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## The Administrative Origins of Modern Civil Liberties Law

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## ARTICLE

### THE ADMINISTRATIVE ORIGINS OF MODERN CIVIL LIBERTIES LAW

*Jeremy K. Kessler\**

*This Article offers a new explanation for the puzzling origin of modern civil liberties law. Legal scholars have long sought to explain how Progressive lawyers and intellectuals skeptical of individual rights and committed to a strong, activist state came to advocate for robust First Amendment protections after World War I. Most attempts to solve this puzzle focus on the executive branch's suppression of dissent during World War I and the Red Scare. Once Progressives realized that a powerful administrative state risked stifling debate and deliberation within civil society, the story goes, they turned to civil liberties law in order to limit the reach of that state. Drawing on a wealth of unexplored archival material, this Article inverts the conventional story: It argues that lawyers within the executive branch took the lead in forging a new civil-libertarian consensus and that they did so to strengthen rather*

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*than circumscribe the administrative state. Tasked with implementing the World War I draft, Felix Frankfurter, Harlan Fiske Stone, and other War Department administrators embraced civil libertarianism as a tool of state-building, not a trump against state power.*

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## INTRODUCTION

This Article offers a new explanation for the puzzling origin of modern civil liberties law. Legal scholars have long sought to explain how a group of Progressive<sup>1</sup> lawyers and intellectuals skeptical of individual

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1. Throughout this Article, "Progressive" indicates a multigenerational network of American individuals, ideas, and institutions prominent from the 1880s to the 1930s. The common feature of this network was a belief that new organizations of public power should and could resolve the challenge to social stability posed by economic, ethnic, and religious difference. See generally Eldon J. Eisenach, *The Lost Promise of Progressivism* 25–29 (1994); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 33–39 (1992); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* 12–17 (1998); Marc Stears, *Progressives, Pluralists, and the Problems of the State: Ideologies of Reform in the United States and Britain, 1906–1926*, at 23–24 (2002); William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in *2 The Cambridge History of Law in America* 643, 643–96 (Michael Grossberg & Christopher Tomlins eds., 2008). The major disagreements within the Progressive network involved the scale and structure of public power—whether public power should be organized at the level of workplaces, communities, cities, states, or the nation itself, and whether it should take legislative, executive, or judicial form. See, e.g., Daniel R. Ernst, Ernst Freund, Felix Frankfurter and the American *Rechtsstaat*: A Transatlantic Shipwreck, 1894–1932, 23 *Stud. Am. Pol. Dev.* 171, 171–88 (2009) [hereinafter Ernst, *American Rechtsstaat*]; William E. Forbath, *Caste, Class, and Citizenship*, 98 *Mich. L. Rev.* 1, 51–57

rights and committed to a strong, activist state came to advocate for robust First Amendment protections after World War I.<sup>2</sup> Most attempts to solve this puzzle focus on the executive branch's suppression of dissent during World War I and the Red Scare.<sup>3</sup> Once Progressives realized that a powerful administrative state risked stifling debate and deliberation within civil society, the story goes, they turned to civil liberties law in order to limit the reach of the state. Drawing on a wealth of unexplored archival material, this Article inverts the conventional story: It argues that Progressive lawyers within the executive branch took the lead in forging a new civil-libertarian consensus and that they did so to strengthen rather than to circumscribe the administrative state.<sup>4</sup>

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(1999) [hereinafter Forbath, *Caste, Class, and Citizenship*]. The Progressive administrators discussed herein embraced both the national scale and the administrative discretion they felt was necessary to regulate a national population. They were what Marc Stears has labeled "nationalist progressives," Stears, *supra*, at 16, and were committed to what Stephen Skowronek has called "presidential democracy." Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Development Perspective on the Unitary Executive*, 122 *Harv. L. Rev.* 2070, 2087 (2009).

2. See, e.g., Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 65–74, 82–83 (1991) (describing Progressives' skepticism of individual rights claims); David M. Rabban, *Free Speech in Its Forgotten Years* 3–4, 299 (1999) (describing Progressives' "prewar faith in a benevolent state and their corresponding aversion to constitutional rights"); John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* 157 (2007) (identifying "[p]uzzle of American Civil Liberties" as recurrent question in academic literature).

3. E.g., Robert Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* 49–50 (2000) (arguing "modern civil liberties movement" was defensive response to government action); Graber, *supra* note 2, at 11, 78 (noting the importance of wartime repression); Donald Johnson, *The Challenge to American Freedoms: World War I and the Rise of the American Civil Liberties Union* 197 (1963) (interpreting civil liberties movement as response to "coercive" character of wartime "federal government"); Paul L. Murphy, *World War I and the Origin of American Civil Liberties in the United States* 25–31 (1979); Rabban, *supra* note 2, at 3–4, 299; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 230 (2004) [hereinafter Stone, *Perilous Times*]; Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 37–47 (1990); Witt, *supra* note 2, at 155–58, 207; G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 *Mich. L. Rev.* 299, 312–14 (1996) [hereinafter White, *Emergence of Free Speech*].

4. This argument is indebted to a group of legal scholars who have previously noted a positive relationship between civil libertarianism and state building in early twentieth-century America. Such a positive relationship is clearest in the context of the labor movement, where administrative agencies and congressional committees rather than courts came to be seen as the best guardians of workers' associational and expressive rights. See Jerold S. Auerbach, *Labor & Liberty: The La Follette Committee and the New Deal* 8–11 (1966) (describing use of executive and legislative coercion to vindicate workers' civil liberties); William E. Forbath, *Law and the Shaping of the American Labor Movement* 139–66 (1991) [hereinafter Forbath, *Law and Shaping*] (tracking positive and negative accounts of civil liberties law in the context of labor politics); Laura Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 *Law & Soc. Inquiry* 187, 201 (2009) [hereinafter Weinrib, *Public Interest to Private Rights*] (describing how interwar civil-libertarian leaders sympathetic to labor "sought to use government affirmatively to advance their free speech

agenda”); Laura Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940* (May 2011) [hereinafter Weinrib, *Liberal Compromise* (unpublished Ph.D. dissertation, Princeton University) (on file with the *Columbia Law Review*) (tracing intersection of civil libertarianism and labor politics and shifting positive and negative accounts of civil liberties law)].

While Laura Weinrib focuses on nongovernmental actors centered at the American Civil Liberties Union, this Article turns to wartime public officials who embraced civil libertarianism as both a goal and a method of governance. Ken Kersch similarly focuses on governmental actors, arguing that, beginning in the early twentieth century, public officials invoked civil liberties to legitimate their regulatory efforts. Ken Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* 338–41, 359–61 (2004). Kersch, however, does not address the formative World War I moment or the role that rights played in shaping, as opposed to legitimating, new forms of state power. See *id.* at 12, 360. Meanwhile, William Novak has alluded to the capacity of individual rights, including civil liberties, to “integrate[] individual citizens with the national socioeconomic ambitions of the [early twentieth-century] state.” William J. Novak, *The Legal Origins of the Modern American State*, in *Looking Back at Law’s Century* 249, 265 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002).

Significantly expanding on Novak’s theme, Karen Tani has argued that administrative provision of welfare rights during the New Deal functioned as a “language of the state”—a language that marked both local bureaucrats and regulated individuals as national citizens. See Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *Yale L.J.* 314, 321–23 (2012) (“Government-issued rights language, trickling down from federal administrators to local welfare workers, helped central-state authority expand into new domains” and “marked poor individuals—still accustomed to thinking of themselves as state and local subjects—as citizens of a beneficent nation-state”). In such a language, rights do not delineate a sphere beyond the state, but serve to recommit all Americans to the fashioning of a democratic and interdependent national polity. *Id.* at 383 (“To speak in the language of rights . . . is to speak to central-state power in a shared language, a language that historically has bypassed state and local intermediaries to demand the perquisites of national citizenship.”). This Article develops Tani’s important insight in two ways. First, it traces the use of individual rights as a method of state building back to the supposedly rights-skeptical Progressive era—particularly the years of World War I—when the administrative theorists and practitioners who would shape the New Deal first took power. While Tani notes that New Deal welfare rights were an effort to continue “progressive” reform, she does not provide a more detailed genealogy. Tani, *supra*, at 323–24; cf. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 *Mich. L. Rev.* 399, 402, 413 (2007) (describing New Dealers as “descendants” of “Progressive” administrative reformers). Second, this Article identifies the provision of specifically *civil-libertarian* rights as a critical aspect of state building.

Between this Article’s World War I-era administrative civil libertarians and Tani’s New Deal administrators, Reuel Schiller provides a critical historical bridge, documenting how the “constitutional protection of freedom of expression was subsumed under administrative law” during the interwar period. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1, 21–22 (2000) [hereinafter Schiller, *Free Speech and Expertise*]. Schiller attributes administrative autonomy in the realm of freedom of expression to the Progressives’ faith in expertise. *Id.* at 21. This Article adds to Schiller’s story by identifying a Progressive theory of civil libertarianism that was a condition of the more general Progressive commitment to the autonomy of expert administrators. For the Progressives discussed herein, not bare expertise but *civil-libertarian* expertise merited decisional autonomy.

While there were civil-libertarian rumblings within the Justice and Labor Departments,<sup>5</sup> this Article focuses on the War Department, a surprising center of civil-libertarian creativity during World War I. One of the chief drivers of the wartime expansion of the American administrative state was the passage of the Selective Service Act of 1917, the first draft law in U.S. history that did not allow men to pay their way out of military service.<sup>6</sup> Although pro-war Progressives lauded this “democratic”

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Finally, a historical analogue to this Article’s account of civil-libertarian state building is Anuj Desai’s argument that the administrative practices of the U.S. Post Office established a set of expressive and privacy norms that would later be incorporated into First and Fourth Amendment jurisprudence. See Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 *Hastings L.J.* 671, 727 (2007) [hereinafter Desai, *Transformation*] (arguing American Post Office practices spurred “First Amendment restrictions on government spending and the right to receive ideas”); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *Stan. L. Rev.* 553, 556–58 (2007) [hereinafter Desai, *Wiretapping*] (“The constitutional principle [of communications privacy] was not rooted in the Fourth Amendment in abstract, textual, or even historical terms; rather, it was a principle deeply embedded in the history of the post office.”). Crucial to Desai’s argument is the insight that the libertarian character of the Post Office advanced governmental interests. See, e.g., *id.* at 565 (“[T]he principle of confidentiality of the mail in the American postal network dates back to, and is intimately intertwined with, the revolutionary goals of those who sought independence.”).

5. Both Richard Steele and Geoffrey Stone have noted that John Lord O’Brian, head of the Justice Department’s War Emergency Division, advocated for a nuanced prosecution of dissent during the war and opposed both local vigilantism and the excesses of military intelligence officials. Richard W. Steele, *Free Speech in the Good War* 5–7 (1999); Stone, *Perilous Times*, *supra* note 3, at 212–20. Similarly, some Labor Department officials, most famously Louis F. Post, actively resisted the deportation of political radicals. See *Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, in the Matter of Deportation of Aliens: Hearings on H. R. Res. 522 Before the H. Comm. on Rules, 66th Cong. 6* (1920) [hereinafter *Post Hearings*] (statement of Rep. Homer Hoch) (“A number of times it has been charged on the floor of the House that Assistant Secretary of Labor Post, by his attitude toward the law and by his action in specific cases, has virtually nullified the law against alien reds and anarchists.”); Peter H. Irons, “Fighting Fair”: Zechariah Chafee, Jr., the Department of Justice, and the “Trial at the Harvard Club,” 94 *Harv. L. Rev.* 1205, 1219–20 (1981) (“Labor Department officials . . . began to seek a way to block the deportation of all but ‘conscious’ members of the Communist Party, thus freeing those who had joined the Party without knowledge of its revolutionary doctrines.”). See generally Louis F. Post, *The Deportations Delirium of Nineteen-Twenty* (1923) (narrating author’s experience during Red Scare).

6. Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 78–80, repealed by Act June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217 (providing compulsory military service should cease four months after proclamation of peace by President); see also 1 U.S. Selective Serv. Sys., *Special Monograph No. 11, Conscientious Objection* 49 (1950) (“In this war, conscription became personal, universal, and absolute; there was no provision whatsoever for the hiring of a substitute or the paying of a commutation fee.”). For the importance of the war, and the draft in particular, to state building, see Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* 210 (2008) (“‘Government’ got bigger during the war and, in some areas, stayed that way, with a standing army, a growing apparatus of surveillance and policing, a nascent welfare state, practice in managing the relations between labor and capital, and experience levying an

approach to conscription, administrators within the War Department, including future Supreme Court Justices Felix Frankfurter and Harlan Fiske Stone, thought that the Selective Service Act's exemption of members of pacifist religious sects from combat duty<sup>7</sup> was far too narrow.<sup>8</sup> They argued that novel administrative procedures should be devised to recognize and respect the rights of individual conscience, rights held by all citizens, whether sectarian or nonsectarian, religious or nonreligious.<sup>9</sup> These Progressive administrators emphasized that democratic values other than majoritarianism—including pluralism<sup>10</sup> and individual self-determination<sup>11</sup>—would be undermined by strict enforcement of

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income tax."); John Whiteclay Chambers II, *To Raise an Army: The Draft Comes to Modern America* 239–60 (1987) (describing legacy of World War I draft); Ajay K. Mehrotra, *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929*, at 294 (2013) ("The Great War . . . was a watershed event in the consolidation of the modern American fiscal state."); William E. Leuchtenburg, *The New Deal and the Analogue of War*, in *Change and Continuity in Twentieth-Century America* 81, 81–143 (John Braeman, Robert H. Bremner & Everett Walters eds., 1964) (describing how New Deal state-builders drew on experience and rhetoric of World War I-driven administrative development); Ernst, *American Rechtsstaat*, supra note 1, at 174 ("The United States' entry into the Great War brought the nationalization of the railroads and merchant marine, a burgeoning of the Bureau of Internal Revenue, and the creation of agencies of war insurance and finance.").

7. The Act stated:

[N]othing in this Act . . . shall be construed to require . . . any person to serve in [the armed forces] who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war . . . but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant . . .

Selective Service Act § 4, 40 Stat. at 78. See also 1 U.S. Selective Serv. Sys., supra note 6, at 49–59 (noting this language recognized as legitimate objectors only official members of pacifist religious sects, such as Quakers and Mennonites).

8. See *infra* Parts II–III.

9. See, e.g., Memorandum from Felix Frankfurter, U.S. Dep't of War, to Newton D. Baker, Sec'y, U.S. Dep't of War 1–4 (Sept. 18, 1917) [hereinafter Frankfurter Memorandum] (on file with the *Columbia Law Review*).

10. Progressives entertained several competing accounts of pluralism, some focused more on the importance of group diversity and self-determination, others focused more on the role that individual diversity and self-determination played in informing and shaping an overarching common good or public interest. See Graber, supra note 2, at 87–92 (describing Progressive views on social value of individual difference); Stears, supra note 1, at 145–66 (describing Progressive views on pluralism and public interest); Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943*, 11 *Law & Hist. Rev.* 59, 62–79 (1993) [hereinafter Ernst, *Common Laborers*] (contrasting approaches to group autonomy taken by industrial pluralists and legal realists). The pluralism espoused by the Progressive administrators discussed here was very much of the latter kind, interested in the role that individual citizens—in all of their political and cultural diversity—played in shaping the state and securing the public interest.

11. For the language of self-determination, see Press Release, Comm. on Pub. Info., Immediate Release (Sept. 28, 1918) [hereinafter Immediate Release, Comm. on Pub. Info.], reprinted in U.S. Dep't of War, *Statement Concerning the Treatment of*

Congress's narrow definition.<sup>12</sup> They also feared that such democratic harms would create additional administrative problems, encouraging pro-war "mob rule" and antiwar disobedience within the draft apparatus and society at large.<sup>13</sup>

In devising a civil-libertarian solution to the problem of conscription, Frankfurter and Stone confronted three challenges that perennially occupied Progressive governance: class conflict, cultural pluralism, and international rivalry.<sup>14</sup> At its most ambitious, the goal of Progressive governance was to create a unified yet democratic national polity capable of competing with—even leading—the world's less-democratic great powers.<sup>15</sup> Conscription, an administrative tool for uniting the nation and channeling its power abroad, could well serve as a means to this Progressive end. But for it to do so, administrators would have to manage resistance to the draft in a manner that preserved, and even enhanced, the democratic character of the national state.<sup>16</sup>

Frankfurter, Stone, and their War Department colleagues responded to this set of challenges by constructing centralized procedures to hear

Conscientious Objectors 47 (1919) [hereinafter U.S. War Dep't, Statement] ("It has been the liberal American policy of according a measure of self-determination to the few . . . whom direct participation in the war would violate religious convictions, as well as a sense of self-respect and integrity of character."). This language was probably inspired by President Wilson's contemporaneous call for an international order based on the principle of self-determination, which the President anchored in the "consent of the governed." Woodrow Wilson, *A League for Peace*, S. Doc. No. 64-685, at 8 (1917). See *infra* Part II.A for further discussion of this point.

12. See *infra* Parts II–III (describing Frankfurter and Stone's arguments).

13. See Steele, *supra* note 5, at 5–7, 17–23 (describing relationship between Progressive interest in civil liberties and Progressive efforts to disrupt local mob rule); see also Margaret Levi, *Consent, Dissent, and Patriotism* 16–27, 33–41, 165–199 (1997) (describing how wartime democratic governments secure compliance from individuals with a range of material interests and cultural commitments, including through provision of conscientious objection).

14. For class conflict, see Shelton Stromquist, *Reinventing "The People": The Progressive Movement, the Class Problem, and the Origins of Modern Liberalism* 165–90 (2006) (describing impact of class conflict on Progressive movement); Forbath, *Caste, Class, and Citizenship*, *supra* note 1, at 58–61 (discussing labor conflict during Progressive era). For cultural pluralism, see Graber, *supra* note 2, at 87–100 (describing Progressive belief that "polity [should] encourage[] citizens to express a wide variety of opinions on matters of public interest"); Stears, *supra* note 1, at 145–66 (tracing relationship between nationalism and pluralism in Progressive thought); Robert Wiebe, *The Search for Order, 1877–1920*, at 44–132 (1967) (describing bureaucratic response to pluralism). For international rivalry, see Alan Dawley, *Changing the World: American Progressives in War and Revolution* 181–216 (2003); Eisenach, *supra* note 1, at 225 ("Reform at home meant both conflict and the need for conquest."); Rodgers, *supra* note 1, at 367–408 (describing impact of competition with Europe on American progressive movement); Robert B. Westbrook, *John Dewey and American Democracy* 195–227 (1991) (describing Progressive split due to World War I).

15. See *supra* note 14 for sources on Progressive governance and international rivalry.

16. See *infra* Parts II–III.



and respond to the individual claims of antiwar draftees. In doing so, they imbued the national bureaucracy with democratic norms of deliberation and dissent.<sup>17</sup> They also asserted their own legal and political authority as civilian administrators against competing modes of draft governance—voluntary, local, military, and legislative.<sup>18</sup> In particular, the War Department's administrative civil-libertarian response to the problem of antiwar dissent was opposed by military lawyers who argued that Congress's narrow conscience clause expressed the majority will and was essential to the war effort, and so should be rigidly enforced.<sup>19</sup>

The story of World War I administrative civil libertarianism helps to solve, or rather dissolve, the puzzle that surrounds the invention of modern civil liberties law. It is only puzzling to learn that Progressives supported both civil-libertarian rights and a powerful state if we view civil-libertarian rights as trumps against state power. At the moment of their inception, however, civil-libertarian rights and state building were not so obviously in conflict. The Progressive administrators who went out of their way to accommodate minority views during World War I never backed away from their support for a strong state.<sup>20</sup> They conceived of the right of individual conscience not as a right to opt out of the warfare state, but rather as a right to participate in the warfare state in a particularistic manner.<sup>21</sup> What Progressive administrators meant by "self-determination" was individualized involvement in the administrative

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17. See Levi, *supra* note 13, at 168 ("The institution of conscientious objection legitimates objection to war, provides a stimulus for public discussion and debate about the war itself, and delimits the bounds of legal objection by sanctioning those who misuse the process.").

18. For the influence of voluntarism and local authority on the draft, see Capozzola, *supra* note 6, at 36–54, 83–143; Chambers, *supra* note 6, at 73–101.

19. Previous accounts of the World War I system of conscientious objection have missed both Felix Frankfurter's formative role and the extent to which that system represented a radical departure from congressional and military policy. E.g., Capozzola, *supra* note 6, at 71–73; Chambers, *supra* note 6, at 217; Charles Chatfield, *For Peace and Justice: Pacifism in America, 1914–1941*, at 70–76 (1971); Ronald B. Flowers, *To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court* 68–72 (2003); 1 Kent Greenawalt, *Religion and the Constitution* 50 (2006); Johnson, *supra* note 3, at 30–36 (1963); Murphy, *supra* note 3, at 158–60; Michael J. Davidson, *War and the Doubtful Soldier*, 19 *Notre Dame J.L. Ethics & Pub. Pol'y* 91, 130 (2005) (noting briefly expanded Army policy in World War I allowed exemptions for nonreligious objection); Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 *U. Cin. L. Rev.* 31, 53–56 (2001) (noting though scope of conscientious objectors remained limited through World War I, Congress began to entertain ideas of broader exemptions); Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 *Sup. Ct. Rev.* 31, 35–36 (summarizing 1917 conscientious-objector law).

20. See *infra* Part IV.B (discussing legacies of World War I administration).

21. In Laura Weinrib's apt phrase, the administrative right of conscience "meant 'freedom to' (participate in government, bargain collectively, protest governmental abuses) rather than 'freedom from' (centralized government tyranny)"; it was "not yet negative, but . . . nonetheless counter-majoritarian." Weinrib, *Public Interest to Private Rights*, *supra* note 4, at 201.

state, not the protection of private individuals, local communities, or civil society from the state's grasp.<sup>22</sup> After the war, Frankfurter, Stone, and other veterans of the World War I executive branch went on to play critical roles in the continuing development of modern civil liberties law, imbuing that law with their commitment to a powerful administrative state capable of sustaining a pluralistic democracy.<sup>23</sup>

By unearthing the administrative roots of modern civil liberties law, this Article reveals that our current understanding of civil-libertarian rights as judicially enforced trumps against state power is neither natural nor timeless. Legal scholars have noted that civil liberties law took on an increasingly antistatist, judicially enforced character during the 1930s and 1940s in response to the growth of American bureaucracy and the fear of foreign totalitarianism.<sup>24</sup> The history of administrative civil

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22. Such individualized involvement was thought to serve normative and functional imperatives: As administered subjects both persuaded and informed expert administrators, administrative decisionmaking would become more democratic *and* more effective. In contrast to contemporary civic-republican theorists of administration, Progressives embraced administrative expertise as a necessary and legitimate bridge between individual diversity and a synthetic public interest. See Note, *Deweyan Democracy and the Administrative State*, 125 *Harv. L. Rev.* 580, 589–90 & n.57 (2011) (comparing civic-republican and Progressive evaluations of role of administrators); see also Schiller, *Free Speech and Expertise*, *supra* note 4, at 14 (“Central to the Progressives’ faith in expertise was the idea that administrative experts needed the flexibility to shape governmental responses to individual problems.”). Some contemporary legal scholars have proposed neo-Progressive and neopragmatist accounts of administration that similarly emphasize individual participation mediated by expertise. See, e.g., James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 *N.Y.U. Rev. L. & Soc. Change* 183, 187–89 (2003) (describing emerging public educational system as advancing Deweyan vision of responsive, experimental administration); Charles Sabel, *Dewey, Democracy and Democratic Experimentalism*, *Contemp. Pragmatism*, Dec. 2012, at 35, 44–45 (arguing for broad goals-based lawmaking informed by administrative expertise); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *Geo. L.J.* 53, 93 (2011) (advocating for experimentalist administrative regimes “that try to combine accountability with local initiative in ways that facilitate learning and individuation”); Note, *supra*, at 594–96 (calling on agencies to follow Deweyan path of identifying and communicating with “intended regulatory beneficiaries”); Blake Emerson, *Critical Bureaucracy: The Communicative Power of the Equal Employment Opportunity Commission 4* (2011) (unpublished manuscript), available at [http://digitalcommons.law.yale.edu/ylsspps\\_papers/68](http://digitalcommons.law.yale.edu/ylsspps_papers/68) (on file with the *Columbia Law Review*) (arguing Equal Employment Opportunity Commission “enacted deliberative democracy through their bureaucratic practices”). This Article contributes to the contemporary recovery of early-twentieth-century administrative and democratic theory by identifying an account of civil libertarianism that emerged in concert with that theory, and remains consistent with it. For further discussion of the theory of democratic participation that motivated both administrative civil libertarianism in particular and Progressive administration generally, see *infra* notes 157–167 and accompanying text.

23. See *infra* Part IV.B (discussing postwar legacies of World War I executive-branch activism).

24. See, e.g., William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980*, at 121–37 (2001) (discussing antitotalitarian roots of

libertarianism illuminates the legal and political obstacles that stood in the way of this antistatist and judge-centric turn. Before the antistatist conception of civil liberties could become dominant, it had to defeat an earlier administrative conception and its remaining adherents, including Felix Frankfurter himself.<sup>25</sup> In defending administrative governance from the new judicially enforced civil libertarianism of the World War II period, Frankfurter and his allies were not simply subordinating civil liberty to judicial restraint. Rather, they were reaffirming a well-pedigreed administrative model of civil-libertarian rights enforcement first developed in World War I.

This Article also contributes to the contemporary study of “administrative constitutionalism,” a form of constitutional development that encompasses “the constitutional understandings and interpretations developed by agencies as well as those that structure the administrative

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modern civil liberties and civil rights jurisprudence); Richard A. Primus, *The American Language of Rights 177–97* (1999) (describing foundation of rights discourse in opposition to Nazi Germany and Soviet Union); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 *Pol. Res. Q.* 623, 649 (1994) (arguing judges developed tradition addressing “threats to civil liberties posed by the rise of the modern state” by “mitigating [its] totalitarian impulses”); Schiller, *Free Speech and Expertise*, supra note 4, at 75–76 (describing how “Americans came to expect the judiciary . . . to protect individuals and minorities from the deadly tide of totalitarianism that seemed to be infecting legislative and administrative actors in Europe and, perhaps, in the United States”); John W. Wertheimer, *A “Switch in Time” Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s*, in 53 *Studies in Law, Politics and Society* 3, 13–15 (Austin Sarat ed., 2010) (describing transformation in American legal culture in response to totalitarianism); Weinrib, *Liberal Compromise*, supra note 4, at 558–571 (summarizing civil-libertarian responses to New Deal).

25. Until the late 1930s, the fate of civil libertarianism as a mainstream legal and political program largely depended on the commitment of those who saw the promotion of civil-libertarian rights and the construction of a powerful administrative state as complementary rather than conflicting projects. This mainstream civil-libertarian advocacy largely focused on infusing administrative decisionmaking—both at the local level and at the federal level—with civil libertarian norms. See Auerbach, supra note 4, at 8–11, 51–73 (describing use of executive and legislative coercion to vindicate workers’ civil liberties); Risa L. Goluboff, *The Lost Promise of Civil Rights 27–30* (2007) (discussing American Civil Liberties Union’s involvement with National Labor Relations Board in securing labor rights); Schiller, *Free Speech and Expertise*, supra note 4, at 3–4 (discussing shift from administrative to judicial protection of free speech after New Deal); Jeremy K. Kessler, “Calculations of Liberalism”: John W. Davis and the Crisis of Civil Libertarianism in the 1930s, at 5–34 (Mar. 2014) [hereinafter Kessler, *Calculations of Liberalism*] (unpublished manuscript) (on file with the *Columbia Law Review*) (noting relationship between civil libertarianism and state building in early 1930s); Jeremy K. Kessler, *The Civil Libertarian Conditions of Conscriptio* 5–17, 34–38 (Jan. 2014) [hereinafter Kessler, *Civil Libertarian Conditions*] (unpublished manuscript) (on file with the *Columbia Law Review*) (describing emergence of antistatist vision of civil liberties law); Laura Weinrib, *Civil Liberties Enforcement and the New Deal State 4–21, 26–34* (n.d.) [hereinafter Weinrib, *Civil Liberties Enforcement*] (unpublished manuscript) (on file with the *Columbia Law Review*) (describing relationship between civil liberties and federal government in 1930s).

state itself.”<sup>26</sup> The administration of conscientious objectors during World War I illuminates several core features of administrative constitutionalism: the emergence of new constitutional understandings from ordinary lawmaking and policymaking,<sup>27</sup> the tendency of those new constitutional understandings to reconfigure both the substance and structure of administration,<sup>28</sup> the lack of transparency that often accompanies such constitutional creativity,<sup>29</sup> and the relationship

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26. Gillian E. Metzger, *Administrative Constitutionalism*, 91 *Tex. L. Rev.* 1897, 1901 (2013) [hereinafter Metzger, *Administrative Constitutionalism*]. Metzger elaborates that forms of administrative constitutionalism include: “the application of established constitutional requirements by administrative agencies,” “the elaboration of new constitutional understandings by administrative actors,” and “the construction . . . of the administrative state through structural and substantive measures” taken by a variety of governmental actors. *Id.* at 1900. While Metzger includes the interplay between administrative lawmaking and judicial review within the ambit of administrative constitutionalism, William Eskridge and John Ferejohn contrast administrative constitutionalism—“the process by which legislative and executive officials . . . advance new fundamental principles and policies”—with “judicial Constitutionalism.” William N. Eskridge Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* 33 (2010). Sophia Lee’s treatment of administrative constitutionalism, meanwhile, zeroes in on “regulatory agencies’ interpretation and implementation of constitutional law.” Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 *Va. L. Rev.* 799, 801 (2010). Metzger’s definition is not only capacious but dynamic, illuminating administrative constitutionalism as both an effect and a necessary condition of administrative governance.

27. See *infra* Parts II.B, III (describing War Department officials’ reliance on subconstitutional arguments from administrative, military, and political prudence in asserting substantive and structural norms of constitutional gravity); cf. Metzger, *Administrative Constitutionalism*, *supra* note 26, at 1911–14 (describing “[a]dministrative constitutionalism’s emphasis on the constitutional dimensions of seemingly ordinary implementation and policymaking”); Desai, *Wiretapping*, *supra* note 4, at 568–77 (describing eventual constitutionalization of postal-service privacy norms).

28. See *infra* Parts II, III.B, IV.A. (describing how civil-libertarian administrators in War Department displaced military and legislative authority over draft while implementing right of individual conscience); cf. Metzger, *Administrative Constitutionalism*, *supra* note 26, at 1910–11 (describing interplay between administrative development of constitutional understandings and construction of administrative state itself); Lee, *supra* note 26, at 810–57 (comparing Federal Communications Commission’s efforts to expand its lawmaking authority in course of promoting equal protection norms with Federal Power Commission’s efforts to limit its lawmaking authority in same realm).

29. See *infra* Parts II.C, IV.A (describing how War Department’s decision to take accommodating approach to conscientious objection reversed conclusion of earlier, public debate and was first implemented through series of covert orders); cf. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. Rev.* 1559, 1594–98 (2007) (describing how “secrecy” compounds dangers of constitutional decision-making by executive actors); Lee, *supra* note 26, at 824–33 (discussing elision of constitutional reasoning in publicly-accessible administrative decision-making); Metzger, *Administrative Constitutionalism*, *supra* note 26, at 1902, 1914, 1929–30 (discussing problem of transparency in both agency- and judge-driven administrative constitutionalism); Anjali Dalal, *Administrative Constitutionalism and the Re-Entrenchment of Surveillance Culture* 7, 14–23, 28 (Mar. 4, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2236502> (on file with the *Columbia*

between administrative constitutionalism and constitutional construction.<sup>30</sup> At the same time, Frankfurter and Stone's wartime work suggests a specific role for administrative constitutionalism in the articulation and promotion of civil-libertarian norms.<sup>31</sup>

Part I of this Article tracks the passage of the Selective Service Act of 1917, which offered noncombatant duty only to members of pacifist religious sects. It then describes the debate between civilian and military officials about whether the Wilson Administration had the legal authority to offer alternative service to nonsectarian objectors, despite the Act's restrictive language. Part II turns to Felix Frankfurter's intervention in this debate and his long-neglected September 1917 memorandum on conscientious objection.<sup>32</sup> Relying on arguments from administrative,

*Law Review*) (describing how "intelligence gathering culture centered on secrecy of process" contributed to entrenchment of pro-executive First Amendment norms).

30. Metzger notes that "[a]dministrative constitutionalism's emphasis on the constitutional dimensions of seemingly ordinary implementation and policymaking, combined with its frequent creative character . . . links administrative constitutionalism to the wider category of constitutional construction." Metzger, *Administrative Constitutionalism*, *supra* note 26, at 1912. Meanwhile, Keith Whittington has identified the federal military draft as a signal case of constitutional construction. Keith E. Whittington, *Constitutional Construction* 12 tbl.1.2 (1999) [hereinafter Whittington, *Constitutional Construction*]. The War Department's conscientious-objector policy can be understood as a construction in its own right—a mixed practice of law and policymaking by which governmental actors "flesh[ed] out constitutional principles, practices and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution." Keith E. Whittington, *Constructing a New American Constitution*, 27 *Const. Comment.* 119, 120 (2010) [hereinafter Whittington, *New American Constitution*]. See *infra* Part II for further discussion of conscientious-objector policy as constitutional construction.

31. See *infra* Parts II.B, III, IV.B, Conclusion (discussing Frankfurter's administrative arguments for accommodating approach to conscientious objection, Board of Inquiry's intervention in draft apparatus, and enduring impact of World War I conscientious-objector policy).

32. Frankfurter's memorandum has never been identified as the blueprint for, and legal justification of, the Wilson Administration's accommodating conscientious-objection policy. Indeed, in his important study of Frankfurter's evolving views of individual liberty, Melvin Urofsky devotes only two sentences to the memorandum, citing it as an example of Frankfurter's *lack* of sympathy for "those who . . . refused to meet their civic obligations." Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* 50 (1991). To the contrary, Frankfurter's work on the problem of conscientious objection laid the groundwork for a strikingly accommodating policy. Joseph Lash provides the longest treatment of Frankfurter's memorandum in the secondary literature, noting that it "emphasized that even those who refused alternative service and had, therefore, to be jailed, should be treated soberly and magnanimously—advice, unfortunately, that went unheeded the further down the chain of command that it traveled." Joseph P. Lash, *A Brahmin of the Law: A Biographical Essay*, in *From the Diaries of Felix Frankfurter* 21 (Joseph P. Lash ed., 1975). Though there is nothing inaccurate in Lash's description, Frankfurter's memorandum was far more detailed and legally nuanced than Lash suggests. Several other biographers neglect to mention the memorandum altogether. See Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* (1984); H.N. Hirsch, *The Enigma of*

military, and political prudence, this memorandum asserted the equality of sectarian and nonsectarian objectors, called for the creation of a three-member board to interview all objectors and assign sincere ones to belief-respecting forms of alternative service, and asserted the War Department's authority to take these measures. Between October 1917 and May 1918, Secretary of War Newton Baker and President Wilson implemented an administration of conscientious objectors that hewed closely to Frankfurter's proposal. Part III describes the work of the three-member Board of Inquiry, on which Harlan Fiske Stone served, and the military noncompliance it encountered. Part IV first traces the reception of the War Department's administrative civil libertarianism in Congress and the press. Then it sketches Frankfurter and Stone's postwar contributions to the intertwined development of civil liberties law and administrative governance.

#### I. DEBATING AND INTERPRETING THE SELECTIVE SERVICE ACT OF 1917

The United States' drift toward war in the winter and spring of 1917 split the Progressive movement. While most Progressives saw the war as an opportunity to accelerate the country's economic growth, legal development, and social integration, some were staunch pacifists and suspicious of the militarization of American society. As the Wilson Administration pushed for a draft in April 1917, these antiwar Progressives sought to mitigate what they saw as conscription's antidemocratic character by including a broad accommodation for conscientious objectors within the draft bill. Emphasizing the participatory and pluralistic nature of conscientious objection, these Progressives argued that individuals opposed to war—regardless of religious belief or affiliation—should be offered a variety of nonviolent ways to serve the state.

Although both Congress and the Wilson Administration rejected this expansive vision of conscientious objection at first, this vision would eventually find a more sympathetic audience within the executive branch. Secretary of War Newton Baker had stacked the War Department with young Progressives who shared many of their antiwar friends' concerns about the threat that military mobilization posed to a pluralistic polity. Throughout the summer of 1917, these administrators considered the legality and practicality of crafting a system of conscientious objection more participatory and pluralistic than the one indicated by the Selective Service Act. Military lawyers, however, pushed back against this flirtation with administrative innovation, arguing that Congress had dictated a narrow accommodation of dissent. In September, the task fell to Felix Frankfurter to make the case for the War Department's authority to implement a more civil-libertarian draft.

*A. The Debate*

Secretary of War Newton Baker was not a military man. Rejected from the army during the Spanish-American War because of his poor eyesight, Baker went on to become the reformist Mayor of Cleveland and served for many years as president of the National Consumers League, a center of Progressive legal reform.<sup>33</sup> Through these activities, Baker became friends with social workers and lawyers—including Jane Addams, Louis Brandeis, and Felix Frankfurter—who were the lifeblood of early-twentieth-century Progressive advocacy.<sup>34</sup> It was also out of this network of reformers that some of the most outspoken critics of the Wilson Administration's wartime policies emerged.<sup>35</sup>

When President Wilson and Secretary Baker did decide to raise a new American army through conscription, they did so in part to marginalize more bellicose factions within the military and society at large. Since 1914, Wilson's chief political antagonist, Theodore Roosevelt, and Roosevelt's close military ally, Major General Leonard Wood, had been pressuring the White House to institute universal military training and service, a form of peacetime national conscription.<sup>36</sup> Roosevelt was not only a former President and a military hero, but the chief advocate of a militant and majoritarian interpretation of democratic state building, one that had little room for the pluralism that many of Wilson's supporters prized.<sup>37</sup> When Wilson scuttled the peacetime draft plan, Roosevelt switched tacks, requesting permission to lead his own volunteer division into battle against the Germans.<sup>38</sup> If the ex-President got his way, the American army that brought peace to Europe would be Roosevelt's, not Wilson's. Anxious to avoid "politico-military challenges to presidential

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33. See C.H. Cramer, *Newton D. Baker: A Biography* 49–56, 190–93 (1961) (chronicling Baker's accomplishments as mayor and work for National Consumers League).

34. See Cottrell, *supra* note 3, at 59 (discussing Baker's connection to members of antiwar organizations); Parrish, *supra* note 32, at 84–85 (describing relationship between Baker, Frankfurter, and Brandeis); Urofsky, *supra* note 32, at 28 (highlighting Frankfurter and Brandeis's work with National Consumers League).

35. See Chatfield, *supra* note 19, at 30–32 (describing emergence of antiwar movement).

36. See Chambers, *supra* note 6, at 79–80, 135–36 (arguing Wilson enacted compulsory draft to "forestall" Roosevelt's "dangerous" military plan); Jack C. Lane, *Armed Progressive: General Leonard Wood* 197–201 (1978) (describing Wood's support for universal military training); Jack McCallum, *Leonard Wood: Rough Rider, Surgeon, Architect of American Imperialism* 264–66 (2006) (explaining Wood's efforts to prepare nation for possibility of war).

37. John Milton Cooper, Jr., *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt* 303–23 (1983) (discussing contentious relationship between Wilson and Roosevelt prior to American entry into World War I).

38. Chambers, *supra* note 6, at 137.

direction of the war," Secretary Baker refused Roosevelt's request.<sup>39</sup> Days later, Wilson and Baker decided to design the nation's first all-conscript National Army.<sup>40</sup> Such a method of recruitment would place manpower policy directly under civilian control, and make the denial of Roosevelt's volunteer division less incongruous.<sup>41</sup>

The day after the United States declared war on Germany, Secretary Baker delivered a conscription bill to Congress.<sup>42</sup> Although he was opposed to what he saw as the militarism of Roosevelt and Wood, Baker would not win over his pacifist friends with such legislation. The language in the bill concerning men who refused to fight was narrow, offering the possibility of noncombatant service in the military only to members of pacifist religious sects.<sup>43</sup> Nonsectarians—whether religious objectors from nonpacifist sects or secular objectors—could not qualify for this exemption, and no alternative service under civilian command was made available. Before a confidential session of the House Military Affairs Committee, Baker explained that looser language would, "in my judgment, [be] inoperable."<sup>44</sup> The problem, he went on, was that such language could make "the question of exclusion purely a question of individual statement and, as lawyers might say, of a self-serving declaration made after the event."<sup>45</sup>

Baker's testimony is noteworthy given how far his War Department would later go in granting legitimacy to the nonsectarian or individual conscience. The simplest explanation for this reversal is that Baker did not want to incentivize conscientious objection before the fact by making the statutory provision too lenient or indeterminate; once the number of men refusing to fight was known and was small, he would be happy to

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39. *Id.* Stymied once again, Roosevelt lashed out at Baker, challenging "the authority of the administration to deny him a command" and suggesting that there were those in the army ready to grant him one despite civilian reluctance. *Id.* at 138. Baker forwarded Roosevelt's letter to Wilson who remarked that it was "one of the most extraordinary documents I have ever read." *Id.* (quoting President Woodrow Wilson).

40. *Id.*

41. *Id.* at 138–41. Wilson and Baker also demoted Major General Leonard Wood, Roosevelt's chief ally on active duty, assigning him to training camps and ensuring that he would not hold a command in Europe. Daniel R. Beaver, *Newton D. Baker and the American War Effort: 1917–1919*, at 41–43 (1966).

42. Chambers, *supra* note 6, at 152.

43. S. 1871, 65th Cong. § 3 (1917) (offering noncombatant service to "member[s] of any well-organized religious sect or organization, at present organized and existing, whose creed forbids its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed of said religious organization").

44. Increase of Military Establishment: Hearings on the Bill Authorizing the President to Increase Temporarily the Military Establishment of the United States Before the H. Comm. on Military Affairs, 65th Cong. 7 (1917) (statement of Newton D. Baker, Sec'y, U.S. Dep't of War).

45. *Id.*



recognize the individual conscience.<sup>46</sup> An alternative explanation is that Baker simply changed his mind over the course of the summer and fall of 1917, as Progressives within his department, including Felix Frankfurter, came to advocate for a broader accommodation.<sup>47</sup> In either case, the congressional debate discussed below suggests that efforts to seek more accommodating language would have met significant political resistance.

Disturbed by the draft bill, Jane Addams met with the Secretary of War on April 11. Addams was a nationally renowned Progressive reformer and a member of the American Union Against Militarism (AUAM), the nation's premier antiwar organization.<sup>48</sup> She was also one of Baker's "heroes."<sup>49</sup> After their meeting, Addams forwarded Baker an AUAM memorandum detailing proposals for a more lenient policy toward conscientious objectors.<sup>50</sup> The AUAM's account of legitimate conscientious objection emphasized individual self-determination: "Exemptions should be granted to individuals on the ground of their own belief; not on the ground of the sect to which they belong," Addams explained.<sup>51</sup> "[T]his is a matter not of corporate but of individual conscience."<sup>52</sup> Since what mattered was the intensity of the individual's beliefs, not the community to which he belonged, exemptions should be given to men with "religious *or other* conscientious convictions."<sup>53</sup>

Finally, the AUAM memorandum explained that conscientious objectors were not seeking to avoid public service, but to perform service that did not violate their deepest commitments. Consequently, the government should tailor different modes of public service to different forms of objection. Those men who objected "simply to bearing arms personally" could perform noncombatant duty within the military, while

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46. In support of this explanation, Christopher Capozzola notes that when Baker learned of initial military estimates that suggested comparatively few men in camp professed objections to fighting, he "breathed to Wilson a sigh of relief," saying that "it does not seem . . . as though our problem [is] going to be . . . so large that a very generous and considerate mode of treatment [of conscientious objectors] would be out of the question." Capozzola, *supra* note 6, at 67 (quoting Letter from Newton D. Baker, Sec'y, U.S. Dep't of War, to Woodrow Wilson, President (Sept. 19, 1917)).

47. See *infra* Parts I.B, II (discussing War Department lobbying for broader accommodation of conscientious objectors).

48. See Cottrell, *supra* note 3, at 49, 58. Like many Progressive organizations, the AUAM had an ideologically diverse membership, running the gamut from upright Christian ministers, such as John Haynes Holmes, to the increasingly radical Crystal Eastman, who would soon become a staunch Bolshevik. See Chatfield, *supra* note 19, at 23 (noting Holmes's involvement with AUAM); Witt, *supra* note 2, at 208 (describing Eastman's radicalization).

49. Louisa Thomas, *Conscience: Two Soldiers, Two Pacifists, One Family—A Test of Will and Faith in World War I*, at 159 (2011) [hereinafter Thomas, *Conscience*].

50. Letter from Jane Addams et al., Am. Union Against Militarism, to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (Apr. 12, 1917) (on file with the *Columbia Law Review*).

51. *Id.* at 2.

52. *Id.*

53. *Id.* (emphasis added).

those men whose beliefs prevented any work that “directly aids military operations” could perform “alternative service” within the civilian branches of the government.<sup>54</sup> The AUAM could only “plead” leniency for “absolutists,” those men who refused to participate in any way.<sup>55</sup>

That the AUAM declined to take a stronger stand on absolutism reflects a basic Progressive commitment to individual participation in the public sphere.<sup>56</sup> In keeping with this participatory vision, the AUAM memo did note that leniency toward absolutists might be particularly advisable if such men were already doing socially useful work.<sup>57</sup> As will be seen below, the system of conscientious objection designed by Baker and his War Department staff would eventually fulfill much of the AUAM’s vision, privileging individuality over group membership, recognizing a plurality of reasons for objection, and tailoring forms of service to the specifics of individual objections. But this system did little to accommodate absolutists, who refused all participation in the nation’s mobilization. Above all, the War Department’s procedures would tie legitimate antiwar dissent to ongoing participation in the administration of the draft.

After Secretary Baker deferred responsibility for the conscientious-objector exemption to Congress, the AUAM turned to the legislative process.<sup>58</sup> Roger Baldwin, secretary of the AUAM and future founder of the American Civil Liberties Union (ACLU),<sup>59</sup> and Norman Thomas, well-respected minister and future head of the Socialist Party, took the lead. Throughout their lobbying, Baldwin and Thomas asserted a strong connection between freedom of conscience and democratic legitimacy. Baldwin quoted President Wilson’s own words in making this point to the House Military Affairs Committee. How could the United States, he asked, “wage war ‘for the privilege of men everywhere to choose their way of life and obedience’ while we compel the conscientious objector to war?”<sup>60</sup> Thomas and Baldwin warned the committee that “autocracies

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54. Id. (*italics omitted*).

55. Id.

56. See Eisenach, *supra* note 1, at 191–95 (discussing Progressive belief in individual participation in institutions as both means of developing individual identity and necessary for democracy).

57. Letter from Jane Addams to Newton D. Baker, *supra* note 50, at 3.

58. Letter from Newton D. Baker, Sec’y, U.S. Dep’t of War, to Jane Addams, *Am. Union Against Militarism* 1 (Apr. 12, 1917) (on file with the *Columbia Law Review*).

59. After studying sociology at Harvard, Baldwin followed the advice of his mentor, Louis Brandeis, and moved to St. Louis to pursue urban-reform work. Cottrell, *supra* note 3, at 19–20. Soon, however, Baldwin became radicalized by the outbreak of war in Europe, and, when the socialist Crystal Eastman fell ill, he took her place at the helm of the AUAM. Id. at 47–48; see also Witt, *supra* note 2, at 196–200.

60. Thomas, *Conscience*, *supra* note 49, at 161. For Wilson’s original speech, see Woodrow Wilson, *Address by the President of the United States*, S. Doc. No. 5, at 104 (1917) (on file with the *Columbia Law Review*).

may coerce conscience in this vital matter; democracies do so at their peril."<sup>61</sup>

The AUAM lobbyists also continued to emphasize the theme of participation, framing a pluralistic approach to wartime service as a way of bridging the gap between freedom of conscience and democratic obligation. They noted that most objectors did not object to participation in the state as such, only to certain forms of participation that violated their deepest commitments.<sup>62</sup> Thomas proposed that "any person who is conscientiously opposed" to service in the armed forces be exempted and drafted instead for service within the "civil branches of the Government."<sup>63</sup> He argued that this approach—which involved compulsory service but not coercion of conscience—would preserve "the principle of freedom of conscience, which is absolutely vital to democracy."<sup>64</sup>

Several amendments supported by AUAM and introduced by congressmen echoed Thomas and Baldwin's views.<sup>65</sup> On April 28, Representative Edward Keating, a Colorado Democrat, assailed the draft bill for accommodating only the "man who belongs to an organization which is opposed to participation in war."<sup>66</sup> In addition to "the organized conscience of the Nation," Keating called on the House to recognize "the unorganized conscience of the Nation"<sup>67</sup>—the conscientious individual who fashioned his own ethical and political worldview. Indeed, Keating implied that there was something *unconscientious* about the "organized conscience." Conscientious opposition to war, he argued, should be based on the individual's active *choice* to adhere to a particular kind of belief, not on the inheritance of, or fealty to, a shared tradition.<sup>68</sup> Keating's opponents, however, argued that the "unorganized conscience" and the orderly management of the draft were utterly opposed. For instance, Georgia Democrat William Howard suggested that the "practical operation" of Keating's broad exemption "would resolve itself into the voluntary system."<sup>69</sup>

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61. Cottrell, *supra* note 3, at 52.

62. 55 Cong. Rec. 928 (1917) (statement of Sen. James Brady) (quoting letter from Norman Thomas explaining objectors "are not cowards and are very eager to serve society").

63. *Id.* at 929.

64. *Id.*

65. See Letter from Jane Addams, Am. Union Against Militarism, to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (Apr. 27, 1917) (on file with the *Columbia Law Review*) (detailing AUAM support for imperiled amendments).

66. 55 Cong. Rec. 1528 (1917) (statement of Rep. Edward Keating) (proposing amendment exempting from service "any person who is conscientiously opposed to engaging in such service").

67. *Id.*

68. *Id.* at 1529 (asserting amendment "recognizes the conscience of the individual instead of the organization").

69. *Id.* (statement of Rep. William Howard).

In the Senate, debate also pitted those who saw the individual conscience as essential to democracy against those who saw it as inimical to the orderly management of the draft. Colorado Senator Charles Thomas argued that to recognize only “those with conscientious scruples who are members of religious organizations” would not be “democratic.”<sup>70</sup> For Senator Thomas, the integrity of an individual’s beliefs was the essence of democratic citizenship, not the details of his private religious associations. Senator William Stone quickly rose to object: “[I]f you confine it to religious organizations . . . I see no objection to that; but if you frame it so that any man who is conscientiously opposed to going into the military service will be exempt, the Lord only knows what that will lead to.”<sup>71</sup>

By the end of April, Congress had decisively rejected all amendments extending legal recognition to nonsectarian individuals conscientiously opposed to combat.<sup>72</sup> While defenders of the nonsectarian conscience associated it with democracy, congressional majorities saw this “unorganized conscience” as a disorderly and potentially disloyal force, inimical to the management of the draft and the national solidarity it sought to create. At the time of the congressional draft debates, the threat posed by anarchism and socialism was felt keenly by the nation’s elites, who had had lived through more than thirty years of labor unrest at home and had recently witnessed the overthrow of the Czar.<sup>73</sup> Legitimate opposition to war, many politicians reasoned, could only reliably be found in the “organized conscience,” a conscience possessed by men who had bound themselves to well-established religious organizations with pacifist doctrines. Such an organized religious commitment may have removed the taint of anarchy and socialism from those who refused to fight.

According to the law that passed, local draft boards in the first instance and district boards in the case of appeal would determine whether or not an individual was a member of a well-recognized religious sect opposed to war.<sup>74</sup> If the draft boards did find that someone qualified under this legislative exemption, then that man would receive a certificate to present at training camp in order to be assigned noncombatant

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70. *Id.* at 1473–74 (statement of Sen. Charles Thomas).

71. *Id.* at 1474 (statement of Sen. William Stone).

72. See *id.* at 1478–79, 1529 (describing defeat of amendments).

73. See Beverly Gage, *The Day Wall Street Exploded: A Story of America in Its First Age of Terror* 2–3 (2009) (describing rise of reform and militant movements between 1890–1920, leading to “‘civil war’ between capital and labor”); Joseph A. McCartin, *Labor’s Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor Relations, 1912–1921*, at 40 (1997) (noting factors contributing to 1917 labor unrest “accentuated what Secretary of Labor [William Bauchop] Wilson called the ‘traditional cleavages between employers and wage earners’”).

74. See Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 79 (granting local draft boards authority to “hear and determine . . . all questions of exemption under this Act”), repealed by Act June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217 (providing compulsory military service should cease four months after proclamation of peace by President).

duties.<sup>75</sup> Men without certificates who refused to train for combat would be treated as disobedient soldiers.

Although the Wilson Administration had supported this narrow exemption, Baker wrote Addams a day after the defeat of the more accommodating amendments, implying that he had tried but failed to get recognition for conscientious objectors: "I think it is unlikely that we can secure a legislative exemption for conscientious objectors."<sup>76</sup> Strikingly, however, Baker added, "In the meantime I hope that the *administration* of whatever law is passed will make it possible for us to avoid" the abuse of objectors.<sup>77</sup> Throughout the legislative debate, the Administration's priority had been to seek "broad powers to implement and enforce the draft."<sup>78</sup> Even as Baker refrained from endorsing the AUAM's proposals for more accommodating legislation, he left the door open for a more flexible administration of conscientious objectors in the coming months.<sup>79</sup>

### B. *Interpretations*

On May 18, 1917, Woodrow Wilson signed the Selective Service Act into law and called for a national registration holiday on June 5.<sup>80</sup> Although attempts to legislate the right of individual conscience had failed, the War Department still had to design the details of the Act's administration, which Baker had suggested to Addams might be more accommodating than the Act itself.<sup>81</sup> Nongovernment advocates of the

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75. See Chambers, *supra* note 6, at 182 (discussing creation and composition of local draft boards); Nat'l Civil Liberties Bureau, *The Facts About Conscientious Objectors in the United States 7* (1918), available at [http://debs.indstate.edu/a505f3\\_1918.pdf](http://debs.indstate.edu/a505f3_1918.pdf) (on file with the *Columbia Law Review*) ("[T]he local and district boards may grant special certificates, exempting from combatant service, men who are members of religious sects or organizations recognized by the boards . . . . [The certificate] authorizes exemption from actual combatant service when drafted.").

76. Letter from Newton D. Baker, Sec'y, U.S. Dep't of War, to Jane Addams, *Am. Union Against Militarism 1* (Apr. 29, 1917) (on file with the *Columbia Law Review*).

77. *Id.* (emphasis added).

78. Chambers, *supra* note 6, at 154.

79. In doing so, Baker indicated his awareness of the "unhappy difficulties which occurred in England"—referring to harsh treatment of objectors at the hands of unsympathetic tribunals. Letter from Newton D. Baker to Jane Addams, *supra* note 76, at 1; see also James McDermott, *British Military Service Tribunals, 1916–1918*, at 36–58 (2011) (reviewing difficulties British tribunals faced in implementing conscientious-objection legislation); John Rae, *Conscience and Politics: The British Government and the Conscientious Objector to Military Service 1916–1919*, at 117–28 (1970) (describing British tribunals' resistance to more accommodating implementation of objection legislation).

80. President Calls the Nation to Arms; Draft Bill Signed; Registration on June 5; Regulars Under Pershing to Go to France, *N.Y. Times*, May 19, 1917, at 1.

81. See *supra* note 79 and accompanying text (describing Baker's hope for flexibility in Act's administration).

individual conscience had reason to hope that Baker meant what he said, given the personnel he was bringing to the War Department.

Throughout the winter and spring of 1917, Baker worked to put his secretariat's office on a war footing, appealing to young Progressives he knew from his reformist work. Felix Frankfurter was an obvious choice for Baker: A disciple of Baker's friend and progressive hero Louis Brandeis, Frankfurter had also served under Secretary of War Henry Stimson during the Taft Administration.<sup>82</sup> Although Frankfurter had initially returned to Harvard Law School when the Wilson Administration came to power, he kept in touch with Baker, writing to the Secretary of War from Cambridge in February 1917 to recommend Walter Lippmann for the position of wartime censor.<sup>83</sup> Frankfurter knew Lippmann from Harvard and the *New Republic*, shared his commitment to strong, centralized national government, and felt he was just the man to manage the flow of wartime news for Baker.<sup>84</sup> Baker took Frankfurter's advice, but also continued to pursue the young law professor. When the U.S. entered the war, Baker asked Frankfurter to come down to Washington for the weekend. As Frankfurter later recalled, "I packed my suitcase, and the weekend didn't terminate until the fall of 1919."<sup>85</sup>

Baker also recruited Frederick Keppel, who was dean of Columbia University and secretary of the American Association for International Conciliation, a premier peace society that had long advocated for legal checks on international conflict.<sup>86</sup> Along with Baker's personal secretary, Ralph Hayes, Frankfurter, Keppel, and Lippmann formed the heart of the Secretary's office at the War Department. Notably, all three served as civilians. Although Baker offered to make Frankfurter a major in the U.S. Army, Frankfurter declined, explaining that "every pipsqueak Colonel would feel that he was more important [than I]."<sup>87</sup> Frankfurter's assessment of the army hierarchy presaged future tensions within the War Department between civilian and military leadership.

Baker's recruitment of such admired Progressives to the War Department boosted the morale of antiwar Progressives. Indeed, after the upsetting imposition of conscription and the passage of the

82. See Cottrell, *supra* note 3, at 19–20 (describing Baker's relationship to Brandeis); Cramer, *supra* note 33, at 191 (describing relationship between Baker, Brandeis and Frankfurter); Urofsky, *supra* note 32, at 4, 9–10 (describing Frankfurter's service under Secretary of War Stimson and later under Baker).

83. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (Feb. 6, 1917) (on file with the *Columbia Law Review*).

84. For a perceptive analysis of the vision of national citizenship shared by Progressives around the *New Republic*, including Frankfurter and Lippmann, see Stears, *supra* note 1, at 4–7, 61–68.

85. See Hirsch, *supra* note 32, at 50 (quoting Felix Frankfurter).

86. See Ralph Hayes, Third Assistant Secretary of War, in *Appreciations of Frederick Paul Keppel by Some of His Friends* 17, 19 (1951) (describing Keppel's decision to join War Department).

87. Parrish, *supra* note 32, at 85 (quoting Frankfurter).

Espionage Act in the spring of 1917,<sup>88</sup> AUAM Secretary Crystal Eastman viewed the War Department administrators as a great boon to the cause of civil liberty. She remarked that

It was as though [Wilson] said . . . , “I know you are disappointed in me—you don’t understand my conversion to the draft—my demand for censorship . . . . But as guarantee of good faith I give you Baker and Keppel[] and Lippmann . . . to carry out these laws. No matter how they look on paper, they cannot be Prussian in effect with such men to administer them.”<sup>89</sup>

Though Eastman did not mention Frankfurter, he too would prove a vital ally in dampening the collectivist implications of wartime legislation.

The day after the Selective Service Act passed, Roger Baldwin, who had recently taken over the role of AUAM secretary from Eastman, proposed forming a “Bureau for Conscientious Objectors” as a branch within the AUAM.<sup>90</sup> Baldwin’s Bureau aimed to work with Baker’s Progressive appointees to ameliorate the problems faced by men who refused to fight.<sup>91</sup> In keeping with this cooperative vision, the Bureau’s first press release called on men conscientiously opposed to fighting to enter into a dialogue with the government. Rather than refusing to register or evading the draft, these men should “register and indicate . . . their personal opposition to participation in war.”<sup>92</sup> “Obedience to law, to the utmost limit of conscience, is the basis of good citizenship,”<sup>93</sup> the release explained.

The task of the conscientious objector was not simply to avoid killing, Baldwin explained, but to practice a form of conscientious citizenship: The “opportunity provided by the Bill to specify one’s claim to exemption from military service should not be missed by those who desire to state their objection to that service on religious or other conscientious grounds.”<sup>94</sup> This last statement was, in part, strategic. Baldwin and the AUAM knew that the Selective Service Act did *not*, in fact, recognize “other conscientious grounds” for legitimate objection. By encouraging objectors to register their nonreligious objections, Baldwin sought to open further negotiations with the government over the interpretation and administration of the Act.

88. The Espionage Act outlawed, among other actions, willful attempts to “obstruct the recruiting or enlistment service of the United States.” Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. §§ 793–799 (2012)). For a recent study of the Act’s passage and enforcement, see Stone, *Perilous Times*, supra note 3, at 146–82.

89. Chatfield, supra note 19, at 34 (quoting Eastman).

90. See Johnson, supra note 3, at 18.

91. *Id.* at 92–93.

92. Statement from the Am. Union Against Militarism 1 (May 23, 1917) (on file with the *Columbia Law Review*).

93. *Id.*

94. *Id.*

Although Baldwin looked forward to working with Baker's recent civilian appointees, they were not the only relevant decisionmakers. Two days after the Bureau's press release, Oswald Garrison Villard, another AUAM board member and editor of *The Nation*, met with Provost Marshal General Enoch Crowder concerning the treatment of conscientious objectors.<sup>95</sup> Crowder was a highly accomplished military lawyer who, after the Spanish-American War, had helped draft the Philippine criminal code and the Cuban Constitution.<sup>96</sup> As Provost Marshal General, the War Department official responsible for overseeing military discipline, Crowder had taken a lead role in drafting the Administration's conscription bill and, after its passage, became chief administrator of the Selective Service System. Crowder shared some disheartening news with Villard and the AUAM: "[C]onscientious objectors [unrecognized by statute] will be treated as military men after acceptance as conscripts and . . . they will be tried by court-martial."<sup>97</sup> The War Department would not deviate from congressional legislation and thus, nonsectarian men opposed to fighting would be prosecuted as disobedient soldiers.

Yet AUAM lobbyists hoped that Baker's civilian administrators might still wrest the rudder from Crowder. On June 2, Roger Baldwin told Third Assistant Secretary of War Frederick Keppel "We don't want to make a move without consulting you."<sup>98</sup> On June 15, Baldwin wrote directly to Baker, explaining, "We are entirely at the service of the War Department in rendering any assistance that you think lies in our power to give."<sup>99</sup> Covering their bases, Baldwin and Villard met on June 21 with President Wilson's private secretary, Joseph Tumulty. Baldwin reported that Tumulty "knew very little about the problem" of conscientious objectors, but when Villard suggested that military brutality be checked, Tumulty was "entirely sympathetic," and asked for material to bring to the President.<sup>100</sup>

That same day, the AUAM submitted detailed recommendations to Tumulty about how to deal with the "many thousands of young men who are Conscientious Objectors to war, but are not affiliated with any

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95. Memorandum from Oswald Garrison Villard, Bd. Member, Am. Union Against Militarism 1 (May 25, 1917) (on file with the *Columbia Law Review*).

96. David A. Lockmiller, Enoch H. Crowder: Soldier, Lawyer and Statesman 116, 140 (1955).

97. Memorandum from Oswald Garrison Villard, *supra* note 95, at 1.

98. Letter from Roger N. Baldwin, Sec'y, Am. Union Against Militarism, to Frederick Keppel, Third Assistant Sec'y, U.S. Dep't of War 1 (June 2, 1917) (on file with the *Columbia Law Review*).

99. Letter from Roger N. Baldwin, Sec'y, Am. Union Against Militarism, to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (June 15, 1917) (on file with the *Columbia Law Review*).

100. Memorandum of Interview with Joseph Tumulty, Sec'y to President Woodrow Wilson, by Roger N. Baldwin, Sec'y, Am. Union Against Militarism 1 (June 21, 1917) (on file with the *Columbia Law Review*).



religious organization."<sup>101</sup> Villard laid out two paths forward, one based on a strict construction of the draft law, the other on a more liberal one. If the Administration "intend[ed] to adhere strictly to the letter of the law," then "no one but members of well recognized religious sects w[ould] be exempt from combatant service."<sup>102</sup> The question would then become one of appropriate punishment for the disobedient nonsectarians. But the Administration could also "propose[] to interpret the law liberally and to provide non-combatant service for other than members of well recognized religious sects."<sup>103</sup>

Villard put plainly before the Administration a choice it had yet to make: How closely would it hew to the narrow recognition of conscience provided in the draft law? Of course, the Administration itself had supported narrow statutory language—apparently to ensure passage of conscription and to forestall a flood of alleged conscientious objectors. Yet many administrators were sympathetic to the call for the accommodation of conscientious objectors, particularly as that call came from longtime Progressive allies. Indeed, upon receiving Villard's memo, Wilson forwarded it to Baker, saying that "I am sure you will be interested in the enclosed, particularly since it outlines a policy very similar to the one you were outlining to me the other day."<sup>104</sup>

Just as Baldwin and Villard seemed to be gaining traction in the executive branch, Provost Marshal General Crowder began to push back against calls for a more lenient policy. In response to Villard's memorandum, Crowder rejected both a liberal reading of the statute itself and the possibility that the Commander in-Chief had independent authority to administer draftees as he saw fit. Noting that Villard's "suggestions [we]re not based upon the exact language of the law but on the expressed intention of the administration," Crowder argued that this appeal to administrative sympathy was entirely out of bounds: "[T]he law determines our action and restricts us to [the language of the statute]."<sup>105</sup>

Indeed, Crowder advised Secretary of War Baker that an implementation of the Act that offered noncombatant duty to nonsectarians would "be quite outside of the law and one you have *no authority to establish or follow* . . . . There is nothing left for us to do but to execute the law as it was enacted by Congress."<sup>106</sup> When Baker met with Roger Baldwin the next day, he endorsed Crowder's point of view: "Baker made it clear at

101. Memorandum from Oswald Garrison Villard, Bd. Member, Am. Union Against Militarism, to Joseph Tumulty, Sec'y to President Woodrow Wilson 1 (June 21, 1917) (on file with the *Columbia Law Review*).

102. *Id.* at 2.

103. *Id.* at 3.

104. 43 *The Papers of Woodrow Wilson* 5 (Arthur S. Link ed., 1983) (footnote omitted) (providing Villard's proposal).

105. Memorandum from Enoch H. Crowder, Provost Marshal Gen., to Newton Baker, Sec'y, U.S. Dep't of War 1 (June 21, 1917) (on file with the *Columbia Law Review*).

106. *Id.* at 2 (emphasis added).

once that the War Department would follow the letter of the law. He apparently approved General Crowder's memorandum to the effect that nine-tenths of our suggestions were outside the Act and impossible of consideration unless the law is changed."<sup>107</sup>

Not only did Secretary Baker appear to agree with Crowder's view of the legal impossibility of an executive recognition of individual conscience, but the increasingly influential Army War College also supported Crowder's interpretation. The Army War College had been a central player in the campaign for universal military service and was also the institutional center for the nascent field of military intelligence. Since 1910, a group of military officers spearheaded by Colonel Ralph Van Deman had been pushing to extend military intelligence tactics pioneered in the Philippines and along the Mexican border to the continental United States.<sup>108</sup> After months of lobbying from Joseph Kuhn, Chief of the War College, Baker "officially assigned the War College the job of espionage and counterespionage" within the United States and appointed Van Deman as Chief of the Military Information Division.<sup>109</sup> While Baker's vision of domestic military intelligence was quite narrow—"guarding against German spies and saboteurs"—Van Deman and his supporters at the College "had much more ambitious plans."<sup>110</sup> They were committed to military expansion, resistant to their political masters, and suspicious of the competence and loyalty of the American people.<sup>111</sup> The enemies at home whom military intelligence sought to target would include conscientious objectors.

On July 4, Joseph Kuhn addressed the subject of conscientious objection directly.<sup>112</sup> Defining "conscientious objectors" as those nonsectarians unrecognized by the Selective Service Act, Kuhn told Baker that "it would not be legal to designate 'Conscientious Objectors' as a class entitled to exemption from combatant service."<sup>113</sup> The only lawful course, Kuhn counseled, was to treat nonsectarian objectors as disobedient soldiers, liable for harsh treatment. Their "sentences should

107. Memorandum of Interview with Newton D. Baker, Sec'y, U.S. Dep't of War, by Roger N. Baldwin, Sec'y, Am. Union Against Militarism 1 (June 22, 1917) (on file with the *Columbia Law Review*).

108. See Joan Jensen, *Army Surveillance in America, 1775–1980*, at 121, 125 (1991) (describing role of Van Deman and Army War College in development of intelligence capabilities).

109. *Id.* at 134–36.

110. *Id.* at 160.

111. See *id.* at 124–25 (describing efforts to expand scope of military-intelligence operations and resistance to civilian control); Brian McAllister Linn, *The Echo of Battle: The Army's Way of War 109–115* (2007) (noting military commanders viewed civilian population as "incapable of the necessary preparation and sacrifice needed to secure victory . . . in case of war").

112. Memorandum from Joseph E. Kuhn, Assistant Chief of Staff, U.S. Army, to Chief of Staff, U.S. Army 1 (July 4, 1917) (on file with the *Columbia Law Review*).

113. *Id.*

be, if possible, 'for the period of the existing emergency,' and should involve hard labor."<sup>114</sup>

Even as Kuhn declared the individual conscience illegitimate, Roger Baldwin pressed on, believing that he still had an audience among the civilian administration. On July 13, he sent a new memorandum to Baker, explaining that, at the "request" of Third Assistant Secretary of War Keppel, he was enclosing "definite suggestions for dealing with the problem of 'Conscientious Objectors' in line with our recent conversation and correspondence."<sup>115</sup> One of these suggestions was that "[m]en opposed to participation in war who are willing to accept non-combatant service in the Army . . . should be assigned to such service without court[-]martial."<sup>116</sup>

When Baker forwarded this new memo to Crowder, the Provost Marshal General rejected it out of hand: Nonsectarian men who refused combat service, Crowder explained, "have incurred the penal clauses of the law which provides that they be tried by court martial."<sup>117</sup> Not only did these men break the law, Crowder went on, if the Administration showed them mercy, it would *itself* flirt with law breaking: "No administrative action avoiding such trial could be taken that would not be plainly subversive of the law which we are sworn to execute."<sup>118</sup> Crowder's legal opinion could not have been clearer—the extension of noncombatant service to nonsectarian objectors was barred by statute.

By the end of the summer, Baldwin found himself no closer to securing administrative recognition of the individual conscience than he had been in April. But the situation began to change in early September when he held meetings with Felix Frankfurter, Frederick Keppel, and John Henry Wigmore, a renowned legal scholar who had left his post as Dean of Northwestern Law School to join the Provost Marshal General's office as a military officer.<sup>119</sup> The results of these meetings marked a turning point in the administration of conscience, as the last doors to military support closed and a crucial door to civilian support opened.

Baldwin first met with Wigmore, who had "been giving the problem of conscientious objectors some attention"; Wigmore appeared surpris-

114. *Id.*

115. Memorandum from Roger N. Baldwin, Sec'y, Am. Union Against Militarism, to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (July 13, 1917) (on file with the *Columbia Law Review*).

116. *Id.*

117. Memorandum from Enoch H. Crowder, Provost Marshal Gen., to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (July 17, 1919) (on file with the *Columbia Law Review*).

118. *Id.*

119. Memorandum of Interview with John Henry Wigmore, Major, U.S. Army, and Allen W. Gullion, Colonel, U.S. Army, by Roger N. Baldwin, Sec'y, Am. Union Against Militarism 2-6 (Sept. 11-12, 1917) [hereinafter Wigmore Interview] (on file with the *Columbia Law Review*); see also William R. Roalfe, John Henry Wigmore: Scholar and Reformer 45, 125 (1977) (noting Wigmore's deanship and military service).

ingly open-minded, given previous resistance from his office.<sup>120</sup> He suggested that some form of alternative service for objectors of all types might be possible, and looked forward to an agreement “so as to forestall further propaganda” that might inveigh against harsh military treatment.<sup>121</sup>

Baldwin next met “at length” with Felix Frankfurter.<sup>122</sup> Frankfurter explained that Secretary Baker had referred all correspondence involving conscientious objectors to him, and that he was now “considering some plan to meet the situation.”<sup>123</sup> Frankfurter and Baldwin discussed the possibility of assembling a committee of all the administrators—both civilian and military—who were working on the problem of conscientious objection so they could devise a comprehensive solution together. Frankfurter, Baldwin reported, “took kindly” to the idea.<sup>124</sup> Finally, Baldwin met with another civilian administrator, Frederick Keppel, who also supported the committee idea and asked Baldwin “to find out if Maj. Wigmore could represent the Provost Marshal General” on it.<sup>125</sup>

On September 13, Wigmore followed up with Baldwin, reiterating his hope that Baldwin would send a memorandum detailing the conditions that nonsectarian objectors would be willing to accept.<sup>126</sup> If Wigmore found such a proposal practicable he would approach his superiors, acting as a go-between.<sup>127</sup> Wigmore’s letter is a striking document in that it provides the one instance in the archives of the World War I administration of conscience in which a high-level military (as opposed to civilian) official entertained the possibility of administrative leniency with regard to nonsectarian objectors. As such, it is not surprising that Wigmore ended his letter with a caution: “Please understand that this memorandum and this proposal emanate entirely from my own unofficial mind, in that I have not consulted my superiors about it, and that I shall not do so until I receive the memorandum from you . . . .”<sup>128</sup> Knowing that he was out on a limb, Wigmore sought to put on record his appreciation of his own lack of authority over the issue.

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120. Wigmore Interview, *supra* note 119, at 1.

121. *Id.*

122. Memorandum of Interview with Felix Frankfurter, U.S. Dep’t of War, by Roger N. Baldwin, Sec’y, Am. Union Against Militarism 1 (Sept. 11–12, 1917) (on file with the *Columbia Law Review*).

123. *Id.*

124. *Id.*

125. Memorandum of Interview with Frederick Keppel, Third Assistant Sec’y, U.S. Dep’t of War, by Roger N. Baldwin, Sec’y, Am. Union Against Militarism 1 (Sept. 11–12, 1917) (on file with the *Columbia Law Review*).

126. Letter from John Henry Wigmore, Major, U.S. Army, to Roger N. Baldwin, Assoc. Dir., Am. Union Against Militarism 1 (Sept. 12, 1917) (on file with the *Columbia Law Review*).

127. See *id.* at 2 (requesting detailed, written memorandum to present to superiors for further action).

128. *Id.*

Baldwin, however, was blind to Wigmore's anxieties. On September 14, he wrote to Wigmore but not with a memorandum that Wigmore could discreetly communicate to his superiors. Instead, Baldwin told Wigmore about his subsequent meetings with Frankfurter and Keppel, and Frankfurter's interest in forming "a committee to go into the whole matter, consisting of those who are already engaged on it [including Frankfurter and Wigmore]."<sup>129</sup> Another potential member of this committee, Baldwin explained, was the civilian Judge Julian Mack.<sup>130</sup> Mack was a Progressive circuit judge, urban reformer, and close friend of Louis Brandeis, Frankfurter's mentor. Frankfurter's assistant in the War Department, Max Lowenthal, had also served as Mack's law clerk.<sup>131</sup>

The committee scheme, proposed by Baldwin, Frankfurter, and Keppel, and including both military and civilian officials as well as outsiders such as Mack, was decidedly *not* the discrete, unofficial process that Wigmore had sought. The next day, Wigmore fired off an angry telegram to Baldwin: "[S]o far as I am concerned you may count me out unless and until you do precisely as stated in my letter."<sup>132</sup> Although Baldwin followed up with a more responsive memorandum, Baldwin, Frankfurter, and Keppel's attempt to implicate Wigmore in a high-profile committee of civilian officials created a permanent breach.<sup>133</sup> A month later, Wigmore would pen a memorandum advocating the harsh treatment of nonsectarian objectors.<sup>134</sup>

Wigmore's fear of exposure is understandable in light of the strict legal line his superiors were taking toward exemptions. Five days after Wigmore sent Baldwin the telegram, his boss, Provost Marshal General Crowder, sent Baker the most definitive memorandum yet on the legal impossibility of treating conscientious objectors as anything other than disobedient soldiers. Crowder first reviewed the Selective Service Act's exemption language and then concluded: "[I]t is evident that individuals, as such, are not considered. They must be members of well-recognized religious sects or organizations, and that it is as members, not as individuals, that they are entitled to exemption."<sup>135</sup> Not only was the

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129. Letter from Roger N. Baldwin, Sec'y, Am. Union Against Militarism, to John Henry Wigmore, Major, U.S. Army 1 (Sept. 14, 1917) (on file with the *Columbia Law Review*).

130. *Id.*

131. Urofsky, *supra* note 32, at 10 & 188 n.40.

132. Telegram from John Henry Wigmore, Major, U.S. Army, to Roger N. Baldwin, Sec'y, Am. Union Against Militarism 1 (Sept. 15, 1917) (on file with the *Columbia Law Review*).

133. Letter from Roger N. Baldwin, Sec'y, Am. Union Against Militarism, to John Henry Wigmore, Major, U.S. Army 1 (Sept. 18, 1917) (on file with the *Columbia Law Review*).

134. Memorandum from John Henry Wigmore, Major, U.S. Army 1 (Oct. 12, 1917) (on file with the *Columbia Law Review*).

135. Memorandum from Enoch H. Crowder, Provost Marshal Gen., to Newton D. Baker, Sec'y, U.S. Dep't of War 2 (Sept. 20, 1917) (on file with the *Columbia Law Review*).

Act clear, its authority to bind the President was also certain. In administering the Act, Crowder reemphasized, "The President . . . is not a free agent."<sup>136</sup> The Executive had no authority over drafted men independent of the clear instructions provided by Congress.<sup>137</sup>

As Baldwin must have understood after his contretemps with Wigmore, the individual conscience's best hope lay with the thirty-five-year-old Felix Frankfurter, who had been assigned the conscientious-objector portfolio by Baker and Keppel.<sup>138</sup> On September 26, Frankfurter vaguely—if prophetically—offered Baldwin some comfort: "Speaking about the matter personally, your own peculiar helpfulness in the situation has been constantly borne in mind, and presented where it should be presented. Just continue your attitude of cooperation. I am full of confidence the thing will work out all right."<sup>139</sup> A week earlier, Frankfurter had in fact sent the Secretary of War an in-depth memorandum on the treatment of conscientious objectors.<sup>140</sup>

As the next Part will discuss, Frankfurter's memorandum outlined a set of administrative procedures capable of accommodating a wide range of antiwar dissent within the draft; it also offered a creative legal defense of the executive's authority to implement such procedures. Both the proposed approach to conscientious objection and the legal arguments that justified it diverged widely from the opinions of military lawyers. While these lawyers argued that Congress's exclusive reference to the sectarian conscience was decisive, Frankfurter countered that where statutory language—whether through silence or narrowness—created an administrative problem, the executive branch had ample authority to innovate. Resting his argument on administrative, military, and political prudence, Frankfurter advocated for a civil-libertarian approach to conscience that military officials themselves considered impractical, even dangerous.

## II. FELIX FRANKFURTER AND THE ADMINISTRATION OF CONSCIENTIOUS OBJECTION

The development of the federal military draft is a signal case of constitutional construction,<sup>141</sup> the mixed practice of law and policymaking by

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136. Id.

137. Id.

138. See Memorandum of Interview by Roger N. Baldwin, Sec'y, Am. Union Against Militarism, with Felix Frankfurter, U.S. Dep't of War, *supra* note 122, at 1; Letter from Felix Frankfurter, U.S. Dep't of War, to Roger N. Baldwin, Sec'y, Am. Union Against Militarism I (Sept. 18, 1917) (on file with the *Columbia Law Review*) (showing Frankfurter's willingness to collaborate with Baldwin on issue of conscientious objectors).

139. Letter from Felix Frankfurter, U.S. Dep't of War, to Roger N. Baldwin, Sec'y, Am. Union Against Militarism I (Sept. 27, 1917) [hereinafter Frankfurter, Second Letter to Baldwin] (on file with the *Columbia Law Review*).

140. Frankfurter Memorandum, *supra* note 9.

141. Whittington, *Constitutional Construction*, *supra* note 30, at 12 tbl.1.2.

which governmental actors “flesh[] out constitutional principles, practices and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution.”<sup>142</sup> Like most significant constructions, the draft has generated new substantive and structural constitutional understandings, transforming both the inventory of “individual and collective rights” and the “delegation and distribution of political powers” within the constitutional order.<sup>143</sup> As initially outlined by Felix Frankfurter, the administration of conscientious objectors within the World War I draft would innovate along both of these dimensions—rights and structure. First, Frankfurter called for a broad accommodation of antiwar belief within the draft, an accommodation that had been denied by both Congress and the courts. Second, he asserted civilian and executive control over draft policy in the face of competing military and legislative claims of authority.

In urging the War Department to implement new rights and claiming it had the authority to do so, Frankfurter was appealing to “[s]omething external to the [constitutional] text”<sup>144</sup>—a mix of administrative, military, and political prudence. Yet these practical arguments had constitutional resonance, sounding in the separation of powers, Commander in Chief authority, and individual-liberty and equality interests. The development of constitutional understandings within the context of everyday lawmaking and policymaking is a hallmark of construction, especially as it unfolds within the administrative state—such development increasingly goes by the name of “administrative constitutionalism.”<sup>145</sup> Because the Constitution itself says little about administration, legislators, judges, and executive officials will generally have to appeal to ordinary law and policy considerations when building

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142. Whittington, *New American Constitution*, *supra* note 30, at 120. Since Whittington mooted the term, legal scholars have developed multiple, overlapping theories of constitutional construction and construction-like processes. See, e.g., Jack M. Balkin, *Living Originalism* 4–5 (2011) (describing constitutional construction as “implementing and applying the Constitution using all of the various modalities of interpretation”); Eskridge & Ferejohn, *supra* note 26, at 1–24 (describing “small ‘c’ constitutionalism” as a mode of constitutional development unbound by constitutional text); Richard H. Fallon, Jr., *Implementing the Constitution* 5–7 (2001) (describing court-centered theory of constitutional “implementation”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L.J.* 408, 410 (2007) (arguing content of Constitution “must be derived functionally, not formally”).

143. Whittington, *Constitutional Construction*, *supra* note 30, at 12 tbl.1.2.

144. *Id.* at 6 (“Something external to the text—whether political principle, social interest, or partisan consideration—must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context.”).

145. See Metzger, *Administrative Constitutionalism*, *supra* note 26, at 1912 (“Administrative constitutionalism’s emphasis on the constitutional dimensions of seemingly ordinary implementation and policymaking, combined with its frequent creative character, is also what links administrative constitutionalism to the wider category of constitutional construction.”).

out or constraining the administrative state.<sup>146</sup> This is just what Frankfurter did in articulating his vision of a civil-libertarian draft. This vision would anger military and legislative officials who considered dissent and wartime administration incompatible; it would also fail to satisfy civil libertarians who saw any form of compulsory participation in the state as an illegitimate encroachment on liberty. The World War I system of conscientious objection and the debate that surrounded it would have long-term implications for the shape of the draft and the relationship between civil liberties and the administrative state more generally.

#### A. *The Social and Political Background of Frankfurter's Memorandum*

By the time Felix Frankfurter entered Woodrow Wilson's War Department he had already made a name for himself as an expert administrator.<sup>147</sup> During the previous presidential administration, Frankfurter had also served in the War Department, at the Bureau of Insular Affairs.<sup>148</sup> There, he tackled the question of colonial citizenship—how, and to what extent, to incorporate the inhabitants of imperial acquisitions into the American polity.<sup>149</sup> This work acquainted Frankfurter with the intimate relationship between individual rights and state building as he took part in the administrative construction of a new mode of citizenship. Over the course of World War I, he would tackle a new set of challenges involving the incorporation of marginal yet politically mobilized citizens into an expanding administrative state. Legal scholars and historians have long recognized Frankfurter's effort to resolve one of these challenges—labor unrest in vital wartime indus-

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146. Id. ("Given the Constitution's silence on administration and the fact that agencies only exist and function as a result of ordinary law delegations of authority, agency officials' constitutional engagement and development necessarily occurs in ordinary law contexts, as they seek to implement a statutory regime or presidential policy."). Frankfurter was especially likely to avoid explicit constitutional argument given the Progressive context in which he wrote. Progressive politicians, lawyers, and intellectuals—from Woodrow Wilson in the White House to Roger Baldwin at the Bureau of Conscientious Objectors—were suspicious of formalism of all sorts, and viewed veneration of the Constitution as a tool of the defenders of traditional property rights. See, e.g., Forbath, *Caste, Class, and Citizenship*, supra note 1, at 53–55 (describing Progressive antiformalism); Skowronek, supra note 1, at 2088–89 (describing Wilson's pragmatism and respect for popular opinion); Weinrib, *Public Interest to Private Rights*, supra note 4, at 210 (describing Baldwin's distrust of courts).

147. His former boss, William Howard Taft, once remarked that "Mr. Frankfurter is like a good Chancellor, he wants to amplify his jurisdiction." Parrish, supra note 32, at 82 (quoting William Howard Taft, Co-Chairman, Remarks at the Executive Meeting of the National War Labor Board (May 11, 1918)).

148. Parrish, supra note 32, at 40–42 (describing Frankfurter's work during the Taft Administration).

149. See Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change* 61–63, 71, 73 (Feb. 28, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2226754> (on file with the *Columbia Law Review*) (describing Frankfurter's approach to colonial citizenship).



tries.<sup>150</sup> But Frankfurter's work on behalf of conscientious objectors has been almost entirely forgotten.

This oversight is particularly poignant given that labor militancy and draft resistance posed related challenges to the legitimacy and stability of a putatively democratic wartime state. Some of the staunchest opposition to the war came from workers who argued that while the war benefited capitalists and kings, it was common men who died.<sup>151</sup> Many conscientious objectors echoed the socialist or quasi-socialist worldview of these labor militants.<sup>152</sup> Millions across the globe also shared this view, and at war's end three of the major combatants—Russia, Germany, and Hungary—were in the grip of revolution.<sup>153</sup> Concerned by this atmosphere of political instability, Frankfurter and his fellow Progressive administrators were loath to antagonize socialist sympathizers, both in the labor movement and within the draft apparatus.<sup>154</sup>

150. Between September 1917 and the end of the war, Frankfurter worked for the Mediation Commission on the problem of labor relations, as workers in essential industries pushed for better wages and working conditions and owners fought back, at times with massive force. See Parrish, *supra* note 32, at 87–97; Urofsky, *supra* note 32, at 10. Frankfurter was sympathetic to labor's demands and condemned the repression of striking miners in Bisbee, Arizona. Parrish, *supra* note 32, at 88–95; Urofsky, *supra* note 32, at 10–12. Subsequently, President Wilson asked Frankfurter to investigate the case of labor organizer Thomas Mooney, who had been convicted of bombing the 1916 Preparedness Day parade in San Francisco. Parrish, *supra* note 32, at 98. Discovering serious irregularities in the prosecution, Frankfurter urged Wilson to pardon Mooney. *Id.* at 98–99. Theodore Roosevelt assailed Frankfurter's interventions: "You are engaged in excusing men precisely like the Bolsheviks in Russia . . . who are traitors to their allies, to democracy, and to civilization, as well as to the United States." *Id.* at 99.

151. Capozzola, *supra* note 6, at 30 (describing workers' resistance to draft); Chatfield, *supra* note 19, at 58–59, 76 (describing economic and political sources of antiwar activism); David M. Kennedy, *Over Here: The First World War and American Society* 26–30, 70–72 (1980) [hereinafter Kennedy, *Over Here*] (describing socialist opposition to war and its appeal to workers); David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925*, at 371–72 (1987) (describing tension between classes during war); Christopher M. Sterba, *Good Americans: Italians and Jewish Immigrants During the First World War* 124–26, 155–63 (2003) (describing antiwar socialist activity).

152. See Chatfield, *supra* note 19, at 76–77 (describing views of political objectors); Norman Thomas, *The Conscientious Objector in America* 4 (1923) (describing relationship between "religious pacifists" and "socialists and internationalists"); Morris Hillquit, Introduction, in Alexander Trachtenberg, *The American Socialists and the War* 3 (1917) (discussing socialist views on the war); Harlan Fiske Stone, *The Conscientious Objector*, *Columbia U. Q.*, Oct. 1919, at 254 [hereinafter Stone, *The Conscientious Objector*] (discussing religious beliefs of objectors); Letter from Stedman & Stoelke to Woodrow Wilson, President 1 (Aug. 21, 1917) (on file with the *Columbia Law Review*) (seeking conscientious-objector recognition for members of "council of Socialist Conscripts, Local Division of Cook County, Illinois").

153. Niall Ferguson, *The Pity of War: Explaining World War I*, at 434 (2000).

154. In formulating his response to the problem of conscientious objection, Frankfurter explicitly referred to the "damage that a strictly rigorous policy may bring upon the public mind" as exemplified by the earlier "British experience" with draft resistance. Frankfurter Memorandum, *supra* note 9, at 2; see also McDermott, *supra* note

Just as pro-labor and antiwar sentiment often overlapped, anti-labor and pro-war fervor frequently converged, undermining the Progressive vision of a “war for democracy” with bouts of mob violence. As Frankfurter learned firsthand both as a draft administrator and as a labor mediator, bellicose politicians, unyielding soldiers, and vigilante gangs harried those cultural groups associated with antiwar and anti-American beliefs—labor activists, German Americans, Eastern European immigrants, Jews, and pacifists of all stripes.<sup>155</sup> The draft—an officially sanctioned form of pro-war coercion—was a catalyst for such violent “mob rule.”<sup>156</sup> But for Frankfurter and other Progressive administrators, the draft was also an opportunity for the federal bureaucracy to model an alternative approach to the governance of political, economic, and cultural difference.

In his September 18 memorandum, Frankfurter gave Secretary of War Baker a long-term blueprint for accommodating a range of antiwar belief within the draft apparatus. Frankfurter framed conscientious objection not as an opportunity to retreat from the state, but as an opportunity for objectors and administrators to engage with one another in a respectful fashion.<sup>157</sup> He also argued that the executive branch had independent authority to administer drafted men as it saw fit—which, if Frankfurter had his way, would mean more flexible procedures than Congress had authorized. Such an assertion of executive authority would be countermajoritarian, frustrating the legislative will in the interests of a few-thousand idiosyncratic draftees. Yet such an assertion would also accord to dissenting citizens what Frederick Keppel characterized as a “measure of self-determination.”<sup>158</sup>

Keppel’s use of the phrase “self-determination” was probably inspired by President Wilson’s contemporaneous call for an international order based on the principle of “self-determination” of national populations, which the President himself anchored in the “consent of the governed.”<sup>159</sup> Wilson’s account of self-determination was not synonymous with simple majoritarianism, however, and like Progressive thought more generally, it both prized the participation of all citizens in public affairs and disdained mob rule. Such a participatory yet antipopulist politics arose from a belief that democracy should be truth seeking, a belief that

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79, at 36–58 (reviewing troubles British tribunals faced in implementing conscientious objection legislation); Rae, *supra* note 79, at 117–28 (describing British tribunals’ resistance to more-liberal implementation).

155. Capozzola, *supra* note 6, at 117–43 (describing assaults on antiwar groups); Kennedy, *Over Here*, *supra* note 151, at 163–67 (discussing suppression of dissent).

156. Capozzola, *supra* note 6, at 117–43.

157. See, e.g., Frankfurter Memorandum, *supra* note 9, at 2 (arguing objectors, by making their case to “wisely constituted board” of lawyers, would develop “belief in the good faith and justice on the part of the government”).

158. U.S. War Dep’t, Statement, *supra* note 11, at 47.

159. Woodrow Wilson, *A League for Peace*, *supra* note 11, at 8.

self-government meant the collective discovery of a common yet objective good.<sup>160</sup>

This democratic theory was elaborated at great length by the circle of Progressive intellectuals around the *New Republic*, a circle that included both Frankfurter and his War Department colleague Walter Lippmann.<sup>161</sup> It depended on a highly normative account of the role of the individual citizen in democratic life. For these thinkers, individual self-determination—and the individual rights that enabled such self-determination—did not mean individual license, but rather individual empowerment to contribute one's own capacities and perspectives to the search for a common good.<sup>162</sup> In the course of this self-reflective work, all citizens would be engaged in what was essentially a learning process, a kind of civic education during which some perspectives might prove more valuable than others.<sup>163</sup> Accordingly, neither the intensity of an individual's viewpoint nor the sheer quantitative force of a majority's viewpoint had the authority to determine the common good. Only well-administered processes of public deliberation and institutional experiment could decide between the plurality of individual viewpoints and thus legitimately and effectively steer the ship of state.<sup>164</sup> In this context,

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160. See, e.g., Herbert Croly, *The Promise of American Life* 207 (1909) ("Democracy does not mean merely government by the people, or majority rule, or universal suffrage. All of these political forms or devices are a part of its necessary organization but the chief advantage such methods of organization have is their tendency to promote some salutary and formative purpose.").

161. Indeed, Lippmann was intimately involved in the development of Wilson's Fourteen Points, which included an emphasis on self-determination. Stears, *supra* note 1, at 132 (discussing involvement of Lippman). For an excellent analysis of intellectual network around the *New Republic* and its role in World War I-era state building, see *id.* at 52–87, 127–67.

162. See John Dewey & James Tufts, *Ethics* 472 (1908) (calling for "generalized individualism: which takes into account the real good and effective—not merely formal—freedom of every social member"); Eisenach, *supra* note 1, at 194 (describing Progressive view of individual rights as providing "resources necessary for effective participation in democratic society"); Stears, *supra* note 1, at 16 (describing Progressives' "radically socialized account of human nature" that "combine[d] the demands of liberty and community").

163. See Stears, *supra* note 1, at 81–85 (describing "educative" character of Progressives' "notion of democracy"); Westbrook, *supra* note 14, at 164–94 (describing John Dewey's account of relationship between education and democracy).

164. See Graber, *supra* note 2, at 87 ("Addams, Dewey, Brandeis, and others maintained that the scientific method would not function efficiently and the community would not be fully unified unless the polity encouraged citizens to express a wide variety of opinions on matters of public interest."); Stears, *supra* note 1, at 83 (describing Progressive search for "set of government institutions that could combine a system of democratic participation which would be truly educative in its effect with a system of efficient and expert administration capable of identifying and pursuing an actual common good"). At the heart of Progressive thought was a belief in the convergence of the rationally true and the politically good, what Robert Gordon has characterized as a belief in the "immanent rationality of the social order." Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in *Professions and Professional*

individual self-determination ensured a degree of pluralism within the public sphere, but it also assumed—even required—participation in the public sphere.

Majoritarian decisions that undermined self-determination—that entirely excluded certain perspectives from public deliberation and institutional experiment—risked two harms: First, such decisions deprived the polity of ongoing exposure to a diversity of views and thus short-circuited public learning; second, they constrained the citizenship of individuals who held such views, forcing them outside the public sphere.<sup>165</sup> This second harm—the exclusion of individuals from the public sphere—was not only a problem for the excluded individuals. For the Progressives, participation in public deliberation had a disciplining effect on individuals, exposing them to social norms and forms of reasoning essential to responsible democratic life.<sup>166</sup> The exclusion of individuals with supposedly irresponsible views risked exacerbating the threat such individuals posed to democracy.<sup>167</sup>

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Ideologies in America 95 (Gerald Geison ed., 1983). It was this very *refusal* to recognize a distinction between the true and the good that led Progressives also to deny any fundamental tension between bureaucracy and democracy, expert administration and popular participation in governance. This denial would lie at the heart of Felix Frankfurter's innovative approach to the problem of conscientious objection, as well as his later work on administrative law. It also helps explain the ongoing disagreement between legal scholars as to whether Progressive civil libertarians such as Zechariah Chafee, Jr., Frankfurter's younger colleague at Harvard Law School, hewed to an epistemic ("marketplace of ideas") or political ("democracy-enhancing") theory of speech protection. Compare G. Edward White, *The Constitution and the New Deal* 137–38 (2000) (emphasizing epistemic, marketplace-of-ideas model), with Rabban, *supra* note 2, at 298 (emphasizing political, democracy-enhancement model).

165. For a representative, contemporary statement of such Progressive pluralism, see John Dewey, *The Principle of Nationality* (1917), reprinted in 10 *The Collected Works of John Dewey: The Middle Works* 288 (Jo Ann Boydston ed., 2008) ("[S]ocial institutions depend upon cultural diversity among separate units. In so far as people are all alike, there is no give and take among them. And it is better to give and take.").

166. See Eisenach, *supra* note 1, at 195 (explaining how Progressive efforts to empower individuals to participate in democracy "entail[ed] expectations of more social responsibility and greater self-discipline"); Stears, *supra* note 1, at 80 (describing *New Republic* editor Walter Weyl's belief that "[b]y encouraging individuals to think through problems and by forcing them to be responsible for their own decisions, it would be possible to transform the 'crowd' into a knowledgeable and reliable 'public'").

167. Even those Progressives most critical of state power, such as Randolph Bourne, acknowledged this positive aspect of public coercion. In February 1918, Bourne himself wrote to Frankfurter on behalf of a pacifist musician who, upon his induction into the army, had been hospitalized as a "constitutional psychopath [sic]." Letter from Randolph Bourne to Felix Frankfurter 1 (Feb. 21, 1918) (on file with the *Columbia Law Review*). Arguing that such a diagnosis was simply "the evasion of doctors who are stumped by a healthy, non-religious, non-fanatical, and courageous pacifism," Bourne condemned "this illogical position" in which his friend found himself. *Id.* "If he is a 'constitutional psychopath,'" Bourne continued, "he should be discharged as unfit for the army; if he is sound, they have no business to keep him in the hospital. If his conscientious objections are not accepted, then he should be frankly dealt with." *Id.* What Bourne wanted was not

The problem posed by the treatment of conscientious objectors was thus a democratic one. To be sure, the Selective Service Act was enacted by congressional majorities and would be found constitutional by the Supreme Court. But by treating those individuals who refused to fight on religious, moral, or political grounds as disobedient soldiers, the Act risked undermining their experience of self-determination. Categorized as subordinates who refused an order, not as citizens with dissenting views about the common good, conscientious objectors would be shut out of deliberation altogether; they would lack both the opportunity to express their normative visions and the opportunity to have those visions subjected to reasoned correction. Frankfurter's memorandum called for a novel administrative process capable of acknowledging the individual conscientious objectors' views. In such a scheme, rights of individual conscience functioned as occasions for the collective construction of a pluralistic state.<sup>168</sup>

### B. *Frankfurter's Memorandum as Law and Policy*

Frankfurter's approach to the problem of conscientious objection departed markedly from legal opinions issued by military officials. While those opinions hewed closely to the language of the Selective Service Act, Frankfurter began with the complaints of those nonsectarian individuals who had lost out during the Act's drafting and who now asked the Administration to innovate *beyond* the statutory language. By proceeding in this inductive fashion, Frankfurter approached the "Treatment of Conscientious Objectors" primarily as an administrative and political problem rather than a question of statutory interpretation. Rather than engaging with the question of whether the statute was simply silent on the question of nonsectarian objectors or explicit in its failure to accommodate them, Frankfurter assumed a reserve of executive authority to resolve tensions between antiwar beliefs and efficient administration.

Referring to the "mass of communications which has poured in on the President and the Secretary of War by and on behalf of Conscientious Objectors,"<sup>169</sup> Frankfurter discerned four categories of objectors that each required separate treatment: "unconscientious" objectors, whose objections were insincere; sectarian objectors offered noncombatant duty

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total emancipation for his friend but for the War Department to "meet his case squarely." Id. Bourne concluded his message to Frankfurter by praising the "great piece of work you have been doing on the labor situation" and hailing him as "the liberal hope." Id. For Bourne's views on the question of war, conscription, and dissent, see generally Randolph S. Bourne, *War and the Intellectuals: Essays, 1915-1919* (1964).

168. Frankfurter's vision exemplified the redefinition of rights and citizenship that Eldon Eisenach finds at the core of the Progressive project: "To link personal freedom to national democracy—a substantive and inclusive public good—not only placed issues of rights within a framework of national institutions, it redefined the idea of citizenship on those terms as well." Eisenach, *supra* note 1, at 221.

169. Frankfurter Memorandum, *supra* note 9, at 1.

by Section 4 of the Selective Service Act; “individualistic” conscientious objectors who did not belong to a pacifist religious sect but who had sincere political, moral, or religious objections to fighting; and “absolutists,” all those objectors who refused to perform even noncombatant service.<sup>170</sup> The recognition of “individualistic conscientious objectors” most directly responded to the repeated calls from Baldwin and the AUAM for administrative innovation. These individualistic objectors possessed what Rep. Edward Keating had called the “unorganized conscience”—a conscience formed not by institutional affiliation but by individual reflection.<sup>171</sup> Frankfurter’s religiously neutral definition, “men whose conscience honestly resists military service,” indicated that the category allowed for both religious and nonreligious grounds of objection.<sup>172</sup> What could be done, Frankfurter asked, with these “true Conscientious Objectors whose honest convictions are unsupported by the beliefs of a sect or organization”?<sup>173</sup>

Frankfurter noted that the statute neglected these nonsectarian objectors: “Congress in the Selective Draft Law dealt only with the latter,” that is, objectors whose “honest convictions” *were* supported “by the beliefs of a sect or organization.”<sup>174</sup> But he then presented a prudential argument for giving administrative recognition to nonsectarians anyway. The sectarian provision in the draft law, Frankfurter explained, “does not answer the administrative or military problem of the use to which certain men called to the colors are to be put in view of their peculiar fitness or unfitness.”<sup>175</sup> In this sober sentence, Frankfurter brushed aside the statutory and structural arguments presented by Crowder and Kuhn that had denied the President’s authority to recognize the individual conscience.

Yet Frankfurter’s pivot from statutory interpretation to administrative problem-solving itself implied an argument from institutional competence and the separation of powers. The military, as directed by the Commander in Chief, had its own set of problems and needs; its task was to decide how best to use drafted men according to their “peculiar fitness or unfitness.” Although the Selective Service Act established the draft, the implementation of the draft—including its relationship to the individual conscience—was necessarily left to administrators and, significantly, civilian administrators, culminating in the President himself.

Thus, although Frankfurter emphasized practicalities, his practical problem—what to do with “true” conscientious objectors unrecognized by statute—rested upon a legal assumption: that the category “true

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170. *Id.*

171. See *supra* notes 58–72 and accompanying text (discussing efforts to include nonsectarian conscience objector exemption in draft bill).

172. Frankfurter Memorandum, *supra* note 9, at 1.

173. *Id.* at 2.

174. *Id.*

175. *Id.*

Conscientious Objector” could be determined by an administrative rather than legislative decision. He reasoned: “Once assume a true Conscientious Objector and he is as ill-suited for combative military service as a sectarian Conscientious Objector.”<sup>176</sup> But why, Crowder might have asked, “assume a true Conscientious Objector” at all? Crowder and Kuhn had seen fit only to assume what Congress had legislated—that sectarians were to be offered noncombatant service. Frankfurter instead conducted an independent executive review of a policy problem: What should be done with drafted men—and their vocal, nongovernmental supporters—who had objections to fighting? Having conducted the review, Frankfurter suggested the construction of a new, pluralistic legal category—the “true Conscientious Objector.”

The question then remained how to treat this pluralistic genus, given that Congress had only provided for one of its species, the sectarian. Frankfurter once again put forward a policy argument for offering all conscientious objectors—whether sectarian or nonsectarian—noncombatant duty, despite the congressional statute’s refusal to do so: “[A]s a matter of military discipline, merely as a decision as to the best use to be made of the human material, it would seem that all those who are attested true Conscientious Objectors should be treated as one class in the disposition that is to be made of them.”<sup>177</sup> Frankfurter’s policy argument both understated the legal work he was doing and reflected a distinctly Progressive approach to social problems.

Legally speaking, Frankfurter claimed autonomy for the executive in the realm of conscientious-objector policymaking. By framing the question of conscientious objection as a question of how best to discipline conscripts, Frankfurter implied that the answer lay beyond congressional decisions about how to raise a conscript army. Socially speaking, Frankfurter framed the problem of dissent as a practical problem of manpower management—what was the “the best use to be made of the human material,” including that “human material” resistant to certain forms of legal ordering? In keeping with Progressive lawyers’ tendency to search for the “immanent rationality of the social order,”<sup>178</sup> Frankfurter saw the challenge of conscientious objection as susceptible to rational calculation. At the same time, his approach was not devoid of normative content—within the phrase “best use . . . of the human material” lurked a Progressive theory of political morality, in which individual and group differences were valuable to the extent they contributed to an overarching public interest.<sup>179</sup>

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176. *Id.*

177. *Id.*

178. Gordon, *supra* note 164, at 95.

179. See *supra* note 22 and accompanying text (discussing Progressive views on self-determination and individualism in relation to administrative state).

Having asserted the need and implicit justification for a more accommodating policy toward conscientious objectors, Frankfurter faced two further questions: how to separate the insincere, “unconscientious” objectors from all categories of sincere objectors (sectarian, nonsectarian, and absolutist) and how to determine the particular noncombatant service that sincere objectors should be asked to perform. Frankfurter explained that although Congress had provided no procedures for a particularized inquiry into the sincerity and character of individual conscientious objections, there would be nothing out of the ordinary about such procedures: “The problem is an inquiry such as the law has to make in the settlement of many issues; namely, an inquiry into the existence of certain beliefs and certain feelings.”<sup>180</sup> To be sure, this task would require a “sympathetic and sophisticated” legal temperament.<sup>181</sup> Yet Frankfurter was certain that the “right kind of lawyers” could handle it.<sup>182</sup>

Accordingly, Frankfurter proposed the establishment of a board of three such lawyers with the twin mandate of testing the sincerity of each objector and determining the kinds of noncombatant duty for which the sincere objectors were best suited. As to the board’s exact composition, Frankfurter suggested that “headed by some one like Judge Amidon of North Dakota, or Judge Mack of Chicago, with a representative of the Provost Marshal General’s Office, and one more member, [it] could handle the situation expeditiously and adequately.”<sup>183</sup> Charles Fremont Amidon was a stalwart Progressive and nascent civil libertarian who “deplor[ed] . . . the surrender to hysteria of judges on the federal bench” in enforcing the Espionage Act.<sup>184</sup> Mack would be even more critical of Espionage Act enforcement. One advantage to the use of “[s]uch a committee, wisely selected,” Frankfurter explained, would be political: such a committee would “serve as the best assurance to the liberal friends of the Administration that the matter is being adequately dealt with.”<sup>185</sup>

As to the exact kinds of noncombatant service such a politically correct committee might offer sincere objectors, Frankfurter recommended an evolving, pragmatic approach.<sup>186</sup> Suitable forms of service would depend in part on “how many Conscientious Objectors the sifting process will finally disclose,” and thus “[t]he problem should be worked out practically and not by abstract speculation.”<sup>187</sup> Wilson and Baker

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180. Frankfurter Memorandum, *supra* note 9, at 1.

181. *Id.* at 2.

182. *Id.* at 1–2.

183. *Id.* at 3.

184. Murphy, *supra* note 3, at 203; see also Stone, *Perilous Times*, *supra* note 3, at 162–64 (describing Judge Amidon’s Progressive philosophy).

185. Frankfurter Memorandum, *supra* note 9, at 2–3.

186. *Id.* at 2–3.

187. *Id.* at 2.



would indeed wait several months before deciding what forms of noncombatant service to make available.<sup>188</sup>

Finally, Frankfurter turned to the question of the "absolutists," those men who would refuse even the noncombatant service offered to them by the ad hoc committee. In keeping with the Progressive worldview, Frankfurter insisted that no individual could simply claim to be free of obligations to the state—the absolutist, like any other citizen, lived in interdependence with society: "[R]espect as one must the rigor of their simple logic in a complicated world, it will not do to discharge them of all responsibility in a society with whose advantages and sacrifices they are inextricably bound up."<sup>189</sup> Impressed by the absolutists' zeal for self-determination, however, Frankfurter condemned the idea of harshly punishing them.<sup>190</sup> He recommended instead that they be "convicted and confined" at Fort Leavenworth, "but under conditions which in effect would be the performance of noncombatant duties."<sup>191</sup> As with most of Frankfurter's proposals, the Wilson Administration would eventually follow this policy.

Taken as a whole, Frankfurter's memorandum was a pathbreaking document. Its two main premises—the equality of individualist and sectarian objectors, and the authority of the executive to recognize this equality despite the distinction Congress had made between them—were premises explicitly rejected by the previous memoranda that Baker and Wilson had received from their advisors. Frankfurter's vision of a single, three-member civilian-military board empowered to evaluate the sincerity and specific demands of each individual conscience was also novel. This committee would offer each objector an opportunity to express his normative commitments and to seek forms of alternative service that could best reflect them. Frankfurter's policy thus treated the problem of conscience as an opportunity for dissenters from government policy and government officials to communicate with one another in a responsive fashion.

Third Assistant Secretary of War Frederick Keppel later hailed this policy as distinguishing American "Democracy" from the "Prussian practices" of the nation's authoritarian, militarist enemy.<sup>192</sup> Yet the meaning of American "Democracy" was itself in a state of flux during the war, and the conscientious-objector policy supported by Frankfurter and Keppel embodied a particularly modern and controversial democratic

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188. See *infra* Part II.C (describing Baker and Wilson's gradual implementation).

189. Frankfurter Memorandum, *supra* note 9, at 3–4.

190. *Id.* at 4 ("[T]he barbarous incarceration of criminals is fast becoming obsolete in practice, as it is anachronistic in principle. . . . This subordination of the punitive element especially deserves to be kept in mind in dealing with the absolutists."). General Kuhn had proposed punitive treatment for all nonsectarian objectors, including but not limited to absolutists. See *supra* notes 112–114 and accompanying text.

191. Frankfurter Memorandum, *supra* note 9, at 4.

192. U.S. War Dep't, Statement, *supra* note 11, at 48.

vision. This vision acknowledged both the legitimacy of marginal beliefs and identities, and the legitimacy of a strong and centralized administrative apparatus. These two features of the War Department's account of "Democracy"—individual rights to expression and identity and expansive administrative authority—were inextricably linked by Frankfurter's legal justification for the conscientious-objector policy.

As Frankfurter argued in his September 1917 memorandum, and as Secretary of War Baker would reiterate the following autumn,<sup>193</sup> the legal basis for the War Department's democracy-enhancing conscientious-objector policy lay in an appeal to civilian executive authority over military manpower management. The provision of democracy-enhancing "rights of individual conscience"<sup>194</sup> was thus a matter of administrative policymaking, not legislative will or purely military perceptions of expedience. Furthermore, the *function* of these rights of individual conscience was both to encourage democratic deliberation and to sustain and legitimate the administration of the draft. Since Frankfurter and like-minded Progressives embraced conscription itself as a peculiarly *democratic* approach to building a powerful warfare state,<sup>195</sup> they were not inclined to see any paradox or hypocrisy in an effort to expand democratic engagement within the draft. To the contrary, rights of individual conscience could both foster democratic engagement and, in doing so, strengthen wartime state-building efforts.

### C. Secretary of War Baker and President Wilson's Orders

Neither the archives nor the available secondary literature contain evidence of Secretary Baker's or President Wilson's direct response to Frankfurter's memorandum. Yet the procedures for dealing with conscientious objectors that Wilson's War Department would implement over the next year reflected the spirit—and often the letter—of Frankfurter's recommendations.<sup>196</sup>

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193. See *infra* notes 305–313 and accompanying text (discussing Secretary Baker's defense of conscientious-objector policy on commander-in-chief grounds).

194. Press Release, Comm. on Pub. Info., For Release in Morning Papers 1 (May 30, 1918) (on file with the *Columbia Law Review*).

195. See Chambers, *supra* note 6, at 128 (discussing Progressive support for conscription as embodying principles of democracy); John A. Thompson, *Reformers and War: American Progressive Publicists and the First World War* 221–22 (1987) (same).

196. In implementing these procedures, Wilson and Baker were not bowing to a pro-conscientious-objector bloc in Congress. Over the course of the war, the War Department and the President received scattered congressional complaints of abuse of conscientious objectors—but these generally came from the representatives of sectarian constituents who were covered, if not satisfied, by the original legislative accommodation. See, e.g., Letter from Enoch H. Crowder, Provost Marshal Gen., to W.W. Griest, U.S. Representative (Sept. 13, 1917) (on file with the *Columbia Law Review*) (addressing complaints about treatment of "Mennonite, Quaker, Dunkard and Amish sects"); Letter from W.W. Griest, U.S. Representative, to Woodrow Wilson, President 1 (Aug. 27, 1917) (on file with the *Columbia Law Review*) (complaining about treatment of "nonresistant sects"); Letter from

Less than a month after Frankfurter sent his memorandum to Baker, signs of a policy in harmony with it began to emerge. On October 10, 1917, Baker issued a confidential order to all generals in charge of training camps.<sup>197</sup> The order instructed them to “segregate the conscientious objectors in their divisions and to place them under supervision of instructors who shall be specially selected with a view of insuring that these men will be handled with tact and consideration.”<sup>198</sup> Baker also ordered that objectors were “not to be treated as violating military laws” or subjected “to the penalties of the Articles of War.”<sup>199</sup> Instead, seemingly disobedient objectors “will be quietly ignored and they will be treated with kindly consideration.”<sup>200</sup> The October 10 order finished with a call for secrecy: “Under no circumstances are the instructions contained in the foregoing to be given to the newspapers.”<sup>201</sup> Publicity of lenient treatment might have encouraged “unconscientious” objection as well as attacks from the Administration’s right-wing critics.<sup>202</sup>

By the middle of November, Baker provided additional evidence of his commitment to Frankfurter’s vision. In a letter to Mennonite leaders who were seeking greater contact with their drafted congregants at army camps, Baker signaled a striking divergence from congressional policy. He announced to the Mennonites that “[t]he Government of the United

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A.W. Gullion, Lieutenant Colonel, to George Chamberlain, U.S. Senator (Sept. 26, 1917) (on file with the *Columbia Law Review*) (advising Chamberlain that Christadelphians were entitled to noncombatant service within “Military Establishment,” not total exemption). The Frankfurterian procedures that the World War I executive branch established did little for these groups. See *infra* notes 203–206 and accompanying text (describing Baker’s reversal of earlier pro-sectarian policy). Instead, Baker and Wilson’s policy more closely tracked the concerns of those whom Frankfurter had called the Administration’s “liberal friends”—Progressives committed to a pluralistic vision of national citizenship, not outright exemption from national obligation. See Frankfurter Memorandum, *supra* note 9, at 3.

197. Memorandum from H.G. Learnard, Adjutant Gen., U.S. Army, to Commanding Gens. of all Nat’l Army and Nat’l Guard Div. Camps (Oct. 10, 1917), reprinted in U.S. War Dept., Statement, *supra* note 11, at 37.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Although the October 10 segregation order was covert, Roger Baldwin clearly knew about it. On October 20, he reported to Baker several incidents in which objectors had not been treated as leniently as the order required. Letter from Roger N. Baldwin, Dir., Nat’l Civil Liberties Bureau, to Newton D. Baker, Sec’y, U.S. Dep’t of War 53 (Oct. 20, 1917) (on file with the *Columbia Law Review*). Baker responded a week later, noting that he had also received such reports. Showing a faith in military goodwill that would be tried as the administration of conscientious objectors evolved, Baker ascribed these reports to “a momentary failure to execute in the proper spirit the orders of this Department with regard to Conscientious Objectors. My investigations, however, always lead me to the conclusion that the Commanding Generals are thoroughly anxious to solve this problem in a helpful way . . . .” Letter from Newton D. Baker, Sec’y, U.S. Dep’t of War, to Roger N. Baldwin, Dir., Nat’l Civil Liberties Bureau 55 (Oct. 28, 1917) (on file with the *Columbia Law Review*).

States is not dealing in the matter, and cannot deal, with organized religious bodies, but must of necessity deal with individuals."<sup>203</sup> Baker's stance was a "direct reversal of earlier policies."<sup>204</sup> Only some six months earlier, Congress had declared that the government of the United States would *only* deal with members of "organized religious bodies" that had doctrinal objections to combat service and *not* individuals with idiosyncratic objections.<sup>205</sup> Baker's letter to the Mennonites revealed the impact of the legal and political vision that lay behind Frankfurter's policy recommendation, a vision that Baker apparently shared. While Progressives like Frankfurter prized pluralism, they believed that individuals should be first and foremost citizens of the nation, their allegiance to the national state unmediated by sectarian attachments.<sup>206</sup>

On December 19, 1917, Baker finally granted formal—if provisional—recognition to Frankfurter's "individualistic" objectors. The Secretary of War directed all camp commanders "that until further instructions on the subject are issued 'personal scruples against war' should be considered as constituting 'conscientious objections' and such persons should be treated in the same manner as other 'conscientious objectors' under the instructions contained in confidential letter from this office dated October 10, 1917."<sup>207</sup> This order identified a new category of legitimate objector, marked by the religion-neutral and nonorganizational language of "personal scruples against war." Now, any individual professing such personal scruples—regardless of their spiritual

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203. Capozzola, *supra* note 6, at 71 (quoting Newton Baker).

204. *Id.*

205. Selective Service Act of 1917, ch. 15, §4, 40 Stat. 76, 78, repealed by Act June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217 (providing compulsory military service should cease four months after proclamation of peace by President); see also *supra* notes 58–78 and accompanying text (discussing Congressional debate surrounding individual, unorganized conscientious objectors).

206. For a perceptive analysis of this vision of national citizenship, see Stears, *supra* note 1, at 61–70; see also Eisenach, *supra* note 1, at 207 ("[D]emocracy now required national, not regional-local 'embodied selves'; national, not local, patriotism and citizenship; and national, not party-local, institutions of civic mobilization and political education."); Ernst, *Common Laborers*, *supra* note 10, at 62–79 (contrasting two early-twentieth-century responses to pluralism, one focused on the preservation of group autonomy, the other on gradual construction of common good). This vision helps explain Frankfurter's reluctance to excuse sectarian Jehovah's Witnesses from saluting the American flag during the 1940s. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) (Frankfurter, J.) (holding requirement school children salute flag does not violate First Amendment), overruled by *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also *Barnette*, 319 U.S. at 646–671 (Frankfurter, J., dissenting); Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 *Stan. L. Rev.* 675, 705–11 (1984) (describing Frankfurter's approach to relationship between marginal beliefs and democratic reason).

207. Memorandum from H.G. Learnard, Adjutant Gen., U.S. Army, to Commanding Gen. of All Nat'l Army and Nat'l Guard Camps Except Camp Grant (Dec. 19, 1917), reprinted in U.S. War Dep't, *Statement*, *supra* note 11, at 37.

or political pedigree—would be entitled to special treatment from his commanding officers.<sup>208</sup>

Such special treatment meant far more than politeness. The October 10 order had commanded that objectors should “not be treated as violating military laws.”<sup>209</sup> In conjunction with the December 19 order, this language meant that a man without any certificate from his local draft board could profess personal scruples against fighting and thereby exempt himself from military prosecution for refusing combat duty, pending further as-yet-unspecified administrative review. The December 19 order thus elided the distinction Congress had carefully introduced between the sectarian objector and the “unorganized conscience.”<sup>210</sup> In place of this distinction stood a new regime designed to protect the “individualistic” conscientious objectors whom Frankfurter’s memo had defined and defended.<sup>211</sup>

Although Baker’s autumn orders moved administrative policy in the direction of Frankfurter’s memorandum, opinion within the Executive Branch on the matter of the individual conscience remained unsettled. Two days after Baker’s first, October 10 order, Major John Henry Wigmore circulated a startling set of recommendations about what to do with nonsectarian objectors. Back in September, Wigmore had sternly rebuked Roger Baldwin for trying to include him—as well as Frankfurter—in a civilian-military committee tasked with developing a more accommodating conscientious-objector policy.<sup>212</sup> On October 12, Wigmore issued his own suggestions about what the law required.<sup>213</sup> In it, he carefully distinguished between legitimate objectors “recognized by the Act of May 18” and the nonsectarian “conscientious objectors” who had “no status except that of garrison prisoners.”<sup>214</sup>

Turning to the treatment of the nonsectarian objector, Wigmore proposed that upon such a man’s refusal of any order (for instance to carry a gun), the commanding officer should immediately arrest him and

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208. As William D. Palmer has noted, Baker’s order “was the first—and, until the Supreme Court interpreted the exemption broadly beginning in the 1960s, the only—example of the federal government granting an exemption to conscientious objectors whose objections may not have been based on religious belief.” William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 *Mil. L. Rev.* 179, 184 (1993).

209. Memorandum from L.A. Dewey, Adjutant Gen., U.S. Army, to Commanding Gens. of All Nat’l Army and Nat’l Guard Camps Except Camp Grant (Oct. 10, 1917), reprinted in U.S. War Dep’t, *Statement*, *supra* note 11, at 37.

210. See *supra* notes 62–71 and accompanying text (describing congressional debate).

211. See *supra* Part II.B (describing Frankfurter’s approach to “individualistic” objectors).

212. See *supra* note 132 and accompanying text (describing Wigmore’s reaction to Baldwin).

213. Memorandum from John Henry Wigmore, *supra* note 134, at 1.

214. *Id.* at 4

hold a “summary court [martial].”<sup>215</sup> Wigmore vividly detailed the appropriate next steps: “The officer finds him guilty . . . and imposes 1 week confinement.”<sup>216</sup> After the week, the officer should give the disobedient soldier the same order and, if he still refuses, another week of confinement, this time in solitary.<sup>217</sup> The isolation should be total: “Forbid any one to speak to them.”<sup>218</sup> When not actively confined, the nonsectarian objector should be assigned harsh forms of labor: “It must be *physically exhausting* . . . It must have a stigma.”<sup>219</sup> For Wigmore, only this regimen of prosecution, confinement, isolation, and exhaustion could determine the sincerity of the nonsectarian objector—not any committee of lawyers.<sup>220</sup>

Not only did Wigmore’s memorandum differ penologically from Frankfurter’s, recommending hard labor and isolation rather than modern “reformatory” methods, it also differed legally. Wigmore was clear that only sectarian objectors were “lawful.”<sup>221</sup> Nonsectarian objectors deserved harsh treatment precisely because their objections to combat service were unlawful according to the Selective Service Act. Wigmore was not the lone hardliner. In a January memorandum to Baker, who was worried about the continuing imprisonment of nonsectarian objectors at some camps, Provost Marshal General Crowder stated simply that “individuals, as distinct from members of well-recognized religious sects,” are not “entitled to treatment as noncombatants.”<sup>222</sup> It would take the President’s own intervention to change Crowder’s tune, but this intervention was still some months away.

When Wilson did reach a decision about what to do with individualistic conscientious objectors, he would do so with the knowledge that, according to the Supreme Court, the draft’s narrow accommodation of conscience was constitutional. On January 7, 1918, a unanimous Court rejected the arguments presented in six separate cases involving political radicals who had refused to register for the draft themselves or had induced others not to register in violation of the Selective Service Act.<sup>223</sup> The appellants’ briefs raised a variety of constitutional objections to the draft.<sup>224</sup> Harry Weinberger, attorney for one of the radicals and a mem-

215. *Id.* at 1.

216. *Id.* at 2.

217. *Id.* at 3.

218. *Id.* at 4.

219. *Id.* (emphasis in original).

220. *Id.*

221. *Id.*

222. Memorandum from Enoch H. Crowder, Provost Marshal Gen., U.S. Army, to Newton Baker, Sec’y, U.S. Dep’t of War 1 (Jan. 16, 1918) (on file with the *Columbia Law Review*).

223. Selective Draft Law Cases, 245 U.S. 366, 366, 387–90 (1918).

224. See Murphy, *supra* note 3, at 214 (“[T]he major part of the argument turned on a contention that the Draft Act was unconstitutional, since it violated the Thirteenth

ber of the AUAM, focused on First Amendment infirmities.<sup>225</sup> He argued that Section 4 of the Selective Service Act—which offered noncombatant duty only to religious sectarians—violated both the Establishment and Free Exercise Clauses.<sup>226</sup> Walter Nelles, attorney for the National Civil Liberties Bureau (NCLB), made the same argument in an amicus brief.<sup>227</sup>

Writing for the Court, Chief Justice Edward White was supremely unimpressed with the First Amendment challenge to Congress's sectarian exemption: "[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise . . . resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more."<sup>228</sup> This decision came as no surprise: The *Selective Draft Law Cases* "announced nothing new. Every single court that heard a challenge to the draft denied it."<sup>229</sup> But Weinberger's First Amendment challenge was particularly "off the wall."<sup>230</sup> The freedom of conscience of nonsectarian and secular objectors would be secured through administrative construction long before it received legislative or judicial recognition.<sup>231</sup>

On March 20, 1918, President Wilson advanced this construction, issuing a lengthy Executive Order that formalized an administration of conscientious objectors starkly different from that envisioned by Congress.<sup>232</sup> The timing of Wilson's formal intervention in the conscientious-objection debate is striking. The day after it was published, German

Amendment, . . . the First Amendment, . . . and . . . the Fifth Amendment due process clause.").

225. See Walker, *supra* note 3, at 18–23 (describing Weinberg's involvement in AUAM and his legal work on behalf of draft resisters).

226. Murphy, *supra* note 3, at 214; Walker, *supra* note 3, at 18–19.

227. *Id.*

228. *Selective Draft Law Cases*, 245 U.S. at 389–90.

229. Capozzola, *supra* note 6, at 30.

230. For "off the wall" constitutional arguments, see Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 *Geo. L.J.* 173, 181 (2001).

231. Congress first accommodated religious nonsectarians in the 1940 Selective Training and Service Act. See Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885, 889 ("Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training or belief, is conscientiously opposed to participation in war in any form.") Only during the Vietnam War era did the Supreme Court interpret this statutory provision to cover secular objections to war. *Welsh v. United States*, 398 U.S. 333, 343–44 (1970); *United States v. Seeger*, 380 U.S. 163, 176, 184–87 (1965). Even then, the Court avoided the constitutional question. *Welsh*, 398 U.S. at 345 (Harlan, J., concurring) (arguing majorities in *Welsh* and *Seeger* exceeded permissible limits of constitutional avoidance in construing statute).

232. Exec. Order No. 2,823 (Mar. 20, 1918) (on file with the *Columbia Law Review*); see also U.S. Dep't. of War, General Order No. 28 (Mar. 23, 1918), reprinted in U.S. War Dep't., *Statement*, *supra* note 11, at 38–39 (publishing President Wilson's Executive Order of March 20, 1918 to Army).

forces launched Operation Michael, a massive strike on the Western front.<sup>233</sup> The goal of this nearly apocalyptic show of force was to break the Allied line before the bulk of fresh American troops could cross the Atlantic.<sup>234</sup> Desperate British leaders appealed directly to the American people to hasten the muster.<sup>235</sup> Yet these events did not lead to a reconsideration of the accommodating approach to conscientious objection that the March 20 Order announced. At the height of the World War, the War Department pushed ahead with its civil-libertarian response to antiwar belief within the draft.

The purpose of the March 20 Order was four-fold. First, the Order designated three types of noncombatant duty: service in the Medical Corps, the Quartermaster Corps, and the Engineer Corps.<sup>236</sup> Second, the Executive Order made permanent the equality between sectarians and nonsectarians first established by Baker's December 19 order:

Persons ordered to report for military service under the above Act who have (a) been certified by their Local Boards to be members of a religious sect or organization as defined in Section 4 of said Act; or (b) *who object to participating in war because of conscientious scruples but have failed to receive certificates as members of a religious sect or organization from their Local Board*, will be assigned to noncombatant military service . . . .<sup>237</sup>

The dichotomous structure of this language makes clear just how conscious Baker and Wilson were of extending the definition of legitimate objection beyond what Congress had authorized. Wilson's Order meant that Frankfurter's "individualistic" objectors were entitled to noncombatant duty.

The Order's third purpose was to institute a new method for certifying conscientious objectors.<sup>238</sup> This method downgraded the importance of certificates issued by local and district draft boards. These draft boards had been administering the Selective Service Act as interpreted by the Provost Marshal General's office—issuing certificates only to those men who could prove that they were members of pacifist religious organizations.<sup>239</sup> Now, however, Wilson ordered that "whenever any person is assigned to noncombatant service by reason of his *religious or other conscientious scruples*, he shall be given a certificate stating the assignment and reason therefor, and such certificate shall thereafter be respected as

233. Kennedy, *Over Here*, supra note 151, at 170; Martin Kitchen, *The German Offensives of 1918*, at 68 (2d ed. 2005).

234. Kitchen, supra note 233, at 17 (noting one argument against defensive strategy was "[b]y the summer of 1918 [Germany] would be facing a large, fresh and excellently equipped American army").

235. Kennedy, *Over Here*, supra note 151, at 170–171.

236. Exec. Order No. 2,823, supra note 232, at 1.

237. *Id.* (emphasis added).

238. *Id.*

239. Chambers, supra note 6, at 181.



preventing the transfer of such persons from such noncombatant to combatant service . . . ."<sup>240</sup> Thus, the President's order deferred the vital moment of certification from the draft boards to the conscript's arrival in camp, where he would deal with military men operating directly under the Commander in Chief's authority. This new certification process ensured that the determination of the legitimate conscience would occur under presidential purview, as Frankfurter's memorandum had suggested it should.

Having established a new apparatus for the administration of conscientious objectors, the Executive Order also rendered this apparatus retroactive. The fourth purpose of the Order was to empower the Secretary of War to "review the sentences and findings of courts-martial heretofore held of persons who come within any of the classes herein described, and bring to the attention of the President for remedy . . . sentences and judgments found at variance with the provisions hereof."<sup>241</sup>

The legal innovations that Wilson's Order represented were not lost on nongovernmental advocates of the individual conscience. On April 2, Roger Baldwin wrote to President Wilson, expressing the NCLB's "appreciation" for his Executive Order: "Your order not only liberally and sympathetically meets the issue, but it is particularly gratifying because it transcends the narrow limitations fixed by Congress, and promises to undo the injustices already committed by courts-martial."<sup>242</sup> As Frankfurter had reassured Baldwin in September, "I am full of confidence the thing will work out all right."<sup>243</sup>

Days later, Frankfurter himself praised the new regime to a would-be conscientious objector. By this point in the war, Frankfurter had moved on to another aspect of the administration of dissent: labor conflict within defense-related industries. But even as he faced this new challenge, Frankfurter had kept abreast of the conscientious-objector situation. On April 9, Frankfurter responded to the young pacifist lawyer Joseph Kline, who had written seeking a way out of military service, even those forms of noncombatant duty made available by the March 20 Order.<sup>244</sup> Noting that Kline himself had been "just enough to characterize the President's recent proclamation on conscientious objectors very fair," Frankfurter explained that this was a "conclusion

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240. Exec. Order No. 2,823, *supra* note 232, at 2.

241. *Id.*

242. Letter from Roger N. Baldwin, Sec'y, Am. Union Against Militarism, to Woodrow Wilson, President 1 (Apr. 2, 1918) [hereinafter April 2, 1918 Letter from Baldwin to Wilson] (on file with the *Columbia Law Review*).

243. Frankfurter, Second Letter to Baldwin, *supra* note 139.

244. See Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Joseph Kline (Apr. 8, 1918) (on file with the *Columbia Law Review*); Letter from Joseph Kline to Felix Frankfurter, Professor, Harvard Law Sch. 1-2 (Apr. 4, 1918) (on file with the *Columbia Law Review*).

shared by the National Civil Liberties Bureau which says that the President's regulations 'constitute a fair and liberal solution of the problem.'<sup>245</sup> Since Kline had expressed doubt whether the range of non-combatant duty described in the order would truly be made available, Frankfurter assured him that "[e]very precaution is sought to be taken for a just administration" and reasoned that "[s]omewhere or other in some field of activities outlined by the President your past experience and your attitude ought to find play."<sup>246</sup> Frankfurter's assurances were not simply a brush-off. Later that month, he followed up with the Adjutant General's office to ensure that Kline was being treated in accordance with the new regime.<sup>247</sup>

Military officials also acknowledged the impact of Wilson's Order, though they often did so reluctantly. As late as January 16, 1918, Provost Marshal General Crowder had insisted to Baker that nonsectarians were not "entitled to treatment as noncombatants."<sup>248</sup> A month after Wilson's Order appeared, however, Crowder offered a new, humbler analysis of his own authority. On April 29, when Crowder received a question from a local administrator about how objectors could qualify for noncombatant duty,<sup>249</sup> Crowder replied that "[b]efore induction a registrant may apply to his Local Board for a certificate of noncombatant service . . . . The question of how a man already inducted is to obtain a certificate restricting his transfer to combatant service does not come under the jurisdiction of this office."<sup>250</sup> Crowder's analysis of his own jurisdiction and that of the Selective Service Act now mirrored the reasoning of Frankfurter's memo. Frankfurter had argued that the question of what kind of treatment men should receive after induction was to be resolved *not* by interpreting legislative language but by consulting the needs of the military as determined by the Commander in Chief.<sup>251</sup> Wilson's public Order operationalized Frankfurter's arguments, and Crowder responded

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245. Letter from Felix Frankfurter to Joseph Kline, *supra* note 244, at 1.

246. *Id.*

247. See Memorandum from Felix Frankfurter, U.S. Dep't of War, to Adjutant Gen. 1 (Apr. 18, 1918) (on file with the *Columbia Law Review*) (strongly suggesting "Private Kline [be] segregated in accordance with the Secretary's instructions, relative to the treatment of conscientious objectors"); Memorandum from H.P. McCain, Adjutant Gen., to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (Apr. 22, 1918) (on file with the *Columbia Law Review*) (reporting Kline's commanding general "has been directed to see that the instructions contained in Presidential Proclamation on Conscientious Objectors are carefully complied with in [Kline's] case").

248. Memorandum from Enoch H. Crowder to Newton Baker, *supra* note 222 (on file with the *Columbia Law Review*).

249. Letter from B.T. Shuler, Postmaster, to Newton D. Baker, Sec'y, U.S. Dep't of War 1 (Apr. 23, 1918) (on file with the *Columbia Law Review*).

250. Record from Letter from Enoch H. Crowder, Provost Marshal Gen., to B.T. Shuler 1 (Apr. 29, 1918) (on file with the *Columbia Law Review*).

251. See *supra* Part II.B (describing Frankfurter's approach to problem of conscientious objectors in face of limited Congressional accommodation).

by retreating to Frankfurter's separate-jurisdictions analysis. As we will see, however, the publication of Wilson's Order did not end military resistance to the Progressive administration of conscientious objectors.

### III. HARLAN FISKE STONE AND THE BOARD OF INQUIRY

Wilson's March 20 Executive Order had, in Roger Baldwin's appreciative words, "transcend[ed] the narrow limitations fixed by Congress" by offering noncombatant duty to individualistic conscientious objectors.<sup>252</sup> But it left unclear how this transcendence of the legislative will would work in practice. Specifically, the Order did not answer the questions of how the Secretary of War would police the new, in-camp certification process of conscientious objectors or conduct the retroactive review of earlier military judgments about conscientious objectors. Both of these questions were answered on June 1, 1918, when Secretary of War Baker instituted the "Board of Inquiry," a three-member, civilian-military review board that was a close approximation of the three-member committee described in Frankfurter's September memorandum.<sup>253</sup> The Board consisted of Judge Mack (whom Frankfurter had specifically suggested), a Judge Advocate General (originally Major William Stoddard and later Major Walter Kellogg), and, in keeping with Frankfurter's two-to-one civilian-military balance, another civilian lawyer, Dean Harlan Fiske Stone.<sup>254</sup>

In coordination with the publication of the June 1 order, the Committee on Public Information—Wilson's propaganda unit—issued a press release announcing the Board of Inquiry and declaring that the "rights of individual conscience will be respected."<sup>255</sup> The release made clear that, under the "new instructions," the importance of determining the sincerity of objectors' particular commitments, not their sectarian pedigree, was paramount.<sup>256</sup> On June 3, Felix Frankfurter wrote to Frederick Keppel, congratulating him on the "happy mingling of sense and discipline" the War Department had finally achieved.<sup>257</sup>

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252. April 2, 1918 Letter from Baldwin to Wilson, *supra* note 242, at 1.

253. Memorandum from Roy A. Hill, Adjutant Gen., to All Div. & Dep't Commanders in U.S. (June 1, 1918) [hereinafter June 1 Order], in U.S. War Dep't, Statement, *supra* note 11, at 41-42.

254. Immediate Release, Comm. on Pub. Info., *supra* note 11, at 47.

255. Press Release, U.S. Dep't of War, For Release in the Morning Papers 1 (May 30, 1918) (on file with the *Columbia Law Review*); Press Release, U.S. Dep't of War, Official Statement as to Conscientious Objectors (June 8, 1918), reprinted in 75 Friends' Intelligencer 357, 357 (June 8, 1918).

256. Press Release, U.S. Dep't of War, For Release in the Morning Papers, *supra* note 255, at 2; Press Release, U.S. Dep't of War, Official Statement as to Conscientious Objectors, *supra* note 255, at 357, 358.

257. Letter from Felix Frankfurter to Frederick Keppel, Third Assistant Sec'y, U.S. Dep't of War (June 3, 1918) (on file with the *Columbia Law Review*).

As written, the Selective Service Act had aimed to resolve the problem of individual draft-related grievances, including conscientious objection, at the local level, through draft boards staffed by neighborhood dignitaries.<sup>258</sup> The Board of Inquiry represented a very different approach to the management of dissent—a centralized apparatus staffed by nationally recognized legal experts. These experts' chief concern was the legitimacy and stability of national governance in the face of antiwar dissent, not the preservation of community norms.

A. *The Board's Approach to Conscientious Objection*

The Board's first destination was Fort Leavenworth, Kansas. Back in September 1917, Frankfurter had recommended sending all absolutists to Fort Leavenworth for humane "treatment" and the June 1 order instituted this policy: All those men refusing noncombatant duty on conscientious grounds would be transferred from their training camps to the Kansas military prison.<sup>259</sup> There, the Board would personally interview each man. While the March 20 Executive Order had defined three types of noncombatant military duty available to conscientious objectors,<sup>260</sup> the June 1 order empowered the Board to offer a new form of alternative service—nonmilitary "agricultural service" under civilian control.<sup>261</sup> If the Board found a man sincerely opposed to all forms of military service—both combatant *and* noncombatant—it could offer him such alternative service.<sup>262</sup> Only objectors refusing even this nonmilitary service would now be considered true "absolutists" and remain at Fort Leavenworth as prisoners.

The Board of Inquiry did not just hold court over absolutists at Fort Leavenworth but took to the road, traveling from training camp to training camp to perform the two functions Frankfurter had envisioned: determination of sincerity and selection of appropriate service for those men found sincere. Between June 1918 and June 1919, the "migratory" Board traveled across the country, erecting makeshift courts of conscience in mess halls and work yards.<sup>263</sup> Over the course of its travels, the

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258. Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 78–80 (1917), repealed by Act June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217 (providing compulsory military service should cease four months after proclamation of peace by President).

259. June 1 Order, *supra* note 253, at 41.

260. See *supra* note 236 and accompanying text.

261. *Id.*

262. Stone, *The Conscientious Objector*, *supra* note 152, at 253, 257–58; see also June 1 Order, *supra* note 253, at 41. The Board could also, in "exceptional cases," "recommend the objector for service in connection with the reconstruction work maintained in Europe by the Society of Friends." Stone, *The Conscientious Objector*, *supra*, at 258.

263. See Walter Guest Kellogg, *The Conscientious Objector* 26 (1919) ("The work of the Board was essentially migratory in character."); see also Stone, *The Conscientious Objector*, *supra* note 152, at 258 (discussing travels).

Board "examined a total of 2,294 alleged conscientious objectors and determined that 1,978 were sincere," either in their objections to combat duty or to all military service.<sup>264</sup> Of these, 1,588 were assigned to various forms of civilian furlough, and 390 were assigned to noncombatant service. An additional 1,560 men received noncombatant duty or civilian furlough without Board investigation.<sup>265</sup> About 450 men refused all forms of alternative service ("absolutists") or, having been found insincere, still refused to fight. This relatively small group remained imprisoned at Fort Leavenworth.<sup>266</sup> The Board of Inquiry personally examined nearly sixty percent of the 3,989 drafted men who maintained their objections throughout the war.

These conscientious objectors were diverse in cultural background and religious (or nonreligious) commitment. About seventy-five percent hailed from the "historic peace churches."<sup>267</sup> These men were the sectarians recognized by the Selective Service Act itself. The other twenty-five percent were Frankfurter's "individualistic" objectors who, under statute, should have been considered disobedient soldiers and court-martialed. Within this group of nonsectarians, a government study estimated that approximately sixty percent were religious in some sense and the other forty percent purely "political."<sup>268</sup> Even the purely political objector could qualify for exemption as long as he convinced the Board that he was opposed to war in any form.<sup>269</sup>

Stone saw the Board's task, especially when it came to the non-religious objectors, as one of dialogue rather than judgment:

The cases of political objectors or those who, upon purely ethical grounds, felt that the state had no right to exact military service, were much more serious [than sectarian cases]. In such cases we had no formal rules of procedure or standards for determining whether the objector was sincere. We usually allowed him to tell his story, asked him rather searching questions as to his background and experience, and as to the

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264. U.S. War Dep't, Statement, *supra* note 11, at 24.

265. Kellogg, *supra* note 263, at 127.

266. U.S. War Dep't, Statement, *supra* note 11, at 25.

267. See Chambers, *supra* note 6, at 216 ("The majority belonged to historic pacifist religious faiths . . ."); Chatfield, *supra* note 19, at 75-76 (breaking down objectors by religious affiliation); Mark A. May, *The Psychological Examinations of Conscientious Objectors*, *Am. J. Psych.*, Apr. 1920, at 154-61 (same).

268. May, *supra* note 267, at 160-61.

269. See Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 105 (1956) [hereinafter *Mason*, *Pillar*] (quoting Letter from Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court, to Fred Briehl (Mar. 4, 1936)) (discussing standard for exemption and requirement objector be opposed to war in any form). It would be over fifty years before any branch of the U.S. government would again take such a liberal approach to conscientious objection—and even then, in the Supreme Court's 1970 decision in *Welsh v. United States*, the validity of objection on purely political grounds remained uncertain. 398 U.S. 333, 342-43 (1970) (suggesting recognition should be denied to draftee whose objections rest "solely upon considerations of policy, pragmatism, or expediency").

basis of his objections. In most cases we felt that objectors of this type were sincere, and when sincere they had as sound moral basis for their attitude as those who based their objections on religious dogmas.<sup>270</sup>

To facilitate this dialogue, the Board declined to have conscientious objectors sworn in and generally “disregard[ed] military discipline during the conduct of the examination.”<sup>271</sup> For instance, objectors did not have to stand at attention or salute the Board members. Although this disruption of military procedures was “a matter of concern to certain of the Army officers,” Board member Walter Kellogg explained that “it would be contrary to the spirit of [Baker and Wilson’s] orders . . . to insist upon military observances from a class of men who strenuously insisted that they were not to be regarded as soldiers at all.”<sup>272</sup> Instead, the Board created a communicative process in which men who profoundly disagreed with the military worldview could engage in discussion, even debate, with government decisionmakers who did not take the military point of view. In doing so, the Board interrupted the managerial norms of military obedience—vital for the efficient achievement of pre-determined goals such as the training of massive conscript army—in the interests of democratic norms, such as individual self-determination and open-minded deliberation.<sup>273</sup>

As Stone explained, “denouncing” a man as a “coward” or “slacker” was an “easy but indiscriminating and shallow way to dispose of the case of the conscientious objector.”<sup>274</sup> While Stone himself did not sympathize with the objectors’ political or moral arguments, he did see them as an expression of forces at work in society that needed to be recognized and understood. Stone was particularly struck by the social and economic views of the individualistic objectors, views that mirrored the complaints of a restive labor movement then militating for greater recognition from the American government.<sup>275</sup> Not only could society benefit from understanding the motives behind conscientious objection, a society that sought to punish rather than persuade such dissenters risked its own integrity: “[I]t may well be questioned whether the state which preserves

270. Mason, *Pillar*, supra note 269, at 105 (quoting Letter from Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court, to Arthur Basse).

271. Kellogg, supra note 263, at 54–55.

272. *Id.* at 55.

273. For this distinction between “management” (which involves “efficiency-minded, goal-driven organization”) and “democracy” (which involves the continual harmonization of individual self-determination and collective decisionmaking through “communicative processes”), see Robert Post, *Constitutional Domains: Democracy, Community, Management* 4, 11 (1995) (quoting Philip Selznick).

274. Stone, *The Conscientious Objector*, supra note 152, at 269.

275. *Id.* at 266 (“No member of the Board who listened to the voluble expositions of their theories by these men during the summer of 1918 could have been surprised by the manifestations of social unrest and the pronounced Bolshevik tendencies which have since been exhibited by the working classes in America.”).

its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."<sup>276</sup> Thus, as much as law breaking was a "serious concern," especially in a time of war, so was "the violation of the conscience of the individual by majority action."<sup>277</sup> In order to avoid such majoritarian suppression of idiosyncratic views, the Wilson Administration and its Board of Inquiry reopened a discussion that the Selective Service Act had purported to close—which objections to fighting had "social value" and which should be punished as deleterious to the war effort.<sup>278</sup> Most boldly, Stone and the Board of Inquiry staged this discussion in the midst of army training camps.

### B. *The Board's Response to Military Noncompliance*

Baker and Wilson's decision to depart from congressional policy and to intervene in ongoing processes of military justice met with significant resistance. Since the passage of the Selective Service Act, military lawyers had argued that a liberal policy toward individualistic objectors would violate the congressional law. Now, military officers on the ground appeared reluctant to comply with Baker and Wilson's decision to ignore their military advisors.

For example, on June 15, when Third Assistant Secretary of War Keppel inquired about noncompliance and "very harsh treatment" of Quakers at Camp Lewis, Washington, the Commanding General responded with almost taunting indifference. Denying *noncompliance* in regard to treatment of "alleged conscientious objectors," the General explained that "as to their *harsh* treatment, this office is unsure of what is meant by this term; it may be that improper treatment is alleged and that this in itself is largely a matter of opinion."<sup>279</sup>

Later in the summer, Secretary of War Baker learned that camp officers had failed to issue certificates guaranteeing noncombatant duty to individuals professing conscientious objections.<sup>280</sup> On August 2, he released a terse memorandum, stating that the certification process laid out by Wilson's Executive Order "will be strictly complied with by all concerned in the future."<sup>281</sup> Baker also included a "suitable form" that officers could issue as "the certificate."<sup>282</sup>

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276. *Id.* at 269.

277. *Id.*

278. *Id.*

279. Letter from H.P. McCain, Adjutant Gen., to Frederick Keppel, Third Assistant Sec'y, U.S. Dep't of War 1 (June 15, 1918) (on file with the *Columbia Law Review*) (emphasis added).

280. Memorandum from John S. Johnston, Adjutant Gen., to All Dep't, Camp, and Cantonment Commanders All Excepted Places (Aug. 2, 1918), in U.S. Dep't of War, Statement, *supra* note 11, at 46.

281. *Id.*

282. *Id.*

By September, reports of regularly administered “severe beatings and humiliation” of “political objectors” at Camp Funston, Kansas became too numerous to dismiss as exaggeration.<sup>283</sup> Baker called an investigation which eventually led to the dishonorable discharge of—among other officers—Major Frank White Jr.<sup>284</sup> White was the Judge Advocate General (JAG) officer responsible for supervising the treatment of the camp’s conscientious objectors, and he “had little tolerance for the secularists” in particular.<sup>285</sup> After his discharge, White “launched a noisy campaign against Secretary Baker and his supposed coddling of subversive pacifists”<sup>286</sup> that would eventually reach Congress.<sup>287</sup>

In October, Third Assistant Secretary of War Keppel asked the Board of Inquiry to review ninety-eight already-closed court-martial cases that the War Department suspected had been improperly decided by camp commanders.<sup>288</sup> Previously, the Board had only been authorized to intervene in open court-martial cases.<sup>289</sup> Keppel’s October order expanded the Board’s mandate to a form of appellate review. The chairman of the Board, Walter Kellogg, recused himself because as a JAG officer he was a member of the department that had signed off on the contested court-martial decisions.<sup>290</sup> Thus, Judge Mack and Dean Stone formed a wholly civilian committee tasked with reviewing divergences between military justice and Wilson and Baker’s policies.

On October 31, Mack and Stone wrote to Secretary of War Baker: “We appreciate fully the weight to be attached to the deliberate conclusions of the reviewing authorities in the Judge Advocate Department, and we have most carefully considered their reports. But in many, if not most, of the cases, we are unable to concur in their recommendations.”<sup>291</sup> As Harlan Fiske Stone later recounted to Nicholas

283. Beaver, *supra* note 41, at 233.

284. Capozzola, *supra* note 6, at 80.

285. *Id.*

286. *Id.*

287. See *infra* Part IV.A (detailing criticisms of War Department’s civil libertarianism).

288. See Letter from Julian Mack, Judge, & Harlan F. Stone, Dean, Columbia Law Sch., to Newton D. Baker, Sec’y, U.S. Dep’t of War (October 31, 1918) [hereinafter 1918 Letter from Mack & Stone], in U.S. War Dep’t, Statement, *supra* note 11, at 26 (providing report after requested inquiry); U.S. War Dep’t, Statement, *supra* note 11, at 26 (“Twelve separate reports accompanied [the Mack and Stone] letter and consisted of comments and recommendations based upon an examination of the court-martial records in 98 cases . . .”).

289. Memorandum from Roy A. Hill, Adjutant Gen., to the Commanding Gens. of All Dep’ts & Divs. (June 10, 1918), in U.S. War Dep’t, Statement, *supra* note 11, at 42.

290. See Letter from S.T. Ansell, Acting Judge Advocate Gen., to Peyton C. March, Chief of Staff (Nov. 16, 1918), in U.S. War Dep’t, Statement, *supra* note 11, at 28 (“I am advised by Maj. Kellogg that, being an officer of this department and having reviewed some of the cases involved . . . he declined to take part either in the examination of the records or in the report rendered thereon.”).

291. 1918 Letter from Mack & Stone, *supra* note 288, at 26.



Murray Butler, the President of Columbia University, "In a good many cases, it appeared to me that the objectors, sometimes through misinterpretation of the orders of the President and the Secretary of War and sometimes through excess of zeal, had been improperly placed on trial by the military authorities."<sup>292</sup>

Mack and Stone asked to personally examine the men whose cases they had reviewed—men who had already been convicted of disobedience. If they found that a man had been sincere in his initial objections, they intended to offer him noncombatant service or civilian furlough, remitting the remainder of his court-martial sentence if he accepted.<sup>293</sup> Furthermore, given the problems identified in the first sample of cases, Mack and Stone "strongly recommend[ed]" that the remaining court-martial cases involving alleged objectors "be taken up promptly" and offered that they were "ready to examine these" as well.<sup>294</sup>

When the Acting Judge Advocate General S.T. Ansell received Mack and Stone's "sweeping statement of disapproval" and their request for further review, he fired off an indignant response to the Army's Chief of Staff, Peyton March.<sup>295</sup> Striking the same formalistic note that military lawyers Crowder, Kuhn, and Wigmore had earlier employed in resisting recognition of the individual conscience, Ansell explained that his office was "concerned solely with the question of the legality of the findings and sentence in each case."<sup>296</sup> Ansell seemed to imply that Mack and Stone's "courteously worded, but ill-advised statement"<sup>297</sup> had *not* confined itself to the law.

Indeed, Ansell called Mack and Stone's review "extra legal."<sup>298</sup> The Board, Ansell explained, had no authority to "differ with the constituted military tribunals upon matters of law . . . which have been reviewed by the only authorities lawfully competent to review them."<sup>299</sup> The court-martial decisions were "as a matter of law final, and are entitled to as much respect as the decisions of any court in the land both as a matter of law and as a matter of fair regard for honestly administered institutions."<sup>300</sup> Ansell's reference to "honestly administered institutions"

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292. Alpheus Thomas Mason, Harlan Fiske Stone: In Defense of Individual Freedom, 1918–20, 51 *Colum. L. Rev.* 147, 151 (1951) (quoting Stone's January 5, 1919 report to Butler).

293. U.S. War Dep't, Statement, *supra* note 11, at 26.

294. 1918 Letter from Mack & Stone, *supra* note 288, at 26.

295. Letter from S.T. Ansell to Peyton C. March, *supra* note 290, at 27.

296. *Id.*

297. *Id.*

298. *Id.* at 28.

299. *Id.*

300. *Id.* (citation omitted). As Baker would respond, however, court-martial decisions were not as final as Ansell suggested, being subject to command review. From the Secretary of War's point of view, the Board of Inquiry was just a vehicle for such oversight further up the chain of command. See *infra* notes 305–312 and accompanying text

raised the specter of *dishonest* administration, and Ansell went on to suggest that the Board was motivated not by legal concern but by Baker and Wilson's "administrative difficulties in dealing with the problem of conscientious objectors."<sup>301</sup> If such difficulties, as a policy matter, militated for "such persons . . . to be excused," then the Secretary of War should have executed such a policy in a straightforward and public manner—"by withholding [the objectors] from trial or by extending to them the pardoning power"—rather than "through manipulation of tribunals of justice."<sup>302</sup>

Not only did Ansell suggest the Board's work was a politically motivated "manipulation" of justice, but he also implied that it was interfering with the nation's military in a time of war:

I think it my duty to ask the department to consider this report of the board of inquiry . . . in the light of first principles which lie at the base of military justice, the discipline of the Army and its integrity, and to that extent involving the safety of this country.<sup>303</sup>

In closing, Ansell counterposed the law and "human rights," as protected by military lawyers such as himself, to the "uncontrolled will," as represented by Baker and his minions.<sup>304</sup>

On December 8, 1918, Baker responded to Ansell's letter with a careful but confident defense of his Department's administration of conscientious objectors. Echoing Felix Frankfurter's framing, Baker explained that the treatment of conscientious objectors was a question of "military administration," not statutory interpretation:

To some extent the novelty and difficulty of this problem was recognized by the Congress, which made express provision for a part of the general class. However, when the law came to be administered it was found that only certain varieties of religious experience had been adequately provided for, and that other varieties of religious obligation and the whole class of conscientious objection based upon ethical considerations and not directly associated with formal religious beliefs was unprovided for.<sup>305</sup>

The Secretary of War continued to follow the line of Frankfurter's legal reasoning: "The President, *as Commander in Chief* of the Army, thereupon laid down a definite policy for the administration of the law, and the

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(detailing authority behind administration of conscience and pointing to Baker's emphasis of hierarchical nature of administration).

301. Letter from S.T. Ansell to Peyton C. March, *supra* note 290, at 28.

302. *Id.*

303. *Id.*

304. *Id.* (quoting *Runkle v. United States*, 122 U.S. 543, 558 (1887)).

305. Memorandum from Newton D. Baker, Sec'y, U.S. Dep't of War, to Peyton C. March, Chief of Staff (Dec. 8, 1918) [hereinafter Baker, 1918 Memorandum], *in* U.S. War Dep't, Statement, *supra* note 11, at 28.

discipline of those called to the service who were affected by any of these forms of conscientious objection not specifically included within the limits of the statute."<sup>306</sup> As Frankfurter had argued, the executive branch was free to recognize new forms of conscientious objection as "a matter of military discipline."<sup>307</sup>

After reviewing the reasoning and authority behind an accommodating administration of conscientious objectors, Baker introduced the problem of noncompliance: "[A] number of cases have arisen in which [the Commander in Chief's] direction has not been complied with."<sup>308</sup> In the interests of the very integrity of military justice which Baker's interlocutors wished to protect, this situation could not stand. Furthermore, Baker went on, such a situation would be "at variance with the positively expressed wishes of the President as Commander in Chief."<sup>309</sup> Throughout his response, the Secretary of War invoked the phrase "Commander in Chief" as a sort of refrain, reemphasizing a hierarchy that he clearly felt his military subordinates had forgotten.

What, Baker asked, could be done about this failure to implement the President's binding commands? "Fortunately," Baker answered, correcting Ansell's suggestion that authority to revise court-martial verdicts was lacking, "we are not obliged to continue the results of such a system [of misapplication]."<sup>310</sup> Contrary to Ansell's skepticism, "all the power necessary to correct any inequality in the application of the law and the executive order is in the Secretary of War."<sup>311</sup> Mack and Stone, Baker explained, were merely his advisors: "The results of their inquiries are laid before the Secretary for the information of his judgment, and are in no sense an extra-judicial review of any action of the constituted military authorities."<sup>312</sup> Having established the legal propriety of Mack and Stone's efforts and his own authority to act upon their recommendations, Baker announced that Mack and Stone would continue their work and demanded military cooperation.<sup>313</sup>

306. *Id.* at 28–29 (emphasis added).

307. Frankfurter Memorandum, *supra* note 9, at 2.

308. Baker, 1918 Memorandum, *supra* note 305, at 29.

309. *Id.*

310. *Id.*

311. *Id.* By statute, the Secretary of War had the authority to grant an "honorable restoration to duty" to convicted soldiers. See Act of March 4, 1915, ch. 143, 38 Stat. 1062, 1074–1075 (repealed by Pub. L. No. 90-377, § 6(1), (3), 82 Stat. 288 (1968)) (extending "authority . . . vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States disciplinary barracks and its branches . . . so that such restoration may be given to general prisoners confined elsewhere").

312. Baker, 1918 Memorandum, *supra* note 305, at 29.

313. *Id.* ("I desire . . . to have Judge Mack and Dean Stone continue the inquiry, as suggested, by their seeing all records of courts-martial in these cases, and being permitted to have access to all persons in this class whom they may elect to see in order that their work may be comprehensive . . .").

On January 7, 1919, as a result of their further review of court-martial records and personal interviews of objectors, Mack and Stone recommended clemency for 113 men who had been convicted of disobedience after refusing orders on conscientious grounds.<sup>314</sup> Nine days later, Baker told the Army Chief of Staff that he “believ[ed] that essential justice will be rendered” by exercising in these cases “the power of clemency intrusted to me by the President.”<sup>315</sup> The next day, the War Department officially issued the clemency order.<sup>316</sup> Mack and Stone continued their review throughout the spring and on July 1, Baker wrote to Wilson, recommending clemency for another batch of objectors found sincere by the Board, and also clemency—after one month’s time—for even those objectors that the Board had found insincere but whose behavior while in prison had been “satisfactory.”<sup>317</sup> The Board of Inquiry’s work had come to an end.

At the moment of the United States’ emergence as the world’s most powerful nation, American conscientious objectors forced state builders within the executive branch to confront the question of the proper relationship between individual citizens, majoritarian decisionmaking, and a centralized, professional bureaucracy. Even as the Wilson Administration was developing a novel democratic theory for the international arena, executive officials also sought new democratic solutions for a home front roiled by mass military and industrial mobilization, hyperpatriotism, and bold dissent. Indicative of these twin democratic projects was a public statement that the Third Assistant of Secretary of War Frederick Keppel released in September 1918.

Defending the War Department’s accommodating approach to conscientious objectors, Keppel explained that the Administration had “accord[ed] a measure of self-determination to the few who in all sincerity have not been able to adjust their minds to the needs of the present sudden and desperate emergency.”<sup>318</sup> Noting that there was “strong sentiment in many quarters against” such a policy, Keppel allowed that “[w]e might imprison or shoot them.”<sup>319</sup> But, he insisted, “Prussian practices such as these would hardly appeal in a Democracy.”<sup>320</sup>

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314. See Letter from Julian Mack, Judge & Harlan F. Stone, Dean, Columbia Law Sch., to Newton D. Baker, Sec’y, U.S. Dep’t of War (Jan. 7, 1919), in U.S. War Dep’t, Statement, *supra* note 11, at 29–30 (providing report of results of examination of prisoners).

315. Memorandum from Newton D. Baker, Sec’y, U.S. Dep’t of War, to Peyton C. Marsh, Chief of Staff (Jan. 16, 1919), in U.S. War Dep’t, Statement, *supra* note 11, at 30.

316. See Memorandum from Frank McIntyre, Major Gen., to Roy A. Hill, Adjutant Gen. (Jan. 17, 1919), in U.S. War Dep’t, Statement, *supra* note 11, at 31.

317. See Letter from Newton D. Baker, Sec’y, U.S. Dep’t of War, to Woodrow Wilson, President 3–4 (July 1, 1919) (on file with the *Columbia Law Review*).

318. Immediate Release, Comm. on Pub. Info., *supra* note 11, at 47.

319. *Id.* at 48.

320. *Id.*

Keppel's use of the language of self-determination and reference to "Prussian practices" situated the administration of conscientious objectors within President Wilson's larger foreign-policy agenda. The principle of national self-determination—the right of a nation to "determine its own institutions" and to "be assured of justice and fair dealing"—was at the center of Wilson's internationalist vision.<sup>321</sup> For Wilson, however, true self-determination had to be grounded in the "consent of the governed."<sup>322</sup> Such consent meant more than the sort of plebiscitary democracy that he believed was fueling Prussian militarism.<sup>323</sup>

Similarly, the vision of democracy enforced by the War Department's administration of conscientious-objector policy did not reduce to majoritarian decisionmaking. Indeed, Harlan Fiske Stone suggested at the end of the war that a state could risk its life by yielding to "majority action."<sup>324</sup> Instead, War Department administrators tied democracy to individual self-determination and created opportunities for such self-determination within the wartime bureaucracy. Specifically, the Board of Inquiry provided a zone of relatively unstructured dialogue within the otherwise strict confines of the training-camp apparatus. Before the Board, individuals were able to articulate their particular moral and political commitments, and, in response, the Board was empowered to offer forms of alternative public service that accorded with those particular commitments. The Wilson Administration invoked the language of the rights—"rights of individual conscience" in particular—to describe this synthesis of centralized administration and individual self-determination. It was only within the Board's novel administrative process—not within the halls of Congress or the federal courts—that such individual rights would be realized.

In enacting this vision of democracy as individual self-determination, Wilson's War Department appeared to buck Congress's intent to restrict offers of noncombatant duty to sectarian objectors. When challenged by military authorities on this score, civilian administrators, beginning with Felix Frankfurter, repeatedly invoked the independent authority of the President over matters of military discipline. The legitimacy of an expansive right of conscience depended upon this particular situation of draft administration within the separation of powers and the expansive executive policymaking that went with it. While such executive policymaking was and remains least controversial in the realm of military discipline, Frankfurter and his War Department colleagues chose to use this disciplinary realm to implement norms of pluralism and individual self-deter-

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321. Woodrow Wilson, President, *The Fourteen Points Address* (Jan. 8, 1918), in 45 *The Papers of Woodrow Wilson* 534, 536 (Arthur S. Link ed., 1984).

322. Woodrow Wilson, *A League for Peace*, *supra* note 11, at 8.

323. Ross Kennedy, *The Will to Believe: Woodrow Wilson, World War I, and America's Strategy for Peace and Security* 134 (2009) (discussing Wilson's "assessing the relationship between German democratization and prospects for international reform").

324. Stone, *The Conscientious Objector*, *supra* note 262, at 269.

mination that they felt Congress had stunted. They hoped that the administrative recognition of the right of individual conscience would imbue the draft apparatus with these norms and, in doing so, help to stabilize and legitimate it. In a surprising series of turns then, a strikingly modern theory of democratic self-government and individual rights was articulated in the name of executive authority and at the expense of congressional policy. The modern administrative state had arrived, cloaked in the language of individual rights; at the same time, a modern theory of individual rights for minorities and dissenters had arrived, cloaked in the language of administrative state building. After the war, military discontent would converge with legislative anger at this bold exercise of presidential power in the name of idiosyncratic dissenters.

#### IV. CRITIQUES AND LEGACIES OF THE WAR DEPARTMENT'S CIVIL LIBERTARIANISM

##### A. *Critiques*

Assaults on the legitimacy of the War Department's conscientious-objector policy did not conclude with the signing of the Armistice in November 1918. To the contrary, continuing criticism of the War Department's policy toward conscientious objectors was a striking feature of the postwar Red Scare. It was also during the Red Scare that an emerging movement of Progressive civil libertarians pushed back against the Justice Department's prosecution of political radicals and scored their first (symbolic) victory at the Supreme Court, as Justice Oliver Wendell, Holmes, Jr. endorsed a newly robust conception of freedom of speech in his dissent in *Abrams v. United States*.<sup>325</sup> Veterans of the World War I War Department were intimately involved with these events, as Frankfurter and Stone issued public denunciations of the Justice Department's suppression of radicals, and John Henry Wigmore, an early critic of the accommodation of the individual conscience, published the first major critique of Holmes's new First Amendment theory.

The Red Scare was a widespread social, legal, and political phenomenon, a stew of wartime xenophobia, postwar economic turmoil, and intensifying anticommunism in the wake of the November 1917 Bolshevik coup in Russia.<sup>326</sup> Even as Wilson's Attorney General A. Mitchell Palmer carried out his sensational antiradical raids and prosecutions,<sup>327</sup> some of the Administration's critics bemoaned the government's softness toward anti-American elements. In particular, an alliance of military-intelligence operatives, disgruntled training-camp officers, and national and local politicians pointed to the War Department's

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325. 250 U.S. 616, 627–31 (1919) (Holmes, J., dissenting).

326. See Robert Murray, *The Red Scare: A Study in National Hysteria, 1919–1920*, at 12, 15–16 (1955) (describing societal circumstances that exacerbated Red Scare in 1919).

327. *Id.* at 78–83.

accommodation of conscientious objectors as early evidence of the government's sympathy for radicals. At the same time, as Progressives became disillusioned with Wilson's unwillingness to check Palmer, the failures of conscientious-objector administration attracted their ire as well.

In January 1919, as Judge Mack and Dean Stone were busy recommending clemency for objectors, Archibald E. Stevenson, the former director of propaganda for the Army's Military Intelligence Division, testified before the Senate's Overman Committee.<sup>328</sup> The Overman Committee had been established to investigate the relationship between beer brewers and German propaganda, but, after the war, Senator Overman wanted its authority extended to the new communist threat.<sup>329</sup> Stevenson helped Overman's cause by drawing a line directly from the "pro-German" defense of conscientious objectors to postwar Bolshevism.<sup>330</sup> Three of the dangerous citizens to whom he alerted the Overman Committee were Jane Addams, Oswald Garrison Villard, and Roger Baldwin, all of whom had lobbied the Wilson Administration on behalf of conscientious objectors.<sup>331</sup> Baldwin's work was particularly familiar to Stevenson, as the military-intelligence officer had, in August 1918, led a raid on the NCLB's office in New York City.<sup>332</sup>

While Stevenson's alarming stories of well-placed radicals helped expand the Overman Committee's jurisdiction, he was most successful at the state level. At Stevenson's instigation, the New York State Legislature established an investigation into the radical elements undermining American society.<sup>333</sup> Stevenson served as "special counsel" for what would infamously become known as the Lusk Committee.<sup>334</sup> In the course of tracing the "Spread of Socialism in Educated Circles," the Committee detailed sympathetic interactions between the NCLB and War Department officials:

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328. Todd Pfannestiel, *Rethinking the Red Scare: The Lusk Committee and New York's Crusade Against Radicalism, 1919–1923*, at 13 (2003).

329. *Id.*

330. *Id.*

331. *Id.*

332. Cottrell, *supra* note 3, at 78. Military-intelligence officers had, in fact, launched a campaign against the nongovernmental advocates of the individual conscience back in December 1917. On December 19, the same day that Baker issued his order calling for lenient treatment of the individual conscience, the Intelligence Section of the War College—the organization that had produced the first legal opinion *against* recognition of the individual conscience—circulated a memorandum entitled "Suspects," with Roger Baldwin at the top of the list. *Id.* at 66. Soon after, Col. Van Deman, the Chief of Military Intelligence, ordered that the "Suspects" memo be distributed to "intelligence operatives" across the country." *Id.* Van Deman followed up in February, warning military intelligence officers that the NCLB's literature had "'the obvious intent to disrupt American patriotic sentiment.'" *Id.* (quoting Van Deman).

333. Pfannestiel, *supra* note 328, at 20.

334. *Id.* at 26.

Considerable correspondence passed to and from Frederick Keppel, of the War Department, to Roger Baldwin and Norman Thomas of the Civil Liberties Bureau, indicating the efforts of that organization to influence the War Department with respect to its treatment of conscientious objectors. A letter from Baldwin to Manley Hudson contains the following: "Lippmann and Frankfurter are of course out of that particular job now, . . . and I have to depend entirely upon Keppel."<sup>335</sup>

Baldwin's letter, implying that he had come to depend upon Lippmann, Frankfurter, and Keppel in his antiwar activism, helped the Committee indicate just how far "socialism" had "spread" in "educated circles."

In February 1919, the *New York Times* dedicated a full page to allegations that the War Department had violated congressional law out of sympathy for conscientious objectors: "There are members of Congress who assert that friendly influence was at work in the War Department to shield the conscientious objector beyond what was his due . . ." <sup>336</sup> These congressional critics had released a report written by Captain Eugene C. Brisbain, who had been stationed at Camp Funston, Kansas, a site of systematic abuse of objectors.<sup>337</sup> Brisbain, the *Times* explained, blamed a crisis of discipline within the camps on the War Department's unlawful accommodation of conscientious objectors: "They all rest assured . . . that nothing can happen to them, as they have a great friend in Washington, Mr. Keppel, the Third Assistant Secretary of War, who will support them . . . in anything their conscience tells them to do . . ." <sup>338</sup>

The *Times* also quoted Congressman T.A. Chandler, who was outraged by the recent amnesty of 113 objectors upon the Board of Inquiry's recommendation.<sup>339</sup> Noting "the large percentage of German names" in the list of newly free objectors, the congressman cataloged the series of orders by which the War Department had imperiously demanded the segregation and lenient treatment of such suspicious malcontents.<sup>340</sup> These orders "were in clear conflict with the law" as established by Congress, and Chandler concluded that "[s]ome one at the War Department was in close sympathy with these men."<sup>341</sup>

In July, Congressman Walter Hughes Newton, a Minnesota Republican, issued his own denunciation of the administration of conscience on the floor of the House.<sup>342</sup> Newton's presentation showed—with extensive evidence—that Wilson and his War Department had

335. 1 J. Legis. Comm. Investigating Seditious Activities, Revolutionary Radicalism: Its History, Purpose and Tactics 1087 (1920).

336. Conscientious Objectors, *N.Y. Times*, Feb. 16, 1919, at 41.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. 58 Cong. Rec. 3063-66 (1919).



bucked the intentions of Congress, and had done so in a covert manner, all while cooperating with radical organizations, including the NCLB. Newton's archive was ample, including a lengthy public interview from Major Frank White—the man whom Baker had relieved of command for his abuse of objectors at Camp Funston.<sup>343</sup>

Congressman Newton began by asserting that during the war “numerous conscienceless objectors, consisting of pro-Germans, . . . political Socialists, and cowardly slackers, were being exempted from all military service . . . [and] were not being held to obey military law or submit to military discipline.”<sup>344</sup> Asking who could be responsible for such a policy, Newton immediately ruled out Congress. He noted that under the Selective Service Act neither the “individual with mere conscientious scruples against war” nor the “individual with conscientious religious scruples against war” were exempted.<sup>345</sup> Local draft boards, which had “conscientiously carried out the law and the regulations to the very letter,” were also blameless.<sup>346</sup> Instead, Newton's investigation had “disclosed” that responsibility for the coddling of traitors, cowards, and communists “rested entirely upon the War Department.”<sup>347</sup>

Citing Baker's October 10 and December 19, 1917 orders, which first equalized the treatment of sectarians and nonsectarians, Congressman Newton remarked, “Here was a deliberate change and enlargement of the exemption proviso in palpable violation of law and by the exercise of authority which the Secretary did not possess. What right had the Secretary of War to legislate? What power did he possess to amend an act of Congress?”<sup>348</sup> The congressman pointed to the concluding section of each of the fall 1917 orders—which commanded secrecy—as further evidence of the insidious political and legal character of the Administration's efforts.

Newton next turned his fire on President Wilson himself. Through his March 20, 1918 Executive Order, Wilson had “deliberately amended and enlarged” Congress's definition of legitimate objectors and explicitly recognized both “religious and other conscientious scruples” as grounds for alternative service.<sup>349</sup> Latching on to Frederick Keppel's own statement that the Administration had sought to accord “a measure of self-determination” to the conscientious objectors, Newton suggested that Wilson had imported his mixed-up foreign-policy notions into the

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343. See *id.* at 3065 (reading public interview of White describing conscientious objectors as German sympathizers and Russian Socialists).

344. *Id.* at 3063.

345. *Id.* at 3064.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 3066.

domestic arena.<sup>350</sup> In doing so, the President had fomented a pluralistic chaos, in which “anyone religious, atheistic, believer in a creed or disbeliever, organization or individual” could refuse to fight.<sup>351</sup>

Noting that such chaos was “not in furtherance of the legislative will but in direct conflict therewith,” Newton appealed to constitutional first principles: “Under the Constitution it is the duty of Congress to raise armies. In raising the Army to wage war against Germany they laid down the principle that in a country where there was equality of opportunity there was a corresponding duty upon our citizens to serve that country . . . .”<sup>352</sup> At the same time, Congress recognized “there were a few individuals belonging to certain religious organizations who had subscribed to certain creeds in good faith and had conscientious convictions against shooting their fellow men even in time of war,” and accordingly exempted these few “from service as combatants.”<sup>353</sup> In doing so, “Congress had determined what constituted a conscientious objector and by implication what did not.”<sup>354</sup> Despite this clear exercise of Congress’s constitutional power to raise armies, “the Secretary of War and the President assumed the authority to make addition of the terms ‘personal scruples’ and ‘conscientious scruples’ . . . .”<sup>355</sup>

It was just this constitutional question that Felix Frankfurter had confronted in his September 1917 memorandum. There, Frankfurter had implied that the administrative recognition of nonsectarian, individualist objectors was a matter not of *raising* the army, but of *administering* the army once it was raised. Once men had been drafted into the army, details of their discipline were not governed by Congress but by the Commander in Chief and his “decision as to the best use to be made of human material.”<sup>356</sup> Congressman Newton did not address this countervailing constitutional construction and did not mention Frankfurter’s memorandum. In keeping with the interpretation of military lawyers, the Congressman thought it incontestable that the congressional definition of legitimate objectors was the final say on the matter, legally binding upon future administrative decisionmaking. His colleagues apparently agreed: When Newton finished his story of the executive usurpation of the popular will, the House broke into applause.<sup>357</sup>

Even as legislators and military officers accused the War Department of protecting a radical minority from the judgment of the nation, War

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350. Id.

351. Id.

352. Id.

353. Id.

354. Id.

355. Id.

356. See Frankfurter Memorandum, *supra* note 9, at 2.

357. 58 Cong. Rec. 3065 .

Department administrators also confronted accusations of brutality from their Progressive friends outside of government. Previously pro-war Progressives disturbed by wartime press censorship and the excesses of the Red Scare began to protest the Wilson government's overly harsh treatment of some objectors.<sup>358</sup> One indication of this turnabout was a piece in the newly hostile *New Republic* criticizing the Administration's continuing imprisonment of absolutists.<sup>359</sup> Calling the trials of the absolutists "barbarisms" and the sentences handed down "atrocities," the piece's author, William Hard, opined that "it is unworthy of [Secretary of War Baker] to let this system so stand."<sup>360</sup>

The previous fall, the *Dial*, another Progressive organ, had published similar attacks on the War Department. John Dewey, who less than two years earlier had himself criticized the sentimentality of the conscientious objector in the pages of the *New Republic*,<sup>361</sup> now sat on the *Dial's* editorial board and was more concerned with the "country's reactionary political posture."<sup>362</sup> A November 30 editorial called for amnesty for all "political prisoners" still held by the government.<sup>363</sup> And on December 28, the magazine printed a lengthy communication from the antiwar minister John Nevin Sayre, detailing the treatment of absolutists—men who had refused any form of alternative service.<sup>364</sup> Sayre called the sentences being handed out to absolutists over a month and a half after the Armistice "a scandal."<sup>365</sup>

Such attacks on the War Department reflected a contest *within Progressive circles* over the function of civil libertarianism and its proper relationship to the administrative state. As we have seen, War Department administrators were themselves contributors to the emergent Progressive commitment to civil liberties. Indeed, Frankfurter wrote his September 18 memorandum calling for the recognition of the "individualistic" objector nearly two months before Dewey's public apology for his earlier critique of individual rights to dissent, and conscientious objection in particular.<sup>366</sup> Yet while Frankfurter and his War

358. See Rabban, *supra* note 2, at 3–4 (describing Progressive views on free speech before and after World War I).

359. William Hard, *Your Amish Mennonite*, *New Republic*, Feb. 1, 1919, at 11, 11–14.

360. *Id.* at 12.

361. John Dewey, *Conscience and Compulsion*, *New Republic*, July 14, 1917, at 297.

362. W. Anthony Gengarely, *Distinguished Dissenters and Opposition to the 1919–1920 Red Scare* 54 (1996).

363. Editorial, *Amnesty for Political Prisoners*, 65 *Dial* 497, 497 (1918).

364. John Nevin Sayre, Editorial, *Political Prisoners in America*, 65 *Dial* 623, 623–24 (1918).

365. *Id.* at 624.

366. As late as September 1, Dewey was "ridicul[ing] the 'ultra-socialists' and other radicals who protested the suppression of their antiwar views by invoking . . . 'the sanctity of individual rights and constitutional guaranties.'" Rabban, *supra* note 2, at 246–47 (quoting John Dewey, *Conscience and Compulsion* (1917), reprinted in 10 *The Collected Works of John Dewey: The Middle Works*, *supra* note 165, at 278–79). Two months later,

Department colleagues saw the expansion of executive authority as critical to this civil-libertarian agenda, some Progressives were coming to view that expansion as a threat that civil liberties law had to neutralize.

War Department administrators felt misunderstood by their sometime allies outside of government, and sought to defend their record against increasingly vociferous critiques. For instance, when Frederick Keppel read Sayre's piece in the *Dial*, he sent Felix Frankfurter a draft of a letter defending the War Department's policies, proposing to send it to the *Dial*, the *New Republic*, and other Progressive publications.<sup>367</sup> Although Keppel felt that "we ought not take it all sitting down," he explained to Frankfurter that Secretary of War Baker had "requested that no statement from the Department be made on this subject."<sup>368</sup>

In his proposed letter, Keppel espoused the view that individual liberty and strong administration were interdependent goals, the same view that had motivated the policies developed by himself, Baker, and Frankfurter early in the war. The "real issue" between Sayre and the Secretary of War, Keppel explained, did not lie in their differing respect for the individual conscience.<sup>369</sup> Both parties agreed that conscientious objectors should be treated "in a way that is creditable to the United States in the Twentieth Century."<sup>370</sup> Rather, the true difference concerned their differing evaluations of the ability of the administrative state itself to enforce civil-libertarian norms. Rather than resorting to ad hoc acts of mercy to dispose of the challenge of conscientious objection, Keppel explained, "[Baker] prefers the slower but more durable and more satisfactory process of guiding the development of an organic and permanent procedure through the fabric of the Army itself."<sup>371</sup> Keppel pointed specifically to the fastidious work of the Board of Inquiry as the proper path to justice: "[A] personal examination to ascertain the sincerity of a given man" conducted by a group of "distinguished men" would respect the goods of individual *and* administrative integrity.<sup>372</sup>

On January 18, 1919, Frankfurter responded to Keppel. Although he agreed with Baker's hesitancy to engage in a public debate, Frankfurter "share[d] the impulse" behind Keppel's proposed response.<sup>373</sup> Offering

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the *New Republic* published a mea culpa, "In Explanation of Our Lapse," in which Dewey repudiated his summer essays, calling them "strangely remote and pallid." *Id.* at 300-01 (quoting John Dewey, *In Explanation of our Lapse* (1917), reprinted in *10 The Collected Works of John Dewey: The Middle Works*, supra note 165, at 292).

367. Letter from Frederick P. Keppel, Third Assistant Sec'y, U.S. Dep't of War, to Felix Frankfurter 1 (Jan. 16, 1919) (on file with the *Columbia Law Review*).

368. *Id.*

369. *Id.* at 2.

370. *Id.*

371. *Id.*

372. *Id.* at 3.

373. Letter from Felix Frankfurter to Frederick P. Keppel, Third Assistant Sec'y, U.S. Dep't of War (Jan. 18, 1919) (on file with the *Columbia Law Review*).

a capstone to the crucial memorandum on the treatment of conscientious objectors that he had written eighteen months earlier, Frankfurter laid out what he thought should be done: "I think the Secretary, or someone for him, *should* speak and speak pretty soon on the Conscientious Objector."<sup>374</sup> It was necessary to detail the "limitations of the law under which [Baker] was acting," "the liberal scope of the regulations" that Baker instituted, and "the sensitive instrument of administration" that the Board of Inquiry represented.<sup>375</sup> These careful, clipped phrases indicated the tricky legal maneuver that Frankfurter had proposed eighteen months earlier when he argued that the individual conscience should be granted legitimacy, regardless of congressional policy.

### B. *Legacies*

Today, the World War I administration of conscientious objectors is generally cited as an example of the wartime repression that Progressive civil libertarians sought to resist, not as an institution paradigmatic of the Progressive turn toward civil liberties. And yet, the accommodating nature of the War Department's approach shaped the development of Progressive civil libertarianism throughout the postwar period.

Begin with the fact that the speech prosecutions that most publicly energized Progressive civil libertarians arose from protests against the draft. In March 1919, a few months after Frankfurter and Keppel's worried exchange about the legacy of the administration of conscientious objectors, the Supreme Court handed down its first decisions involving convictions of political radicals under the Espionage Act. All three cases featured radicals whose speech had targeted the operations of the Selective Service Act. In *Schenck v. United States*, the defendants sent anti-war circulars to men accepted for military service.<sup>376</sup> In *Frohwerk v. United States*, a newspaper editor had published an article that asked whether anyone would "pronounce a verdict of guilty" upon a young man who "stops reasoning" and participates in a draft riot.<sup>377</sup> The implied—and allegedly illegal—answer was "no."<sup>378</sup> And in *Debs v. United States*, Socialist leader Eugene Debs praised several persons who had been convicted of encouraging others to refuse induction.<sup>379</sup> Thus, while the March cases involved convictions under the Espionage Act, the substance of the offending speech would have been familiar to War Department administrators—criticism of the draft and the violence that it underwrote.

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374. *Id.*

375. *Id.*

376. 249 U.S. 47, 48–49 (1919).

377. 249 U.S. 204, 207–08 (1919).

378. *Id.*

379. 249 U.S. 211, 212–14 (1919).

Justice Oliver Wendell Holmes, Jr. wrote the unanimous opinions upholding the convictions in all three cases. David Rabban has suggested that Holmes chose *Schenck* as “the vehicle for discussing First Amendment issues”<sup>380</sup> because that case provided the clearest evidence that the prosecuted speech was intended to persuade “persons subject to the draft” to obstruct the draft’s operations.<sup>381</sup> Holmes found that there was “a clear and present danger” that antiwar circulars sent to draftees would “bring about the substantive evils” that Congress had “a right to prevent” through its espionage legislation, namely hindrance of the war effort.<sup>382</sup>

Holmes’s decisions were deeply disappointing to Progressive civil libertarians. Eight months later, however, he would vindicate their point of view in his famous dissent in *Abrams v. United States*, which Justice Brandeis joined.<sup>383</sup> The rapid “transformation” of Justice Holmes from realist critic to democratic defender of a robust First Amendment right to free speech has received increasing historical attention.<sup>384</sup> The available evidence suggests that during the summer and fall of 1919, Holmes was influenced by the same ideas that motivated the War Department’s accommodating approach to dissent and by Felix Frankfurter’s own post-war defenses of political radicals. Holmes’s dissent would also be prominently opposed by a major opponent of the accommodation of the individual conscience, who saw Holmes’s reasoning as threatening the legitimacy of conscription.

In June, Holmes read Harvard law professor Zechariah Chafee’s just-published article, “Freedom of Speech in War Time,”<sup>385</sup> which argued that the Justice’s “clear and present danger” language in *Schenck* should be understood as suggesting a novel, protective approach to free speech.<sup>386</sup> This reading was probably a willful misinterpretation, but it allowed the young law professor to put forward his own theory of First Amendment protection, one that rested on “the importance of political expression in a democracy.”<sup>387</sup> He argued that the First Amendment was

380. Rabban, *supra* note 2, at 280.

381. 249 U.S. at 51.

382. *Id.* at 52.

383. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

384. See Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America* 7 (2013) (“Holmes’s dissent in *Abrams* marked not just a personal transformation but the start of a national transformation as well.”); Rabban, *supra* note 2, at 342–80 (“Although the *Abrams* dissent marked the transformation of Holmes . . . into [a] defender[] of free speech, [he] developed [his] new approach to the First Amendment in opinions throughout the 1920s.”); Stone, *Perilous Times*, *supra* note 3, at 198–211 (discussing Holmes’s transformation).

385. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 *Harv. L. Rev.* 932 (1919).

386. Healy, *supra* note 384, at 154–55; Rabban, *supra* note 2, at 342–43.

387. Rabban, *supra* note 2, at 303.

“much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression.”<sup>388</sup> The right to free speech was not some simple negative right against government interference but rather “a declaration of national policy in favor of the public discussion of all public questions.”<sup>389</sup>

As we have seen, War Department administrators approached the right of individual conscience in a similar manner. These administrators gave effect to that right by creating new opportunities for deliberation and dissent within the structure of the draft. They introduced into the summary processes of military justice the informal dialogue of the Board of Inquiry, a dialogue that enabled idiosyncratic dissenters to articulate and defend the depth and coherence of their moral and political commitments.

The relationship between Chafee’s legal vision, the administration of conscientious objectors, and Justice Holmes’s First Amendment transformation is not merely conceptual—Chafee, Frankfurter, and Holmes were friends and collaborators.<sup>390</sup> When Frankfurter returned to Harvard Law School from the War Department, he joined Chafee in resisting ongoing political prosecutions. Together, the two Progressives wrote an amicus brief in *Colyer v. Skeffington*,<sup>391</sup> defending twenty aliens who had been swept up in a Justice Department raid.<sup>392</sup> Their brief provided a comprehensive indictment of the Department’s aggressive procedures, and the judge in *Colyer*—an old friend of Justice Brandeis—freed the aliens.<sup>393</sup>

Such legal work on behalf of political radicals raised eyebrows at Harvard and created problems for Frankfurter and Chafee on the faculty. But when Justice Holmes “heard that Frankfurter’s position at Harvard might be in jeopardy . . . he promptly wrote [Harvard] President Lowell praising Frankfurter for contributing to ‘the ferment which is more valuable than an endowment.’”<sup>394</sup> Frankfurter also asked Holmes to intervene on behalf of the more junior Chafee, which the Justice did.<sup>395</sup> The next month, Frankfurter’s good friend and renowned political theorist Harold Laski arranged a meeting between Chafee and Holmes at his home, presumably to sway Holmes to Chafee’s new First Amendment

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388. Chafee, *supra* note 385, at 934.

389. *Id.*

390. Healy, *supra* note 384, at 240–43 (noting collaboration between Chafee, Frankfurter, and Holmes in Palmer Raids case).

391. 265 F. 17 (D. Mass. 1920), *rev’d sub nom.* *Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922).

392. Urofsky, *supra* note 32, at 21.

393. *Id.*

394. Rabban, *supra* note 2, at 352 (quoting Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, U.S. Supreme Court, to A. Lawrence Lowell (June 2, 1919), *in* 1 Holmes-Laski Letters 211 n.2 (M. Howe ed., 1953)).

395. Urofsky, *supra* note 32, at 22.

theory.<sup>396</sup> Laski himself had recently dedicated his new book on the relationship between the individual citizen and the administrative state, *Authority in the Modern State*, to Holmes and Frankfurter.<sup>397</sup>

The following November, Holmes wrote his famous dissent in *Abrams*. In it, the Justice proclaimed that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”<sup>398</sup> As G. Edward White has written, the *Abrams* dissent “served to supply First Amendment jurisprudence with its first modern set of theoretical apologetics, which associated protection for speech with a search for truth in a democratic society.”<sup>399</sup> But these “theoretical apologetics” did not emerge ex nihilo. The august Justice was embedded in a social network of Progressive legal advocates, some of whom had been struggling to synthesize wartime administration and democratic deliberation and dissent for the past two years.

If Holmes’s words were spurred in part by the “vigilance” of his friend Frankfurter, they were quickly condemned by another veteran of the conscience debates, Dean John Henry Wigmore, who issued the legal community’s “most forceful criticism” of the *Abrams* dissent.<sup>400</sup> During the war Wigmore had served in the Provost Marshal General’s Office. There, he had rejected Baldwin and Frankfurter’s early overtures of cooperation on the conscientious-objection issue, penning a sharp memorandum that prescribed court-martial, solitary confinement, and “physically exhausting” work for the nonsectarian objector.<sup>401</sup> Three years later, Wigmore took to the pages of the *Illinois Law Review* to denounce Holmes and Brandeis’s “disquisition on Truth” in their *Abrams* dissent.<sup>402</sup> Although the piece was prompted by a free-speech decision, Wigmore’s critique replayed the intragovernmental debate over the rights of individual conscience.

Wigmore used his understanding of the relationship between individual rights and conscription to analyze the proper relationship between individual rights and the Espionage Act: “Where a nation has definitely committed itself to a foreign war, all principles of normal internal order may be suspended. As property may be taken and corporal

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396. Healy, *supra* note 384, at 158–59.

397. Stone, *Perilous Times*, *supra* note 3, at 203.

398. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

399. White, *Emergence of Free Speech*, *supra* note 3, at 313.

400. Stone, *Perilous Times*, *supra* note 3, at 207.

401. See *supra* notes 213–221 and accompanying text (describing Wigmore’s recommendations on appropriate punishment for nonsectarian objectors).

402. John Henry Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 *Ill. L. Rev.* 539, 551 (1920) [hereinafter Wigmore, *Abrams*].



service . . . conscripted, so liberty of speech may be limited or suppressed, so far as . . . needful for the successful conduct of the war."<sup>403</sup>

A society at war, Wigmore argued, needed no more free speech than existed in the military itself: Although freedom of speech "is limited for all military men . . . yet enough is left of 'free trade in ideas' to secure effective responsible leaders" and "intelligent action based on ample deliberation."<sup>404</sup> The meaning of "ample deliberation" for Wigmore was quite thin—the amount of discussion necessary to effectively execute predetermined goals.<sup>405</sup> Holmes and Brandeis's dissent, on the other hand, risked exposing the nation to the democratic vicissitudes of a "free trade in ideas" and intellectual and political "experiment."<sup>406</sup> Such an expansive conception of wartime deliberation, Wigmore argued, endangered the "moral right of the majority" to survive.<sup>407</sup> Indeed, if Holmes and Brandeis's approach had been supported by a majority of the Court, such a decision "would have ended by our letting soldiers die helpless in France."<sup>408</sup>

It is unsurprising that Wigmore's criticism of the *Abrams* dissent sought to apply the legal structure of conscription to the realm of speech; such an analogy was commonplace at the time.<sup>409</sup> But what is noteworthy about Wigmore's argument is that it sought to apply a model of conscription that had already been rejected by War Department administrators. For Wigmore, war meant conscription and conscription meant that "all rights of the individual, and all internal civic interests, become subordinated to the national right in the struggle for national life."<sup>410</sup> Unlike Wigmore, Frankfurter, Stone, and other Progressive officials within the executive branch did not believe that once the majority decided upon war, all further debate about policy was foreclosed. Instead, these administrators crafted communicative processes that allowed minority voices to continue to participate in government deci-

403. *Id.* at 552.

404. *Id.* at 553.

405. As Wigmore later insisted, "[W]hen a nation has once decided upon war, it must stop any further hesitation, or it will fail in the very purpose of the decision." *Id.* at 554.

406. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

407. Wigmore, *Abrams*, *supra* note 402, at 554.

408. *Id.* at 551.

409. See, e.g., John Dewey, *Conscription of Thought*, *New Republic*, Sept. 1, 1917, at 128–129 ("What I am concerned with is . . . the historically demonstrated inefficacy of the conscription of mind as a means of promoting social solidarity, and the gratuitous stupidity of measures that defeat their own ends."); Zechariah Chafee Jr., *The Conscription of Public Opinion*, in *The Next War: Three Addresses Delivered at a Symposium at Harvard University: November 18, 1924*, Norris F. Hall, Zechariah Chafee, Jr. & Manley O. Hudson 39, 53–54 (1925) ("[S]ome men will refuse to devote their speech and writing to the cause of victory, and for these force will be necessary—the conscription of thought.")

410. Wigmore, *Abrams*, *supra* note 402, at 553.

sionmaking, even in that most severe of legal orders, the draft. Just as Wigmore's criticism of the *Abrams* dissent had already been undermined by wartime executive practice, wartime executive practice had already pointed toward the reasoning of the *Abrams* dissent.

Even as Wigmore dissented from their administrative civil-libertarian point of view, veterans of the World War I War Department pushed back against antiradicalism in other ways. Although Wigmore's vision had lost out within the War Department, it had flourished at the Justice Department under Attorney General Palmer. After the war, Frankfurter and Stone turned their attention to Palmer's pursuit of political radicals.

Two months after Wigmore assailed the *Abrams* dissent, Frankfurter, Chafee, Roscoe Pound, and nine other leading jurists signed their names to the *Report upon the Illegal Practices of the United States Department of Justice*, attacking the legitimacy of Palmer's antiradical campaign.<sup>411</sup> Steering clear of the more controversial First Amendment issue raised by the campaign, the Report documented overzealous policing techniques that violated Fourth, Fifth, and Eighth Amendment rights.<sup>412</sup> Strikingly, however, the focus of the report was on political reform, not judicial correction of executive overreach. "Since these illegal acts [of the Justice Department] have been committed by the highest legal powers in the United States," the Report's authors reasoned, "there is no final appeal from them except to the conscience and condemnation of the American people."<sup>413</sup> Echoing the concerns of War Department administrators in confronting the treatment of conscientious objectors, the Report's central complaint against administrative misrule was that it undermined the political stability of the national government:

American institutions have not in fact been protected by the Attorney General's ruthless suppression. On the contrary those institutions have been seriously undermined, and revolutionary unrest has been vastly intensified. No organizations of radicals acting through propaganda over the last six months could have created as much revolutionary sentiment in America as has been created by the acts of the Department of Justice itself.<sup>414</sup>

And while emphasizing the political character and consequences of the Justice Department's failings, the Report suggested that a political solution could take a specifically administrative, as opposed to legislative,

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411. Nat'l Popular Gov't League, *Report upon the Illegal Practices of the United States Department of Justice* (1920) [hereinafter Nat'l Popular Gov't League, Report]. Among other case studies, the report contained a fourteen-page description of the *Colyer* case in which Chafee and Frankfurter had intervened. *Id.* at 42–56. For an overview of Frankfurter's anti-Red Scare activities, see Parrish, *supra* note 32, at 72–75, 81–128.

412. See Nat'l Popular Gov't League, *Report*, *supra* note 411, at 4–6 (documenting cruel and unusual punishments, arrests without warrant, unreasonable searches and seizures, provocative agents, compelling persons to be witnesses against themselves, and propaganda by Department of Justice).

413. *Id.* at 7.

414. *Id.*

form. It singled out Assistant Secretary of Labor Louis Post for praise, noting that his "courageous reestablishment of American Constitutional Law in deportation proceedings" had led to the cancellation of 1,547 deportations sought by Attorney General Palmer.<sup>415</sup> Just as the War Department's implementation of a system for reviewing conscientious-objector claims had sparked investigations in the U.S. Congress and the New York State Senate, Post's insistence on "full hearings and consideration of the evidence" in deportation proceedings elicited "attacks" on him in Congress.<sup>416</sup>

Eventually, reform came to Congress as well, and Harlan Fiske Stone took a lead role in urging legislative investigations of the Justice Department.<sup>417</sup> Having returned to Columbia Law School after his work on the Board of Inquiry was complete, Stone resisted the firing of Columbia faculty for their antiwar views and vocally opposed the New York State Assembly's refusal to seat five elected Socialist representatives.<sup>418</sup> And on February 1, 1921, a letter from Stone was read into the record at the Senate Judiciary Committee's first hearing on "Charges of Illegal Practices in the Department of Justice."<sup>419</sup> In it, Stone appeared to reflect on his own recent experience on the Board of Inquiry reviewing summary courts-martial. He insisted that "[i]t is inevitable that any system which confers upon administrative officers power to restrain the liberty of individuals, without safeguards substantially like those which exist in criminal cases and without adequate authority for judicial review of [their] action . . . will result in . . . intolerable injustice and cruelty to individuals."<sup>420</sup> Of course, it was precisely over the question of Stone and Mack's quasi-judicial review of court-martial cases that civilian and military lawyers within the War Department had clashed.

In the wake of their efforts to reform the Red Scare Justice Department, Frankfurter and Stone continued to engage in the mix of civil-libertarian advocacy and administrative state building that had defined their brief tenures at the World War I War Department. In 1924, Calvin Coolidge chose Stone to head a Justice Department still in need of deep reform in the wake of the Red Scare and the Harding Administration's corruption.<sup>421</sup> As Felix Frankfurter wrote to Stone on hearing of his appointment, the new Attorney General was to correct the

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415. *Id.* at 8.

416. *Id.*; see also Post Hearings, *supra* note 5, at 265-69 (describing Post's behavior in deportation proceedings); Irons, *supra* note 5, at 1218-21 (recounting conflict between Justice Department and Labor Department).

417. Mason, Pillar, *supra* note 269, at 113.

418. *Id.* at 112.

419. Charges of Illegal Practices of the Department of Justice: Hearings Before a Subcomm. of the S. Comm. on the Judiciary, 66th Cong. 279-80 (1921).

420. *Id.*

421. Mason, Pillar, *supra* note 269, at 141-50.

Department's "betrayal of law."<sup>422</sup> One of Stone's earliest executive decisions in this vein was to end the "surveillance of political radicals" that the Bureau of Investigation had begun during the war.<sup>423</sup> Stone explained that "a secret police may become a menace to free government and free institutions," and declared the "political or other opinions of individuals" off limits to investigation.<sup>424</sup> Ironically, Stone was drawing on his experience as someone who *had* investigated the "political or other opinions of individuals" during the war, but in order to end rather than initiate prosecutions.

As Stone took control of the Justice Department, Felix Frankfurter was becoming one of the premier civil-libertarian advocates in the country and an active member of the ACLU.<sup>425</sup> Throughout Stone's tenure as Attorney General, Frankfurter corresponded with him, conveying the ACLU's views on Department of Justice investigations. In February 1925, for instance, Frankfurter reported to Stone that the head of the ACLU, Roger Baldwin, had spoken "in the warmest terms of appreciation not only of your own work, but also of Mr. [J. Edgar] Hoover's conduct of the Bureau of investigation."<sup>426</sup> Two years later, Frankfurter would achieve national prominence as a passionate and controversial critic of the murder convictions of anarchists Sacco and Vanzetti.<sup>427</sup>

The Harvard Law School professor also took special interest in the question of conscientious objection when it arose again in the context of immigration and naturalization law during the late 1920s and early 1930s.<sup>428</sup> Motivated by continuing fears of anarchist and socialist subversion, the Bureau of Immigration and Naturalization refused citizenship to a number of applicants who announced that they would seek conscientious-objector status in the event of a future draft.<sup>429</sup> Frankfurter participated in both a legal challenge to the Bureau's requirement that successful citizenship applicants swear to bear arms<sup>430</sup> and legislative efforts to

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422. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Harlan Fiske Stone (Apr. 3, 1924) (on file with the *Columbia Law Review*).

423. Stone, *Perilous Times*, supra note 3, at 230.

424. *Id.* at 230–31 (quoting Harlan Fiske Stone).

425. See Hirsch, supra note 32, at 65–98 (describing Frankfurter's activities in 1920s); Parrish, supra note 32, at 118–28 (same); Urofsky, supra note 32, at 20–44 (same).

426. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Harlan Fiske Stone, Att'y Gen., U.S. Dep't of Justice (Feb. 19, 1925) (on file with the *Columbia Law Review*).

427. See Parrish, supra note 32, at 176–96 (describing Frankfurter's role in Sacco and Vanzetti case); Urofsky, supra note 32, at 22–26 (same).

428. See Jeremy K. Kessler, *Calculations of Liberalism*, supra note 25, at 15–34 (unpublished manuscript) (on file with the *Columbia Law Review*) (discussing Frankfurter's involvement in *United States v. Macintosh* and related legislation).

429. See Flowers, supra note 19, at 17–19, 87–227 (describing Red Scare background to these challenges and their outcomes).

430. See Letter from Charles E. Clark, Dean, Yale Law Sch., to Allen Wardwell (May 1, 1930) (on file with the *Columbia Law Review*) (conveying Frankfurter's views on legal

overturn that requirement.<sup>431</sup> As he complained to one congressman, "the law as it stands will exclude those best qualified by character and conscience for incorporation into American citizenship."<sup>432</sup> As to the question of whether only religious pacifists should be naturalized, Frankfurter answered in the negative, explaining that to the extent that the U.S. government had permitted "*conscientious* objectors—not necessarily religious—to decline to fight [in previous conflicts], I believe a case can be made for their admission to citizenship."<sup>433</sup>

Frankfurter and Stone's continuing commitment to civil-libertarian administration paralleled a more general interest in the modernization of the administrative state. Both played important roles in the Commonwealth Fund's Committee on Administrative Law and Practice, formed in 1921 to study and shape the landscape of administrative governance in the wake of the war.<sup>434</sup> As Daniel Ernst has shown, it was Stone who recommended administration as the best subject for the Fund's investment in legal research, and his "ideas prominently appeared in the proposal" for the Committee.<sup>435</sup> Stone also served on the Committee's board, alongside Roscoe Pound, Benjamin Cardozo, and other legal elites. Despite the misgivings that some board members had about his work on behalf of radicals during and after the war, Felix Frankfurter was also recruited to participate in the Committee.<sup>436</sup> There, he joined the leading administrative law scholar of the last generation, Ernst Freund, in guiding the Committee's work.

For over a decade, Frankfurter and Freund struggled to entrench their accounts of the social significance and legal structure of administrative governance.<sup>437</sup> Frankfurter's position was informed by his work in past presidential administrations and presaged by his World War I recommendations in the conscientious-objection debate. There, he had argued that administrative discretion exercised at the national level was the proper way to resolve potential clashes between individual rights and

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situation of pacifist naturalization applicants); Letter from Charles E. Clark, Dean, Yale Law Sch., to W. Charles Poletti (May 5, 1930) (on file with the *Columbia Law Review*) (discussing Frankfurter's views); Letter from W. Charles Poletti to Felix Frankfurter, Professor, Harvard Law Sch. (May 6, 1930) (on file with the *Columbia Law Review*) (responding to Frankfurter's suggestions).

431. See, e.g., Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Anthony Griffin, U.S. Rep. (Jan. 10, 1932) (on file with the *Columbia Law Review*) (giving reasons for supporting change in law); Letter from W. Charles Poletti to Forrest Bailey, Am. Civil Liberties Union (Oct. 13, 1931) (noting Frankfurter agreed with proposed amendment to proposed legislation).

432. Letter from Felix Frankfurter to Anthony Griffin, *supra* note 431.

433. Letter from Charles E. Clark to Allen Wardwell, *supra* note 430 (quoting Felix Frankfurter).

434. Ernst, *American Rechtsstaat*, *supra* note 1, at 172.

435. *Id.* at 174.

436. *Id.*

437. *Id.* at 172.

the public interest. Freund, on the other hand, was less certain of the preeminence of national administration, committed to the protection of private interests from public oppression, and suspicious of administrative discretion.<sup>438</sup>

While Freund wished to study administration in a range of local, state, and federal contexts, Frankfurter argued that the most useful program would focus on national administration.<sup>439</sup> More fundamentally, Frankfurter objected to Freund's method of evaluation, which asked "whether private interests are adequately safeguarded" by a given administrative scheme.<sup>440</sup> For Frankfurter, the task of administration was the expert balancing of private and public interests, not the sacrifice of the former to the latter: "[W]e can't consider whether private interests are safeguarded without equally considering the public interests that are asserted against them."<sup>441</sup> Stone seemingly concurred with Frankfurter's views and felt that Freund's approach was impractical.<sup>442</sup>

Freund and Frankfurter's differing accounts of the social purpose of administrative law drove different assessments of the legal status of administrative discretion:

For Freund, administrative discretion was an evil, tolerable only until experience under open-ended standards suggested the content of a certain rule. Frankfurter's outlook was quite different . . . . He thought that the governance of modern societies required more subtle adjustments of social interests than any rule could anticipate. If Freund thought the first job of administrative law was the constraint of administrative discretion, Frankfurter thought it was the freeing of administrators from the oversight of common-law courts. From his vantage point, Freund's [model] left too little to the professional judgment of administrators.<sup>443</sup>

By 1927, Frankfurter's view was winning out, as the Commonwealth Fund asked him to prepare a "readable, synthetic account" of the Committee's findings.<sup>444</sup> While Frankfurter declined to take on that formidable task, he did publish a short law-review article on the same subject, *The Task of Administrative Law*.<sup>445</sup> In it, Frankfurter argued that the ultimate task of administrative law was to "fashion[] . . . instruments and processes at once adequate for social needs and the protection of individual

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438. Id. at 173.

439. Id. at 179–80.

440. Id. at 180.

441. Id. (emphasis omitted) (quoting Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Ernst Freund (Dec. 10, 1921)).

442. Id.

443. Id. at 173.

444. Id. at 184–85.

445. Felix Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614 (1927) [hereinafter Frankfurter, *Task of Administrative Law*].

freedom.”<sup>446</sup> This synthetic work required a great deal of administrative discretion, which itself posed a risk of abuse, even constitutional abuse.<sup>447</sup> Indeed, it was precisely “[b]ecause of the danger of arbitrary conduct in the administrative application of legal standards,” Frankfurter explained, that “our administrative law is inextricably bound up with constitutional law.”<sup>448</sup>

The constitutional gravity of administrative law did not, however, merit the imposition of legalistic constraints by courts of law: “[A]fter all, the Constitution is a *Constitution*, and not merely a detailed code of prophetic restrictions . . . .”<sup>449</sup> Just as his 1919 *Report upon the Illegal Practices of the United States Department of Justice* had rested hope of reform on the “conscience and condemnation of the American people,”<sup>450</sup> Frankfurter in 1927 argued that the “[u]ltimate protection” against constitutional abuses by administrators “is to be found in the people themselves, their zeal for liberty, their respect for one another and for the common good.”<sup>451</sup> In addition to this external, political check, he also recommended internal, administrative safeguards: “a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure . . . easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar.”<sup>452</sup>

Over the course of the next decade, Frankfurter continued to promote a theory of administration that celebrated discretion while rooting its legitimacy in political oversight and professional—specifically lawyerly—expertise.<sup>453</sup> As Daniel Ernst notes, this vision was “congenial to Frankfurter’s protégés who worked in New Deal and wartime Washington and created the modern regulatory law practice during the Truman Administration.”<sup>454</sup> Yet Frankfurter’s New Deal apologetics had a much longer pedigree, dating back to Frankfurter’s own administrative service during World War I.

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446. *Id.* at 617.

447. See *id.* at 618 (describing how “legislative regulation of economic and social activities . . . turned to administrative instruments . . . [and] greatly widened the field of discretion and thus opened the door to its potential abuse, arbitrariness”).

448. *Id.*

449. *Id.*

450. Nat’l Popular Gov’t League, Report, *supra* note 411, at 7–8.

451. Frankfurter, Task of Administrative Law, *supra* note 445, at 618.

452. *Id.* The 1919 Report had also noted the importance of constitutionally self-aware lawyer-administrators, such as Louis Post, in avoiding administrative abuse. Nat’l Popular Gov’t League, Report, *supra* note 411, at 7.

453. Felix Frankfurter, *The Public and Its Government* 124–67 (1930) (extolling benefits of recruiting talented lawyers for public service); see also *Cases and Other Materials on Administrative Law* vii–viii, 1–17 (Felix Frankfurter & J. Forrester Davison eds., 1932) (citing various contemporary legal authorities on importance of lawyers, judges and administrators to evolution of “the State”).

454. Ernst, *American Rechtsstaat*, *supra* note 1, at 188.

Then, Frankfurter's response to the problem of conscientious objection had been to recommend the exercise of administrative discretion by the "right kind of lawyers"—specifically those with civil-libertarian leanings.<sup>455</sup> These lawyer-administrators' "sympathetic and sophisticated" legal temperament would, in turn, be underwritten by the Commander in Chief's own authority.<sup>456</sup> Throughout the 1930s, Frankfurter's "protégés" and others sympathetic to his point of view would similarly seek to imbue new administrative agencies with a specifically civil-libertarian form of discretion, most notably at the National Labor Relations Board and the Justice Department's Civil Liberties Unit.<sup>457</sup>

With the coming of the next World War, Frankfurter and Stone would themselves try to impart their vision of civil-libertarian administration to a new generation of political officials. On January 19, 1940, the day after Robert Jackson became Attorney General, Justice Frankfurter wrote to him about the wartime atmosphere then descending on the nation.<sup>458</sup> Reminding Jackson of how badly the Department had performed in the aftermath of the last war, Frankfurter enclosed a copy of the *Report upon the Illegal Practices of the United States Department of Justice* that he had coauthored in 1919.<sup>459</sup> And when the prospect of a new draft law surfaced that spring, both Stone and Frankfurter weighed in.

On June 22, two days after a peacetime conscription bill was introduced in Congress, Justice Harlan Fiske Stone wrote to the bill's author, Grenville Clark, pushing for a broader accommodation of conscientious objectors:

The experience of the last war showed that conscientious objection to military service was not confined to religious objections or combatant service. Some of the most determined objectors—undoubtedly conscientious—were non-religious and

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455. Frankfurter Memorandum, *supra* note 9, at 1.

456. *Id.* at 2.

457. See Auerbach, *supra* note 4, at 51–73 (describing ideology of National Labor Relations Board); Forbath, *Law and Shaping*, *supra* note 4, at 165 (describing how “[a] group of . . . attorneys, several of them students of Frankfurter . . . created . . . the National Labor Relations Act . . . . They envisioned [NLRB] as . . . a more active guardian of labor’s liberties than the courts could be . . . .”); Goluboff, *supra* note 25, at 111–24 (describing formation and leadership of Civil Liberties Unit, later Civil Rights Section); Weinrib, *Civil Liberties Enforcement*, *supra* note 25, at 4–21, 26–34 (discussing civil-libertarian milieu from which National Labor Relations Board and Civil Liberties Unit emerged).

458. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Robert Jackson, Att’y Gen., U.S. Dep’t of Justice 1 (Jan. 19, 1940) (on file with the *Columbia Law Review*).

459. *Id.* Frankfurter wrote that the report “might, without using too grandiose language, be called a historic document.” *Id.* Jackson responded with thanks and a chuckle, “If your historic document does not rank with Magna Charta, it is at least a good supplement to it, and I am glad to accept it.” Letter from Robert Jackson, Att’y Gen., U.S. Dep’t of Justice, to Felix Frankfurter, Assoc. Justice, U.S. Supreme Court 1 (Jan. 23, 1940) (on file with the *Columbia Law Review*).



logically enough they refused to aid in the war effort in any way . . . . This was true of some of the religious objectors also.<sup>460</sup>

After the bill's passage, both Stone and Frankfurter lobbied Attorney General Jackson to develop an accommodating approach, as the new law had assigned the Justice Department responsibility for hearing appeals from men who had been refused conscientious-objector status by their local draft boards.<sup>461</sup>

Even as Justices Frankfurter and Stone continued to push for civil-libertarian administration within the wartime state, they confronted the limits of administrative civil libertarianism at the Supreme Court. Between Frankfurter's arrival there in 1939 and Stone's death in 1946, the two veterans of the World War I War Department engaged in an extended, and now famous, debate over the extent to which the First Amendment deserved special judicial protection against legislative and administrative encroachment.<sup>462</sup> By the late 1930s, a combination of anti-

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460. Letter from Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, to Grenville Clark 1 (June 22, 1940) (on file with the *Columbia Law Review*).

461. In September, Frankfurter's good friend Francis Biddle, then serving as Solicitor General, passed along to the Attorney General Stone's 1919 article, *The Conscientious Objector*, detailing his World War I experience, as well as the War Department's 1919 *Statement on Conscientious Objectors*, prepared under Third Assistant Secretary of War Frederick Keppel's supervision. Memorandum from Francis Biddle, Solicitor Gen., U.S. Dep't of Justice, to Robert Jackson, Att'y Gen., U.S. Dep't of Justice 1 (Sept. 25, 1940) (on file with the *Columbia Law Review*). In October, Stone relayed a message to Attorney General Jackson "stress[ing] the need for having the proper type of man as Hearing Officer." Memorandum from Matthew F. McGuire, Assistant to the Att'y Gen., U.S. Dep't of Justice, to Robert Jackson, Att'y Gen., U.S. Dep't of Justice (Oct. 10, 1940) (on file with the *Columbia Law Review*). And in December, Frankfurter wrote Jackson about early draft resistance in Boston, where a group of university students were refusing to register. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Att'y Gen., U.S. Dep't of Justice 1 (Dec. 5, 1940) (on file with the *Columbia Law Review*). He also forwarded a letter to the editor written by his Harvard colleague Samuel Eliot Morison, calling for an end to the House Un-American Activities Committee and the relocation of all investigation of "subversive activities" to the Department of Justice, where "unnecessary snooping and spying and smearing" might be avoided. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Robert H. Jackson, Att'y Gen., U.S. Dep't of Justice (Dec. 9, 1940) (on file with the *Columbia Law Review*) (enclosing Morison letter).

462. For the outlines of this debate, see Gerald T. Dunne, *Hugo Black and the Judicial Revolution* 209–23 (1977) (noting development of allegiances in debate over First Amendment rights); Sidney Fine, *Frank Murphy: The Washington Years* 372–88 (1984) (discussing preferred position debate); Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* 27–47 (2012) (discussing debate about scope of First Amendment in relation to Jehovah's Witnesses); Mason, *Pillar*, supra note 269, at 511–35 (describing preferred position debate); Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* 230–59 (2002) (discussing debate about scope of First Amendment in relation to Jehovah's Witnesses); Urofsky, supra note 32, at 50–63 (describing Frankfurter's role in preferred position debate); White, *Emergence of Free Speech*, supra note 3, at 128–63 (discussing relationship between New Deal and expanded constitutional protection for free speech); Gillman, supra note 24, at 624 (discussing origins of judicial identification of "preferred freedoms"); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products*

totalitarian politics and anxiety about the growth of New Deal administration had given rise to a court-centric alternative to administrative civil libertarianism.<sup>463</sup> Championed by the American Bar Association and supported by a growing faction within the ACLU, this negative account of civil libertarianism saw state power and civil liberties as unavoidable antagonists.<sup>464</sup> Stone came to sympathize with this vision, arguing that courts had a special obligation to police democratic encroachments on First Amendment freedoms—freedoms that occupied a “preferred position” in the constitutional order.<sup>465</sup> Frankfurter, in keeping with the earlier account of the civil-libertarian state, insisted that democratically run political institutions should be the “primary resolvers” of “the clash of rights,” even when that clash involved “ultimate civil liberties.”<sup>466</sup> “For resolving such clash we have no calculus,”<sup>467</sup> he wrote to Stone, days before the latter’s dissent in *Minersville School District v. Gobitis*.<sup>468</sup> After a change in Court personnel in the early 1940s, Stone’s approach began to

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Footnote, 46 S. Tex. L. Rev. 163, 202–09 (2004) (discussing preferred-position debate); Peter Linzer, *The Carolene Products* Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 Const. Comment. 277, 277–78 (1995) (discussing competing interpretations of footnote four and its reception); Louis Lusky, Footnote Redux: A *Carolene Products* Reminiscence, 82 Colum. L. Rev. 1093, 1093 (1982) (attempting to clarify misconceptions about drafting and reception of footnote four); G. Edward White, Free Speech and the Bifurcated Review Project: The “Preferred Position” Cases, in *Constitutionalism and American Culture: Writing the New Constitutional History* 99–122 (Sandra F. VanBurkleo, Kermit L. Hall & Robert J. Kaczorowski eds., 2002) (describing evolution of preferred-position cases).

463. See *supra* note 24 and accompanying text (describing rise of antitotalitarian civil libertarianism).

464. Weinrib, *Liberal Compromise*, *supra* note 4, at 330–517 (describing emergence of antistatist vision of civil liberties law at ACLU and American Bar Association); Kessler, *Calculations of Liberalism*, *supra* note 25, at 35–59 (describing John W. Davis’ role in development of antistatist vision of civil liberties law); Kessler, *Civil Libertarian Conditions*, *supra* note 25, at 6–17 (describing Grenville Clark’s role in development of antistatist vision of civil liberties law).

465. *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting).

466. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court 1–2 (May 27, 1940) (on file with the *Columbia Law Review*).

467. *Id.* at 2.

468. 310 U.S. 586, 601–07 (1940) (Stone, J., dissenting). For further background on the Justices’ thinking about the relationship between administration and civil liberties in the flag salute cases, see generally Vincent A. Blasi & Seana V. Shiffirin, *The Story of West Virginia Board of Education v. Barnette*. The Pledge of Allegiance and the Freedom of Thought, in *Constitutional Law Stories* 416–18, 424–31 (Michael C. Dorf ed., 2d ed. 2009); Richard Danzig, *How Questions Begot Answers in Felix Frankfurter’s First Flag Salute Opinion*, 1977 Sup. Ct. Rev. 257, 262 (1977); Danzig, *Justice Frankfurter’s Opinions*, *supra* note 206; Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 Wash. U. L. Rev. 363, 380 (2008).

win out, and by the time Frankfurter left the Court, judicial supremacy and First Amendment enforcement had become tightly linked.<sup>469</sup>

### CONCLUSION

Over the past century, the growth of the bureaucracy has made administrative decisionmaking a main driver of constitutional development.<sup>470</sup> The development of civil liberties law is no exception. To a significant degree, modern First Amendment doctrine emerged from a contest between administrative and judicial authority over civil-libertarian rights enforcement.<sup>471</sup> This Article takes us back to the beginning of that contest, when civil-libertarian innovation was still very much dependent on agency-driven constitutional construction. The innovators at the heart of the World War I story—Felix Frankfurter and Harlan Fiske Stone—would go on to play key roles in the later struggle, as Justice Frankfurter defended administrative civil libertarianism while Justice Stone sought new authority for judicial actors to promote civil-libertarian norms and to constrain the civil-libertarian constructions of nonjudicial actors. Frankfurter largely lost that battle, but civil liberties law today remains squarely in the ambit of administrative constitutionalism. For instance, some contemporary commentators worry that aggressive First Amendment enforcement is significantly redrawing the boundaries of

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469. See sources cited *supra* note 462; see also Kessler, *Civil Libertarian Conditions*, *supra* note 25, at 2–6, 33–38 (describing Court’s abandonment of Frankfurter’s approach).

470. See Metzger, *Administrative Constitutionalism*, *supra* note 26, at 1901 (“[Administrative constitutionalism] represents a main mechanism by which constitutional meaning is elaborated and implemented today. Given the dominance of the modern administrative state, a full picture of contemporary constitutionalism in the United States must include administrative constitutionalism . . .”).

471. As legal scholars have begun to document, mid-twentieth-century courts did not simply discover robust civil-libertarian rights in constitutional text—more often than not, they were modifying or adopting civil-libertarian norms embedded in administrative practice. See Desai, *Transformation*, *supra* note 4, at 717–27 (describing judicial constitutionalization of civil-libertarian norms immanent in postal administration); Desai, *Wiretapping*, *supra* note 4, at 562–69 (describing judicial constitutionalization of privacy norms immanent in postal administration); Schiller, *Free Speech and Expertise*, *supra* note 4, at 57–74 (describing judicial intervention in administrative enforcement of civil-libertarian rights); Weinrib, *Public Interest to Private Rights*, *supra* note 4, at 212–17 (describing increasingly court-centered nature of civil-libertarian advocacy); Kessler, *Civil Libertarian Conditions*, *supra* note 25, at 2–6 (describing judicial rejection of Selective Service enforcement of civil-libertarian rights); see also Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 *B.U. L. Rev.* 2029, 2049–50 (2011) (describing emergence of judicial review of administrative procedure in licensing context); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 100 *Colum. L. Rev.* 479, 530–31 (2010) (discussing judicial review of administrative procedure in licensing context); Henry P. Monaghan, *First Amendment “Due Process,”* 83 *Harv. L. Rev.* 518, 522–23 (1970) (noting with approval trend toward judicial intervention in administrative evaluation of speakers’ rights).

the administrative state.<sup>472</sup> If these commentators are right, we are witnessing only the next stage in the intertwined constitutional development of civil-libertarian rights and administrative governance. This development began a long time ago, and it took a critical though forgotten turn within the World War I War Department.

There, Progressive administrators exercised controversial forms of executive authority in order to create a space within the administrative state for the individual dissenter to express his deepest commitments—whether religious, ethical, or political in nature. After this wartime work, these same administrators took lead roles in the Progressive critique of the persecution of political radicals, a critique that, in its earliest stages, influenced Justice Holmes in composing his groundbreaking *Abrams* dissent. The foremost contemporary critic of this innovation in First Amendment jurisprudence—John Henry Wigmore—was an early opponent of the Progressive administration of conscientious objectors, and read the *Abrams* dissent as a challenge not just to the government's right to censor speech but its right to raise an army and win a war. Despite its poor civil liberties record elsewhere on the home front, the Wilson Administration had rejected Wigmore's vision of conscription, claiming executive authority to create new procedures for deliberation and dissent within the structure of the draft. In doing so, it presaged later Progressive expansions of the public sphere, both through First Amendment advocacy in the courts and through executive efforts to create a more pluralistic and participatory administrative state.

The War Department's attempts to respect the individual conscience were, however, imperfect, and abuse of objectors—largely stemming from military intransigence—did occur. These abuses came to light just as the popularity of civil libertarianism was growing in Progressive circles outside of government. Consequently, even as Progressive administrators sought to defend their innovative policy from internal military resistance and external charges of radicalism, the Progressive press associated their

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472. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J. dissenting) (warning invalidation of state medical-confidentiality law on First Amendment grounds "reawakens *Lochner's* pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue"); *Korte v. Sebelius*, 735 F.3d 654, 693 (7th Cir. 2013) (Rovner, J., dissenting) (calling injunction of contraception mandate on religious-freedom grounds "reminiscent of the *Lochner* era, when an employer could claim that the extension of statutory protections to its workers constituted an undue infringement on the freedom of contract and the right to operate a private, lawful business as the owner wished"); Jedediah Purdy, *The Roberts Court v. America, Democracy*, Winter 2012, at 46, 46–58 (describing use of First Amendment to create new "free-market jurisprudence"); Tim Wu, *The Right to Evade Regulation*, *New Republic* (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (on file with the *Columbia Law Review*) (describing use of free speech arguments to advance "corporate deregulation"); Joey Fishkin, *Who Is a Constituent?*, *Balkinization* (Apr. 3, 2014), <http://balkin.blogspot.com/2014/04/who-is-constituent.html> ("[F]ive Justices continue to grind campaign finance regulations through their First Amendment woodchipper . . .").

efforts with governmental reaction. Today, what was perhaps the earliest example of Progressive civil libertarianism is remembered as one of many examples of the government's violation of civil liberties during World War I. This Article has sought to dispel this anachronistic reading of the World War I administration of conscientious objectors and recover its Progressive civil-libertarian core.

At the same time, this Article has argued that we misread Progressive civil libertarianism when we read it as an effort to limit state power. The Progressive lawyers who crafted the right of individual conscience did so to build a pluralistic but powerful state. In the first third of the twentieth century, most Progressives saw such a civil-libertarian state as the democratic embodiment of the First Amendment. Only during the next World War would the American legal profession come to view civil liberties and the administrative state as countervailing forces, locked in a potentially irreconcilable conflict. It is because we have inherited this oppositional view that we puzzle over—and often forget altogether—an earlier era of civil-libertarian state building.