollars or specific snafus in the black budget. The Reagan administration wanted the laws toughened so that a reporter or a public official who obtained information about a black program and published it could be convicted of high treason. Upon conviction, such a traitor could be shot to death by a firing squad.").

912 *Id.* at 8.

913 *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

914 *See id.* at 103.

915 *See id.* at 324-25.

916 President Richard Nixon, First Inaugural Address (Jan. 20, 1969), *in* INAUGURAL ADDRESSES, *supra* note 20, at 317.

917 Office of the Historian, *History of the National Security Council, 1947-1997*, *supra* note 701, at 12.

918 *Id.*

919 President Gerald R. Ford, State of the Union Address (Jan. 15, 1975), *available at* <http://www.ford.utexas.edu/library/speeches/750028.htm>.

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⁹²⁰ *Id.*

⁹²¹ Cf. President Gerald R. Ford, Address Before a Joint Session of the Congress Reporting on United States Foreign Policy (Apr. 10, 1975), *available at* <http://www.ford.utexas.edu/library/speeches/750179.htm> (“United States military assistance to an old and faithful ally, Turkey, has been cut off by action of the Congress.”).

⁹²² *Id.*

⁹²³ *Id.*

⁹²⁴ *See id.*

⁹²⁵ *See id.*

⁹²⁶ *See id.*

⁹²⁷ *Id.*

⁹²⁸ *Id.*

⁹²⁹ *Id.*

⁹³⁰ Office of the Historian, *History of the National Security Council, 1947-1997*, *supra* note 701, at 3, 13.

⁹³¹ *Id.*

⁹³² President Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *in* INAUGURAL ADDRESSES, *supra* note 20, at 333.

⁹³³ *Id.*

⁹³⁴ *See id.*

⁹³⁵ President Ronald Reagan, Second Inaugural Address (Jan. 21, 1985), *in* INAUGURAL ADDRESSES, *supra* note 20, at 342.

⁹³⁶ *Id.*

⁹³⁷ Maxwell D. Taylor, *The Legitimate Claims of National Security*, 52 FOREIGN AFF. 577, 593 (1974) [hereinafter Taylor, *Legitimate Claims*].

⁹³⁸ *See id.* (“Hence, I would make a closing suggestion for dealing with this organizational deficiency. It is to create an expanded

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National Security Council charged with dealing with all forms of security threats, military and nonmilitary, and having access to all elements of government and to all relevant resources capable of contributing to this broad task.”).

939 LESTER BROWN, WORLDWATCH PAPER NO. 14: REDEFINING NATIONAL SECURITY 6 (1977).

940 *See id.*

941 OBAMA NSS, *supra* note 1, at 2, 29-30.

942 *See supra* notes 6-7 and accompanying text.

943 QICR, *supra* note 7, at 1 (according to the QICR, the intelligence community has relied heavily on NAT’L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025 (2008) [hereinafter NAT’L INTELLIGENCE COUNCIL, 2025]).

944 *Id.* at 6.

945 *Id.* at 13. (“[P]owerful, self-sustaining megacities displace national authority Governments create city- and community-level intelligence agencies.”).

946 *Id.* at 14.

947 *See id.*

948 *Id.* at 2. The agencies include the CIA, the Defense Intelligence Agency, the Department of Energy (Intelligence and Counterintelligence), the Department of Homeland Security (Under Secretary for Intelligence and Analysis), the Department of State (Intelligence and Research), the Department of the Treasury (Intelligence and Analysis), the Drug Enforcement Administration (Intelligence), the FBI (National Security Branch), the Marine Corps Intelligence Activity, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the National Security Agency, the Office of the Director of National Intelligence, the Office of Naval Intelligence, the United States Air Force, the United States Army, and the Department of Defense (Under Secretary of Defense for Intelligence, Under Secretary of Defense for Policy). *Id.*

949 *Id.* at 2.

950 *See, e.g.*, GEORGE W. BUSH, NATIONAL STRATEGY FOR INFORMATION SHARING (White House ed., 2007); DEP’T OF HOMELAND SEC, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), <http://www.state.gov/documents/organization/60172.pdf>; DEP’T OF HOMELAND SEC, QUADRENNIAL HOMELAND SECURITY REVIEW REPORT: A STRATEGIC FRAMEWORK FOR A SECURE HOMELAND (2010), http://www.dhs.gov/xlibrary/assets/qhsr_report.pdf; OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE STRATEGY (2009), http://www.dni.gov/reports/2009_NIS.pdf; QICR, *supra* note 7. Each agency, moreover, develops strategic plans, which incorporate U.S. national security interests. *See, e.g.*, CENT. INTELLIGENCE AGENCY, STRATEGIC INTENT 2007-2011 (2007); DEE SCI. BD., 21ST CENTURY STRATEGIC TECHNOLOGY VECTORS (2006); DEP’T OF DEE, JOINT CHIEFS OF STAFF, JOINT VISION 2020 (2000); DEP’T OF STATE, STATE 2025 WORKING GROUP FINAL REPORT (2008); FED. BUREAU OF INVESTIGATION, FEDERAL BUREAU OF INVESTIGATION STRATEGIC PLAN 2004-2009 (2004); NAT’L GEOSPATIAL-INTELLIGENCE AGENCY, NGS STATEMENT OF STRATEGIC INTENT (2007); NAT’L RECONNAISSANCE OFFICE, TRANSFORMING THE NATIONAL

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RECONNAISSANCE OFFICE ENTERPRISE (2008); NAT'L SEC AGENCY, NSA/CSS STRATEGIC PLAN (2006); OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NATIONAL COUNTERINTELLIGENCE STRATEGY (2007); OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, VISION 2015 (2008); UNDER SEC'Y OF DEE FOR INTELLIGENCE, DEFENSE INTELLIGENCE STRATEGY (2008).

⁹⁵¹ *Welcome to PNSR: Leading the Way in National Security Reform*, PROJECT ON NAT'L SEC. REFORM, <http://www.pnsr.org/index.asp> (last visited Oct. 17, 2011). Members of the coalition included: Norman Augustine, Retired Chairman & CEO of Lockheed Martin Corporation; Robert D. Blackwill, Council on Foreign Relations; Admiral Dennis C. Blair, Former Commander in Chief of U.S. Pacific Command; General Wesley Clark, Former Supreme Allied Commander, Europe; Leon Fuerth, Project on Forward Engagement, George Washington University; Newt Gingrich, Former Speaker of the U.S. House of Representatives; Jessica Tuchman Mathews, President, Carnegie Endowment for International Peace; Joseph S. Nye, Professor, John F. Kennedy School of Government, Harvard University; and Carlos Pascual, Vice President, Brookings Institution.

⁹⁵² National Defense Authorization Act for Fiscal Year 2008, [Pub. L. No. 110-181](#), § 1049, 122 Stat. 3 (requiring an independent, non-profit, non-partisan organization to study the national security interagency system and to report); PROJECT ON NAT'L SEC REFORM, FORGING A NEW SHIELD, at v (2008), http://pnsr.org/data/files/pnsr_forging_a_new_shield_report.pdf.

⁹⁵³ *Id.* at 440.

⁹⁵⁴ *Id.* at 26.

⁹⁵⁵ *Id.*

⁹⁵⁶ *See* 50 U.S.C. § 401a(5) (2006).

⁹⁵⁷ *See, e.g.,* Taylor, *Legitimate Claims*, *supra* note 937.

⁹⁵⁸ THOMAS ROBERT MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 13 (1st ed. 1798), <http://www.esp.org/books/malthus/population/malthus.pdf>.

⁹⁵⁹ *See id.*

⁹⁶⁰ FAIRFIELD OSBORN, OUR PLUNDERED PLANET 200-01 (1948).

⁹⁶¹ Ted Gurr, *On the Political Consequences of Scarcity and Economic Decline*, 29 INT'L. STUD. Q. 51-75 (1985) (suggesting environmental change may diminish economic vitality, underscore social tensions, and lead to insurgencies).

⁹⁶² WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY: A PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE 214-17 (1977).

⁹⁶³ ROBERT HEILBRONER, AN INQUIRY INTO THE HUMAN PROSPECT 39, 95 (1980).

⁹⁶⁴ *See generally* JODI JACOBSON, WORLDWATCH PAPER NO. 86: ENVIRONMENTAL REFUGEES: A YARDSTICK OF

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HABITABILITY (1988) (describing the volume of refugees displaced by past environmental disasters and identifying potential threats of further displacement).

965 *See id.*

966 *See, e.g.,* J.P. von Aarsten, *Consequences of the War on Agriculture in the Netherlands*, 37 INT'L. REV. OF AGRIC. 55,495-705(1946).

967 *See generally* ARTHUR WESTING, *ECOLOGICAL CONSEQUENCES OF THE SECOND INDOCHINA WAR* (1976) (exploring the environmental effects of warfare in Indochina).

968 *See generally* ARTHUR WESTING, *WEAPONS OF MASS DESTRUCTION AND THE ENVIRONMENT* (1977) (evaluating the effect of weapons of mass destruction on the environment).

969 *See generally* ARTHUR WESTING, *WARFARE IN A FRAGILE WORLD: MILITARY IMPACTS ON THE HUMAN ENVIRONMENT* (1980) (discussing the environmental damage caused by military action); ENVIRONMENTAL HAZARDS OF WAR: *RELEASING DANGEROUS FORCES IN AN INDUSTRIALIZED WORLD* (Arthur H. Westing ed., 1990) (discussing the environmental impact of nuclear and chemical facilities, among others).

970 *See, e.g.,* JONI SEAGER, *EARTH FOLLIES: COMING TO FEMINIST TERMS WITH THE GLOBAL ENVIRONMENTAL CRISIS* (1993) (exploring the feminist perspective on the military's effects on the environment); Michael Renner, *Assessing the Military's War on the Environment*, in *STATE OF THE WORLD 1991: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY* 132-52 (Linda Starke ed., 1991) (discussing warfare's impact on the environment, particularly its toxicity to land, air, energy, and minerals); 1 *WAR AND UNDERDEVELOPMENT: THE ECONOMIC AND SOCIAL CONSEQUENCES OF CONFLICT* (Frances Stewart & Valpy Fitzgerald eds., 2000) (analyzing the effect of violent conflict on the environment in the context of social costs). Like the first argument, variations appeared. Some works, for instance, explored the role of violence in generating famine. *See, e.g.,* Jon Barnett, *Climate Change, Insecurity and Justice*, in *FAIRNESS IN ADAPTATION TO CLIMATE CHANGE* 115-29 (W. Neil Adger et al. eds., 2006) (investigating how violent conflict leads to environmental instability and climate change); Amartya Sen, *War and Famines: On Divisions and Incentives*, in *ECONOMICS OF ARMS REDUCTION AND THE PEACE PROCESS: CONTRIBUTIONS FROM PEACE ECONOMISTS AND PEACE SCIENCE* 219-33 (Walter Isard & Charles H. Anderton eds., 1992) (asking how warfare impacts famine-prone countries).

971 *See* Paul Ehrlich & Anne Ehrlich, *The Environmental Dimensions of National Security*, in *GLOBAL PROBLEMS AND COMMON SECURITY: ANNALS OF PUGWASH* 1988, at 180-91 (J. Rotblat & V.I. Goldanskii eds., 1988); PAUL R. EHRLICH & ANNE H. EHRLICH, *THE ENVIRONMENTAL DIMENSIONS OF NATIONAL SECURITY* (1988).

972 *See* Ehrlich & Ehrlich, *supra* note 971, at 180-91.

973 LESTER R. BROWN ET AL., *STATE OF THE WORLD* 1988, at 182 (1988).

974 *Id.*; *see also* Kurt M. Campbell & Christine Parthemore, *National Security and Climate Change in Perspective*, in *CLIMATIC CATAclysm: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF CLIMATE CHANGE* 5 (Kurt M. Campbell ed., 2008).

975 *See, e.g.,* Arthur H. Westing, *An Expanded Concept of International Security*, in *GLOBAL RESOURCES AND*

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INTERNATIONAL CONFLICT: ENVIRONMENTAL FACTORS IN STRATEGIC POLICY AND ACTION 183-200 (1986) (exploring how the availability of natural resources impacts global security); Richard Ullman, *Redefining Security*, 8 INT'L SEC. 129, 133, 143 (1983) (redefining a national security threat to include natural disasters and population growth).

⁹⁷⁶ Ullman, *supra* note 975, at 133.

⁹⁷⁷ *See id.*

⁹⁷⁸ Jon Barnett et al., *Introduction*, in GLOBAL ENVIRONMENTAL CHANGE AND HUMAN SECURITY 11 (Richard Matthew et al. eds., 2010).

⁹⁷⁹ Jessica Tuchman Mathews, *Redefining Security*, FOREIGN AFF., Spring 1989, at 162.

⁹⁸⁰ *Id.* I disagree with Mathews's assertion that the expansion of national security to include economics was a product of the 1970s. As discussed at great length throughout this Article, the economic condition of the country was of primary concern to the Founders and came to mark all three epochs that preceded the current age.

⁹⁸¹ *Id.*

⁹⁸² *The Future of Europe: Hearing Before the Subcomm. on Foreign Relations*, 101st Cong. 107 (1990) (statement of James Baker, III, U.S. Secretary of State), quoted in CLIMATIC CATAclysm: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF CLIMATE CHANGE, *supra* note 974, at 7.

⁹⁸³ Robert Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 1, 8 (emphasis added).

⁹⁸⁴ *See, e.g.*, JANET WELSH BROWN, IN THE U.S. INTEREST: RESOURCES, GROWTH, AND SECURITY IN THE DEVELOPING WORLD (1990); 1 WAR AND UNDERDEVELOPMENT: THE ECONOMIC AND SOCIAL CONSEQUENCES OF CONFLICT, *supra* note 970; Peter H. Gleick, *Global Climatic Change and International Security*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 41 (1990); Thomas F. Homer-Dixon, *On the Threshold: Environmental Changes as Causes of Acute Conflict*, INT'L SEC, Fall 1991, at 76-116 (summarizing the arguments that justify treating environmental degradation as a national security concern); Peter H. Gleick, *The Implications of Global Climatic Changes for International Security*, CLIMATIC CHANGE, Oct. 1989, at 309-25 [hereinafter Gleick, *Implications*] (arguing that countries will fight over diminished access to clean water); Norman Myers, *Environment and Security*, FOREIGN POL'Y, Spring 1989, at 23-41 (suggesting that environmental pressure has a detrimental impact on national and international security); Joyce R. Starr, *Water Wars*, FOREIGN POL'Y, Spring 1991, at 17 ("As early as the mid-1980s, U.S. government intelligence services estimated that there were at least 10 places in the world where war could break out over dwindling shared water--the majority in the Middle East. Jordan, Israel, Cyprus, Malta, and the countries of the Arabian Peninsula are sliding into the perilous zone where all available fresh surface and groundwater supplies will be fully utilized. Algeria, Egypt, Morocco, and Tunisia face similar prospects in 10 to 20 years."); David Wirth, *Climate Chaos*, FOREIGN POL'Y, Spring 1989, at 3, 10 (arguing environmental changes produce instabilities leading to war).

⁹⁸⁵ *See, e.g.*, Thomas F. Homer-Dixon, *Environmental Scarcities and Violent Conflict: Evidence from Cases*, INT'L SEC, Summer 1994, at 5-40 ("[E]nvironmental scarcities are already contributing to violent conflicts in many parts of the developing world. These conflicts are probably the early signs of an upsurge of violence in the coming decades that will be induced or aggravated by scarcity. The violence will usually be sub-national, persistent, and diffuse. Poor societies will be particularly affected since they are less able to buffer themselves from environmental scarcities and the social crises they cause. These societies are, in fact, already suffering acute hardship from shortages of water, forests, and especially fertile land."); *see also* Peter Gizewski & Thomas F.

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Homer-Dixon, *Environmental Scarcity and Violent Conflict: The Case of Pakistan*, EPS, Apr. 1996; Philip Howard & Thomas F. Homer-Dixon, *Environmental Scarcity and Violent Conflict: The Case of Chiapas, Mexico*, EPS, June 1995; Kimberley Kelly & Thomas F. Homer-Dixon, *Environmental Scarcity and Violent Conflict: The Case of Gaza*, EPS, June 1995; Valerie Percival & Thomas F. Homer-Dixon, *Environmental Scarcity and Violent Conflict: The Case of Rwanda*, EPS, June 1995; Valerie Percival & Thomas F. Homer-Dixon, *Environmental Scarcity and Violent Conflict: The Case of South Africa*, EPS, June 1995.

⁹⁸⁶ See, e.g., *Our Common Future: Report of the World Commission on Environment and Development*, U.N. DOC. A/42/427 (May 20, 1987).

⁹⁸⁷ Hanns W. Maull, *Energy and Resources: The Strategic Dimensions*, 31 SURVIVAL 500 (1989); Neville Brown, *Climate, Ecology and International Security*, 31 SURVIVAL 519 (1989); Sam C. Sarkesian, *The Demographic Component of Strategy*, 31 SURVIVAL 549 (1989).

⁹⁸⁸ See, e.g., Peter H. Gleick, *Ultimate Security: How Environmental Concerns Affect Global Political Stability*, 50 BULL. OF THE ATOMIC SCI. 55 (1994) (reviewing NORMAN MYERS, *ULTIMATE SECURITY: THE ENVIRONMENTAL BASIS OF POLITICAL STABILITY* (1993)).

⁹⁸⁹ See, e.g., Eugene Linden, *Greening of Geopolitics*, TIME MAG. (Oct. 23, 1989), <http://www.time.com/time/magazine/article/0,9171,958835,00.html> (discussing friction between the Third World and the United States over U.S. responsibilities with regard to global warming).

⁹⁹⁰ Al Gore, *Earth's Fate Is the No. 1 National Security Issue*, WASH. POST, May 14, 1989, quoted in Kurt M. Campbell & Christine Parthemore, *National Security and Climate Change in Perspective*, in CLIMATIC CATAclysm: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF CLIMATE CHANGE, *supra* note 974, at 5.

⁹⁹¹ CLIMATIC CATAclysm: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF CLIMATE CHANGE, *supra* note 974, at 6-7.

⁹⁹² See, e.g., Gleick, *Implications*, *supra* note 984; see also Richard A. Matthew, *In Defense of Environment and Security Research*, ENVTL. CHANGE & SEC. PROJECT REP., Summer 2002, at 109. But see RICHARD N. LEBOW, *NUCLEAR CRISIS MANAGEMENT: A DANGEROUS ILLUSION* 508 (1988) (arguing for restricting security studies to “anything that concerns the prevention of superpower nuclear war”); Marc A. Levy, *Is the Environment a National Security Issue?*, INT’L SEC., Autumn 1995, at 35 (arguing against a national security framing and suggesting that climate change, ozone depletion, and other ecological concerns are best addressed in environmental arena); Shira Yoffe, *Basins at Risk: Conflict and Cooperation over International Freshwater Resources* (Oct. 12, 2001) (unpublished Ph.D. dissertation, Oregon State University), available at <http://ir.library.oregonstate.edu/xmlui/handle/1957/9693> (creating a database of historical incidents of water-related cooperation and conflict across all international river basins from 1948 to 1999 and finding that “international relations over shared freshwater resources were overwhelmingly cooperative. Although conflicts over water occurred, violent conflict was rare” and outweighed by agreements. Indicators, like climate, water stress, government type, power relationships, showed no statistically significant association with international water conflict or cooperation. Instead, “the tendency towards conflict was associated with rapid to extreme changes in physical or institutional systems”).

⁹⁹³ See JOSHUA W. BUSBY, COUNCIL ON FOREIGN RELATIONS, *CLIMATE CHANGE AND NATIONAL SECURITY: AN AGENDA FOR ACTION* 22 (2007).

⁹⁹⁴ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 603, 100 Stat. 992 (amending National Security Act of 1947, Pub. L. No. 80-235, § 108, 61 Stat. 495 (codified as amended at 50 U.S.C. § 403(a))).

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- ⁹⁹⁵ DON M. SNIDER, THE NATIONAL SECURITY STRATEGY DOCUMENTING STRATEGIC VISION 2 (2d ed. 1995), <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub332.pdf>.
- ⁹⁹⁶ See Goldwater-Nichols Department of Defense Reorganization Act § 603.
- ⁹⁹⁷ *Id.*
- ⁹⁹⁸ See generally SNIDER, *supra* note 995.
- ⁹⁹⁹ *Id.* at v.
- ¹⁰⁰⁰ *Id.*
- ¹⁰⁰¹ See GLOBALSECURITY.ORG, [http:// www.globalsecurity.org/military/library/policy/national/index.html](http://www.globalsecurity.org/military/library/policy/national/index.html) (last visited Feb. 18, 2012).
- ¹⁰⁰² See PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006) [hereinafter BUSH NSS 2006], [http:// georgewbush-whitehouse.archives.gov/nsc/nss/2006/](http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/); PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002) [hereinafter BUSH NSS 2002], <http://merln.ndu.edu/whitepapers/USnss2002.pdf>.
- ¹⁰⁰³ OBAMA NSS, *supra* note 1.
- ¹⁰⁰⁴ PRESIDENT RONALD REAGAN, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 3, 33 (1987) [hereinafter REAGAN NSS].
- ¹⁰⁰⁵ SNIDER, *supra* note 995, at 6-7.
- ¹⁰⁰⁶ See REAGAN NSS, *supra* note 1004.
- ¹⁰⁰⁷ See *id.* at 9-34 (focusing on U.S. foreign policy and U.S. defense policy); see also SNIDER, *supra* note 995, at 7.
- ¹⁰⁰⁸ See REAGAN NSS, *supra* note 1004, at 20 (including a section titled “Taking Advantage of U.S. Strengths and Soviet Weaknesses”).
- ¹⁰⁰⁹ See *id.* at 1.
- ¹⁰¹⁰ *Id.*
- ¹⁰¹¹ SNIDER, *supra* note 995, at 7.

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¹⁰¹² REAGAN NSS, *supra* note 1004, at 5.

¹⁰¹³ *See* SNIDER, *supra* note 995, at 6-7 (discussing focus on the U.S.S.R. as part of both the 1987 and 1988 NSS documents).

¹⁰¹⁴ *Id.*

¹⁰¹⁵ *See id.*

¹⁰¹⁶ *Id.*

¹⁰¹⁷ *Id.* at 8.

¹⁰¹⁸ *Id.*

¹⁰¹⁹ *Id.*

¹⁰²⁰ *See id.* at 8-9.

¹⁰²¹ *See id.*

¹⁰²² *See id.*

¹⁰²³ *Id.* at 9.

¹⁰²⁴ *Id.*

¹⁰²⁵ *Id.* Although the report had been prepared from early 1992, various summits and the 1992 election had delayed completion. *Id.*

¹⁰²⁶ *See id.*; *see also Security Through Strength: Legacy and Mandate*, in NATIONAL SECURITY STRATEGY OF THE UNITED STATES 13-20 (1993).

¹⁰²⁷ *See* SNIDER, *supra* note 995, at 9-10.

¹⁰²⁸ President William J. Clinton, Second Inaugural Address (Jan. 20, 1997), in 2 INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 173 (Applewood ed. 2009) [hereinafter 2 INAUGURAL ADDRESSES].

¹⁰²⁹ SNIDER, *supra* note 995, at 10.

¹⁰³⁰ THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT, at i. (1995), <http://www.au.af.mil/au/awc/awcgate/nss/nss-95.pdf>.

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1031 *Id.* at 2.

1032 *Id.* at i (emphasis added).

1033 *Id.* at 1-2.

1034 SNIDER, *supra* note 995, at 11 (“The Clinton administration has created a national security structure within the Executive branch that allows each major point of view on national security an institutional power base just short of the President, and with no other office capable of integrating them. The important points of view, particularly relevant to crisis management, but also applicable to formulating strategy for a [National Security Strategy Report], and their organizational bases are: the military options for security and stability in the Department of Defense; bilateral relations and transnational issues with a regional focus, in the Department of State and on the White House staff; considerations of economic security, particularly as they influence the domestic economy, in the National Economic Council supported by very strong Treasury and Commerce Departments, and the US Trade Representative; and, issues of environmental security, in the Office of the Vice President. When working as the National Security Council, opinions of cabinet-level representatives of this structure can only be melded together by the President himself, not by the National Security Advisor or the White House Chief of Staff.”).

1035 THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE (2000) [hereinafter CLINTON NSS], [http:// www.bits.de/NRANEU/others/strategy/nss-0012.pdf](http://www.bits.de/NRANEU/others/strategy/nss-0012.pdf).

1036 *See* SNIDER, *supra* note 995, at 13 (discussing some of the concerns faced by the Clinton Administration).

1037 CLINTON NSS, *supra* note 1035, at iii.

1038 *See* BUSH NSS 2002, *supra* note 1002.

1039 *Id.* at iv.

1040 *Id.*

1041 *See id.*

1042 *Id.*

1043 *See id.* at 19.

1044 *Id.*

1045 *Id.*

1046 *Id.* at 20.

1047 *Id.*

1048 *Id.*

1049 *See, e.g., id.* at 27-28 (discussing relations with China).

1050 BUSH NSS 2006, *supra* note 1002.

1051 *Id.*

1052 *Id.* at 36.

1053 *Id.* at 26-27.

1054 *Id.* at 36.

1055 *Id.* at 41.

1056 *Id.* at 47.

1057 *See* U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 7 (2008), <http://www.defense.gov/news/2008%20National%20Defense%20Strategy.pdf>. In a departure from prior practice, the Administration issued the NDS separately from the 2006 QDR, stating that the NDS was based on the QDR, which was, in turn, benchmarked against the 2002 NSS. *Id.* at 1.

1058 *Id.* at 4, 7-8, 13, 21.

1059 *Id.* at 8.

1060 OBAMA NSS, *supra* note 1, at 51.

1061 *See id.* at 1-6.

1062 *Id.* at 8.

1063 *Id.* at 47.

1064 *Id.* at i.

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- ¹⁰⁶⁵ *Id.* at 50 (“Arctic Interests: The United States is an Arctic Nation with broad and fundamental interests in the Arctic region, where we seek to meet our national security needs, protect the environment, responsibly manage resources, account for indigenous communities, support scientific research, and strengthen international cooperation on a wide range of issues.”).
- ¹⁰⁶⁶ See Arija Flowers, *National Security in the 21st Century: How the National Security Council Can Solve the President’s Climate Change Problem*, 11 SUSTAINABLE DEV. L. & POL’Y 50, 53-54 (2011).
- ¹⁰⁶⁷ See Press Release, Cent. Intelligence Agency, CIA Opens Center on Climate Change and National Security (Sept. 25, 2009), [https:// www.cia.gov/news-information/press-releases-statements/center-on-climate-change-and-national-security.html](https://www.cia.gov/news-information/press-releases-statements/center-on-climate-change-and-national-security.html).
- ¹⁰⁶⁸ NAT’L INTELLIGENCE COUNCIL, 2025, *supra* note 943, at xi; see also *National Security Implications of Global Change: Hearing Before the H. Select Comm. on Energy Independence and Global Warning and the Subcomm. on Intelligence, Community Management, Permanent Select Comm. on Intelligence*, 110th Cong. 13 (2008) (statement of T. Fingar, Chairman, National Intelligence Council).
- ¹⁰⁶⁹ BUSH NSS 2006, *supra* note 1002, at 47.
- ¹⁰⁷⁰ See Thomas F. Homer-Dixon, ENVIRONMENT, SCARCITY, AND VIOLENCE 3 (1999).
- ¹⁰⁷¹ See *id.* at 133--35. An additional variation has since emerged with regard to aggressive steps that might be taken against the United States itself. Taken to an extreme, the argument anticipates complete chaos in the international environment, with significant implications for U.S. national security. See *The Implications of Global Climatic Changes for International Security: Hearing on Energy as a Weapon Before the Subcomm. on Nat’l Sec., Emerging Threats, and Int’l Relations*, 109th Cong. (2006) (statement of Dr. Peter H. Gleick, President of the Pacific Institute).
- ¹⁰⁷² See Flowers, *supra* note 1066, at 53.
- ¹⁰⁷³ Cf. NAT’L INTELLIGENCE COUNCIL, 2025, *supra* note 943, at vi (“The international system--as constructed following the Second World War--will be almost unrecognizable by 2025 owing to the rise of emerging powers, a globalizing economy ... [and] growing energy, food, and water constraints”).
- ¹⁰⁷⁴ See *Internal Wars and Failures of Governance, 1955-Most Recent Year*, POL. INSTABILITY TASK FORCE (Jan. 19, 2010), [http:// globalpolicy.gmu.edu/pitt/](http://globalpolicy.gmu.edu/pitt/).
- ¹⁰⁷⁵ *Id.*
- ¹⁰⁷⁶ See ELIZABETH L. CHALECKI, PACIFIC INST., ENVIRONMENTAL SECURITY: A CASE STUDY OF CLIMATE CHANGE, available at <http://www.pacinst.org/reports/>.
- ¹⁰⁷⁷ PEW CTR. ON GLOBAL CLIMATE CHANGE, NATIONAL SECURITY IMPLICATIONS OF GLOBAL CLIMATE CHANGE 1-2 (2009), available at [http:// www.pewclimate.org/federal/memo/national-security-implications](http://www.pewclimate.org/federal/memo/national-security-implications) (“First, military facilities and personnel will be directly impacted: Sea level rise and taller storm surges will encroach on important coastal installations around the world. Increasing land area under drought will affect how and where U.S. forces acquire and transport water to support operations. Weather conditions will become more extreme in places where the local climate already presents serious operational challenges. Second, climate change portends a rise in the frequency of natural disasters. U.S. Navy ships

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provided critical logistical assistance in the aftermaths of Hurricane Katrina and the 2004 Indonesian tsunami, and calls for such assistance are likely to increase, both at home and abroad. Third, climate change will create new theaters of operation. For instance, the opening of the Arctic, which is rapidly losing sea ice, will force the U.S. military to deploy significant assets to this newly accessible, resource-rich area, where Russia's military is already established and well equipped.”).

1078 See CANWEST NEWS SERV., *Canada Draws Line in the Ice over Arctic Seabed*, CANADA.COM (June 30, 2007), <http://www.canada.com/topics/news/national/story.html?id=a3822b19-7c35-41ac-86f8-bcd882b2df8b&k=88331> (“‘Canada’s sovereignty over the lands and waters of the Canadian Arctic is long-standing, well-established and based on historic title,’ the Department of Foreign Affairs [said] ... in response to reports that Russian scientists have amassed fresh geological evidence supporting their country’s claim to about 1.2 million square kilometers of the Arctic seafloor-- and the potential oil riches that lie below.”).

1079 See, e.g., KURT M. CAMPBELL ET AL., *THE AGE OF CONSEQUENCES: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF GLOBAL CLIMATE CHANGE 7* (2007) [hereinafter *THE AGE OF CONSEQUENCES*].

1080 *Id.*

1081 ELIZABETH L. CHALECKI ET AL., ENVTL. CHANGE & SEC. PROJECT, *FIRE & WATER: AN EXAMINATION OF THE TECHNOLOGIES, INSTITUTIONS, AND SOCIAL ISSUES IN ARMS CONTROL AND TRANSBOUNDARY WATER-RESOURCES AGREEMENTS* (2002), available at www.pacinst.org/reports/fire_and_water/fire_and_water.doc.

1082 PETER SCHWARTZ & DOUG RANDALL, *AN ABRUPT CLIMATE CHANGE SCENARIO AND ITS IMPLICATIONS FOR UNITED STATES NATIONAL SECURITY* 17 (2003), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA469325&Location=U2&doc=GetTRDoc.pdf>.

1083 *Id.* at 19.

1084 *Id.* at 22.

1085 See, e.g., NIGEL PURVIS & JOSHUA BUSBY, ENVTL. CHANGE & SEC. PROJECT, *THE SECURITY IMPLICATIONS OF CLIMATE CHANGE FOR THE UN SYSTEM* (2004).

1086 NAT’L WEATHER SERV., U.S. DEP’T OF COMMERCE, *SERVICE ASSESSMENT: HURRICANE KATRINA AUGUST 23-31, 2005*, at 6 (2006), <http://www.nws.noaa.gov/om/assessments/pdfs/Katrina.pdf> (“At 6:10 a.m. Central Daylight Time (CDT) August 29, the center of Katrina made landfall in Plaquemines Parish, LA ... as a Category 3 hurricane”).

1087 See *id.* at 7-8 (“Four levee breaches occurred around New Orleans on August 29: two along the London Avenue Canal, one along the 17th Street Canal, and one along the Industrial Canal The floodwaters from the Industrial Canal levee breach submerged much of the Lower Ninth Ward and areas nearby The 17th Street Canal breach resulted in a slow-rising flood over a larger area. Several levees around New Orleans were overtopped adding to the flooding problems. Data from the U.S. Army Corps of Engineers (USACE) indicates that the breaches and overtopped levees flooded approximately 80 percent of the city to varying depths”).

1088 *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, H.R. Rep. No. 109-377 (2006).

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1089 *See id.*

1090 *See, e.g.,* J.R. McNeill, *Can History Help Us with Global Warming?*, in *THE AGE OF CONSEQUENCES*, *supra* note 1079, at 29.

1091 Julianne Smith et al., *The Race to Replace Kyoto by 2012*, in *THE AGE OF CONSEQUENCES*, *supra* note 1079, at 100.

1092 DEF. THREAT REDUCTION AGENCY, EXPLORATION AND DEVELOPMENT OF THE NATIONAL CONFLICT STUDIES INSTITUTE CONCEPT, at ii (2005), [http:// www.au.af.mil/au/awc/awcgate/dtra/nat_confl_studies_inst.pdf](http://www.au.af.mil/au/awc/awcgate/dtra/nat_confl_studies_inst.pdf). DTRA was founded in 1998 to integrate and focus the capabilities of the Department of Defense to counter the threat of weapons of mass destruction. *Id.* at i.

1093 *See id.*

1094 *See* PEW CTR. ON GLOBAL CLIMATE CHANGE, *supra* note 1077.

1095 *See* CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE 1 (2007), http://biotech.law.lsu.edu/climate/docs/SecurityandClimate_Final.pdf. The eleven military signatories were: General Gordon R. Sullivan, Former Chief of Staff, U.S. Army; Admiral Frank “Skip” Bowman, Former Director, Naval Nuclear Propulsion Program; Lt. General Lawrence P. Farrell, Jr., Former Deputy Chief of Staff, Plans and Programs, U.S. Air Force; Vice Admiral Paul G. Gafney, II; General Paul J. Kern, Former Commanding General, U.S. Army Material Command; Admiral T. Joseph Lopez, Former Commander in Chief, U.S. Naval Forces Europe, and Allied Forces, Southern Europe; Admiral Donald L. Pilling, Former Vice Chief of Naval Operations; Admiral Joseph W. Prueher, Former Commander in Chief, U.S. Pacific Command; Vice Admiral Richard H. Truly, Former NASA Administrator, and Shuttle Astronaut; General Charles F. Wald; General Anthony C. Zinni, Former Commander in Chief, U.S. Central Command. *Id.*

1096 *Id.*

1097 *Id.*

1098 *Id.* at 6.

1099 *Id.*

1100 *See id.*

1101 *Id.* at 7.

1102 *Id.*

1103 *Id.* at 7-8.

1104 *Id.*

1105 *Id.* at 8.

1106 *See id.* at i; *see also supra* note 1095 (providing a list of the positions of the military signatories at the time of publication).

1107 Secretary of Defense Robert M. Gates, Speech Delivered to the U.S. Global Leadership Campaign (July 15, 2008), *available at* [http:// www.defense.gov/speeches/speech.aspx?speechid=1262](http://www.defense.gov/speeches/speech.aspx?speechid=1262).

1108 *Id.*

1109 *See id.*

1110 *See* Michele Flournoy, Dep't of Def., Rebalancing the Force: Major Issues for QDR 2010 (Apr. 29, 2009), *available at* [http:// www.defense.gov/qdr/transcripts_fiournoy_20090429.html](http://www.defense.gov/qdr/transcripts_fiournoy_20090429.html).

1111 *Id.*

1112 *See Climate Change and Global Security: Challenges, Threats and Diplomatic Opportunities: Hearing Before the Comm. on Foreign Relations*, 111th Cong. 9-10 (2009) (statement of former Sen. John Warner).

1113 *Id.*

1114 *See* Kurt M. Campbell & Richard Weitz, *Conclusion: Summary and Implications of Global Climate Change*, in *THE AGE OF CONSEQUENCES*, *supra* note 1079, at 103.

1115 *See id.*

1116 *Id.*

1117 *See Executive Summary*, in *THE AGE OF CONSEQUENCES*, *supra* note 1079, at 9.

1118 *id.* at 10.

1119 *See id.* at 6.

1120 *Id.*

1121 *Id.* at 7.

1122 *Id.*


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- ¹¹²³ *Id.* at 10 (“In the coming decade the United States faces an ominous set of challenges for this and the next generation of foreign policy and national security practitioners. These include reversing the decline in America’s global standing, rebuilding the nation’s armed forces, finding a responsible way out from Iraq while maintaining American influence in the wider region, persevering in Afghanistan, working toward greater energy security, re-conceptualizing the struggle against violent extremists, restoring public trust in all manner of government functions, preparing to cope with either naturally occurring or manmade pathogens, and quelling the fear that threatens to cripple our foreign policy—just to name a few. Regrettably, to this already daunting list we absolutely must add dealing responsibly with global climate change. Our group found that, left unaddressed, climate change may come to represent as great or a greater foreign policy and national security challenge than any problem from the preceding list.”).
- ¹¹²⁴ *See About Us*, BULL. OF THE ATOMIC SCI., [http:// thebulletin.org/content/about-us/purpose](http://thebulletin.org/content/about-us/purpose) (last visited Oct. 20, 2011). Established in 1945 by scientists and engineers who worked on the Manhattan Project, the publication sought to warn the public about the threat posed by nuclear weapons. *Id.* Two years after its founding, the *Bulletin* began displaying a clock on its cover, with the idea of conveying the countdown to total annihilation. *See id.* The decision to move the minute hand reflects the decision of the Board of Directors, in consultation with the Board of Sponsors, which currently includes some eighteen Nobel Laureates. *Id.*
- ¹¹²⁵ “Doomsday Clock” Moves Two Minutes Closer to Midnight, BULL. OF THE ATOMIC SCI. (Jan. 17, 2007), <http://thebulletin.org/content/media-center/announcements/2007/01/17/doomsday-clock-moves-two-minutes-closer-to-midnight> (last visited Oct. 26, 2011).
- ¹¹²⁶ *Id.*
- ¹¹²⁷ *Id.*
- ¹¹²⁸ *Id.*
- ¹¹²⁹ PEW CTR. ON GLOBAL CLIMATE CHANGE, *supra* note 1077, at 2.
- ¹¹³⁰ Concern marked the potential use of biological agents by non-state actors. In 1984, for instance, the Rajneesh cult in Oregon unsettled policymakers when it contaminated local salad bars with *Salmonella typhimurium*, causing 751 people to become ill. Gillian Flaccus, *Oregon Town Never Recovered from Scare*, ASSOCIATED PRESS, Oct. 19, 2001.
- ¹¹³¹ For a discussion of the history of U.S. quarantine law in this context, see Laura K. Donohue, *Biodefense and Constitutional Constraints*, NAT’L SEC. & ARMED CONFLICT L. REV. (forthcoming 2012).
- ¹¹³² *See, e.g.*, BUSH NSS 2002, *supra* note 1002, at 13 (“With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation [N]ew deadly challenges have emerged from rogue states and terrorists [T]he nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world’s strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today’s security environment more complex and dangerous.”).
- ¹¹³³ *See* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2714 (codified as amended in scattered sections of 50 U.S.C. (2006)).
- ¹¹³⁴ *Id.*


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- ¹¹³⁵ Jonathan Tucker, *Introduction*, in TOXIC TERROR: ASSESSING TERRORIST USE OF CHEMICAL AND BIOLOGICAL WEAPONS I (Jonathan B. Tucker ed., 2000) [hereinafter Toxic TERROR].
- ¹¹³⁶ Jessica Eve Stern, *Larry Wayne Harris*, in Toxic TERROR, *supra* note 1135, at 227-46. While investigators later realized Harris obtained only a harmless anthrax strain, as Stern concludes, Harris posed a real and substantial threat to American national security. *Id.*
- ¹¹³⁷ Judy Parker-Tursman, *FBI Briefed on District's Terror Curbs*, PITTSBURGH POST-GAZETTE, May 5, 1999, at A14; Tim Weiner, *Reno Says U.S. May Stockpile Medicine for Terrorist Attacks*, N.Y. TIMES, Apr. 23, 1998, at A14.
- ¹¹³⁸ Parker-Tursman, *supra* note 1137.
- ¹¹³⁹ *See* Weiner, *supra* note 1137.
- ¹¹⁴⁰ *Monterey WMD Terrorism Database*, CENTER FOR NONPROLIFERATION STUD., <http://wmddb.msis.edu/> (last visited Oct. 28, 2011) (password protected).
- ¹¹⁴¹ *See* Homeland Sec. Sec'y Michael Chertoff, Remarks at the Stanford Constitutional Law Center's Germ Warfare, Contagious Disease, and the Constitution Conference (Apr. 11, 2008), available at http://www.dhs.gov/xnews/speeches/sp_1208283625146.shtm; *Science and Security in the Post-9/11 Environment: Bioterrorism*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. (Aug. 2004), <http://www.aaas.org/spp/post911/agents/>.
- ¹¹⁴² *See generally* Hong Kong, 1997, BIRD FLU: A VIRUS OF OUR OWN HATCHING, <http://birdflubook.com/a.php?id=15> (last visited Dec. 30, 2011).
- ¹¹⁴³ At its first outbreak in 1997, most deaths occurred amongst patients older than age thirteen, but by 2006, the fatality rate for children younger than fifteen had reached eighty-nine percent. *See* Writing Comm. of the World Health Org., *Avian Influenza A (H5N1) Infection in Humans*, 353 N. ENGL. J. MED. 1374, 1378 (2005), available at <http://content.nejm.org/cgi/content/full/353/13/1374>. There appear to be a handful of questionable cases in which the virus may have been transmitted between people (mother and child, and patient to nurse, but unique situations). *See id.*
- ¹¹⁴⁴ *See Higher Human Learning*, BIRD FLU: A VIRUS OF OUR OWN HATCHING, <http://birdflubook.com/a.php?id=15> (last visited Dec. 30, 2011) ("H5N1 and the virus of 1918 both shared a proclivity for the lungs, but H5N1 doesn't always stop there.").
- ¹¹⁴⁵ *See generally* THE 1918-1919 PANDEMIC OF INFLUENZA: THE URBAN IMPACT IN THE WESTERN WORLD (Fred R. van Hartesveldt ed., 1992) (estimates at least 40 million); NIAL JOHNSON, BRITAIN AND THE 1918-19 INFLUENZA PANDEMIC 103 (2007) (estimating up to 100 million).
- ¹¹⁴⁶ Compare JOHNSON, *supra* note 1145, at 103 (describing the mortality rate of the Spanish flu), with *Cumulative Number of Confirmed Human Cases of Avian Influenza A (H5N1) Reported to WHO, 2003-2011*, WORLD HEALTH ORG. (Oct. 10, 2011), http://www.who.int/influenza/human_animal_interface/EN_GIP_LatestCumulativeNumberH5N1cases.pdf (describing the mortality rate of the recent avian flu outbreak). As of October 10, 2011, the World Health Organization reported 332 deaths out of 566 cases of H5N1 in humans. *Id.*

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- ¹¹⁴⁷ Cf. ANGIE A. WELBORN, CONG. RESEARCH SERV., RL31333, FEDERAL AND STATE ISOLATION AND QUARANTINE AUTHORITY 1 (2005), <http://www.fas.org/sgp/crs/RL31333.pdf> (discussing disease outbreaks and their mortality rates).
- ¹¹⁴⁸ See Kristen Philipkoski, *Superspreaders May Hold SARS Clue*, WIRED (May 21, 2003), <http://www.wired.com/medtech/health/news/2003/05/58907?currentPage=all>.
- ¹¹⁴⁹ *Summary of Probable SARS Cases with Onset of Illness from 1 November 2002 to 31 July 2003*, WORLD HEALTH ORG. (2003), available at http://www.who.int/csr/sars/country/table2004_04_21/en/index.html.
- ¹¹⁵⁰ Graeme T. Laurie & Kathryn G. Hunter, *Mapping, Assessing and Improving Legal Preparedness for Pandemic Flu in the United Kingdom*, 10 MED. L. INT'L 101, 103 (2009).
- ¹¹⁵¹ *Compare Report: Swine Flu Could Cause up to 90,000 U.S. Deaths*, CNN HEALTH (Aug. 24, 2009), http://articles.cnn.com/2009-08-24/health/us.swine.flu.projections_1_swine-flu-h1n1-seasonal-flu?_s=PM:HEALTH, with *CDC Estimates of 2009 H1N1 Influenza Cases, Hospitalizations and Deaths in the United States, April-November 14, 2009*, FLU.GOV, http://www.flu.gov/individualfamily/about/h1n1/estimates_2009_h1n1.html#Background (last visited Dec. 30, 2011) (estimating between 8870 and 18,300 deaths occurred in the United States from the H1N1 outbreak).
- ¹¹⁵² NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: THE GLOBAL INFECTIOUS DISEASE THREAT AND ITS IMPLICATIONS FOR THE UNITED STATES (NIE No. 99-17D) (2000) [hereinafter NAT'L INTELLIGENCE COUNCIL, INTELLIGENCE ESTIMATE], http://www.dni.gov/nic/PDF_GIF_otherprod/infectiousdisease/infectiousdiseases.pdf.
- ¹¹⁵³ See DEF. THREAT REDUCTION AGENCY, *supra* note 1092, at 31.
- ¹¹⁵⁴ See CNA CORP., *supra* note 1095, at 7-8.
- ¹¹⁵⁵ See BUSH NSS 2002, *supra* note 1002, at 23.
- ¹¹⁵⁶ OBAMA NSS, *supra* note 1, at 49.
- ¹¹⁵⁷ *Id.* at 49.
- ¹¹⁵⁸ Pub. L. No. 107-188, 116 Stat. 294 (codified in scattered sections of  7, 18, 21, 29, 28, 42, 47 U.S.C.).
- ¹¹⁵⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2003).
- ¹¹⁶⁰ *Preparedness, Response & Recovery*, U.S. DEPARTMENT OF HOMELAND SEC., <http://www.dhs.gov/files/prepresprecovery.shtm> (last visited Apr. 26, 2012).
- ¹¹⁶¹ U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN, http://www.dhs.gov/xlibrary/assets/NRP_Brochure.pdf.

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- ¹¹⁶² See THE WHITE HOUSE, BIODENSE FOR THE 21ST CENTURY (2004) [hereinafter BIODENSE FOR THE 21ST CENTURY], available at <http://www.fas.org/irp/offdocs/nsdp/hspd-10.html>.
- ¹¹⁶³ *Id.*
- ¹¹⁶⁴ See *id.*
- ¹¹⁶⁵ Dr. Jeff Runge, DHS C. Med. Officer on Pandemic Preparedness, Press Briefing on National Strategy for Pandemic Influenza Implementation Plan: One Year Summary (July 17, 2007), available at <http://georgewbushwhitehouse.archives.gov/news/releases/2007/07/20070717-13.html>; see also Dr. Venkayya, Special Ass't to the President for Biodefense, Press Briefing on National Strategy for Pandemic Influenza Implementation Plan: One Year Summary (July 17, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070717-13.html>.
- ¹¹⁶⁶ Venkayya, *supra* note 1165.
- ¹¹⁶⁷ Proposed Rules, 70 Fed. Reg. 71,892 (Nov. 30, 2005).
- ¹¹⁶⁸ The Chemical Biological Incident Response Force, 4th Marine Expeditionary Brigade, for instance, is highly trained in responding to chemical, biological, radiological, nuclear, or high-yield explosive incidents. See *Chemical Biological Incident Response Force, MARINES*, <http://www.marines.mil/unit/cbirf/Pages/default.aspx> (last visited Feb. 9, 2012).
- ¹¹⁶⁹ *Id.*
- ¹¹⁷⁰ See PRESIDENT GEORGE W. BUSH, DEPARTMENT OF HOMELAND SECURITY 4 (2002), <http://www.dhs.gov/xlibrary/assets/book.pdf>.
- ¹¹⁷¹ See BIODENSE FOR THE 21ST CENTURY, *supra* note 1162 (“[T]he Department of Defense will continue to ensure that ... our troops and our critical domestic and overseas installations are effectively protected against [biological] threats.”).
- ¹¹⁷² See John Warner National Defense Authorization Act for Fiscal Year 2007, ch. 15, 120 Stat. 2083, 2405 (2006).
- ¹¹⁷³ *Id.*
- ¹¹⁷⁴ *Id.* at 2404 (amending  10 U.S.C. § 333) (emphasis added).
- ¹¹⁷⁵ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 325.
- ¹¹⁷⁶ See, e.g., STEVE BOWMAN ET AL., CONG. RESEARCH SERV., RL33095, HURRICANE KATRINA: DOD DISASTER RESPONSE 1 (2005), <http://www.fas.org/sgp/crs/natsec/RL33095.pdf> (stating that in regard to natural disasters “the role of the National Guard is critical in the maintenance of civil order, the provision of logistical support, and the coordination of rescue and relief effort.”); Alfred J. Sciarrino, *The Grapes of Wrath and the Speckled Monster, Part III: Epidemics, Natural Disasters and Biological Terrorism--The Federal Response*, 10 MICH. ST. U. J. MED. & L. 429, 462 (2006) (“The suggestion to use the military in a national emergency is not merely academic, as in the immediate aftermath of Katrina, Americans saw the breakdown

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of civilian leadership, especially by the Department of Homeland Security, charged with the primary responsibility of responding to ‘a terrorist attack, natural disaster or other large-scale emergency,’ and by FEMA, the lead agency under the Department of Homeland Security. Only the military offered a wide range of worthwhile assistance, including proper search and rescue measures; recovering the bodies of those killed in the storm or afterward; immediately attempting to bolster and secure the levees; providing for and delivering food, shelter, and water; and restoring law and order.”) (internal footnotes omitted).

- ¹¹⁷⁷ David Shull, *Drugs as a National Security Issue*, in NATIONAL SECURITY LAW 493 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005).
- ¹¹⁷⁸ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.
- ¹¹⁷⁹ See Exec. Order No. 11,599, 36 Fed. Reg. 11,793 (June 17, 1971).
- ¹¹⁸⁰ See Comprehensive Drug Abuse Prevention and Control Act § 601.
- ¹¹⁸¹ See Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, § 302, 86 Stat. 65.
- ¹¹⁸² See Memorandum from President Richard Nixon to William P. Rogers, Sec’y of State (Sept. 7, 1971), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=3139>.
- ¹¹⁸³ See Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, § 201, 86 Stat. 65.
- ¹¹⁸⁴ Shull, *supra* note 1177, at 496.
- ¹¹⁸⁵ Richard Nixon, Message to the Congress Transmitting Reorganization Plan 2 of 1973 Establishing the Drug Enforcement Administration (Mar. 28, 1973), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=4159#axzzlbneBG92h>.
- ¹¹⁸⁶ *Id.*
- ¹¹⁸⁷ *Id.*
- ¹¹⁸⁸ Shull, *supra* note 1177, at 496.
- ¹¹⁸⁹ *Id.*
- ¹¹⁹⁰ See *Military Cooperation with Civilian Law Enforcement Officials: Hearing on DOD and Military Serv. Cooperation with and Assistance to Civilian Agency Before Subcomm. on Crime, H. Comm. on the Judiciary*, 98th Cong. (1983) (statement of Ronald F. Lauve, Senior Associate Director, General Government Division).
- ¹¹⁹¹ See Andrew Glass, *Reagan Declares ‘War on Drugs,’ October 14, 1982*, POLITICO (Oct. 14, 2010), <http://www.politico.com/news/stories/1010/43552.html> (recounting Reagan’s declaration that illicit drugs were a threat to national security and acknowledging that President Nixon popularized the term “war on drugs” in 1971).

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- ¹¹⁹² Department of Defense Authorization Act, 1982, [Pub. L. No. 97-86](#), Title IX, 95 Stat. 1115 (1981). The Posse Comitatus Act of 1878 had apparently limited the military's ability to assist law enforcement, prompting the new language from Congress. *See* Posse Comitatus Act,  [18 U.S.C. § 1385 \(2006\)](#).
- ¹¹⁹³ THE WHITE HOUSE, NATIONAL SECURITY DECISION DIRECTIVE NUMBER 221: NARCOTICS AND NATIONAL SECURITY (1986), *available at* [http:// www.fas.org/irp/offdocs/nsdd/nsdd-221.htm](http://www.fas.org/irp/offdocs/nsdd/nsdd-221.htm) (redacted declassified document).
- ¹¹⁹⁴ *See id.* at 1.
- ¹¹⁹⁵ *Id.*
- ¹¹⁹⁶ *Id.* at 2.
- ¹¹⁹⁷ *Id.*
- ¹¹⁹⁸ *Id.*
- ¹¹⁹⁹ *Id.* ("Policy. The international drug trade threatens the national security of the United States by potentially destabilizing democratic allies. It is therefore the policy of the United States, in cooperation with other nations, to halt the production and flow of illicit narcotics, reduce the ability of insurgent and terrorist groups to use drug trafficking to support their activities, and strengthen the ability of individual governments to confront and defeat this threat.").
- ¹²⁰⁰ *Id.* at 3-5.
- ¹²⁰¹ President George H.W. Bush, Address on National Drug Control Strategy (Sept. 6, 1989), *available at* [http:// www.nytimes.com/1989/09/06/us/text-of-president-s-speech-on-national-drug-control-strategy.html?pagewanted=all&src=pm](http://www.nytimes.com/1989/09/06/us/text-of-president-s-speech-on-national-drug-control-strategy.html?pagewanted=all&src=pm).
- ¹²⁰² PRESIDENT GEORGE H.W. BUSH, NATIONAL SECURITY DIRECTIVE 13: COCAINE TRAFFICKING (1989), [http:// bushlibrary.tamu.edu/research/pdfs/nsd/nsd13.pdf](http://bushlibrary.tamu.edu/research/pdfs/nsd/nsd13.pdf).
- ¹²⁰³ PRESIDENT GEORGE H.W. BUSH, NATIONAL SECURITY DIRECTIVE 18: INTERNATIONAL COUNTER-NARCOTICS STRATEGY 1 (1989), [http:// bushlibrary.tamu.edu/research/pdfs/nsd/nsd18.pdf](http://bushlibrary.tamu.edu/research/pdfs/nsd/nsd18.pdf).
- ¹²⁰⁴ *Id.*
- ¹²⁰⁵ *Id.* at 3.
- ¹²⁰⁶ *See id.* The DEA's Operation Snowcap (run from 1987 to the mid-1990s) similarly focused on the source of supply in Central and South America. CURT A. KLUN, WAR ON DRUGS: LESSONS LEARNED FROM 35 YEARS OF FIGHTING ASYMMETRIC THREATS 45 (2010). Note that operations conducted under this program were conducted in Guatemala, Panama, Costa Rica, Argentina, Brazil, Chile, Venezuela, Colombia, Ecuador, Bolivia, Peru, and Mexico. *Id.* at 46.

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- ¹²⁰⁷ Bush, *supra* note 1201.
- ¹²⁰⁸ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 2 (1989), <https://www.ncjrs.gov/pdffiles1/ondcp/119466.pdf>.
- ¹²⁰⁹ See e.g., Michael J. Dziedzic, *The Transnational Drug Trade and Regional Security*, 31 SURVIVAL 533 (1989) (issuing his article in November 1989, the same month as the Wall's fall).
- ¹²¹⁰ STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS, at xvi (1993).
- ¹²¹¹ Exec. Order No. 12,880, 58 Fed. Reg. 60,989 (Nov. 16, 1993), amended by Exec. Order No. 13,008, 61 Fed. Reg. 28,721 (June 3, 1996) (shifting the responsibility of chairing an interagency working group in international counternarcotics policy to the Office of National Drug Control Police, rather than the Department of State).
- ¹²¹² THE WHITE HOUSE, PRESIDENTIAL DECISION DIRECTIVE NO. 14: COUNTER-NARCOTICS "ANDEAN STRATEGY" (1993).
- ¹²¹³ H. COMM. ON GOV'T REFORM & OVERSIGHT, NATIONAL DRUG POLICY: A REVIEW OF THE STATUS OF THE DRUG WAR, H. R. Doc. No. 104-486, at 44 (1996) (summarizing testimony by Thomas A. Constantine, Administrator of the Drug Enforcement Administration, who stressed that it is imperative that the United States "destroy some of these [drug trafficking cartels] rather than merely disrupt them").
- ¹²¹⁴ *Id.*
- ¹²¹⁵ THE WHITE HOUSE, PRESIDENTIAL DECISION DIRECTIVE NO. 44: HEROIN CONTROL POLICY (1995).
- ¹²¹⁶ See generally *Questions for the Record: Joint Hearing on Interdiction Before the H. Comm. on Transportation & Infrastructure, Subcomm. on Coast Guard & Maritime Transportation, and S. Caucus on International Narcotics Control*, 104th Cong. (1996), available at http://www.fas.org/irp/congress/1996_hr/j960912q.htm.
- ¹²¹⁷ Jane E. Becker, Principal Deputy Ass't Sec'y, Bureau of Int'l Narcotics & L. Enforcement Aff., Address in [Bangkok,] Thailand (Nov. 6, 1995), available at http://www.state.gov/www/global/narcotics_law/becker_110695.html.
- ¹²¹⁸ *Id.*
- ¹²¹⁹ H. COMM. ON GOV'T REFORM & OVERSIGHT, *supra* note 1213, at 67.
- ¹²²⁰ *Id.*
- ¹²²¹ See CLINTON NSS, *supra* note 1035, at 11.

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- ¹²²² *Id.*
- ¹²²³ See, e.g., 10 U.S.C. § 124 (2006) (designating DOD as the lead agency for detecting and monitoring the transit of illegal drugs into the United States); § 371 (2006 & Supp. IV 2011) (authorizing DOD to share information obtained during training or operations with law enforcement officials); § 372 (2006 & Supp. IV 2011) (empowering DOD to provide equipment to local, state, and federal law enforcement organizations); § 373 (2006) (authorizing DOD to provide training and advice to law enforcement officials); § 374 (2006 & Supp. IV 2011) (giving DOD the authority to maintain and operate equipment to be used by law enforcement agencies); § 375 (2006) (restricting direct military participation in search, seizure, and arrest operations conducted by law enforcement, unless otherwise authorized by statute); 32 U.S.C. § 112 (2006) (providing for DOD to grant funding requests from state governors where the funds are to be used for counter-narcotics activities).
- ¹²²⁴ See, e.g., KLUN, *supra* note 1206, at 3 (“The United States[] [has a] thirty-plus year history in fighting a war on drugs [offering researchers] unique insight in addressing ... non-traditional [national security] threats.”).
- ¹²²⁵ See RONALD L. GOLDFARB, PERFECT VILLAINS, IMPERFECT HEROES: ROBERT F. KENNEDY’S WAR AGAINST ORGANIZED CRIME (1996).
- ¹²²⁶ See, e.g., James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC MONTHLY, May 1972, available at <http://www.theatlantic.com/past/politics/crime/crimewar.htm>.
- ¹²²⁷ President Lyndon B. Johnson, State of the Union Address (Jan. 17, 1968), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/680117.asp>.
- ¹²²⁸ See RICHARD NIXON, TOWARD FREEDOM FROM FEAR (1968), reprinted in 114 Cong.Rec. 12936 (May 13, 1968).
- ¹²²⁹ See, e.g., John F.X. Irving, *New Directions in the War on Crime*, 1 CRIM. JUST. Q. 40, 41 (1973).
- ¹²³⁰ See Gerald M. Caplan, *Criminology, Criminal Justice, and the War on Crime*, 14 CRIMINOLOGY 3, 4 (1976).
- ¹²³¹ See *id.* at 7-8.
- ¹²³² See *id.* at 3 (“[W]e have more crime than any other place in the world, more this year than last, and much, much more than we had in 1964 when Senator Goldwater became the first presidential candidate to argue that the federal government must do something about crime in the streets.”).
- ¹²³³ See generally BARRY BUZAN ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS (1998).
- ¹²³⁴ Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 832 (2001).
- ¹²³⁵ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

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- ¹²³⁶ See, e.g., Albert J. Krieger, *Friendly Fire and the Casualties of the War on Crime*, 30 LOY. L.A. L. REV. 49,50 (1996).
- ¹²³⁷ *Id.*
- ¹²³⁸ *Id.* at 51.
- ¹²³⁹ See *id.* at 51-52.
- ¹²⁴⁰ Stephen B. Bright, Essay, *Casualties of the War on Crime: Fairness, Reliability, and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 413 (1997).
- ¹²⁴¹ See *id.*
- ¹²⁴² *Id.*
- ¹²⁴³ *Id.*
- ¹²⁴⁴ Dubber, *supra* note 1234, at 832.
- ¹²⁴⁵ *Id.*
- ¹²⁴⁶ AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 1 (Mary Louise Frampton et al. eds., 2008).
- ¹²⁴⁷ *Id.*
- ¹²⁴⁸ Matthew Linkie, Note, *The Defense Threat Reduction Agency: A Note on the United States 'Approach to the Threat of Chemical and Biological Warfare*, 16 J. CONTEMP. HEALTH L. & POL'Y 531, 542-43 (2000).
- ¹²⁴⁹ DEF. THREAT REDUCTION AGENCY, *supra* note 1092, at A-165, A-166.
- ¹²⁵⁰ *Id.* at 20.
- ¹²⁵¹ *Id.*
- ¹²⁵² ALAN G. WHITTAKER ET AL., THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM 18 (2011), [http:// www.ndu.edu/icafo/outreach/publications/nspp/docs/icafo-nscpolicy-process-report-08-2011.pdf](http://www.ndu.edu/icafo/outreach/publications/nspp/docs/icafo-nscpolicy-process-report-08-2011.pdf).
- ¹²⁵³ OBAMA NSS, *supra* note 1, at 8.

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- 1254 *Id.* at 15:
- 1255 *Id.*
- 1256 *Id.* at 40.
- 1257 Pub. L. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).
- 1258 See S. Rep. No. 95-604(I), at 2 (1977); S. Rep. No. 95-604(I), at 2 (1977) (setting forth the purpose of FISA).
- 1259 See David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 488 (2006) ("The FISA wall [between criminal law and national security concerns] resisted all efforts to tear it down ... until [the Department of Justice] in 2002 took an unprecedented appeal to the Foreign Intelligence Surveillance Court of Review ...").
- 1260 See *In re [redacted] Sealed Case*, 310 F.3d 717, 728 (FISA Ct. Rev. 2002) (concluding that FISA never established a dichotomy between criminal law and national security concerns); see also Kris, *supra* note 1259, at 513 (describing broader application of FISA).
- 1261 DEA Congressional Testimony Executive Summary Before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary, 107th Cong. (2002), available at <http://www.justice.gov/dea/pubs/cngrtest/ct031302.html> (testimony of DEA Administrator William Asa Hutchinson).
- 1262 *Id.*
- 1263 *Id.*
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¹²⁷⁶ *P-3 Subhunters Using ASW Gear to Find Narco-Subs?*, *supra* note 1275.

¹²⁷⁷ Walter Jayawardhana, *Tamil Tigers Are Developing a Submarine for Terrorism*, LANKA PAGE (Mar. 30, 2007), <http://lankapage.wordpress.com/2007/03/30/tamil-tigers-are-developing-a-submarine-for-terrorism/>.

¹²⁷⁸ Press Release, Dep’t of State, Office of the Coordinator for Counterterrorism, Foreign Terrorist Organizations (Sept. 15, 2011), <http://www.state.gov/s/ct/rls/other/des/123085.des/123085.htm>.


¹²⁷⁹ See *P-3 Subhunters Using ASW Gear to Find Narco-Subs?*, *supra* note 1275 (“It sounds like [the semi-submersibles and fully submersibles used by criminal organizations] are capable of staying underwater long enough to warrant the use of P-3 subhunters to find them.”).

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- ¹²⁸⁷ ELIZABETH L. CHALECKI, PAC. INST. FOR STUD. IN DEV., ENV'T, & SEC, A NEW VIGILANCE: IDENTIFYING AND REDUCING THE RISKS OF ENVIRONMENTAL TERRORISM 4-6 (2001), http://www.pacinst.org/reports/environment_and_terrorism/environmental_terrorism_final.pdf.
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Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying”).

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- 1307  *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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Commentary: National Security

Lead Article
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WHO DECIDES ON SECURITY?

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, this 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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***1419 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 a part of the drinking water in this country that there has been a tradeoff 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.² 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.³ He writes, "[w]e have to worry that the very means given to the government to combat our enemies will be used by the government against its enemies"⁴ Especially disconcerting for many commentators, executive judgments—due to fears of infiltration and *1420 security leaks—are often cloaked in secrecy.⁵ This lack of transparency undermines a core value of democratic decision-making: popular scrutiny of government action. As Sixth Circuit Judge Damon Keith famously declared in a case involving secret deportations by the executive branch, "[d]emocracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."⁶ In the view of no less an establishment figure than Neal Katyal, who until June 2011 was the Acting Solicitor General, such security measures transform the current presidency into the "most dangerous branch[.]" one that "subsumes much of the tripartite structure of government."⁷

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.⁸ What is remarkable about these reform efforts is that in 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.⁹ 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.¹⁰ More recently, *1421 Bruce Ackerman has defended the need for an “emergency constitution” premised on congressional oversight and procedurally specified practices.¹¹ As for increased judicial vigilance, Arthur Schlesinger argued nearly forty years ago, in his seminal book, *The Imperial Presidency*, that the courts “had to reclaim their own dignity and meet their own responsibilities” by abandoning deference and by offering a meaningful check to the political branches.¹² Today, Laurence 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.”¹³

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 primarily has been to entrench further the system of discretion and centralization. In the case of congressional legislation (from the 200 standby statutes on the books¹⁴ to *1422 the post-September 11 and Iraq War Authorizations for the Use of Military Force, to the Detainee Treatment Act and the Military Commissions Acts¹⁵), this has often entailed Congress self-consciously playing the role of junior partner-buttredding 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.¹⁶ 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.¹⁷ 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? This Article argues 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 key role in shaping security practices in each era of American constitutional history, *1423 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, this Article 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, many 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.¹⁸ 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.¹⁹ 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.²⁰

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.²¹ 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.²² Insulated decision-makers in the executive branch, armed with the specialized skills of the *1424 professional military, are assumed to be best equipped to make sense of complicated and often conflicting information about safety and self-defense.²³ The result is that the other branches-let alone the public at 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, Part II begins 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 these 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, John Locke and even Thomas Hobbes (famous as the philosopher of absolutism) presented accounts of security and self-defense that were normatively more democratic than the current framework. Part III then explores 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.

Part IV continues by detailing the steady emergence, beginning during the New Deal, of the prevailing American idea of security, with its emphasis on professional expertise and insulated decision-making. This discussion highlights the work of Edward 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 then shows how Herring's "national security" vision increasingly became internalized by judicial actors during and after World War II. It argues 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 *1425 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.²⁴ According to Frankfurter, the rise of security expertise entailed the welcome spread of meritocratic commitments to a critical and complex arena of policymaking. This discussion focuses especially on a series of Frankfurter opinions, including *Ex parte Quirin*,²⁵ *Hirabayashi v. United States*,²⁶ *Korematsu v. United States*,²⁷ and *Youngstown Sheet & Tube Co. v. Sawyer*,²⁸ and connects these opinions to contemporary cases such as *Holder v. Humanitarian Law Project*.²⁹ Finally, Part VI, the conclusion, notes how today's security concept-normatively sustained by Frankfurter's judgments about merit and elite authority-shapes current discussions of threat and foreign policy in ways that often inhibit rather than promote actual security. The Article then ends with some reflections on what would be required to alter the governing arrangements.

As a final introductory note, a clarification of 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, "[a]lthough 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."³⁰ 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 the purposes of this Article, when invoked without any modifier, the word security refers to *1426 more specific questions of common defense and physical safety. These questions, emphasizing issues of war and peace, are largely coterminous with what Franklin Delano Roosevelt famously referred to in his "Four Freedoms" State of the Union Address as "freedom from fear:" namely ensuring that citizens are protected from external and internal acts of "physical aggression."³¹

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, national security-as Americans understand it today-is in fact a relatively novel concept, which took hold discursively 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.³² 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, it is helpful to 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 *1427 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.

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.³³ 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.³⁴ 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 *1428 popular accountability. For this reason alone, revisiting his vision of security is deeply instructive for the present moment.

Hobbes began by positing that individuals exist in a state of nature prior to the construction of civil society.³⁵ Due to the conflicts and insecurities that bedevil this original position, individuals develop a social contract and with it governmental arrangements.³⁶ The necessity and structure of these arrangements ultimately derive from assumptions Hobbes made about the nature of human reason and its implications for collective life. Hobbes contended that, as an epistemological matter, we can possess no definitive knowledge regarding the external world around us. He presented 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.³⁷ We have no knowledge of what an object really looks like, only its sensory appearance. Yet, despite this rejection of natural essences, Hobbes did claim that we know

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that the external world exists as such.³⁸ He reached this conclusion based on the fact that humans experience change. People do not apprehend a static image of the world, but rather a series of constantly shifting images, thoughts, noises, and tactile sensations. This indicates that there exists some “matter”³⁹ 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 wrote, “[s]o that sense in all cases, is nothing else but original fancy, caused (as I have said) by the pressure, that is, by the motion, of external things upon our eyes, ears, and other organs”⁴⁰

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 *1429 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 wrote:

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.⁴¹

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.⁴² 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.⁴³ 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.”⁴⁴

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 *1430 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 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, and unlawful.”⁴⁵ 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 and deformed birth, it shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws.”⁴⁶

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.⁴⁷ 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-
*1431
making. This is because his epistemology is fundamentally egalitarian and thoroughly rejects any distinction between elite and ordinary rationality. Hobbes's skepticism implies 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 legitimize 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 was merely a "difference of convenience."⁴⁸ 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"⁴⁹

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 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.

B. 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.⁵⁰ 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
*1432
framework for both the Federal Constitution and early American judgments about the appropriate role of ordinary citizens in issues of war and peace.⁵¹

Like Hobbes, Locke commenced 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 that then generate a social contract.⁵² As a result, he too underscored the priority of security for political life and viewed civil society as the product of our search for such security.⁵³ What differentiates Locke from his predecessor is a fundamental disagreement about rationality and human knowledge in the state of nature. Unlike Hobbes, Locke argued that human beings are endowed by God with a faculty of reason.⁵⁴ 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, health, liberty, or possessions"⁵⁵ 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"⁵⁶ we are, to know good from evil, and to arbitrate disputes with justice and equanimity. Given these

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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 *1433 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. 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,⁵⁷ 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 argued 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 it⁵⁸

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-lead 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 wrote, “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.”⁵⁹

More important for our purposes, Locke also argued that the popular capacity to understand and respond to security threats suggests that *1434 individuals can gauge the relative intensity of competing dangers.⁶⁰ 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 dismissed the Hobbesian solution by commenting:

[A]s if when men quitting the state of nature . . . agreed that all of them but one[] should be under the restraint of 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 pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions.⁶¹

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 implied that people do not simply know that maintaining a condition of security is in their self-interest. They also are able to recognize the most appropriate means to overcome violence and thus determine 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.⁶² Locke argued that once in civil society, unexpected “accidents and necessities”⁶³ may occur requiring immediate and flexible action. Since *1435 legislatures are “usually too numerous, and so too slow”⁶⁴ 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.”⁶⁵ This expansive extra-legal authority no doubt runs contrary to the politics of limited government, which Locke so carefully establishes elsewhere.⁶⁶ Yet, the effects 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.⁶⁷ It is this capacity-to appreciate when governmental actions are contrary to basic security-that in particularly egregious circumstances can justify revolution. Locke saw prerogative power as the occasional emergence of the state of nature within civil society, since during these moments of crisis “no judge on earth”⁶⁸ exists to adjudicate independently popular opposition to the use of discretion. He argued 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.”⁶⁹ 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.⁷⁰ Given his belief that the 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.

*1436 Ultimately, both Hobbes and Locke contended 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 will be discussed 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 U.S. 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 Part 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. Section A first explores how views about security knowledge set the terms for the Constitution’s initial distribution of war-making and common defense powers between executive and legislative branches. Section B then details how courts in the mid nineteenth century assessed

questions of emergency. *1437 This discussion pays particular attention to *Mitchell v. Harmony*,⁷¹ a case from the Mexican-American War which is among the most sustained legal explorations in the early republic of (1) what constitutes an emergency; (2) who decides whether one exists; and (3) which departures from constitutional normalcy are legally justified.⁷²

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.⁷³ In this context, historian Robert Wiebe described 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]"⁷⁴ 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.⁷⁵

No doubt gentry and commercial elites found many of these *1438 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.⁷⁶ James Madison famously remarked in *Federalist* No. 55 that, "[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."⁷⁷ In his view, "avoid[ing] the confusion and intemperance of a multitude"⁷⁸ 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.⁷⁹ 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 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" by creating political bodies with overlapping responsibilities.⁸⁰ 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 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, *1439 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 the 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."⁸¹ Indeed, not only did Article I of the Constitution give Congress, not the President, the power to declare war,⁸² it provided Congress with the responsibility of raising both the army⁸³ and the navy.⁸⁴

Just as important, the legislative branch also enjoyed primary federal responsibility in directing the militias.⁸⁵ 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.'"⁸⁶ 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.⁸⁷ It constituted perhaps the key mechanism by which

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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 determine how best to “organiz[e], arm[], and disciplin[e]” the militias, as well as how to *1440 “govern[] such Part of them as may be employed in the Service of the United States”⁸⁸ This authority vis-a-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 [v]iolence” justified federal involvement.⁸⁹ 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.⁹⁰ 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.⁹¹ 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 *1441 much to the support of pure government, as sores do to the strength of the human body.”⁹² By contrast, citizens in colonial and postcolonial America enjoyed agricultural abundance and easy access to property, a condition that would persist “as long as there shall be vacant lands in any part of America.”⁹³ 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.

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.”⁹⁴ 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.⁹⁵

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 Hamilton 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.”⁹⁶

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 *1442 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, politicians and social critics questioned the view that property-less citizens were any more liable than wealthy elites to think in terms of partial self-interest rather than the common good.⁹⁷ 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 *1443 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, “[t] here 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.”⁹⁸

Such an account was perhaps most powerfully articulated by Abraham Lincoln, in his 1859 “Address Before the Wisconsin State Agricultural Society.”⁹⁹ There, he argued that the “mud-sill theory”¹⁰⁰ was more than simply a defense of slavery; it was also a claim about the imprudence of *1444 combining cultural and scientific knowledge with ordinary labor.¹⁰¹ He declared, “[b]y 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.”¹⁰² 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.”¹⁰³

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.”¹⁰⁴ In sharp contrast, the ideal of democratic self-government took for granted the value of “universal education[.]”¹⁰⁵ 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.”¹⁰⁶ 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, “each 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.”¹⁰⁷ For Lincoln, the democratic hope was that common education 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 *1445 superintendent noted in 1875, reflecting sentiment that was pervasive at the time, “[i]f we shall limit the 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.”¹⁰⁸

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.”¹⁰⁹ 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.¹¹⁰

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*, 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.¹¹¹ In the *1446 case, the 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.¹¹² In his ruling on behalf of the Court, Chief Justice Roger Taney rejected these claims and presented a robust Jacksonian defense of popular knowledge and participation in issues of security.¹¹³

Today, Taney is most famous, or rather infamous, for his opinion in *1447 *Dred Scott v. Sandford*.¹¹⁴ 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.¹¹⁵ On its face, this combination may well strike today’s reader as contradictory. On the one hand, Jacksonians like Taney depicted the early republic as subject to near continuous threat from external groups like Native Americans and African slaves, and, as a consequence, they justified practices of subordination and expropriation. Yet, at the same time (as discussed below), Taney also held absolutely firm to the belief that constitutional life should be organized on the Lockean premises of presumptive peace-only punctuated occasionally by war-and widespread (white) security knowledge.¹¹⁶ In a sense, this discontinuity spoke to an implicit feature of Lockean thought, one that early Americans took for granted and as politically foundational. In *The Second Treatise*, Locke famously defended indigenous dispossession on grounds that Native Americans left the continent a “wild woods and uncultivated waste[.]”¹¹⁷ In line with such claims, English colonists in the years before the Revolution often questioned whether the colonies were indeed conquered at all and presented Anglo plantations instead as “settled” land. This category of royal dominion had its basis in the legal principle of *res nullius*, or the notion that “[a] thing of no owner belongs to the first finder.”¹¹⁸ For most imperial officials in Europe, *res nullius* had generally been ignored as a justification for empire, because it contradicted the evident reality of indigenous presence and colonial warfare.¹¹⁹ Yet Locke’s notion of untitled land as an “uncultivated waste” suggested to American settlers that territory could be both inhabited and still empty for moral and political purposes.

Moreover, this Lockean image of North America as “empty” did not merely reject Indian claims to territorial sovereignty or property rights; it presupposed a fundamental erasure of Native American presence. It legitimated dispossession as morally necessary, because only settlers *1448 transformed the continental wilderness into a site for social utility. By contrast, supposed Native American failure to do so meant that as a moral fact they did not exist on the land. In essence, the settlers were the real “natives,” who discovered a pristine and untouched new world.¹²⁰ As a consequence, a Jacksonian committed to territorial expansion and continuous conflict with indigenous communities could nonetheless view such everyday violence neither as projects of conquest nor as “warfare” proper—especially since the latter would challenge fundamentally the presumptive social condition of peace. Above all, this meant that the land and material abundance that sustained Jeffersonian faith in widespread security knowledge were grounded in practices of intense violence—practices that were largely erased from collective self-understanding. In fact, one might well conclude that, in reality, both Locke’s philosophical framework and the early republic’s political structure were much more akin to a concealed Hobbesian state marked by endemic war.

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Given this implicit feature of the early republic, it is thus not surprising that the figure who best articulated a xenophobic and expansionist America (in *Dred Scott*) as well as one committed to popular security knowledge and checks on military and executive power (in *Mitchell v. Harmony*) was the same individual—Roger Taney.

In the *Mitchell* ruling, Taney began by railing against governmental assertions of secrecy. According to the opinion, 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.¹²¹ As he declared, “[t]he fact that such an intention existed must be shown; and of that there is no evidence.”¹²² 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.¹²³ 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 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 *1449 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.¹²⁴ 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 that justified ceding discretionary authority to the president or to his military subordinates, the threat needed to be both “immediate and impending[.]”¹²⁵ 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.¹²⁶ It had to accord with what a “reasonable”¹²⁷ 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.¹²⁸ 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”¹²⁹ standard. This alternative standard is one *1450 for professional experts, and courts often apply it to assess whether police officers may have used excessive force.¹³⁰ Such a determination assumes that being an armed professional 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 primarily has 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 for armed professions. 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.¹³¹ 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.¹³²

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 ¹⁴⁵¹ 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. The following sections 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 overall 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.¹³³ 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.¹³⁴ Moreover, the United States had a limited foreign intelligence network with few actual spies, relying instead on overseas military attaches, Foreign Service officials, Americans living abroad, and members of the press.¹³⁵ 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 the attack on Pearl Harbor. As this Part 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 contended that modern sociological conditions were increasingly too complex for most citizens to make sense of and thus that ¹⁴⁵² issues of threat and necessity were no longer domains of popular understanding.¹³⁶ In the process, they invoked those elements of Hobbes’s old security narrative that promoted absolutism, such as his belief in permanent and continuous crisis, while rejecting Hobbes’s 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 any 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.¹³⁷ The Depression generated nearly wholesale joblessness as unemployment figures rose from 429,000 in October 1929 to over fifteen million, or one-third of the labor force, in 1933.¹³⁸ Without work, men and women were left absolutely destitute, facing eviction and foreclosure and unable to feed or clothe their families.¹³⁹ 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.¹⁴⁰ As British philosopher Harold Laski—a staunch

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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 remain unable to realize the fruits of freedom.”¹⁴¹ According to Laski, basic economic welfare was the primary means for all *1453 other shared ends. For this reason, it should properly precede our normal political debates and disagreements.¹⁴² In the words of Sidney Hillman, a key organizer of the Congress of Industrial Organizations and one of the most popular figures in the union movement,¹⁴³ economic security was nothing less than the “central issue in this life of modern man.”¹⁴⁴

For New Dealers, the Depression made clear that all Americans-regardless of sectional or class background-shared a common goal.¹⁴⁵ 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. Journalist 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 of 1935,¹⁴⁶ 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.¹⁴⁷ According to Epstein, in the past, the United States 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.¹⁴⁸ By contrast, the rise of industrial wage labor and *1454 salaried work meant that individuals no longer controlled their economic fortunes; as Epstein argued, financial well-being “depend[ed] entirely upon the stability of [their] jobs.”¹⁴⁹ According to him, “[i]t is our present complex civilization which, while conquering nature, time and space, has made men the slaves of their jobs.”¹⁵⁰

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.¹⁵¹ This dependence meant that economic insecurity was now a pervasive and dominant social experience.¹⁵² 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.”¹⁵³

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 well-being. For a 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.¹⁵⁴ 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.¹⁵⁵ For Epstein, the solution was ultimately twofold. First, it required that the government employ state resources to create social insurance schemes for the aged, disabled, and unemployed, which would *1455 establish a broad safety-net to address problems of destitution.¹⁵⁶ 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.¹⁵⁷

This defense of expertise did not emerge out of nowhere. In particular, it had important precedents in the institutional practices and intellectual currents of the Progressive Era. The first decades of the twentieth century witnessed the increasing bureaucratic complexity of government and the economy, developments that generated a plethora of new social groups and occupational categories, from salaried employees to lawyers, doctors, engineers, social workers, and teachers. As members of these new middle classes, many Progressive intellectuals saw a basic incompatibility between what Walter Lippmann evocatively called the nineteenth century belief in the “omnicompetent citizen”¹⁵⁸ and modern industrial and political realities. Rather than relying primarily on popular judgment and common sense, such Progressive reformers instead hoped to harness the expert knowledge of the new professions in order to address diverse social problems.¹⁵⁹ As none other than Louis

Brandeis famously told the Harvard Ethical Society in 1905 (a speech a young Felix Frankfurter attended and was quite moved by),¹⁶⁰ it was up to the professional classes to shape the direction of American political life:

The people's thought will take shape in action; and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed; whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution.¹⁶¹

In keeping with these sentiments, the Progressives' administrative apparatus extended dramatically into multiple arenas of collective life, with *1456 the creation of the Interstate Commerce Commission, the Food and Drug Administration, the Federal Reserve Board, the Federal Trade Commission, and World War I's War Industries Board, among many others.¹⁶² In the process, these institutions helped unleash the social power of emerging professional groups.¹⁶³ Just as crucially for later practices, while Progressive commissions were ostensibly under legislative control, such expert bodies enjoyed extensive independence from any electoral or participatory check.¹⁶⁴

Indeed, by the time of the New Deal, concerns about omniscient citizenship and faith in social scientific and professional expertise had increasingly become conventional wisdom among the new generation of policymakers. As Robert Lynd, the author of two classics of American sociology, *Middletown* and *Middletown in Transition*, wrote, "so great is our reliance upon the rational omni-competence 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.'"¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ This information gave them quantifiable insight into problems of material wellbeing; it meant that their judgments about social policy amounted to objective determinations of *1457 right and wrong.¹⁶⁸ And because 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 (akin to Brandeis's views at the beginning of the century)¹⁶⁹ could be counted on to pursue society's long-term needs rather than destructive partial or selfish interests.¹⁷⁰ Since their focus was on discerning scientific facts, they were consequently disinterested and committed above all to the public good.¹⁷¹ Lynd, for example, saw the New Deal's reformist impulse as the progressive spread of empirical truth to social institutions and asserted that "[t]here 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."¹⁷² 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-a point that even Brandeis had presumed.¹⁷³ This was because, according to Lynd, the sheer depth of modern complexity now 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.¹⁷⁴ This emerging focus on expertise was also distinct from the older idea of the grand statesman.¹⁷⁵ Social scientists claimed only role- *1458 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, 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 government institutions toward greater hierarchy and executive discretion.¹⁷⁶ Herring was a political science professor in Harvard's Government Department who later became president of both the American Political Science Association and the Social Science Research Council, as well as the first Secretary of the U.N. Atomic Energy Agency.¹⁷⁷ During World War II, he chaired the Committee of Records of the War Administration, overseeing the publication of *The United States at War*, the official governmental account of the war.¹⁷⁸ 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.¹⁷⁹ In two books, *Public Administration and the Public Interest* and *The Impact of War*, Herring defended the growing case for the benefits of professional expertise.¹⁸⁰ 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.¹⁸¹

Like Epstein and Lynd,¹⁸² 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, "[t]he freedom of a competitive capitalistic order is not compatible with" the goal of protecting individuals from economic uncertainty.¹⁸³ 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."¹⁸⁴ As a consequence, Herring took as a foundational element of the new politics the unavoidable truth that "[t]he day of the positive state is upon us. This is not a matter of choice."¹⁸⁵ 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."¹⁸⁶ 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."¹⁸⁷ 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.¹⁸⁸ 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."¹⁸⁹ He believed that the solution was to develop an institutional structure "for introducing expertise"¹⁹⁰ into political decision-making. Such expertise would "join the disparate economic forces of society behind a unified political program[[[,"]¹⁹¹ 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."¹⁹² Importantly, however, this increase was not meant to establish supreme authority in the single will of the President himself,¹⁹³ 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.¹⁹⁴ 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."¹⁹⁵ 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.¹⁹⁶ Herring concluded that, “[o]ur 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.”¹⁹⁷

Thus, Herring ultimately sought the elevation of a professional elite rather than any particular official or actor (such as the President). This elite would staff scientific agencies within the executive branch and thereby “become the responsible agent of public purpose.”¹⁹⁸ 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”¹⁹⁹ the programmatic agenda developed by administrators. The inevitable and, for Herring, much needed consequence would be a drastic *1461 reduction in the lawmaking responsibilities of Congress. According to Herring, “[i]f 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.”²⁰⁰ At the same time, he also hoped to limit the President’s own function, precisely because presidents too may be beholden to special interests and swayed by irrational public opinion.²⁰¹ 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.²⁰² 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.²⁰³ If individuals sought a “peaceful adjustment of social conflicts, it thereby involve[d] a willingness . . . to make substantial sacrifices.”²⁰⁴

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 that plagued domestic economic life were even more troubling in the context of foreign affairs.²⁰⁵ There, the rise of totalitarian regimes meant that the United States 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 United States was no longer safe behind the oceans.²⁰⁶ Hamilton had once imagined that American isolation ensured that peace from foreign threat was the pervasive social experience.²⁰⁷ Now, by contrast, scientific *1462 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 contended in *The Impact of War*, the result was that “[i]nternational affairs have become domestic problems.”²⁰⁸ 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, “[i]n 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.”²⁰⁹ What made the problems especially perilous was the fact that totalitarian regimes were better equipped than democracies to take advantage of the new technologies of transportation, warfare, and even communication: 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 governmental structures appropriate to combat the Great Depression, creating a permanent institutional infrastructure for responding to global threats. He began by invoking a relatively novel phrase—“national security”²¹⁰—to mirror the domestic discourse of economic security. The term itself had existed before, although used less frequently in public debate. Still, Laura Donohue finds references dating back to the founding, noting that as early as “the Constitutional Convention, according to James Madison’s notes, Oliver Ellsworth remarked that a national government would help to secure national security.”²¹¹ During World War I, corporations and pro-war nativists even organized the National Security League, which at its peak in *1463 1916 included nearly 100,000 members across the country.²¹² The League became a central mechanism for enflaming anti-German, and later anti-communist hysteria, as well as assisting government efforts to suppress general opposition to the war.²¹³ 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.²¹⁴ As a result, during the 1930s the term national security was still largely unfamiliar and carried little of the resonance that it would for later generations of

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Americans.²¹⁵ 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.’”²¹⁶

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.”²¹⁷ Herring sought to reassure critics by arguing that although he was not calling for the United States simply to mimic authoritarian states, he nonetheless believed that the country’s leaders could learn from *1464 authoritarian methods of shaping policy and projecting power. In other words, “[t]his 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.”²¹⁸

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.²¹⁹ 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.²²⁰

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.”²²¹ Only members of the military had the knowledge to make sense of specialized questions of preparedness, which were 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 spies, as well as linguistic and technological experts skilled in collecting and sifting through *1465 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.²²² 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, “[d]emocracy may have to remain under arms for a long time to come.”²²³

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.”²²⁴ 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.”²²⁵ 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.

As with the New Deal approach to economic crisis, Herring was certainly not the first to defend the need for greater centralization and secrecy in confronting perceived threats. Not surprisingly, these arguments, too, had crucial precedents in Progressive era developments. Against the backdrop of the United States' growing global power as well as concerns about internal labor strife and bureaucratic complexity, Theodore Roosevelt famously argued for a far more muscular theory of executive authority, in which the President was "a steward of the people *1466 bound actively and affirmatively to do all he could"²²⁶ to ensure the public's protection and wellbeing.²²⁷ Even more pointedly, World War I embodied an important test case for the utility of insulated and expert decision-making in the face of external threat. Woodrow Wilson established a series of executive institutions to direct industrial production, wartime labor relations, and propaganda efforts as well as empowered federal police and prosecutors to crackdown on political dissent.²²⁸ In addition, through authorities provided by 1918's Overman Act, he moved unilaterally to reorganize existing agencies to better serve the state's wartime and immediate postwar objectives.²²⁹ Such efforts provided a key template for how Herring twenty years later imagined that the United States could implement a permanent system of military planning and national security vigilance.

Indeed, by the eve of World War II, Herring was hardly alone in seeing the future of American defense and foreign policy practices as extending Wilsonian prescriptions. In January 1941, social scientist Harold Lasswell, who too later became president of the American Political Science Association, famously depicted the United States as headed toward a "garrison state" in which "the specialists on violence are the most powerful group in society."²³⁰ In a sense, both Lasswell and Herring were responding to the zeitgeist, in which many Americans wondered if the perceived threat posed by fascism and communism—as well as the new technologies of warfare—required developing more centralized and, indeed, more authoritarian institutions of statecraft. For Lasswell, Herring's national security vision may well have been the inevitable future, but such structural shifts were to be deplored rather than defended. Reminding readers of the value of democratic self-governance and the significant dangers of insulated authority, Lasswell argued that the rise of a militarized security expertise would inevitably "tip the internal equilibrium toward narrow rather than wide power sharing" and in the process "favor the self-perpetuation of an elite specialized to the planning and implementation of coercive strategies of power."²³¹

But to Washington officials, Herring's national security vision and his *1467 arguments in *The Impact of War* appeared particularly prescient given that they were published only months before the surprise attack on Pearl Harbor, an event that shattered the old faith in domestic safety behind the oceans for many political commentators.²³² Despite Lasswell's warnings of the potential costs, for foreign policymakers, Pearl Harbor made the appropriate institutional path seem both self-evident and unavoidable. Above all, besides underscoring American insecurity, the attack brought home the perceived limitations of democratic and transparent deliberation; it justified arguments about why greater secrecy and greater centralization were both required and had to go hand in hand.

Crucially, the new condition of endemic threat highlighted the potentially tragic consequences if Americans persisted in counting on representative and deliberative bodies to behave with the requisite degree of discretion and long-term thinking. Even in the early days of the New Deal, public intellectuals like Charles Beard, another important influence on Herring, had raised significant concerns that a foreign policy structure dominated by majoritarian politics only produced factionalism and divisiveness with "little or no reference to any supreme conception of national interest rising above [the] particular concerns"²³³ of special interest groups. After Pearl Harbor, the danger posed by majoritarian institutions appeared even starker. Roosevelt's foreign policy team widely believed that military preparedness and mobilization had been woefully compromised by special interest wrangling and democratic incoherence.²³⁴

Moreover, given the very recent failure of politicians to create a unified wartime front and to put security commitments ahead of partisan point scoring, legislators could not be trusted to handle sensitive information appropriately. Transparent majoritarian institutions always held out the potential for leaks (aimed at serving the goals of special interests), which compromised collective safety or war efforts abroad. Ultimately, the lesson of Pearl Harbor was that due to the short-term

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logic and factionalism of legislative practice, any systematic security policy had to combine centralization in the executive branch with secrecy from broader deliberative arenas.

***1468** Following the war, the National Security Act of 1947,²³⁵ aptly using Herring's phrase, gave legal substance to these shared judgments and the emerging security discourse. 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 National Security Resources Board, the Munitions Board, and the Research and Development Board.²³⁶

Among the long-term implications of these changes was the creation of a permanent, 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.

***1469** 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.²³⁷ 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 branch. 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 governmental 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.

V. Felix Frankfurter and the Deferential Court

Today, the pervasive tendency of courts to tread lightly with respect to executive branch determinations of external threat is a central feature of American legal and political life. 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.²³⁸ Yet, the clear trend in recent decades has been the ***1470** 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 Part explores 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, it 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. The discussion focuses 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. This Part next describes how Frankfurter applied his 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, Part V ends 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.²³⁹ 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 sacrifices.”²⁴⁰ 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 ***1471** and more compelling vision of democratic practice itself.²⁴¹ Today, Frankfurter's arguments about security, merit, and expertise are pervasive in the law of emergency and executive power;²⁴² 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.²⁴³ Due to his intelligence and hard work, he rose quickly through the social ranks.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ 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 ***1472** I knew, with the sure instinct of a child, that this was my native spiritual home.²⁴⁷

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 among men” who are marked by “virtue and talents.”²⁴⁸ The natural aristocracy was “the most precious gift of nature for the instruction, the

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trusts, and government of society.”²⁴⁹ He distinguished this natural aristocracy from the “artificial aristocracy founded on wealth and birth, without either virtue or talents.”²⁵⁰ 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.²⁵¹

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.²⁵² For critics like Orestes Brownson, who rejected any divide between a “learned” and an “unlearned” class,²⁵³ 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 inequalitarian. Meritocracy was a theory of society in which a majority were deferential to, and 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 *1473 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*, the complexities and interdependence of modern society made “heavy demands upon wisdom and omniscience.”²⁵⁴ Referencing economic turmoil as just one illustration of the need for specialized decision-making, Frankfurter declared, “[w]e 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.”²⁵⁵

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.”²⁵⁶ 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.”²⁵⁷

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

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 *1474 knowledge on which the choice of policies must be based.²⁵⁸

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.²⁵⁹ 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.²⁶⁰ 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. Frankfurter wrote that:

The veto power of the Supreme Court . . . is 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 the 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.²⁶¹

For Frankfurter, this lack of judicial expertise meant that deference *1475 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.”²⁶² This zeal had to be “institutionalized through machinery and processes.”²⁶³ And successful institutionalization “largely depend[ed] on very high standards of professional service.”²⁶⁴ 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:

[c]ertainly 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.²⁶⁵

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.”²⁶⁶ 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 *1476 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

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convince fellow justices to abstain from constraining presidential actions. Years later, Frankfurter referred to the decision in *Ex parte Quirin*, as “not a happy precedent.”²⁶⁷ 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.²⁶⁸ 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,²⁶⁹ as civilians may not fully appreciate the danger posed to the homeland by Nazi infiltration. Despite these encounters and the fact that months before the Court even agreed to hear the case Frankfurter already was committed to backing Roosevelt’s actions, he refused to recuse himself from the case.²⁷⁰ Instead, he actively campaigned on the Court for a single and unanimous majority opinion defending the 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 *1477 to create “a bitter conflict” among the three branches “after your bodies will be rotting in lime.”²⁷¹

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,²⁷² Frankfurter played a similar role to the role he played in *Quirin* a year earlier. In particular, he fought behind the scenes again to guarantee a unanimous opinion in *Hirabayashi v. United States*, 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.²⁷³ 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.²⁷⁴

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.²⁷⁵ Still, in his concurrence in *Korematsu v. United States*, Frankfurter reasserted the importance of a highly deferential review of executive practices, especially in security contexts where the government acted on the basis of perceived military necessity.²⁷⁶ 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 *1478 fundamentally “different.”²⁷⁷

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.²⁷⁸

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.

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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."²⁷⁹ In his opinion,


the 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.²⁸⁰

In effect, Frankfurter read the Constitution flexibly-as a set of functional *1479 powers that adapted to fit the security needs of the community.²⁸¹ Just as in the case of economic policy, he believed that to allow the abstract thinking and "dialectic subtleties"²⁸² 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."²⁸³ In *Youngstown Sheet and Tube Co. v. Sawyer*, the Court invalidated President Truman's seizure of the steel mills, holding that he had neither the statutory nor constitutional authority to do so, especially given Congress's explicit refusal to delegate this power when passing the Taft-Hartley Act in 1947.²⁸⁴ While Justice Hugo Black's opinion, delivering the judgment of the court, (no opinion received a majority of votes) emphasized textualism and clear formal categories 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.²⁸⁵ 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 "[t]he great ordinances of the Constitution do not establish and divide fields of black and white."²⁸⁶

According to Frankfurter, 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, "[i]t 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."²⁸⁷ For Frankfurter, *1480 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."²⁸⁸

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*,²⁸⁹ which was 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 otherwise lawful and nonviolent support of foreign entities designated by the State Department as "terrorist" organizations.²⁹⁰ In that case, the Humanitarian Law Project ("HLP"), a non-governmental organization ("NGO") with

consultative status at the United Nations, had sought to provide humanitarian assistance to two 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 promoting peaceful means for the groups to advocate on behalf of Kurdish and Tamil communities.²⁹¹ In defending the criminal prohibition of "material support," the Court concluded 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."²⁹²

In dissent, Justice Stephen Breyer questioned the fungibility claim, noting that the Government had provided "no empirical information" to *1481 support this proposition and that "[t]here [was] no obvious way in which undertaking advocacy for political change . . . [was] fungible with other resources that might be put to more sinister ends"²⁹³ The majority's reply was quite telling. Rather than marshaling concrete evidence, the Court invoked "an affidavit stating the Executive Branch's conclusion on that question."²⁹⁴ Indeed, the Court continued by explaining 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,' and 'specific evidence.'"²⁹⁵ 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."²⁹⁶ In effect, the Court maintained-in language virtually identical to Frankfurter's a half 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."²⁹⁷ 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 facts 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 United States and Iran in the Persian Gulf, referred to as the "Tanker War," ultimately led a U.S. cruiser to mistakenly shoot down a *1482 civilian Iranian airliner in the Persian Gulf, killing 290 people.²⁹⁸ 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.²⁹⁹ In *Lowry v. Reagan*, the district court however found the case to present a non-justiciable political question.³⁰⁰ 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."³⁰¹

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 Lamberth, wrote:

[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 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.³⁰²

For Taney, Lamberth'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 *1483 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 Lamberth'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 that emerged and took hold in the 1930s 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.

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. The final pages of this Article explore this basic question of the degree to which objective conditions justify the conceptual shifts. The conclusion then offers some initial reflections on what might be required to limit the government's expansive security powers.

***1484 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 "[s]ome 1,271 government organizations and 1,931 private companies" across 10,000 locations in the United States, all working on "counterterrorism, homeland security, and intelligence."³⁰³ This apparatus is especially concentrated in the Washington, D.C. area, which amounts to "the capital of an alternative geography of the United States."³⁰⁴ 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.³⁰⁵ 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 [National Security Agency] relies on the largest number of mathematicians in the world. It needs linguists and technology experts, as well as cryptologists, known as 'crippies.'"³⁰⁶

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.³⁰⁷ As the executive of Howard County, Virginia, one such community, declared, "[t]hese are some of the most brilliant people in the world . . . They demand good schools and a high quality of life."³⁰⁸ 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."³⁰⁹ 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 ***1485** 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, this conclusion assesses them more directly and, in the process, indicates what they suggest about the prospects for any future reform. The first claim is that global interdependence means that the United States 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.³¹⁰

***1486** 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 the national security state, with the U.S. military permanently mobilized 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 footprint³¹¹-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 ***1487** world and its potential 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.³¹² 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.³¹³ 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.”³¹⁴ For Fulbright, the driving impetus behind the need to jettison antiquated constitutional practices was the importance of sustaining the country’s “pre-eminence in political and military power.”³¹⁵ Fulbright believed 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.”³¹⁶ According to Fulbright, the United States had *1488 both a right and a duty to suppress those forms of chaos and disorder that existed at the edges of American authority.³¹⁷ 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.³¹⁸ To appreciate the open nature of security determinations, one need only look at the presentation of terrorism as a principle and overriding danger facing the country. According to National Counterterrorism Center’s 2009 Report on Terrorism, in 2009 there were just twenty-five U.S. noncombatant fatalities from terrorism worldwide—nine abroad and sixteen at home.³¹⁹ 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 emphasizes 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 *1489 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. These assumptions mean 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 underlines 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.”³²⁰ At present, part of what obscures this fact is the 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 threats to newspapers as a method of shaping the public debate.³²¹ 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 generally is 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 *1490 War in 2003, although the actual content of this secret information is flawed,³²² 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 the 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 constitutional politics. The problem at present, however, is that it remains unclear which popular base exists in society to raise these questions. Unless such a base fully emerges, we can expect our prevailing security arrangements to become ever more entrenched.






Footnotes

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- ¹ James B. Comey, Former Deputy U.S. Att’y Gen., *Fighting Terrorism and Preserving Civil Liberties*, Address at the University of Richmond School of Law (Apr. 15, 2005), in 40 U. Rich. L. Rev. 403, 403 (2006).
- ² See Arthur M. Schlesinger, Jr., *The Imperial Presidency* viii-x (1973) (explaining that underneath the “all-purpose invocation of ‘national security’ . . . could be discerned a revolutionary challenge to the separation of powers itself”).
- ³ See Jeremy Waldron, Essay, *Safety and Security*, 85 Neb. L. Rev. 454, 485-86 (2006) (providing as an example the Israeli measures against “internal or quasi-internal enemies of the state”).
- ⁴ Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. Pol. Phil. 191, 206 (2003). For more on Waldron’s account of the prevailing trade-off between liberty and security, see Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (2010).
- ⁵ Anthony Rapa, Comment, *When Secrecy Threatens Security: Edmonds v. Department of Justice and a Proposal to Reform the State Secrets Privilege*, 37 Seton Hall L. Rev. 233, 236-37 (2006) (proposing reform of the state secret privilege in order to prevent executive abuses).
- ⁶  *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

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- ⁷ Neal Kumar Katyal, Essay, [Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within](#), 115 Yale L.J. 2314, 2316, 2358 (2006).
- ⁸ See infra notes 9-13 and accompanying text (providing a short overview of a sixty-year period when scholars such as Rossiter, Schlesinger, Koh, Ackerman, Tribe, and Gudridge advocated for reform aimed at limiting state discretion).
- ⁹ See Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 306-13 (1948) (outlining proposals for reform, including strengthening and streamlining of the legislative functions). According to Rossiter, “[i]f 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.
- ¹⁰ See Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 158-61 (1990) (advocating for the necessity of national security reform legislation). Koh wrote at the time that: [w]hat 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 statutory successor to the National Security Act of 1947. *Id.* at 157.
- ¹¹ 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); *id.* at 103 (explaining that “the emergency constitution places the legislative oversight committees in the hands of the minority party,” with the courts playing “a more important role . . . on more-procedural matters”).
- ¹² Schlesinger, *supra* note 2, at 418 (admonishing also “Congress, . . . the executive establishment, the press, the universities, [and] public opinion”).
- ¹³ Laurence H. Tribe & Patrick O. Gudridge, Essay, [The Anti-Emergency Constitution](#), 113 Yale L.J. 1801, 1846 (2004).
- ¹⁴ These statutes provide the President with the authority to engage in various emergency measures during times of crisis. Approximately thirty such statutes are triggered when Congress formally declares war, including the Alien Enemy Act, 50 U.S.C. § 21 (2006) (providing for the detention and deportation of citizens of “the hostile nation or government”) and the Trading With the Enemy Act, 50 U.S.C. App. §§ 1-44 (2006) (giving the President the ability to regulate and prohibit commerce with the enemy state and its citizens). Moreover, Stephen Dycus et al. write that “[m]ore than 170 other standby authorities” come into effect “‘in time of war’ or ‘when war is imminent’ without requiring a declaration of war.” Stephen Dycus et al., *National Security Law* (4th ed., 2007) (stating that these additional statutes “authorize the President to take land for military purposes; commandeer private production lines for war manufacturing; take control of private transportation for war transport; and sequester, hold, and dispose of enemy property, among other powers”). For more on standby statutes, see generally David M. Ackerman & Richard F. Grimmett, Cong. Research Serv., RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (2003).
- ¹⁵ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. No. 109-163, 119 Stat. 3474; Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

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- ¹⁶ For more on the normalization of emergency in American law, see Kim Lane Scheppele, Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life, in *The Limits of Constitutional Democracy* 124, 124-34 (Jeffrey K. Tulis & Stephen Macedo eds., 2010) (detailing examples of foreign and domestic legislative acts which tend to “constitutionalize emergency exceptions to normal government”).
- ¹⁷ 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 Provisions*, CNN (May 27, 2011, 10:55 AM), http://articles.cnn.com/2011-05-27/politics/congress.patriot.act_1_lone-wolf-provision-patriot-act-provisions-fisa-court?_s=PM:POLITICS.
- ¹⁸ See Mark E. Kann, *On the Man Question: Gender and Civic Virtue in America* 42-44 (1991) (“[The liberal theorists] portrayed men as individuals who understood and obeyed natural law, accurately gauged current options against future consequences, placed intelligence and sobriety ahead of passion, and self-consciously adjusted private interests to public order. . . . Locke painted the most stunning portrait of men’s rationality.”).
- ¹⁹ *Id.* at 44-45.
- ²⁰ *Id.* at 43-45 (outlining Locke’s ideas about limited government and men’s participation in political life).
- ²¹ See Amos A. Jordan & William J. Taylor, Jr., *American National Security: Policy and Process* 112-13 (1981) (explaining that even Congress lacks the necessary expertise and access to information).
- ²² *Id.* at 113.
- ²³ 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 Aziz Rana, *Ten Questions on National Security: Responses to the Ten Questions*, 37 *Wm. Mitchell L. Rev.* 5099, 5099-5109 (2011).
- ²⁴ See Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 *Wash. & Lee L. Rev.* 193, 202 (2002) (noting that Justice Frankfurter believed that “[p]ublic-mindedness was the obligation attendant to one’s rise in the meritocracy. The expertise and elite status achieved in reward for surviving the competition of the educational system was to be used to prepare the way for other entrants.”) (quoting G. Edward White, *The American Judicial Tradition* 326-27 (1976)).
- ²⁵  317 U.S. 1 (1942).
- ²⁶  320 U.S. 81 (1943).
- ²⁷  323 U.S. 214 (1944).
- ²⁸  343 U.S. 579 (1952).
- ²⁹  130 S. Ct. 2705 (2010).

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- ³⁰ See Waldron, *supra* note 3, at 456 (criticizing the lack of attempts to clarify the meaning of “security”).
- ³¹ President Franklin Delano Roosevelt, State of the Union Address (Jan. 6, 1941), available at <http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/> (“The fourth is freedom from fear-which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor-anywhere in the world.”).
- ³² For the seminal articulation of the multiple and potentially conflicting meanings of liberty, see Isaiah Berlin’s 1958 lecture, Two Concepts of Liberty, Isaiah Berlin, Two Concepts of Liberty, in *Four Essays on Liberty* 118, 121-34 (1969).
- ³³ This view has been presented by individuals as ideologically diverse as conservative philosopher Leo Strauss in *Natural Right and History* 165-66, 202, 248-51 (1953) and Marxist philosopher C.B. Macpherson in *The Political Theory of Possessive Individualism: Hobbes to Locke* 237-41 (1962). In the American context, the 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* 140-41 (1955) (explaining the dominion of Lockean principles in American political life); see also Kann, *supra* note 18, at 12 (“Hartz’s Lockean consensus, then, refers to a tacit contract among American men to act as if the individual search for wealth was the meaning of life, liberty, and happiness.”).
- ³⁴ See Sharon A. Lloyd & Susanne Sreedhar, *Hobbes’s Moral and Political Philosophy*, *Stanf. Encyclopedia of Phil.* (Feb. 12, 2002), <http://plato.stanford.edu/entries/hobbes-moral> (last updated Aug. 23, 2008) (“[Hobbes] is infamous for having used the social contract method to arrive at the astonishing conclusion that we ought to submit to the authority of an absolute-undivided and unlimited-sovereign power.”).
- ³⁵ For a summary of Hobbes’s conceptions of the state of nature, see Lloyd & Sreedhar, *supra* note 17.
- ³⁶ *Id.* (“When people mutually covenant each to the others to obey a common authority, they have established what Hobbes calls ‘sovereignty by institution.’ When, threatened by a conqueror, they covenant for protection by promising obedience, they have established ‘sovereignty by acquisition.’ These are equally legitimate ways of establishing sovereignty, according to Hobbes, and their underlying motivation is the same-namely fear-whether of one’s fellows or of a conqueror.”).
- ³⁷ See Thomas Hobbes, *Leviathan* 6-7 (Edwin Curley ed., 1994) (1668) (describing how the human body and mind subjectively interpret the surrounding world).
- ³⁸ This is in contrast to Rene 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. Rene Descartes, *Discourse on Method and Meditations on First Philosophy* 18-22 (Donald A. Cress trans., Hackett Pub. Co. 4th ed. 1998) (1637).
- ³⁹ Hobbes, *supra* note 37, at 20.
- ⁴⁰ *Id.* at 7.
- ⁴¹ Thomas Hobbes, *Human Nature and De Corpore Politico* 44 (J.C.A. Gaskin trans. & ed., Oxford Univ. Press 1994) (1650).
- ⁴² 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

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which make up the human emotive psychology.” See Richard Tuck, Hobbes 53 (1989).

⁴³ Lloyd & Sreedhar, *supra* note 34.

⁴⁴ Hobbes, *supra* note 37, at 76.

⁴⁵ *Id.* at 114.

⁴⁶ Hobbes, *supra* note 37, at 181.

⁴⁷ See, e.g., Michael C. Williams, *The Realist Tradition and the Limits of International Relations* 20 (2005). Williams maintains that “Hobbes’ state of nature is designed to illustrate the relationship between knowledge, belief, and the social construction of action.” *Id.* From that starting point, Williams argues that Hobbes’ epistemological skepticism (his account of the constraints on knowledge and rationality) place important, and perhaps counterintuitive, checks on the Leviathan’s actual coerciveness in political life. *Id.* at 21-28.

⁴⁸ Hobbes, *supra* note 37, at 120.

⁴⁹ *Id.* at 109.

⁵⁰ See Lloyd & Sreedhar, *supra* note 34 (discussing how the state of nature can be seen as a state of war and conflict).

⁵¹ See Donald L. Doernberg, “We the People”: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 Calif. L. Rev. 52, 52 (1985) (commenting on how John Locke’s ideas of consent influenced the framers of the United States Constitution); Alex Tuckness, Locke’s Political Philosophy, Stanf. Encyclopedia of Phil. (Nov. 9, 2005), <http://plato.stanford.edu/entries/locke-political> (last updated July 29, 2010) (discussing Locke’s argument that if the government ignores the rights of the people, the people have the right to take back power from the government).

⁵² John Locke, *Second Treatise of Government* 15-16 (C. B. Macpherson ed., Hackett Pub. Co. 1980) (1690).

⁵³ *Id.* at 16.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 12.

⁵⁸ *Id.*

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⁵⁹ Id. at 48.

⁶⁰ See id. at 66 (“[T]he enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.”).

⁶¹ Id. at 50.

⁶² See, e.g., Mark Neocleous, *Critique of Security* 7-8 (2008). In this fine book, Neocleous nonetheless problematically presents the Lockean concept as the intellectual foundation of the modern security framework by focusing too exclusively on his arguments about prerogative. He 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.

⁶³ Locke, *supra* note 52, at 84.

⁶⁴ Id.

⁶⁵ Id.


⁶⁶ For instance, in his account of the establishment of civil society, Locke famously stated that legitimate government requires that “no man in civil society can be exempted from the laws of it” and thus enjoy freedom from the checks placed against absolutism. Locke, *supra* note 52, at § 94.

⁶⁷ Locke wrote 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.” Locke, *supra* note 52, at 87.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ As Locke remarked, “it being out of a man’s power so 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 his own preservation: and since he cannot take away his own life, neither can he give another power to take it.” Id. at 88.

⁷¹  54 U.S. (13 How.) 115 (1851).

⁷²  Id. at 133-37.

⁷³ See Merrill Jensen, *The American Revolution and American Agriculture*, 43 *Agric. Hist.* 107, 107, 120 (1969) (“American society at the outbreak of the American Revolution was an overwhelmingly agricultural society with perhaps ninety percent of a

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population of two and a half million people living on farms and plantations, and the remaining ten percent living in small towns and the few urban centers, dependent upon the American farmers for their well being. . . . The farmers of the middle states had been far more prosperous in prewar days than those of New England, and this continued to be the case after the war. In two states they had achieved considerable political strength as a result of the Revolution.”).

⁷⁴ Robert H. Wiebe, *The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion* 3 (1984); see also Gordon S. Wood, *The Radicalism of the American Revolution* 245, 258 (1992) (“[P]opular and pluralist [political] representation was only the fulfillment of the localist tendencies of public life that went back to the seventeenth-century beginnings of American history. . . . American society could no longer be thought of as either a hierarchy of ranks or a homogeneous republican whole. . . . In such a pluralistic egalitarian society there was no possibility of a liberal enlightened elite speaking for the whole”).

⁷⁵ For detailed discussions of two of the era’s most notorious popular uprisings, the Shays Rebellion and the Whiskey Rebellion, see generally David P. Szatmary, *Shays’ Rebellion: The Making of an Agrarian Insurrection* (1980), and Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (1986).

⁷⁶ See, e.g., Aziz Rana, *The Two Faces of American Freedom* 131-42 (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).

⁷⁷ *The Federalist* No. 55, at 283 (James Madison) (Ian Shapiro ed., 2009).

⁷⁸ *Id.*

⁷⁹ *The Federalist* No. 10 (James Madison) (discussing the advantages of representative government in preventing the rise of divisive factions within the public); see also Rana, *supra* note 76, at 138 (“Madison’s model of divided sovereignty, in which the creation of a truly national government insulated statecraft from mass interests and thus divisive social conflict, emerged as the primary theoretical framework for the new federal Constitution.”).

⁸⁰ 1 Bruce Ackerman, *We the People: Foundations* 198-99 (1991) (emphasis omitted) (discussing how *The Federalist Papers* propose a constitutional structure that distinguishes constitutional and normal politics, fosters deliberation among elected officials and the public, and provides space for judicial review).

⁸¹ *The Federalist* No. 69, *supra* note 77, at 349 (Alexander Hamilton).

⁸² U.S. Const. art. I, § 8, cl. 11.

⁸³ *Id.* cl. 12.

⁸⁴ *Id.* cl. 13.

⁸⁵ *Id.* cl. 15.

⁸⁶ Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* 262 n.43 (1978) (quoting 6 *Annals of Cong.* 305

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(1800)).

- ⁸⁷ See *id.* at 261-64 (describing the early Republican belief that “a militia of independent freeholders was the backbone of a republic”). Historian Lance Banning powerfully captured founding era judgments about the evils of a standing army and the value of militia service. As he wrote of Randolph’s speech:
I know of no better example of the persistence of the idea that the militia is the agency through which freemen 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. at 262 n.43 (quoting 6 Annals of Cong. 300 (1800)).
- ⁸⁸ U.S. Const. art. I, § 8, cl. 16. 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).
- ⁸⁹ U.S. Const. 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.” *Id.*
- ⁹⁰ For more on the populist role of state legislatures during the era, see Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* 60-97 (1993).
- ⁹¹ See Thomas Jefferson, *The Present State of Manufactures*, in *The Philosophy of Manufactures* 15, 17 (Michael Brewster Folsom & Steven D. Lubar eds., 1982) (“Dependence [sic] begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.”).
- ⁹² *Id.* at 17.
- ⁹³ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in *Political Writings* 360, 363 (Joyce Appleby & Terence Ball eds., 1999).
- ⁹⁴ *The Federalist* No. 8, at 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- ⁹⁵ *Id.* at 70.
- ⁹⁶ *Id.* at 71.
- ⁹⁷ For an extended discussion of democratic leveling and Jacksonian faith in popular capacities during the mid-nineteenth century, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 189-206 (2004), and Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 312-29, 359-424 (2005).
- ⁹⁸ Orestes A. Brownson, *Our Future Policy*, in 15 *The Works of Orestes Brownson* 113, 124 (Detroit, Thorndike Nourse 1884).
- ⁹⁹ Abraham Lincoln, *Address Before the Wisconsin State Agricultural Society* (Sept. 30, 1859), available at <http://showcase.netins.net/web/creative/lincoln/speeches/fair.htm>. 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 the writ of habeas corpus), these actions were understood to be extreme responses to the extreme and highly unusual circumstance of massive internal rebellion. They did not signal a new collective experience of endemic and complex insecurity requiring 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 will be shown, 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 Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* 41-70 (2005) (discussing Lincoln's use of military tribunals during the war as well as his constitutional justifications); Rossiter, *supra* note 9, at 223-39 (describing Lincoln's presidency as a story of government crisis during the Civil War); Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 79-134 (2004) (chronicling the wartime fate of civil liberties during Lincoln's presidency).

¹⁰⁰ 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), available at <http://www.pbs.org/wgbh/aia/part4/4h3439t.html>.

¹⁰¹ See Abraham Lincoln, *supra* note 99.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (internal emphasis omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Lincoln's evocative language of uniting heads and hands was not unique to him. Throughout the nineteenth 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 labor 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 and mangled, burn in protest and are pledged to redeem a thousand men." Nick Salvatore,

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Eugene V. Debs: Citizen and Socialist 228 (2d ed. 2007) (quoting Eugene V. Debs.).

108 Salvatore, *supra* note 107, at 10 (quoting Eugene V. Debs).

109 Jules Lobel, Comment, [Emergency Power and the Decline of Liberalism](#), 98 Yale L.J. 1385, 1394 (1989).

110 As Lobel describes, this process played out in various well-known cases. *Id.* at 1394-95. For instance, in [Little v. Barreme](#), 6 U.S. (2 Cranch) 170, 179 (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. *Id.* at 1394. For more on the episode, see Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 Cardozo L. Rev. 233, 245-51 (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, 378 (1824).

111 [Mitchell v. Harmony](#), 54 U.S. (13 How.) 115, 136 (1851). The great nineteenth century counterweight to the Mitchell ruling is generally considered to be Justice Robert Grier's majority opinion for a five-to-four court in *The Prize Cases*, [67 U.S. \(2 Black\) 635 \(1863\)](#). The decision upheld the constitutionality of the President's decision, in the days following the attack on Fort Sumter, to pursue a naval blockade of the seceding states even though Congress remained in recess. There, Grier stated that the initial determination of whether to use defensive force-and how much force was required-to "suppress[] an insurrection . . . [were] question[s] 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 in the post-9/11 context to defend the notion that the Constitution has long granted the executive extreme deference on issues of war and peace. See Louis Fisher, *The Law: John Yoo and the Republic*, 41 Presidential Stud. Q. 177, 189 (2011) (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. The issue at stake in the case was whether seizures taken before Congress finally sat in session and asserted its legislative war power were valid prizes. The problem of how far the President's unilateral authority extended, and thus whether Lincoln could on his own initiative pursue a blockade even after Congress passed relevant legislation, was not directly at issue. In fact, in oral arguments before the Court, U.S. Attorney Richard Henry Dana, Jr., consciously sought to limit the scope of the government's position, maintaining that the only subject concerned "the power of the President before Congress shall have acted, in case of a war actually existing." [The Prize Cases](#), 67 U.S. (2 Black) 635, 660 (1862).


Indeed, at the time, the decision was understood to refer specifically to the singular and extraordinary phenomenon of the Civil War. A central justification for the President's expanded authority was that, according to Grier, while Congress "alone has the power to declare a national or foreign war," no clause in the Constitution gave it the authority to "declare war against a State, or any number of States." *Id.* at 668. This was critical because ordinarily the President's war powers (such as under the commander-in-chief clause) were only triggered once Congress had sanctioned the use of force, legally initiating the start of armed hostilities. But in this context, following the attack on Fort Sumter, the Union clearly found itself facing a massive insurrection and thus a de facto state of war. Moreover, Congress did not have the constitutional power to declare war against rebelling states and thereby give the conflict its de jure legislative approval. As a result, Grier concluded that although this Civil War could not be "declared" through traditional means, as a matter of common sense a war still existed and still triggered the full panoply of the President's Article II powers. *Id.*

In the end, while the Grier opinion justified a specific instance of unilateral executive action, *The Prize Cases*-unlike *Mitchell v. Harmony*-never reached war powers more broadly, let alone issues of foreign invasion or offensive American action abroad. If anything, based on Grier's constitutional distinction between civil wars and foreign wars, presumably he would have been deeply suspicious of how post-9/11 government lawyers have extended *The Prize* logic. Not unlike Lincoln, *The Prize Cases* majority presumed that the ruling was bound to the supreme exigencies of state secession and did not imply a wider reordering of the constitutional roles of the executive and the legislative branches.

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112  [Mitchell, 54 U.S. at 135.](#)

113  [Id. at 134.](#)

114 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. \(19 How.\) 393, 407 \(1856\).](#)

115 For more on how Taney connected settler judgments of internal liberty and external exclusion, see Rana, *supra* note 76, at 167-72.


116 See *infra* notes 133-136 and accompanying text (discussing Taney’s view of Lockean principles).

117 Locke, *supra* note 52, at 24.

118 Daniel J. Hulsebosch, [The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence](#), 21 *Law & Hist. Rev.* 439, 471 & n.150 (2003).

119 [Id. at 461-62.](#)

120 For more on the legal and political implications in the early republic of indigenous erasure, see Rana, *supra* note 76, at 9, 49-50, 106-14.

121  [Mitchell v. Harmony, 54 U.S. \(13 How.\) 115, 133 \(1851\).](#)

122 [Id.](#)

123  [Id. at 135.](#)

124 See *id.* at 134 (“And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, . . . [unless] the danger must be immediate and impending . . . and where the action of the civil authority would be too late in providing the means which the occasion calls for.”).




125 [Id.](#)



126  [Mitchell, 54 U.S. at 135.](#)


127 [Id.](#)

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128 Id.

129 For a discussion and critique of the standard, see  [Whren v. United States, 517 U.S. 806, 810, 812-13 \(1996\)](#) (detailing the reasonable officer standard and 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  [Wilson v. Layne, 526 U.S. 603, 615-16 \(1999\)](#) (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);  [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).

130 See  [Scott v. Harris, 550 U.S. 372, 381, 386 \(2007\)](#) (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 judged from the perspective of a reasonable officer . . . [and must take into account] the fact that police officers are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation”).

131 See  [Mitchell, 54 U.S. at 135](#) (characterizing the actions of military officers as motivated by “zeal for the honor and interest of his country” and “excitement of military operations,” compared to the more objective perspectives of Congress and the Court).

132 See id. (concluding that the reasonableness of an officer’s decision is a question for the jury, and the legal ramifications of his behavior is a question for Congress).

133 Douglas T. Stuart, *Creating the National Security State: A History of the Law That Transformed America* 34 (2008).

134 Id. at 34-35.

135 See id. at 34-36 (describing, in particular, the remarkably small intelligence infrastructure that existed in the United States on the eve of World War II).

136 See *infra* notes 172-176 and accompanying text.

137 Eric Foner, *The Story of American Freedom* 195 (1998).

138 Frances Fox Piven & Richard A. Cloward, *Poor People’s Movements: Why They Succeed, How They Fail* 46, 108 (1977).

139 See id. at 47-48 (detailing the impact of widespread unemployment on daily American life during the Great Depression).

140 See Foner, *supra* note 137, at 196 (“[T]he Depression . . . reinvigorat[ed] the Progressive conviction that the national state must protect Americans from the vicissitudes of the marketplace. . . . [N]ow, economic security, not the civil and political rights of the former slaves and their descendants, dominated discussions of freedom.”).

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¹⁴¹ Harold J. Laski, *Liberty in the Modern State* 51 (1949).

¹⁴² See *id.* at 34-35.

¹⁴³ Sidney Hillman, in *Encyclopedia of American Jewish History* 370-72 (Stephen H. Norwood & Eunice G. Pollack eds., 2008).

¹⁴⁴ Steve Fraser, *The ‘Labor Question’*, in *The Rise and Fall of the New Deal Order, 1930-1980*, at 55, 78 (Steve Fraser & Gary Gerstle eds., 1989).

¹⁴⁵ Social scientist Max Rubinow 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*. See I.M. Rubinow, *The Quest for Security* 8, 626-29 (1934) (beginning his work with the proposition that a key tenet of American democracy is the “right to enjoy life,” and concluding his work with a summary of how Washington could implement the means to ensure the protection of such a right in the future).

¹⁴⁶ Although Epstein personally believed that the Social Security Act was insufficient and opposed financing through a payroll tax, his efforts in the preceding years—as an author and as the founder of the American Association of Social Security—helped popularize the term and create the climate for the bill. As Glenn Altschuler writes, Epstein “crisscrossed the nation, organized the March on Albany, and lobbied politicians to support legislation that would provide economic protection for the elderly and combat the Depression by enhancing the purchasing power of the masses.” Glenn Altschuler, *Security a Father’s Place in American Social History*, *Forward* (Nov. 9, 2007), <http://forward.com/articles/11973/securing-a-father-s-place-in-american-social-his-/>.

¹⁴⁷ See Abraham Epstein, *Insecurity: A Challenge to America* 18-19 (1933) (detailing the effects of modern labor practices on the average wage-earning, observing “[t]he worker under the factory system has no stake in industry; he is given no right to his job. His employer is bound neither legally nor morally to provide him with regular employment; he feels no obligation to support him during emergencies.”).

¹⁴⁸ *Id.* at 3-4.

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.* at 4.

¹⁵¹ *Id.* at 6.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *id.* (detailing the developing financial interconnectedness of all professions of Americans and the uncertainty such dependence created).

¹⁵⁵ *Id.*

- ¹⁵⁶ See id. at 663-64 (“The most desirable program would be for Congress to enact a comprehensive social insurance law for the entire nation.”).
- ¹⁵⁷ Id. at 672.
- ¹⁵⁸ Walter Lippmann, Public Opinion 273, 284 (1922).
- ¹⁵⁹ See id. at 30-32 (concluding that to effectively govern according to public opinion there must be an “independent, expert organization for making the unseen facts intelligible to those who have to make the decisions”).
- ¹⁶⁰ See David Luban, [The Twice-Told Tale of Mr. Fixit: Reflections of the Brandeis/Frankfurter Connection](#), 91 Yale L.J. 1678, 1704 (1982).
- ¹⁶¹ Louis D. Brandeis, The Opportunity in the Law, in *Business: A Profession* 313, 343 (New York, Augustus M. Kelley 1971) (1914).
- ¹⁶² Robert L. Rabin, [Federal Regulation in Historical Perspective](#), 38 Stan. L. Rev. 1189, 1191, 1194, 1223, 1228 n.110, 1237 (1986).
- ¹⁶³ See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, at 286 (1982) (discussing how university-trained professionals were at the forefront of championing “bureaucratic alternatives” to respond to “new environmental demands”).
- ¹⁶⁴ For more generally on the rise of the administrative state and Progressive era precedents for New Deal practices, see id. at 209-11.
- ¹⁶⁵ Robert S. Lynd, Knowledge for What? The Place of Social Science in American Culture 234 (1939).
- ¹⁶⁶ See id. at 234 (suggesting the personal and cultural dilemmas of U.S. society during the Depression were a result of reliance on the “rational omni-competence of human beings”); Epstein, *supra* note 147, at 659-61 (discussing how the emphasis on common sense and pursuit of materialism among business and political leaders led to a failure to foresee the Depression).
- ¹⁶⁷ See Lynd, *supra* note 165, at 18-19 (noting how professional groups, such as economists, political scientists, and other social scientists rely on quantitative methods to respond to different problems in society).
- ¹⁶⁸ See id. at 120-22 (discussing how social scientists drew on empirical information to develop “scientific objectivity”).
- ¹⁶⁹ See Brandeis, *supra* note 161, at 325-27 (arguing that lawyers, as a professional group, should spearhead solutions to the country’s problems).
- ¹⁷⁰ 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 A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* 129-42 (Yale University rev. ed. 1998) (1990).

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- ¹⁷¹ Id. at 115-16 (explaining how skilled experts within administrative agencies would draw on objective data to make their decisions, all for the common good of the people).
- ¹⁷² Lynd, *supra* note 165, at 247-48.
- ¹⁷³ Brandeis, *supra* note 161, at 1-4.
- ¹⁷⁴ See Lynd, *supra* note 165, at 12-17 (discussing how professionals across various disciplines have strived to “break down their disciplinary walls” and “cross fertilize each other”).
- ¹⁷⁵ For more on the concept of statesmanship, particularly in the domain of foreign policy, see generally Henry Kissinger, *Diplomacy* 23-28 (1994). For an account that presents statesmanship as the lawyer ideal par excellence, see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 109, 113-16 (1993).
- ¹⁷⁶ Stuart, *supra* note 133, at 5-6.
- ¹⁷⁷ Id. at 5, 9-10, 274.
- ¹⁷⁸ Id. at 9.
- ¹⁷⁹ For an excellent account of Herring’s career and his influence in structuring new defense practices, see *id.* at 9, 27-30.
- ¹⁸⁰ Pendleton Herring, *The Impact of War* 46-48 (1941); Pendleton Herring, *Public Administration and the Public Interest* (1936).
- ¹⁸¹ Herring, *The Impact of War*, *supra* note 180, at 22-23.
- ¹⁸² Epstein, *supra* note 147, at 662-65.
- ¹⁸³ Pendleton Herring, *A Prescription for Modern Democracy*, 180 *Annals Am. Acad. Pol. & Soc. Sci.* 138, 138 (1935).
- ¹⁸⁴ Id.
- ¹⁸⁵ Herring, *The Impact of War*, *supra* note 180, at 22.
- ¹⁸⁶ Herring, *supra* note 183, at 139.
- ¹⁸⁷ Id. at 140.
- ¹⁸⁸ See *id.* (discussing how sectionalism and disparate interest groups have disrupted the country’s national character).

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¹⁸⁹ Id. at 139.

¹⁹⁰ Id. at 140 (emphasis omitted).

¹⁹¹ Id.

¹⁹² Id. at 141.

¹⁹³ See id. at 143 (discussing the need for a stronger, more unified executive branch, rather than a government where the Office of the President alone was the central site of policymaking).

¹⁹⁴ Id. at 142-45.

¹⁹⁵ Id. at 143.

¹⁹⁶ See id. at 143-45 (discussing how the council would have powers to utilize experts both inside and outside the government and coordinate the necessary resources to help the President solve pressing national problems).

¹⁹⁷ Id. at 146.

¹⁹⁸ Id. at 148.

¹⁹⁹ Id.

²⁰⁰ Herring, *supra* note 183, at 146-47.

²⁰¹ Id. at 147.

²⁰² See id. at 148 (“The bureaucracy must become the responsible agent of public purpose. In the executive branch lies the task of confronting the people generally with an interpretation of the public interest which they can accept or reject through the established channels of representative government.”).

²⁰³ Id. at 147.

²⁰⁴ Id. at 147.

²⁰⁵ Herring, *The Impact of War*, *supra* note 180, at 15.

²⁰⁶ See Mark R. Shulman, [The Progressive Era Origins of the National Security Act](#), 104 Dick. L. Rev. 289, 326 (2000) (“[T]he

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emergence of post-war technology meant that for the first time an enemy could strike the continental United States catastrophically.”).

207 As George Washington’s Farewell Address-written, famously, with Hamilton’s assistance-concluded,

“[o]ur detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off, when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality, we may at any time resolve upon, to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.

George Washington, Farewell Address (Sept. 19, 1796), <http://usinfo.org/docs/democracy/49.htm>.

208 Herring, *The Impact of War*, supra note 180, at 15.

209 Id. at 15-16.

210 See id.

211 See Laura Donohue, *The Limits of National Security*, 48 *Am. Crim. L. Rev.* 1573 (2011) (presenting various instance where the term was employed in the first century of the republic, including by Franklin Pierce in his presidential inaugural address and by both sides during the Civil War).

212 Shulman, supra note 206, at 305.

213 Id. at 314, 322.

214 Id. at 322. 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. Id. at 296, 299. 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.” Id. at 305-06. For more on the rise and fall of League membership, see John Whiteclay Chambers II, *To Raise an Army: The Draft Comes to Modern America* 81-82 (1987).

215 Thus, for my purposes, the central point about the novelty of national security as a concept is not whether the term had ever been employed previously. It is that during and following World War II national security gained a particular meaning-one that has had long-lasting discursive effects. Rather than simply operating as a synonym for common defense or safety generally (when occasionally deployed), the term now came to describe a particular vision of security. This vision emphasized conditions of endemic and complex threat as well as the institutional need for heightened centralization and secrecy.

216 Neocleous, supra note 62, at 77.

217 Herring, *The Impact of War*, supra note 180, at 277.

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218 Id. at 14.

219 See id. at 279 (for instance, arguing that “freedom necessitates a high degree of co-operation, organization, and intelligent planning. . . . Thus freedom depends not upon the shaking off of controls but upon their skillful administration” through “[e]ducation” and the “promotion of science.”).

220 Id.

221 Id. at 20.

222 See id. at 277 (discussing the “rapid change at work in our world today and . . . the interrelations between these forces and our traditional political values”).

223 Herring, *The Impact of War*, supra note 180, at 277.

224 Id. at 282.

225 Id. at 14.

226 Theodore Roosevelt, *Autobiography* 372 (1914).

227 For more on the expansion of executive power from the late nineteenth century until the 1930s, see Aziz Rana, supra note 76, at 222-26, 262-90.

228 See Stone, supra note 99, at 136-33 (detailing efforts during and after World War I by the Wilson Administration to employ new powers of propaganda and centralized administration to censor speech, arrest opponents, and deport noncitizens).

229 David Kennedy, *Over Here: The First World War and American Society* 125-26 (2004) (describing the Overman Act and its uses during the war, especially to reorganize the War Industries Board).





230 Harold Lasswell, *The Garrison State*, in *Essays on the Garrison State* 55, 56 (Jay Stanley ed., 1997).

231 Id. at 95.

232 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.” 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 id. at 193-220.

233 Charles A. Beard, *The Idea of National Interest: An Analytical Study in American Foreign Policy* 522 (1934).

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- ²³⁴ See Stuart, *supra* note 133, at 31-51 (detailing Roosevelt’s national security team and how it responded to Pearl Harbor).
- ²³⁵  50 U.S.C. § 401 (2006).
- ²³⁶ Stuart, *supra* note 133, at 8.
- ²³⁷ Herring, *supra* note 180, at 213 (“[A]ll interests must feel sufficient confidence in the administration to do their part freely. If they waste their energies fighting with each other, all is lost. . . . The national symphony contains many different instruments and many potential soloists, but a disciplined response for the sake of harmony renders no musician less a man.”).
- ²³⁸ 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 “[i]t 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.
- ²³⁹ See Herring, *supra* note 183, at 147 (“If democracy means the peaceful adjustment of social conflicts, it thereby involves a willingness on the part of all concerned to make substantial sacrifices in order that this process may continue.”).
- ²⁴⁰ See *supra* notes 107-119 and accompanying text.
- ²⁴¹ See Richard M. Abrams, Review Essay, The Reputation of Felix Frankfurter, 1985 Am. B. Found. Res. J. 639, 640 (1985) (noting that Frankfurter was part of the New Deal coalition that ascribed to the view that “[s]ocial evils . . . could be reduced, and individual freedom enhanced, if men and women of intelligence and good will made use of governmental mechanisms for the purpose”).
- ²⁴² See *supra* note 10 and accompanying text (noting the tendency of Congress to entrench and facilitate executive power).
- ²⁴³ Jeffrey D. Hockett, New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson 141-42 (1996).
- ²⁴⁴ *Id.* at 142.
- ²⁴⁵ *Id.*
- ²⁴⁶ See Sanford V. Levinson, Note, *The Democratic Faith of Felix Frankfurter*, 25 Stan. L. Rev. 430, 446-47 (1973) (“[B]elief in the potential of American democracy assumed the status of a religious credo [for Frankfurter].”).
- ²⁴⁷ Letter from Felix Frankfurter to President Franklin Delano Roosevelt (Jan. 1, 1940), in *Roosevelt and Frankfurter: Their Correspondence, 1928-1945*, at 511 (Max Freedman ed., 1967).

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- ²⁴⁸ Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 2 *The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams* at 387, 388 (Lester J. Cappon ed., 1959).
- ²⁴⁹ *Id.*
- ²⁵⁰ *Id.*
- ²⁵¹ For more on the Jeffersonian vision of natural aristocracy, see Alex Gourevitch & Aziz Rana, *America's Failed Promise of Equal Opportunity*, Salon.com, Feb. 12, 2012, www.salon.com/2012/02/12/americas_failed_promise_of_equal_opportunity/singleton.
- ²⁵² See *supra* notes 60-74 and accompanying text.
- ²⁵³ Brownson, *supra* note 98, at 124.
- ²⁵⁴ Felix Frankfurter, *The Public and Its Government* 35 (1930).
- ²⁵⁵ *Id.* at 127.
- ²⁵⁶ *Id.*
- ²⁵⁷ *Id.*
- ²⁵⁸ *Id.* at 145.
- ²⁵⁹ 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.” Levinson, *supra* note 246, at 430.
- ²⁶⁰ *Id.* at 446.
- ²⁶¹ Frankfurter, *supra* note 254, at 50-51.
- ²⁶² *Id.* at 159.
- ²⁶³ *Id.*
- ²⁶⁴ *Id.*
- ²⁶⁵ *R.R. Comm’n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 581-82 (1940). This passage is also quoted in Hockett, *supra* note 243, at 172.

266 [Rowan & Nichols Oil Co.](#), 310 U.S. at 584.

267 Fisher, *supra* note 99, at 124 (quoting Justice Frankfurter) (explaining that it was “extremely undesirable” to announce a decision on the merits without any type of opinion accompanying it).

268  [Ex parte Quirin](#), 317 U.S. 1, 48 (1942).


269 Fisher, *supra* note 99, at 108.




270 *Id.*


271 *Id.* at 116.

272  [Hirabayashi v. United States](#), 320 U.S. 81, 88 (1942).

273 See Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 Sup. Ct. Rev. 455, 466-67 (2002) (discussing Frankfurter’s efforts to unite the Court around one unanimous opinion in *Hirabayashi*).

274 See  [Hirabayashi](#), 320 U.S. at 113 (Murphy, J., concurring) (explaining that his affirmance in judgment should not be understood as “intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens”). For more on the case and Frankfurter’s private negotiations, see Stone, *supra* note 99, at 297-99.

275 See  [Korematsu v. United States](#), 323 U.S. 214, 225 (1944) (Roberts, J., dissenting);  *id.* at 233 (Murphy, J., dissenting);  *id.* at 242 (Jackson, J., dissenting).

276  *Id.* at 224-25 (Frankfurter, J., concurring).

277  *Id.* at 225.

278 *Id.* at 234 (Murphy, J., dissenting) (citing  [Mitchell v. Harmony](#), 54 U.S. 115, 134-35 (1851)).

279 *Id.* at 225 (Frankfurter, J., concurring).

280 *Id.* at 224-25.


281 For more on Frankfurter’s account of a functional theory of the Constitution, see Lobel, *supra* note 109, at 1410-12.


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282  [Korematsu](#), 323 U.S. at 225 (Frankfurter, J., concurring).

283 Lobel, *supra* note 109, at 1410.

284  [Youngstown Sheet & Tube Co. v. Sawyer](#), 343 U.S. 579, 585-89 (1952) (plurality opinion).

285 In hinting at the potential legitimacy of inherent presidential authority under other, unspecified conditions, Frankfurter started 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 (Frankfurter, J., concurring).


286 *Id.* (quoting  [Springer v. Philippine Islands](#), 277 U.S. 189, 209 (1928) (Holmes, J., dissenting)); see also Lobel, *supra* note 109, at 1411.

287  [Youngstown](#), 343 U.S. at 610 (Frankfurter, J., concurring).

288  [Korematsu v. United States](#), 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring).

289  130 S. Ct. 2705 (2010).

290  [Id.](#) at 2712.

291 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.

292 *Id.* at 2725.

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

294 *Id.* at 2727 (majority opinion).

295 *Id.*

296 *Id.*

297  [N. Jersey Media Grp., Inc. v. Ashcroft](#), 308 F.3d 198, 219 (3d Cir. 2002). This litigation produced a split in the circuits that

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remains unaddressed by the Supreme Court. While the Third Circuit upheld the constitutionality of the government's decision to 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.

²⁹⁸ Michael R. Gordon, U.S. Account of Downing of Iran Jet Criticized, N.Y. Times, July 2, 1992, at A7 (discussing the controversy surrounding the mistaken shooting of the civilian airliner).

²⁹⁹ See *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987) (involving a claim filed by Members of the House of Representatives seeking a declaration that the War Powers Resolution required the President to file reports concerning past and future involvement the U.S. Armed Forces had in the Persian Gulf).

³⁰⁰ *Id.* at 341. 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 if the subject matter is fundamentally "political," then it should be entrusted to the other branches for resolution. For more on the doctrine, see Alexander M. Bickel, *The Supreme Court, 1960 Term-Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 75 (1961) (providing examples of several historical cases in which the issue presented was not a justiciable controversy); Fritz W. Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 533-38 (1966) (discussing the political question doctrine as a form of judicial avoidance); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-9 (1959) (articulating political questions as questions that "are not to be resolved judicially, although they involve constitutional interpretation and arise in the course of litigation").

³⁰¹ *Lowry*, 676 F. Supp. at 340 n.53.

³⁰²  *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990).

³⁰³ Dana Priest & William M. Arkin, A Hidden World, Growing Beyond Control, Wash. Post, July 19, 2010, at A1.

³⁰⁴ Dana Priest & William M. Arkin, The Secrets Next Door, Wash. Post, July 21, 2010, at A1.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ 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 President George W. Bush, Remarks to the Military Officers Association of America, 42 Weekly Comp. Pres. Doc. 1557, 1559 (Sept. 5, 2006) (identifying an Al Qaeda strategy to create "numerous, decentralized operating bases across the world, from which they can plan new attacks and advance their vision of a unified, totalitarian Islamic state that can confront and eventually destroy

the free world”); President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 129, 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”); President Barack Obama, Address to the Nation on the Drawdown of United States Military Personnel in Afghanistan, 2011 Daily Comp. Pres. Doc. 1, 2 (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).

These presidential assertions also mirror the conventional wisdom as expounded by key foreign policy figures 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. See Thomas H. Kean & Lee H. Hamilton, Public Statement: Release of 9/11 Commission Report 5 (July 22, 2004), available at http://govinfo.library.unt.edu/911/report/911Report_Statement.pdf (“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 also 9/11 Commission, Final Report of the National Commission on Terrorist Attacks Upon the United States: Executive Summary 16 (2004), available at 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).

³¹¹ 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 in approximately 150 foreign states (nearly eighty percent of the world’s countries). Dep’t of Def., Base Structure Report DoD-22 (2009), available at <http://www.defense.gov/pubs/pdfs/2009baseline.pdf>; Dep’t of Def., Active Duty Military Personnel Strengths by Regional Area and by Country 309A (2009), available at <http://www.globalsecurity.org/military/library/report/2009/hst0906.pdf>. 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 Peter Stalenheim et al., SIPRI Yearbook: Military Expenditure Data, 1999-2008 219-20 tbl.5A.1, 230-36 tbl.5A.3 (2009), available at <http://www.sipri.org/yearbook/2009/05/05A>.

³¹² See David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* 13-14 (1998) (describing the nineteenth century as a time of continental expansion, in which settlers engaged in near constant battles with Indians, the British, and Mexicans); see also Richard Slotkin, *Regeneration through Violence: The Mythology of the American Frontier, 1600-1860* 4 (2000) (presenting the republic’s founders as a group who “tore violently a nation from implacable and opulent wilderness” and who saw the Native Americans as the personification of this wilderness).

³¹³ See Christopher Layne & Benjamin Schwartz, *American Hegemony—Without an Enemy*, 92 Foreign Pol’y 5, 5-10, 22 (1993) (describing America’s interventionist foreign policy after World War II and stating “[t]oday, America’s insecurity is the self-inflicted consequence of a foreign policy that equates national interests with the maintenance of world order.”).

³¹⁴ J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 Cornell L.Q. 1, 1 (1961).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ See *id.* at 1-2 (stating that the preservation of the American system of values had come to depend on the nation’s “ability to cope with worldwide revolutionary forces”).

³¹⁸ For more on the historical relationship in American life between accounts of security and contested political values, see generally Campbell, *supra* note 312 (discussing the linkage between the concept of “danger” and American identity and foreign policy); see

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also Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. Legal Educ. 433, 436 (2011) (arguing that post-9/11 responses to perceived threats are bound more to longstanding American practices toward communal “others” than to objective evaluations of danger).

³¹⁹ Nat’l Counterterrorism Ctr., 2009 NCTC Report on Terrorism 19 (2010), available at http://www.nctc.gov/witsbanner/docs/2009_report_on_terrorism.pdf.

³²⁰ 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 Comm’n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* xvii (2011), available at <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); Dana Priest, *Report Finds No Evidence Syria Hid Iraqi Arms*, Wash. Post, Apr. 26, 2005, at A1 (noting that the Iraq Survey Group ultimately found no proof of American officials’ claims that “Syria worked in tandem with Hussein’s government to hide weapons before the U.S.-led invasion”).

³²¹ See, e.g., David Johnston & David E. Sanger, *Cheney’s Aide Says President Approved Leak*, N.Y. Times, Apr. 7, 2006, at A1 (discussing I. Lewis Libby’s testimony that President Bush, through Vice President Cheney, authorized the disclosure in July 2003 of classified prewar intelligence estimates on Iraq); James Risen, *Democrat Lodges Complaints over Leaks from Bush Camp*, N.Y. Times, Sept. 10, 2004, at A21 (noting concerns by “[t]he ranking Democrat on the Senate intelligence committee . . . that senior Bush administration officials [had] disclosed classified information to a prominent journalist ‘for partisan purposes’”).

³²² Yet another recent and telling illustration of flawed secret information concerns the assessment by military analysts at Guantanamo Bay, Cuba 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 based on flawed evidence).

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