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The Pre-NSC Origins of National Security Expertise

GREGORY S. McNEAL

America’s contemporary security state—a massive bureaucracy staffed with military and civilian experts—is a dominant feature in current debates over national security policy. Few decisions regarding war and diplomacy are made without consulting executive branch experts. While many contend that the current national security bureaucracy is an outgrowth of the National Security Act of 1947 (NSC), the origins of national security expertise as a concept date back to the founding. The Founders recognized that “energy in the executive” was a key element of good government and early drafts of the Constitution even referred to a cabinet-style government which would include a Department of Foreign Affairs and a Department of War. After the founding the nation debated the propriety of secret presidential advisers, sole Presidential conduct of foreign affairs, the dividing line between matters of peace and matters of war, and the propriety of executive branch agencies created, staffed, and exercising powers at the discretion of the president and subject only to his authority and expertise. The nation’s experiences during the Civil War, during the beginning of the industrial age, and during World War I each incrementally changed the nation’s understanding of founding era ideas regarding national security expertise. This Article traces those historical developments, ties them to founding era debates and contemporary affairs, and argues that scholarly discourse about authority is oftentimes inextricably tied to debates over national security expertise.
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The Pre-NSC Origins of National Security Expertise

GREGORY S. MCNEAL*

I. INTRODUCTION

America's contemporary security state—a massive bureaucracy staffed with military and civilian experts—is a dominant feature in current debates over national security policy. Few decisions regarding war and diplomacy are made without consulting executive branch experts. While a prominent feature of American society today, the current executive branch security apparatus witnessed its greatest growth following World War II. But, the concept of national security expertise has origins which date back to the founding. This article is part of a commentary issue focused on Aziz Rana's article, Who Decides on Security?1 Rana's contribution to the national security literature enhances our understanding regarding questions of authority in national security decision-making. He argues that despite over six decades of reform initiatives, the overwhelming drift of security arrangements in the United States has been toward greater—not less—executive centralization and discretion. Building off of points made by Rana, this article makes a unique contribution to the literature by drawing attention to the fact that struggles over national security authority are oftentimes intimately tied to notions of expertise. Accordingly, this article explores some of the historical origins of the concept of national security expertise.2

For much of American history, periods of peace and periods of major

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* Associate Professor of Law, Pepperdine University School of Law. Special thanks to the commentary editor at the Connecticut Law Review for organizing this issue and providing an opportunity to respond to Aziz Rana's article, Who Decides on Security?, 44 CONN. L. REV. 1417 (2012). Thanks to librarian Gina McCoy who provided outstanding assistance in finding obscure sources to support some of the arguments made in the Article.


2 This Article is not intended as an exhaustive exploration of the historical origins of national security expertise. Rather this Article explores the origins of the concept as they relate to Rana's arguments about authority and to a lesser extent, secrecy. Interestingly, the literature on national security expertise is not very deep. When the term is used in law journals, it is most frequently used to refer to the debatable assumption that courts lack institutional competence in matters of national security. Nonetheless, notable contributions to the literature include ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS (2007), Robert M. Chesney, National Security Fact Deference, 95 VA. L. REV. 1361 (2009), Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 CAL. L. REV. 301 (2009), and Deborah N. Pearlstein, The Soldier, The State, and The Separation of Powers, 90 TEX. L. REV. 797 (2012).
war were defined and distinct.³ In periods of peace, the State Department
managed matters of foreign affairs, and, during major wars, the Navy and
the War Department were preeminent until the national emergency ended.⁴
However, "[b]y the late 1930s many policymakers and scholars had begun
to criticize this bifurcated approach to U.S. foreign policy."⁵ These
policymakers argued that advancements in technology and the rise of
totalitarian regimes made the old policy-making approach dangerous and
anachronistic.⁶ The modern solution to these problems originated in the
post-World War II National Security Act of 1947.⁷

The National Security Act established the expert bureaucracies of the
National Security Council,⁸ the Office of Secretary of Defense,⁹ the U.S.
Air Force,¹⁰ the Joint Chiefs of Staff,¹¹ and the Central Intelligence Agency
("CIA").¹² Following the passage of the act, the President, for the first
time, had a statutorily authorized staff member and support staff "whose
purpose was to give the president advice and assistance in matters
pertaining to national security."¹³ This centralization of military and
intelligence services was no doubt influenced by the nation's experiences
in World War II. As former Yale Law Dean and current Department of

³ Cf. MARY L. Dudziak, WAR TIME 4 (2012) ("This book takes up the idea of wartime and its
effects, showing that a set of ideas about time are embedded in the way we think about war. In
particular, we tend to assume that wartime is always followed by peacetime, and there that an essential
aspect of wartime is that it is temporary. The assumption of temporariness becomes an argument for
exceptional policies, such as torture. And those who cross the line during war sometimes argue that
circumstances deprive them of agency; their acts are driven or determined by time.").
⁴ CODY M. BROWN, THE NATIONAL SECURITY COUNCIL: A LEGAL HISTORY OF THE PRESIDENT'S
the%20national%20security%20council.pdf.
⁵ Id.
⁶ See id.
U.S.C. §§ 401–442b (2006)). For a history of the National Security Act, see DOUGLAS T. STUART,
CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA
(2008), Brown, supra note 4 at 81 ("Since passage of the original National Security Act of 1947,
Congress has left unchanged the fundamental purpose, function, and duties of the NSC. Each President
has made an independent determination of the type of NSC that would best serve the nation. But over
time, it is clear that the NSC has evolved from a limited advisory council to a vast network of
interagency groups that are deeply involved in integrating national security policy development,
oversight of implementation, and crisis management. This evolution has not been the result of
congressional action, but rather presidential determination, rooted in the increasingly complex task of
managing and optimizing U.S. national security.").
50 U.S.C. §§ 401–442b (2006)).
⁹ Id. § 202 (repealed 1972).
¹⁰ Id. § 208 (repealed in part 1956 & 1966).
¹¹ Id. § 211 (repealed 1956).
¹² Id. § 102 (codified as amended 50 U.S.C. § 403).
¹³ SAM C. SARKESIAN ET AL., U.S. NATIONAL SECURITY: POLICYMAKERS, PROCESSES & POLITICS
State Legal Adviser Harold Koh noted, "[t]he central innovation of the 1947 National Security Act was its recognition that the management of this complex structure of agencies and alliances required a unified national security system, centered in the executive branch." That unified national security system focused on formalizing the structures for national security expertise, and centralizing those functions within the executive branch under the firm control of the President.

While the National Security Act centralized foreign affairs and national security decision-making, this centralization marked the culmination of ideas that had existed since the founding and had evolved throughout the nation's history. The Founders recognized that "energy in the executive" was a key element of good government and early drafts of the Constitution even referred to a cabinet-style government which would include a Department of Foreign Affairs and a Department of War. After the founding the nation debated the propriety of secret presidential advisers, sole Presidential conduct of foreign affairs, the dividing line between matters of peace and matters of war, and the propriety of executive branch agencies created, staffed, and exercising powers at the discretion of the president and subject only to his authority and expertise. These historical facts and the debates surrounding them are oftentimes associated with arguments about Executive power, however a corollary, and perhaps overlooked aspect of the power argument is the role of expertise.

This Article takes the position that the centralization of certain national security decisions in the hands of experts who report to the President relates to broader debates about Presidential power, but is a distinct concern. Stated differently, one can accept either that Congress (rightly or wrongly) will oftentimes defer to the President's functional expertise, or one can adopt the view that because of his greater functional expertise the President possesses inherent authority to act in matters of national security. Regardless of which theory one subscribes to, the idea of expertise can no doubt be tied to the efficiency that flows from a unitary actor whose responsibilities include daily supervision of experts within the national security bureaucracy. Extending deference to Executive branch decisions may be premised upon a belief in Executive branch expertise, or it may simply be deference borne of convenience, for the purposes of this Article, it is sufficient to recognize that perceptions of expertise are frequently tied to arguments over authority.

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16 Koh, supra note 14, at 76.
Arguments over authority are a feature of national security scholarship because the Framers intended there to be debates and conflict between the branches. The framers vested an undefined “executive Power” in the President and made him “Commander in Chief” of the Army and Navy. However, they also gave to the Congress the power to make rules for the regulation of the Army and Navy, and gave them control over spending. The Founders made the President responsible for and subordinate to the law by stating that he “shall take Care that the Laws be faithfully executed.” The institution of divided authority makes for a President who must honor the Constitution’s separation of powers, who must abide by valid laws passed by the Congress, and must conform his reliance on his own authority and expertise with the dictates of Congress. Such an arrangement was intentionally designed to ensure that there would be struggles over any attempts to concentrate the powers of government in one set of hands.

This Article shows that part of the historical trend toward placing unilateral authority in the hands of the President was an outgrowth of the President’s ability to react quickly and coherently to foreign initiatives something I refer to as his functional expertise or functional advantage. It also was grounded in a belief that certain matters required a cadre of trained experts capable of analyzing and dealing with complex threats. The current bureaucratized national security system is the culmination of that recognition of functional expertise and the quest for a cadre of trained experts.

This Article’s goal is modest: it seeks to trace some of the historical

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18 THE FEDERALIST No. 48, at 232 (James Madison) (Clinton Rossiter ed., 1961) (stating “The conclusion I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”). Rather, Madison believed that the interior structure of government must be organized so that competition and mutual relations would check each part of government, keeping the other in its proper place.

19 Koh, supra note 14, at 77–78 (“The varied task of nation building—recognition of and by foreign states, establishment of diplomatic relations, and conclusion of treaties—all demanded a branch of government that could react quickly and coherently in foreign initiatives. Not only was the office of the president ideally structured for such responsive action, it was filled during those early years by founding presidents of unusual personal force.”).
examples of expertise in matters of national security that pre-date the 1947 National Security Act.\textsuperscript{20} It begins in Part II by discussing early American history at the time of the founding, and shortly thereafter. This part briefly outlines the influence that political theory had on the drafters of the Constitution, noting that political theory and the British experience with war provided essential context for the Founders. That context, the structure of the vesting clause, and the desire for unity, speed, and dispatch suggest that the framers believed that the president would possess certain functional advantages which would lend him greater expertise in matters of national security. The founding era debates over secrecy, also discussed in this part, lend credence to the argument that debates over authority were oftentimes bound up in discussions of whether elected officials or the people could be trusted to make expert decisions regarding matters of war.

Part III picks up where Part II ends, discussing nineteenth century examples of presidential expertise, and deference to such presidential expertise. This part concedes that there are nineteenth century sources suggesting that the legislative and judicial branches were skeptical of executive discretion, however the goal of this part is to highlight some of the contrary sources from this era. Specifically, this section looks briefly at the Civil War era examples of a government which during a time of crisis placed few limits upon the President’s discretion and expertise in matters of warfare.

Part IV, focuses on the scholarship of Woodrow Wilson, a proponent of administrative reform. It outlines how Wilson believed that diffusion of authority and expertise prevented effective government. It explains how his reform ideas were to create a system of empowered experts who would sit in the void created by fights over power and authority, operating in a fluid space of administrative action, bounded by law but empowered by delegation from political actors. This discussion sets the stage for Part V which discusses the explosion of WWI era expert agencies, created at the sole discretion of a President empowered by broad enabling acts passed by Congress. This Part highlights how an evolution in thinking about expertise set the stage for the modern national security state and its complement of expert actors. The Article concludes by making the non-controversial observation that these historical examples are an outgrowth of the Founders’ plan to leave matters of security undefined and subject to the needs of the nation to respond to “national exigencies."\textsuperscript{21}

\textsuperscript{20} For a discussion of the events leading up to the passage of the National Security Act, see generally Aziz Rana, supra note 1.

\textsuperscript{21} See THE FEDERALIST NO. 23, supra note 18, at 153 (Alexander Hamilton) (“The authorities essential to the common defense [should be limitless] because it is impossible to foresee or to define the extent and variety of national exigencies . . . .”).
II. EARLY AMERICAN HISTORY AND NATIONAL SECURITY EXPERTISE

The constitutional scholar Clarence Berdahl, quoting James Garner, once wrote, "the domain of the executive power in time of war constitutes a sort of 'dark continent' in our jurisprudence, the boundaries of which are undetermined."22 While the boundaries of executive power remain a source of constant scholarly discussion,23 the idea of executive or presidential expertise has received far less attention. This lack of attention is surprising given the fact that The Federalist No. 23 recognized that "[t]he principal purposes to be answered by union are these—the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks..."24 The Founders intended to create a system of government that would value the type of expertise that could handle threats to the nation. While that expertise might be found in either the legislative or executive branch, the vesting of

22 CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 15 (1921) (quoting James W. Garner, Le Pouvoir Exécutif en Temps de Guerre Aux États-Unis, 35 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 13 (1918)).

23 See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011) (discussing the evolution of presidential power); JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE BUSH (2009) (chronicling individual presidents and their use of executive power); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941, 947–48 (2008) ("[I]n sharp contrast with Congress’s substantial acquiescence to the assertion of some executive power to employ military force unilaterally, the legislature has not acceded, pragmatically, to the Executive’s preferred resolution of the separation of powers disputes concerning control of the actual conduct of campaigns."); Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545 (2003) (challenging the "Vesting Clause Thesis" on historical and textual grounds); Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 CONST. COMMENT. 307, 338–41 (2006) (arguing that the President has the constitutional authority to issue signing statements and rejecting arguments that such statements are an abuse of the executive’s power); Jack Goldsmith & John F. Manning, The President’s Completion Power, 115 YALE L.J. 2280, 2282, 2287–93 (2006) ("[T]he President has the authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any constitutional authorization to complete that scheme."); William M. Goldsmith, A New Look at an Old Argument, 11 GEO. MASON L. REV. 65 (1988) (discussing ongoing debate concerning the division of power between the President and Congress with regard to conduct of foreign affairs); Harold Hongju Koh, Setting the World Right, 115 YALE L.J. 2350, 2364, 2367, 2368–73 (2006) (arguing that that Constitution imposes limits on the President’s power to act unilaterally in national security and foreign affairs and criticizing the completion power argued for by Goldsmith and Manning); H. Jefferson Powell, The Founders and the President’s Authority over Foreign Affairs, 40 WM. & MARY L. REV. 1471 (1998) (examining founding-era documents and concluding "the President possesses significant independent constitutional authority over foreign affairs"); Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 YALE L.J. 231 (2001) (arguing inter alia the President enjoys a residual foreign affairs power under Article II, section 1, which is limited by specific allocations of foreign powers to other entities); John C. Yoo, War and the Constitutional Text, 69 U. CHI. L. REV. 1639, 1640 (2002) ("[T]he Constitution creates a flexible system of war powers [that] provides the President with significant initiative as commander-in-chief, while reserving to Congress ample authority to check executive power thorough its power of the purse.").

24 THE FEDERALIST NO. 23 (Alexander Hamilton), supra note 18, at 153.
undefined executive powers in the hands of the President, suggests that the Founders were willing to accept a dynamic role for the President in matters of national security. The principal purpose of common defense, surely requires some level of expertise as the Founders no doubt "understood that they could not foresee the myriad potential threats to national security that might later arise[;] they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation."  

The Founders, well versed in the political theories of their time, were highly influenced by Locke, Montesquieu, and Blackstone. As Aziz Rana notes, "[t]he philosophical positions of Hobbes and Locke not only shaped the development of modern political thought, but also provided the intellectual context for early American debates about the meaning and implications of security." Similarly, in his classic work *The Control of American Foreign Relations*, Quincy Wright noted that the work of Locke, Montesquieu, and Blackstone were "the political Bibles of the constitutional fathers." Indeed, many of the Framers were "well read in history and political philosophy—from ancient Greece and Rome to contemporary Continental Europe. As erstwhile Englishmen, however, the Framers turned to English ideas and experiences above all others."

What did the Founders, influenced by these political theorists say about national security expertise? Not much directly, but quite a bit by implication. To reason by implication, the analysis must begin with a determination of who has authority or power to decide on matters of national security. In that regard, Wright wrote:

> [W]hen the constitutional convention gave “executive power” to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto. This power ought to be distinguished from the power of the President as head of

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25 U.S. CONST. art. I, § 1, cl. 1.
27 Rana, *supra* note 1, at 1417, 1435.
29 Id. By way of illustration, Montesquieu and Blackstone are mentioned in *The Federalist*. See, e.g., THE FEDERALIST No. 9, *supra* note 18, at 73–76 (Alexander Hamilton) (mentioning Montesquieu); THE FEDERALIST No. 43, *supra*, at 275–77 (James Madison) (same); THE FEDERALIST No. 47, *supra*, at 301–05 (James Madison) (same); THE FEDERALIST No. 84, *supra*, at 512 (Alexander Hamilton) (mentioning Blackstone).
30 STEVEN DYCUS ET. AL., *NATIONAL SECURITY LAW* 10, 13 (2012). (noting also, that “[g]eneral theories of government were not the only European notions to influence the text of the Constitution. The Framers’ views of war and peace, in their declared and undeclared forms, seem to be derived especially from Grotius, Pufendorf, Vattel, and Burlamaqui.”).
the administration which he exercises independently within the limits of congressional legislation and which by present usage forms the essential element in "executive power."\textsuperscript{31}

Similarly, Robert Turner argued that there is an important distinction between the language in Article I, Section 1, which provides that "all legislative Powers herein granted shall be vested in a Congress of the United States" and "the much more comprehensive grant in article II to the president of not 'all executive Powers therein granted' but instead 'the executive Power . . . .',"\textsuperscript{32} Turner contends that "[b]ecause of this difference in wording, it was necessary for the Founding Fathers to enumerate every foreign affairs power of Congress, while permitting them to convey the bulk of the executive foreign affairs powers to the President.

\textsuperscript{31} WRIGHT, supra note 28, at 147. Professors Prakash and Ramsey explain that because "Locke, Montesquieu, and Blackstone, the great political philosophers most familiar to the Framers, said that foreign affairs powers were part of the executive power," then "in 1877, when the Constitution provided that the President would have 'the executive Power,' that would have been understood to mean not only that the President would have the power to execute the laws (the primary and essential meaning of 'executive power'), but also that the President would have foreign affairs powers." Prakash & Ramsey, supra note 23, at 253 (footnotes omitted).

\textsuperscript{32} ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 55 (1991). The extent to which Article I, section 1 vests executive power in the President over foreign affairs has been the subject of much debate. See, e.g., BERDAHL, supra note 22, at 11 ("The lack of such express limitations in the article dealing with the Executive has led to some difference of opinions as to whether the executive power vested in the President by the Constitution is defined and limited by the following specified powers, or whether it includes other powers not enumerated but naturally executive in character. Even if the former interpretation of the Constitution is accepted as correct, the conception of the term 'executive power' still remains somewhat vague, since several of the expressly enumerations powers of the President, such as his powers as Commander-in-Chief and his power to see that the laws are executed, are in themselves undefined in the Constitution, uncertain as to their limits, and therefore subject to various interpretations."); KOH, supra note 14, at 76 ("Although the Framers also vested the 'executive power' in the president, they expressly incorporated within the nebulous grant neither an exclusive power in foreign affairs nor a general war-making power. Nor, despite expansive claims later asserted by more recent advocates of presidential power, did the Framers intend apparently by that grant to bestow upon the president an unenumerated inherent authority to take external actions."); Bradley & Flaherty, supra note 23, at 551 ("[T]he difference in wording between the Article I and Article II Vesting Clauses can be explained in other plausible ways and need not be read as distinguishing between a limited grant of legislative powers and a plenary grant of executive power."); H. Jefferson Powell, The President's Authority Over Foreign Affairs: An Executive Branch Perspective, 67 GEO. WASH. L. REV. 527, 535 (1998) ("[T]he fact that the arguments for the President's authority over foreign affairs rest largely on structural inference, while Article I expressly delegates power to Congress over foreign commerce, does not suggest that the presidential authority is any less legitimate or is to be interpreted any less liberally than the congressional power. The words of the Constitution are authoritative, and any persuasive constitutional argument must make sense of the provision or provisions of the text that bear on the issues being considered, but the interpreter is equally responsible for giving due weight and proper respect to the political and legal institutions and relationships that the text creates.") (footnotes omitted).
in the first sentence of article II." While Turner's point is to suggest that this is an exclusive vesting of the foreign affairs and national security powers in the President, for the purposes of this Article it is sufficient to recognize that the presidency at least shares the power to decide on matters of national security (which are no doubt matters requiring expertise) and that should the legislature choose to abdicate its role (by not exercising its power or not offering its own institutional expertise) the presidency possesses sufficient authority to act based on its own power and competence, relying for authority grounded in the exercise of "the Executive power." Turning back to matters of political philosophy, in a manner of reasoning similar to Turner's, William Goldsmith, in his treatise *The Growth of Presidential Power*, wrote that the Founders were "greatly influenced by Blackstone's definition of executive powers, and gave their democratic monarch many of the same responsibilities." Blackstone believed that it was an executive prerogative to handle all aspects of "national intercourse with foreign nations" which requires expertise and by...
definition implicates matters of national security.\textsuperscript{36} Similarly, Montesquieu, addressing what we now think of as national security, wrote in \textit{The Spirit of Laws}, that the executive has primacy “over things dependent on the right of nations.”\textsuperscript{37} The term “right of nations” as used here, was an historical reference to the “law of nations” and the war power or what is now known as matters of national security.

Moreover, one can read Locke as supporting the notion of exclusive presidential power and expertise. Locke explained that the power to execute laws was distinguishable from the “federative power” stating:

These two powers, executive and federative, though they be really distinct in themselves, yet one comprehending the execution of the municipal laws of the society within itself upon all that are parts of it; the other the management of the security and interest of the public without, with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws than the executive; and so must necessarily be left to the prudence and wisdom of those whose hands it is in to be managed for the public good. For the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions and the variation of designs and interest, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.\textsuperscript{38}

Note how Locke makes reference to the “prudence and wisdom” and managerial “skill” of those who are entrusted to act. The implication is that while many may have varying degrees of input into matters of national security, effective governance requires trusting that the one with authority to act will have sufficient expertise to act. Furthermore, Locke noted the impracticability of separating the expertise and authority to act, writing

\textsuperscript{36} \textsc{blackstone’s commentaries on the law} 114 (Bernard C. Gavit ed., 1892).
\textsuperscript{37} \textsc{charles de montesquieu, the spirit of laws} bk. 11, ch. 6, at 156 (Anne M. Cohler et al. trans & ed., Cambridge Univ. Press 1989) (1748). Montesquieu further explains that the executive “makes peace or war, sends or receives embassies, establishes security, and prevents invasions.” \textit{Id.} at 157.
\textsuperscript{38} \textsc{john locke, the second treatise of civil government and a letter concerning toleration} 73 (J.W. Gough ed., 1948) (emphasis added).
"for both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the Commonwealth in distinct and not subordinate hands." Given the influence that Locke, Montesquieu and others had on the Founders, we can assume that the Founders understood that they would need to reconcile how America's government would deal with matters of foreign relations and national security. They created a system of government which recognized that in those matters dealing with the security of the nation, the President might possess functional advantages that would lend him greater expertise. But expertise alone, was an insufficient basis on which to design good government, because the Founders were also fearful of tyranny.

Thus, while recognizing the President's expertise, the Founders were nonetheless fearful of aggregating too much power in the hands of one person. Thus, their dilemma was to design a government which would simultaneously arm the President as commander-in-chief with the authority to act with speed and dispatch, taking advantage of the expertise at his disposal, while simultaneously constraining his power. The Founders therefore sought to create Constitutional mechanisms to guard against the concentration of power in the hands of the President, ensuring that even a wellspring of popular support for a heroic commander-in-chief expertly leading the nation in war couldn't lead to military rule.

These fears regarding a military coup were well grounded; consider John Adams' writings in 1787 regarding the lessons of history, in particular the lessons from Caesar's rise to power. Adams wrote, "Caesar... had no hopes of obtaining from [the Senate] the prolongation of his power, and the command of a province... In order to carry his point, he must set aside the authority of the senate, and destroy the only check, the only appearance of a balance, remaining in the constitution. A tool of his... moved the people to set aside the law... and by their own unlimited power name Caesar as proconsul... with an army of several legions." Adams was fearful that "some general might overawe the republic" with his expertise and military prowess, destroying checks and balances. As such, he and the Founders put in place constitutional mechanisms that in Louis Henkin's words were grants of power, eked out slowly and not without limitations and safeguards.

The Founders also had in mind more contemporary examples of military coups, as they were no doubt aware of the five military coups that

39 Id.
42 HENKIN, supra note 33, at 27–28.
took place in England during the middle of the seventeenth century. The Founders learned from these events that an army could seize the political institutions of a nation, and they sought to simultaneously guard against such concentrations of power, while still creating a strong executive. In fact, the Founders dealt with their own military revolt in 1783 when a group of angry, unpaid soldiers descended upon the Congress, only to be placated by George Washington’s overtures. Three months later “Congress fled from Philadelphia to Princeton after unpaid Pennsylvania soldiers surrounded the statehouse.” The lesson was not lost on the Founders with even presidential power proponent Alexander Hamilton warning in *The Federalist No. 21,* against the dangers posed by “malcontents... headed by a Caesar.” The Founders were clearly aware of the risks associated with creating a government where a skilled leader could use military expertise to his advantage and secure power for himself. But a fear of expertise, does not mean the Framers didn’t recognize the virtues of a skilled leader, rather they merely sought mechanisms to ensure that expertise did not allow the President to aggrandize his power.

To counter the possibility of a power-grab premised upon the aggregation of military expertise under the command of one man, the Founders established a system which cabined Presidential exercise of power and expertise. While the Framers of the Constitution wanted to ensure that the commander-in-chief could exercise military expertise with speed and dispatch, they also recognized that not all security challenges required speed. Thus, at the Virginia ratifying convention, George Nicholas stated “The President is to command. But the regulation of the army and navy is given to Congress. Our representatives will be a powerful check here.” And with respect to the fear that a president might seize command of the militia, Nicholas noted “God forbid we should ever see a public man in this country who should have this power. Congress only are to have the power of calling forth the militia.” These ratification era remarks highlight the fact that the Founders were aware of the problems associated with aggregating national security expertise in one branch of government. Accordingly, they designed mechanisms within the Constitution to address the legitimate need for unity, speed and dispatch

44 Id.
46 *The Federalist No. 21,* supra note 18, at 135 (Alexander Hamilton).
47 The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 14, 1788) in 3 *Elliott’s Debates* 365, 391.
48 Id. at 393.
while recognizing that not all national security problems require expertise that is wielded with speed—some matters may be appropriately addressed by a deliberative body like the Congress.49

As an example, to ensure that the experts employed by the President are not wholly beholden to him, the Article 2 Appointments Clause requires Senate advice and consent for appointment of federal officers (and legislation requires Senate advice and consent for appointment of general officers).50 Similarly, the Take Care Clause requires that the President “take care that the laws be faithfully executed” which forces the President, in the exercise of his national security expertise to follow the laws passed by Congress.51 As David Luban notes, “[t]he Take Care Clause embeds the presidency in a civilian, rule of law culture, not a military, efficacy-first culture. Even though the framers did not explicitly draft the Take Care Clause as a check on a president’s military ambitions, its emphasis on the primacy of civilian rule of law provides powerful evidence that the Constitution was not meant to establish a warrior-president.”52 Taken together, this history suggests that the Founders designed a system that could cabin Presidential power while still maximizing Presidential expertise.

It is important to note that while the Founders were fearful of power grabs, enabled by Presidential expertise, they were not so fearful that they believed that the Congress alone possessed sufficient expertise to effectively manage matters of national security. This much was obvious from their Revolutionary War experiences when Congress exercised outsized control over the military.53 That control lasted until the Congress...

49 Specifically, Congress possesses the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions . . . .” U.S. CONST. art. I, § 8.


51 See Luban, supra note 41, at 526 (“There is no hint in either the text or debates that this duty ceases when presidents act in their capacity as commander in chief.”). For more on this point, see the statement of Congressman John Marshall, who while defending President John Adams’ extradition of a British subject under the Jay Treaty of 1795, stated: “The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person . . . . Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.” 10 Annals of Cong. 613–14 (emphasis added).

52 Id. at 527.

53 Luban, supra note 41, at 528 (“When Congress appointed Washington commander in chief of the Continental Army in June 1775, it instructed him ‘punctually to observe and follow such orders and directions, from time to time, as you shall receive from this or a future Congress . . . or a committee of
realized that they were incapable of effectively directing the military campaign, and with the military effort on the verge of collapse the Congress turned operational command over to Washington. This model of operational command housed in the Executive branch was the form of government adopted at the constitutional convention.

Hamilton, making note of the challenges associated with legislative direction of matters of national security argued that “difference of opinion... might impede or frustrate the most important measures of the government in the most critical emergencies of the state.” During the debates over the Constitution in North Carolina, James Iredell made a similar point, stating “the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision which are necessary in military operations, can only be expected from one person.” Iredell invoked the concept of “decision” while Hamilton invoked the idea of “competent powers” both ideas harken back to Locke’s references to prudence, wisdom and skill. Moreover, both are oblique references to the idea of expertise which is inherently bound up in the concept of authority. They are related because even if one has the authority to command, one cannot command what one does not have the competence and expertise to understand. In Hamilton’s words, this concept of unity was “the power of directing and employing the common strength [which] forms a usual and essential part in the definition of executive authority.” The Founders understood that at least for situations requiring speed and dispatch, the President would need to be entrusted with the power of command, and his expertise would, for practical reasons, need to be placed in unitary and subordinate hands.

How the Framers chose to deal with executive secrecy can also inform us about their views on expertise in matters implicating the security of the nation. Some of the Founders understood that secrecy was an essential component of executive power and expertise. This is a controversial

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54 Id. See also Dycus et al., supra note 30 (“While Congress sought to carry out its policies through committees, boards, and appointed agents, it soon became apparent that the exigencies of the war were beyond the legislature’s capacity to manage. Broad powers had to be delegated to the Board of War and to General George Washington. Nevertheless, Washington and other military leaders were often forced to choose between acting on the basis of ambiguous grants of authority or referring questions to Congress for decisions. This arrangement proved to be extremely inefficient.”).
55 THE FEDERALIST NO. 70, supra note 18, at 424, (Alexander Hamilton).
56 Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 28, 1788).
57 THE FEDERALIST NO. 70, supra note 18, at 424 (Alexander Hamilton).
58 Locke, supra note 38 and accompanying text.
59 THE FEDERALIST NO. 73, supra note 18, at 446 (Alexander Hamilton).
assertion, at least in the eyes of scholars such as Rana who suggest that executive secrecy in the development of national security policy is contrary to the democratic principles the nation was founded upon. The argument Rana makes is that government decisions which take place in secret, particularly those involving national security, are contrary to the Founders vision of a nation where popular knowledge was sufficient for judging questions of security.

To bolster his argument, Rana cites *Mitchell v. Harmony* decided in 1851. In *Mitchell* the Court was called upon to evaluate (among other issues) whether the United States was at war with Mexico. Rana notes that the Court believed that citizens could make “determinations of threat as ultimately rooted in shared and popularly accessible judgments about safety and survival—judgments that might reasonably be reached by a group of ordinary Americans drawn from a representative pool of citizens.” To make those determinations, Rana argues that Justice Taney declared that government secrecy had to be set aside so that citizens (not experts in any branch of government) could make judgments about whether the nation was in a state of emergency sufficient to trigger reliance on executive branch claims of national security expertise. While I don’t question Rana’s account of *Mitchell*, and its holding with regard to assertions of government secrecy, the case is less valuable than he makes it out to be because it does not grapple with any contrary founding era sources that support assertions of national security secrecy.

One founding era source supporting assertions of national security secrecy is Thomas Jefferson’s legal opinion, drafted for President Washington on April 24, 1790, in which he stated:

> The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly; the constitution itself, indeed, has taken care to circumscribe this one within very strict limits; for it gives the nomination of the foreign agent to the president, the appointment to him and the senate jointly, and the commissioning to the president.

> [T]he senate is not supposed by the constitution to be acquainted with the concerns of the executive department. It was not intended that these should be communicated to

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60 Rana, *supra* note 1, at 1417.
62 Rana, *supra* note 1, at 1448–49.
them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the president; they are only to see that no unfit person be employed.  

In Jefferson’s view, at least in this legal opinion, the Senate lacked the authority, beyond the appointment power, to weigh in on matters implicating foreign affairs (and by extension national security). Moreover, because information was not to be “communicated to them” they were also not “qualified to judge” the propriety of any mission. Thus, members of the legislature could be kept in the dark about matters of foreign affairs and national security, and contrary to Rana’s reliance on Mitchell, the People themselves could also be prevented from learning about certain matters related to the security of the nation. As a matter of practice, by the end of the Washington administration, the President’s custom was merely to notify the Senate of proposed negotiations when it consented to his appointment of the negotiator and to submit to the Senate a copy of his instructions to the negotiator only with the completed treaty.

Jefferson’s legal opinion suggests that the idea of secrecy was not contrary to democratic principles; rather, it was a necessary element of powers implicating the security of the nation. The President was entrusted as an expert capable of deciding what missions were necessary, where he would send individuals, what their grade would be, and what was properly kept secret. The Senate’s only role would be to determine whether one was fit for office, once confirmed those subordinate experts would be subject to employment at the discretion of the President. In this respect, Jefferson’s legal opinion stands as evidence of executive supremacy in matters of national security and clear evidence that even Jefferson—whom advocates of legislative preeminence cite as authority—was not an advocate of “congressional micromanagement of national security affairs . . . .”65 More important than the executive supremacy point is what these facts tell us about expertise. If the legislature could be kept from knowing the details of diplomatic missions, whatever expertise they may possess (no matter how salutary) would have no opportunity to be

65 TURNER, supra note 32, at 56. Similarly, Prakash and Ramsey cite the opinion as “notable confirmation” that the “President enjoyed formidable foreign affairs powers by virtue of his executive power.” Prakash & Ramsey, supra note 23, at 305–06. Professor Powell suggests that “undergirding [Jefferson’s] textual reasoning were assumptions about the manner in which American Foreign policy would be made that he believed were implicit in the Constitution.” Powell, supra note 23, at 1483.
exercised. Thus, if Jefferson’s view of secrecy and exclusion of the legislature from knowing details of diplomatic missions is accurate, there are matters in which the expertise of the President and his subordinates must trump that of the legislature and even the people. The fact that this discussion over the authority and secrecy occurred so close to the founding demonstrates the founding era origins of arguments over national security expertise and highlights how expertise can be tied to authority.

Not surprisingly, Hamilton also made clear his position that the grant of executive power extends to the President the exclusive authority to engage in matters touching on foreign relations (subject to a small set of limitations), and by virtue of this grant the President is also entrusted with the necessary expertise to act pursuant to this authority. In fact, Hamilton stated as much when he wrote “it belongs to the ‘Executive Power,’ to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates with foreign Powers.”

Hamilton seemed to adopt a view that there was some residuum of undefined responsibility into which the President’s judgment and expertise would be relied upon to fill in the specifics where the Constitution provided only generalities.

Just as Jefferson wrote three years earlier, this power may very well mean that the legislature will be precluded from involvement in decision-making, decisions may be made in secret, and decisions may be made subject to the counsel of whomever the President chooses as his advisors. Thus, we see again that expertise and authority are inextricably linked, and in the views of these Founders, the exclusion of the legislature suggests that, at best, the legislature’s expertise was unnecessary for the rendering of some key national security related decisions, and, at worst, they were perceived as lacking expertise altogether. These notions are reinforced by

67 Id.
68 For the argument that, at least in the context of war powers, leaving it to the executive to decide is an unconstitutional delegation, see William Van Alstyne, Congress, the President, and the Power to Declare War: A Requiem for Vietnam, 121 U. PA. L. REV. 1, 16–17 (1972) (“I[t seems to me clearly the case that the exclusive responsibility of Congress to resolve the necessity and appropriateness of war as an instrument of national policy at any given time is uniquely not delegable at all. The pursuit of national interest by sustained extraterritorial uses of direct force was textually reserved to Congress alone after alternative formulations were pressed on precisely the grounds that conventionally rationalize a limited power to delegate an interstitial lawmaking authority to the executive, viz., superior expertise in the executive, the need for flexibility in the face of rapidly changing circumstances, the cumbersoness of parliamentary processes, and a residual power to check the executive in the event of displeasure with the manner in which he might make war. To the extent that such arguments were considered to have merit, they were accommodated by other means among the several war-related clauses. To the extent that they were not thus accommodated, the conclusion seems inescapable that they were rejected and correspondingly, that no further latitude of executive control was to be permitted than that already provided for.”).
There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. . . .

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.69

The opening paragraphs of this passage are perhaps the most powerful founding era evidence in support of the idea that national security expertise is lodged, at least in part, in the hands of the executive and the executive’s advisers. The concept of “energy in the executive” and the connection of this concept to protection “against foreign attacks” is a clear carve out of some residuum of national security expertise, which, as a functional matter, must rest in presidential hands.

Turning his attention to the problem of multiple decision makers in matters of national security, Hamilton wrote:

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the control and co-operation of others, in the capacity of counsellors to him . . . .

69 THE FEDERALIST NO. 70, supra note 18, at 198–200 (Alexander Hamilton).
Wherever two or more persons are engaged in any common enterprize or pursuit, there is always danger of difference of opinion. If it be a public trust or office in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissentions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide.

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted and have happened to disapprove, opposition then becomes in their estimation an indispensable duty of self love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments.

These concluding paragraphs suggest that national security disputes might create public disagreements and opposition by those who felt they had no agency in making plans or by those who ultimately lost the debate over what plan to adopt. These passages implicate two ideas. First, Hamilton’s views were consistent with a modern view that places expert advisers in a subordinate position to the President (to protect against the destruction of unity). Second, the modern view of the national security state places a veil of secrecy over national security deliberations. Both views have founding era origins and reinforce the idea that secrecy adds value to expert national security decision making. The Founders recognized that secrecy is important for functional reasons, and allows for decisions to be made based on expertise rather than posturing for the eventuality that one’s opinion might not be adopted (what Hamilton called the risk of animosity).

Turning to the Commander-in-Chief Clause, Hamilton’s writings further inform us about his views regarding presidential expertise, he wrote:

The propriety of this provision is so evident in itself, and so consonant to the precedents of the State constitutions in

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70 *id.*
general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority.\textsuperscript{71}

Again we see the exclusion of the legislature from matters in which they might possess the necessary expertise. The demands of unity and the need for a "single hand" to direct the "common strength" combine to create a military authority that rests in the hands of the President and his subordinates. This is not just a Hamiltonian view, even James Madison, who "strongly disagreed with Hamilton’s assertion in his \textit{Pacificus} letters of broad executive powers in foreign affairs\textsuperscript{72} recognized that Congress must, for prudential reasons, be kept out of the business of deploying or directing military forces. Madison’s rationale had more to do with separation of powers, than expertise or unity, as he believed that such direction would violate the maxim that control of the purse should be separate from control of the sword.

With that said, while the exclusion of Congress from deploying or directing forces was a prudential decision, it also had overtones of expertise associated with it. Madison suggested a form of functionalism that provided specified roles for the Congress consistent with its expertise (regulating, raising and, funding an army) while the President would act consistent with his expertise (command, appoint). As Madison wrote,

\[T\]he honorable gentleman has laid much stress on the maxim, that the purse and sword ought not to be put in the same hands, with a view of pointing out the impropriety of vesting this power in the general government. But it is totally inapplicable to this question. What is the meaning of this maxim? Does it mean that the sword and purse ought not to be trusted in the hands of the same government? This cannot be the meaning; for there never was, and I can say there never will be, an efficient government, in which both are not vested. The only

\textsuperscript{71} \textsc{The Federalist} No. 73, \textit{supra} note 18, at 447 (Alexander Hamilton).
\textsuperscript{72} \textsc{Turner}, \textit{supra} note 32, at 67.
rational meaning is, that the sword and purse are not to be
given to the same member. Apply it to the British
government, which has been mentioned. The sword is in
the hands of the British king; the purse in the hands of the
Parliament. It is so in America, as far as any analogy can
exist. Would the honorable member say that the sword
ought to be put in the hands of the representatives of the
people, or in other hands independent of the government
altogether? If he says so, it will violate the meaning of
that maxim. This would be a novelty hitherto
unprecedented. The purse is in the hands of the
representatives of the people. They have the appropriation
of all moneys. They have the direction and regulation of
land and naval forces. They are to provide for calling
forth the militia; and the President is to have the command,
and, in conjunction with the Senate, to appoint the officers.
The means ought to be commensurate to the end. The end
is general protection. This cannot be effected without a
general power to use the strength of the Union.\textsuperscript{73}

Furthermore, in the foreign affairs context Madison seemed to agree
Jefferson's legal opinion to President Washington regarding the use of
diplomats and their appropriate "grade." It seems that it was not just
Jefferson who adopted a form of legislative deference to presidential
decisions about how to staff the executive branch and how to employ its
expert agents. Regarding Madison's views, Washington wrote:

Had some conversation with Mr. Madison on the propriety
of consulting the Senate on the places to which it would be
necessary to send persons in the Diplomatic line, and
Consuls; and with respect to the grade of the first—His
opinion coincides with Mr. Jay's and Mr. Jefferson's—to
wit—that they have no Constitutional right to interfere
with either, and that it might be impolitic to draw it into a
precedent, their powers extending no farther than to an
approbation or disapprobation of the person nominated by
the President, all the rest being Executive and vested in the
President by the Constitution.\textsuperscript{74}

\textsuperscript{73} The Debates in the Several State Conventions, on the Adoption of the Federal
Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 393–

\textsuperscript{74} The Diary of George Washington 128 (Benson J. Lossing ed., 1860).
This passage reinforces the Founding era view that the President is entrusted to use his expertise as he sees fit in matters relating to foreign relations and national security, and that it is up to him to decide whom he confides in for advice on such matters.\textsuperscript{75} When the President decides on security, he may very well decide with the advice of whomever he chooses and the legislature may be left out of that deliberative decision-making process. One of the primary motivating factors for leaving such matters to the discretion of the President was the recognition that large deliberative bodies like the Congress were not competent when it came to matters of national security and also were incapable of the necessary secrecy associated with such decisions.\textsuperscript{76}

For example, in 1816 the Senate Committee on Foreign Relations endorsed the idea of the President as the sole expert in foreign affairs, and that sole expertise means that he may keep matters secret from the legislature:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what

\textsuperscript{75} See, e.g., Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993) ("Article II not only gives the President the ability to consult with his advisers confidentially, but also, to organize his advisers and see advise from them as he wishes.").

\textsuperscript{76} Indeed, as Prakash and Ramsey explain in their article, under the Articles of Confederation, Congress had extensive power over foreign affairs; however, “from the beginning statesmen criticized Congress as an ineffectual executive. Foreign affairs require secrecy, dispatch, and consistency, three qualities in short supply in a plural, fluctuating executive.” Prakash & Ramsey, supra note 23, at 277.

John Jay, who was then the Secretary of Foreign Affairs, voiced his frustration with Congress on several occasions. In a letter to Thomas Jefferson, Jay lamented that he “often experiences unseasonable delays and successive obstacles in obtaining the decisions and sentiments of Congress, even on points which require dispatch.” Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), in 3 John Jay, The Correspondence and Public Papers of John Jay 210 (Henry P. Johnston ed., 1891). In another letter to Jefferson, Jay wrote:

I daily become more and more confirmed in the opinion, that government should be divided into executive, legislative, and judicial departments. Congress is unequal to the first, very fit for the second, and but ill calculated for the third; and so much time is spent in deliberation, that the season for action often passes by before they decide on what should be done; nor is there much more secrecy than expedition in their measures. These inconveniences arise, not from personal disqualifications but from the nature and construction of the government.

Letter from John Jay to Thomas Jefferson (Dec. 14, 1786), in Jay, supra, at 223. To General George Washington, Jay wrote the following about the foreign affairs duties of Congress: “The executive business of sovereignty depending on so many wills, and those wills moved by such a variety of contradictory motives and inducements, will in general be but feebly done.” Letter from John Jay to George Washington (Jan. 7, 1787), in Jay, supra, at 226.
subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.77

Even prior to 1816, the Framers recognized that secrecy (which necessarily implies excluding other branches from the expert decisions of the Executive branch) was essential to foreign relations and national security.78 Making this point, Turner wrote:

[w]hile it is true that [the Founders] believed as a general principle that an informed public was essential to democratic government, they were practical men who recognized that intelligence, military, and diplomatic matters often had to be kept secret not only from the nation’s enemies, but even from the American people and their elected representatives in Congress.79

77 4 THE FOUNDERS’ CONSTITUTION 88–89 (Philip B. Kurland & Ralph Lerner eds., 1987). Powell stresses the significance of this report in its historical context: “The fact that this view was expressed in a formal document, by members of the Senate with some significant incentive to come to different conclusions, and that the Senate as a whole was, at the very least, undisturbed by the Committee’s opinion, strengthens this Article’s thesis that arguments supporting independent executive authority over foreign policy cannot be dismissed as sheerly opportunistic.” Powell, supra note 23, at 1532–33.

78 For example, prior to the Constitutional Convention, John Jay noted on several occasions that Congress could not keep secrets, a necessary element in foreign affairs. See Letter from John Jay to George Washington (Apr. 26, 1779), in 1 JAY, supra note 76, at 210 (“There is as much intrigue in this State-house as in the Vatican, but as little secrecy as in a boarding-school.”); Letter from John Jay to Thomas Jefferson (Apr. 24, 1787), in 3 JAY, supra note 76, at 243 (“It is greatly to be regretted that communications to Congress are not kept more private; a variety of reasons which must be obvious to you oppose it, and while the federal sovereignty remains just as it is little secrecy is to be expected. These circumstances must undoubtedly be a great restraint on those public and private characters from whom you would otherwise obtain useful hints and information. I for my part have long experienced the inconveniency of it, and in some instances very sensibly.”). Turner provides further evidence of the Founders’ perception of Congress’ inability to keep secrets, quoting Thomas Jefferson: “‘They said . . . That if the particular sum was voted by the Representatives, it would not be a secret. The President had no confidence in the secrecy of the Senate . . . .’” Turner, supra note 32, at 926 (quoting THE COMPLETE ANAS OF THOMAS JEFFERSON 72–73 (Franklin B. Sawvel ed., 1903)).

79 Turner, supra note 32, at 922.
In fact “as early as 1775, the management of foreign affairs was largely delegated to a five-member Committee of Secret Correspondence... whose sensitive proceedings were kept from most other members of Congress.”\textsuperscript{80} For the President to carry out his responsibilities in the conduct of foreign affairs, secrecy in deliberations is oftentimes a necessity. It thus follows that if only the President and his advisers are privy to certain information, then they must have sufficient expertise on their own to make decisions related to foreign affairs and national security.

In \textit{The Federalist No. 64} John Jay addressed this secrecy issue with respect to the making of treaties. He reinforced the point that there are matters to which the President and his advisers alone must be privy. He argued that should the President, in his prudent judgment, require the advice and consent of the Senate, he would seek it. Jay wrote:

\begin{quote}
It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those
\end{quote}

\textsuperscript{80} \textit{TURNER}, supra note 32, at 73. In an article, Turner explained that the Committee of Secret Correspondence was created precisely because Congress could not keep secrets. \textit{See id.} at 922. Turner went on to recount the history of the Committee sending a secret messenger to France, Holland, and England for what may have been the first United States “covert operation.” \textit{Id.} at 921–22. A memorandum written by the committee about the operation explained the operation had to remain secret, even from Congress, for three reasons:

\begin{quote}
First, Should it get to the ears of our enemies at New York, they would undoubtedly take measures to intercept....
\end{quote}

\begin{quote}
Second, as the Court of France have taken measures to negotiate this loan of succor in the most cautious and secret manner, should we divulge it immediately, we may not only lose the present benefit, but also render that Court cautious of any further connection with such unguarded people....
\end{quote}

\begin{quote}
Third, We find by fatal experience that Congress consists of too many members to keep secrets.
\end{quote}

persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other. 81

Note how Jay framed the issue. "Those matters" which "require the most secrecy" will be handled by the President, while the advice and consent of the Senate will be sought "should any circumstance occur" which requires such advice. In sum, Jay views the President's interaction with the Senate as one where the President could say "We'll seek out your

81 The Federalist No. 64, supra note 18, at 392–93 (John Jay) (emphasis added). Arthur Bestor opined that

[a]s an interpretation of the original intent of the document, Jay's essay is of the highest importance. His diplomatic experience . . . fitted him better than anyone else to judge the intended effect of the new Constitution both on the actual process of negotiation and on the character of the relationship that would have to be maintained between executive and legislative authorities.

advice if we need it. Otherwise trust in our expertise."

To further reinforce the idea of secrecy as a component of expertise (by virtue of its exclusion of other forms of expert advice), one need only look back to Thomas Jefferson who, in 1807, wrote:

With respect to papers, there is certainly a public & a private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, & other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. Hence, under our Constitution, in requests of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed; as you will see in the enclosed resolution of the H of Representatives, which produced the message of Jan 22, respecting this case. The respect mutually due between the constituted authorities, in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candor & integrity to which the nation has in like manner trusted in the disposal of it's judiciary authorities. Considering you as the organ for communicating these sentiments to the Court, I address them to you for that purpose, & salute you with esteem & respect.82

Note how Jefferson invokes the idea of secrecy, when he wrote that “for the advantageous conduct” of the nation’s affairs, some matters are best left to the executive alone who will exercise “the duty of discrimination confided to him.” While this passage is about executive secrecy, a necessary component of secrecy is having the expertise required to act on one’s own, without the input of other actors. In other words, Jefferson believed there were certain areas in which the Executive branch (like that in other nations) could by design be trusted to rely on its own expertise to make decisions concerning the entirety of government.

82 3 The Founders’ Constitution, supra note 77, at 529–30 (emphasis added).
In a similar vein, the Founders were deeply concerned with the complexities involved in foreign affairs and national security. They believed, as articulated in *The Federalist No. 23*, that the power to protect the nation ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power which the care of it is committed.83

Of course, this passage only speaks to the necessity of a flexible war power in the government at large, without specifying a branch. In fact, Hamilton made these remarks in defense of the congressional power to raise armies.84 But the idea is one of an adaptive war power, capable of changing in response to unforeseeable threats to the national security. Hamilton’s concerns regarding the complexity of foreign relations and the expertise necessary to appropriately deal with “national exigencies” suggests that deference to the President in matters relating to national security is appropriate, at least when the legislature decides to allow the President and his agents to take the preeminent role in matters of national security. These founding era sources support the idea that national security expertise and authority are interrelated concepts. If the President may act on his own in certain areas (those areas not specifically entrusted to other branches) the Founders must have expected that he had the requisite expertise to do so. Thus, the Constitution contemplates certain circumstances where Presidential expertise will be paramount (while also recognizing that there are areas such as regulating and funding the military where Congressional expertise is paramount). Notions of secrecy, national security expertise, and perhaps even a preeminent role for the President in acting on that expertise are all concepts with Founding-era roots. Those founding era concepts evolved during the 1800s and the early 1900s, eventually forming the modern day national security state.

III. PRECEDENTS OF THE 1800S

The concerns of the Founders regarding national exigencies were borne out in the face of nineteenth-century challenges, particularly the

83 THE FEDERALIST NO. 23, supra note 18, at 153 (Alexander Hamilton).
Civil War. While Rana has highlighted the nineteenth century sources suggesting that the legislative and judicial branches were, at that time, skeptical of executive discretion, there are also contemporaneous sources which suggest the contrary. For example, as early as 1836, John Quincy Adams took to the floor of the Congress and stated:

There are, then, Mr. Chairman, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature and often incompatible with each other—the war power and the peace power. The peace power is limited by regulations and restricted by provisions, prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. The power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life... [T]he powers of war are all regulated by the laws of nations, and are subject to no other limitations.

Later, the Supreme Court drew a similar conclusion, establishing a distinction between the powers of peace and the powers of war. The Court in *Miller v. United States* wrote:

[If the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the

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85 See Rana, *supra* note 1, at 1435–41 and sources cited therein; *see also*, e.g., Little v. Berreme, 6 U.S. (2 Cranch) 170 (1804) (holding seizure unlawful where Captain followed orders from the President that exceeded Congress' authorization).

86 Rana, *supra* note 1, at 1479–81; *see also*, e.g., *The Prize Cases*, 62 U.S. (2 Black) 635 (1836) (upholding constitutionality of President's decision to pursue unilaterally blockage of Confederate ports during the Civil War). In *The Prize Cases* opinion, Justice Grier wrote:

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.

*Id.* at 670.

government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. . . . Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.88

By this account, the prevailing nineteenth-century view was that Congress could pass laws governing those matters of purely domestic concern. In matters of war, however, such legislation was, in the words of the Miller dissent:

subject to different considerations and limitations from those applicable to legislation founded upon the municipal power of the government . . . [and] is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. . . . The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations.89

Thus, by the time the nation faced the possibility of utter destruction in the Civil War, all three branches of government were of the view that few limits could be placed upon the President’s discretion and expertise in matters of warfare. While Congress may pass laws governing peacetime endeavors, in matters of warfare the President’s expertise was preeminent.

Echoing these views, Charles Sumner, the Massachusetts senator and lawyer—who was a strong defender of President Lincoln’s Civil War policies wrote:

89 Id. at 315 (Field, J., dissenting). Other contemporaneous cases reinforce this view. See, e.g., Mechanics’ & Traders’ Bank v. Union Bank, 89 U.S. (22 Wall.) 276, 295–96 (1874) (“[I]t has been determined that the power to establish by military authority for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the National forces, is precisely the same as that which exists when foreign territory has been conquered and is conquered by the conquerors.”); Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506–07 (1870) (“The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are conferred by the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections.”); McCormick v. Humphrey, 27 Ind. 144, 154 (1866) (“Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the constitution . . . .”).
Pray, Sir, where in the Constitution is any limitation of the War Powers? Let Senators who would limit them mention a single section, line, or phrase, which even hints at any limitation. . . . The War Powers are derived from the Constitution, but when once set in motion, are without any restraint from the Constitution . . . so that what is done in pursuance of them is at the same time under the Constitution and outside the Constitution. . . . It is under the Constitution in its beginning and origin; it is outside the Constitution in the latitude with which it is conducted; but, whether under the Constitution or outside the Constitution, all that is done in pursuance of the War Powers is constitutional.\textsuperscript{90}

Under this view, the rights of peace may even be disregarded: "[I]n bestowing upon the Government War Powers without limitation, [the Founders] embodied in the Constitution all the Rights of War as completely as if those rights had been severally set down and enumerated; and among the first of these is the right to disregard the Rights of Peace.\textsuperscript{91}"

There were substantial carve-outs created for the conduct of war with sufficient "latitude" to ensure its success. The passage, "it is outside the Constitution in the latitude with which it is conducted" is a clear reference to the manner in which warfare would be conducted.\textsuperscript{92} That is an idea tied by implication to the expert means by which the nation would conduct warfare.

In fact, as the challenges facing the nation expanded during the course of the nineteenth century, the courts further recognized that the President was entitled to rely on advisers and others to supplement his national security expertise. This was not a new idea, as even Jefferson's early legal opinions supported the notion of expert subordinate actors within the


\textsuperscript{91} \textit{Id.} at 136–37.

\textsuperscript{92} \textit{Id.}. In fact, Sumner even believed that expert judgments could be exercised by choosing what source of law would apply to warfare. Andrew Kent describes this as a "dual" theory of conflict, where the United States, in Sumner's view, had the expert discretion to choose how to respond to rebels. In his words "The 'rebels in arms' were 'criminals' because they were committing treason and also 'enemies because their combination has assumed the front and proportions of war.' The U.S. government, it was argued, may choose 'to proceed against them in either character, according to controlling considerations of policy.' Then here is the rub: 'If we treat them as criminals, then we are under the restraints of the Constitution; if we treat them as enemies, then we have all the latitude sanctioned by the rights of war;' indeed, 'the rights against enemies, founded on war . . . are absolutely without constitutional limitation.' The choice of means was discretionary; the applicable legal regime flowed from the choice of means made by the U.S. government." Andrew Kent, \textit{The Constitution and the Laws of War During the Civil War}, 85 \textit{Notre Dame L. Rev.} 1839, 1851 (2010).
executive branch. However, it is during this period that we first begin to see judicial recognition of subordinate expert agents within the executive branch. Berdahl summarized this development by noting "[n]ot all of the acts required of the President can possibly be performed by him personally, and the courts have definitely recognized that he may act through the heads of departments."\(^93\) For example, in *Wilcox v. Jackson* the Supreme Court stated: "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."\(^94\) Furthermore, in the 1842 case *United States v. Eliason*, the Court noted that heads of departments are "constitutional organ[s] of the president" and thus "rules and orders publicly promulgated through [them] must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority."\(^95\) Thus, by the middle of the nineteenth century, the Court had recognized the functional advantages of the presidency that Hamilton espoused during the Founding debates\(^96\) and the Court extended these principles to the presidency as a whole, not just the President in his role as commander-in-chief.

With respect to the President, as commander-in-chief, Berdahl noted that he "occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments."\(^97\) His expertise is such that "as Commander-in-Chief [he] may constitutionally do what any military commander may do in accordance with the usual practise of carrying on war among civilized nations . . . ."\(^98\) His conduct of war is limited only "his own judgment and discretion, subject to his general responsibility under the Constitution."\(^99\)

While this sort of deference to the President's expertise may seem limitless, the Court noted in *Ex Parte Milligan* that the limits of these powers must be "determined by their nature, and by the principles of our

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\(^93\) Berdahl, *supra* note 22, at 21.

\(^94\) Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839) (explaining an order by the Secretary of War directing land for military purposes not public sale).


\(^96\) See *supra* note 71 and accompanying text.

\(^97\) Berdahl, *supra* note 22, at 117; see also Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499 (1866) ("By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshal, as 'an absurd and excessive extravagance.'").


\(^99\) Id.
In so far as expertise in the conduct of warfare or matters of national security is concerned, the specific details must be entrusted to the President alone. Thus, theorists, such as the noted law of war expert Guido Norman Lieber, noted that the direction of military movement:

belongs to command, and neither the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives it the command of the Army. Here the constitutional power of the President as commander-in-chief is exclusive.

Thus while Congress might play an expert role in regulating the military, concerns about speed which were highlighted during the founding, would exclude Congress from micro-managing a war. This means that decisions about troop movements or how best to deploy troops are war-time judgments that are not the type of matters which could properly be entrusted to the citizenry as a whole, or even to the legislature. It was during this period that we witnessed the greatest pre-NSC expansion in the concept of Presidential expertise in matters of national security. The exigent circumstances of the Civil War provided the perfect circumstances for the expansion of founding era notions of exigency, authority, and

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100 Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); id. at 139 (holding military tribunal did not have jurisdiction to try Milligan). Despite the fact that Milligan appeared to be facing an uphill battle in light of earlier Supreme Court decisions upholding the judgments of military tribunals—for example, the Vallandigham case—“those opinions were issued, as was the Court’s decision in the Prize Cases, when the outcome of the war was still in doubt. By the time the Court heard Milligan’s appeal, the war had been finished for nearly a year. And what a difference that year made.” Judging Executive Powers: Sixteen Supreme Court Cases That Have Shaped the American Presidency 104 (Richard J. Ellis ed., 2009). Professor Kent suggests the Court’s true view of executive power during wartime is closer to that expressed by Charles Sumner. See supra text accompanying notes 90–91; see also Andrew Kent, The Constitution and the Laws of War, 85 Notre Dame L. Rev. 1839, 1846 (2009); id. at 1927 (“[T]he Court’s sweeping rhetoric about the universality of constitutional rights in Milligan cannot be taken at face value.”) (footnote omitted). Professors Issacharoff and Pildes criticize the Milligan majority opinion’s rights-based approach. See Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inq. L. 1, 9–19 (2004). For a more detailed account of Milligan, see Curtis A. Bradley, The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization, in Presidential Power Stories 93–132 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

101 Guido Norman Lieber, Remarks on the Army Regulations and Executive Regulations in General 18 (1898).

102 Berdahl, supra note 22, at 121 (“[I]n time of war the authority of the President is recognized as being absolute as to where the war is to be conducted, whether to await the onslaughts of the enemy and wage a purely defensive war within the boundaries of the United States, or to send the armed forces of the United States out of the country to carry on an offensive war in the enemy territory, in the territory of an ally, or perhaps even in the territory of a neutral.”).
expertise outlined in prior sections of this Article. In areas where the
Constitution did not speak with specificity, the Executive seized the
opportunity to carve out areas of exclusive authority and expertise. Borne
of exigency, one would expect that the claims of expertise made by the
Executive would be relinquished when the crisis subsided. However once
the emergency of the Civil War passed, the nation faced a new exigency in
the form of industrialization, the subject of the next section.

IV. INDUSTRIALIZATION AND THE TURN OF THE CENTURY

As the nation grappled with the challenges of industrialization at the
end of the nineteenth century, scholars and elected officials grew
concerned with the ability of government to cope with new threats to
industry and the nation. Woodrow Wilson was one of the most influential
scholars of the era and would eventually become the 28th President of the
United States. As a scholar, he believed that the government of the
founding, which was created for a "homogeneous and rural" nation needed
to be modified to serve a country now "heterogeneous and crowded into
cities."103 Wilson believed that "administrative reform would assure
efficiency, whereas the existing diffusion of authority prevented effective
action."104 In his book, The State, Wilson wrote that government was
designed "to accomplish the objects of organized society" and if necessary,
"there must be constant adjustment of governmental assistance to the needs
of a changing social and industrial organization."105 Wilson placed a great
degree of trust in the qualifications of experts, and he believed that
political leaders should shape the broad policies of government, and
empower administrators to execute such plans.106 This trust in bureaucrats
and their expertise formed the framework for an expansion of
administration in matters of domestic policy and national security.

This framework of empowered experts relied on bureaucrats who
would be "cultured and self-sufficient enough to act with sense and vigor,
and yet so intimately connected with the popular thought, by means of
elections and constant public counsel, as to find arbitrariness of class spirit
out of the question."107 Central to Wilson's beliefs was the notion that
there was a fluid space for administrative action, bounded by law but

103 Kendrick A. Clements, Woodrow Wilson and Administrative Reform, 28 PRESIDENTIAL STUD.
Q. 320, 320 (1998) (internal citations omitted)
104 Id. at 323.
105 WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 659,
691 (1897); see also Clements, supra note 103, at 320.
106 Woodrow Wilson, The Study of Administration, 2 POL. SCI. Q. 197, 218 (1887).
107 Id. at 217.
empowered by delegation from political actors. 108 The idea was similar to that discussed above, with the Constitution outlining a government of separate power and authority. The allocation of expertise within that outline was to be decided through a struggle over authority between the Executive and Legislative branches. Wilson's contribution to this debate was to view struggles over authority as the biggest barrier to harnessing the nation's expertise, and his solution was to insert a massive well trained administrative apparatus into the middle of the separation of powers dispute.

With regard to the scope of authority in the hands of these experts, Wilson wrote, "the sphere of administrative authority is as wide as the sphere in which it may move [without] infringing the laws, statutory or customary, either in the letter or in their reasonable inferential meaning." 109 Scholars such as Rana cite Chief Justice Taney as authority for the argument that determinations of threats and other matters of national security expertise are "ultimately rooted in shared and popularly accessible judgments about safety and survival—judgments that might reasonably be reached by a group of ordinary Americans drawn from a representative pool of citizens." 110 Wilson, on the other hand, endorsed a markedly different view, writing that it was the job of the political leader to listen to and interpret the will of the people "by being spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form its judgments alike of parties and men." 111 Clements, interpreting Wilson's writings, states

Americans, Wilson argued, often confused the source of authority with authority itself. The will of the people was indeed the source of authority, but the people did not and could not rule directly. We are consulted about laws, but we do not originate them; neither do we carry them into execution. . . . There must be rule, under whatever polity, and there must be rulers: command and obedience, authority and submission to authority, even though the

108 BERDAHL, supra note 22, at 19 (Berdahl echoes this view especially when it comes to discretion and delegation in the area of war powers, writing, "most authorities hold that the war powers of the President constitute a latent power of discretionary action capable of almost unlimited expansion in times of emergency and making the President practically absolute within a certain sphere of action") (internal quotations omitted). For a somewhat extravagant claim as to the absolute nature of the President's war powers, see remarks of Senator Lewis, 65 CONG. REC. 4552, 4553 (1917).
109 Clements, supra note 103, at 322.
110 Rana, supra note 1, at 1437.
111 WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 68 (Columbia Univ. Press 1921) (1908).
people undoubtedly retained the right to choose their governors in periodic elections. I believe in the people, he said: in their honesty and sincerity and sagacity; but I do not believe in them as my governors.112

Expert bureaucrats would be, in Wilson’s view, “another process of representation” accountable to elected officials by regulation, those elected officials were themselves, accountable to the public through elections. The concept was one of “administrative legislation” whereby regulations would be prepared by subordinate officials (experts) in the several departments. They would be issued in the name of the head of the department, or in the name of the President, but it’s unlikely either had much say in the content of the regulations. The concepts of authority and expertise, while still tied together as a matter of power, were beginning to separate as a matter of reality and execution. The concept evolved to the point where, subordinate officials would write and implement regulations, pursuant to the authority of the head of a department, even in matters where the text of the statutes vested the power to act solely in the President.113 The evolution was such that the expert judgments of the President and the expert judgments of his subordinates were one and the same, just as the founding era sources discussed above suggested.

During the early 1900s, Wilson’s views as a scholar evolved due to his experience in office. He witnessed the expansion of Presidential power following the Spanish-American War14 and observed the expansion of authority granted to the President to cope with the looming threat of a great war in Europe. The model of expertise Wilson helped develop—expert bureaucrats within the executive branch—became a model for America’s emerging national security bureaucracy. The next Part discusses those expanding powers and Wilson’s reaction to them.

V. THE PATH TO WORLD WAR I

The government of the United States was largely unprepared to handle wartime mobilization leading up to World War I.115 The lead up to the war was characterized by “spiraling wages and prices, strikes and shortages and a near collapse of the railroad system” leading an outraged public to blame

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112 Clements, supra note 103, at 323 (internal quotations omitted).
114 For a helpful elaboration on the expansion of presidential power following the Spanish American War, see James T. Patterson, The Rise of Presidential Power before World War II, 40 Law & Contemp. Probs. 39 (1976).
The war required the creation of new administrative agencies steeped with experts in mobilization, prices, war time supplies and other military-industrial skill sets. It is worthy of note that “Congress, in providing for these [expert agencies], in almost every instance gave the President blanket authority to work out the administrative details—to create the necessary offices, to prescribe the character of their organization, and to determine upon the administrative methods to be used.” In short, the run-up to World War I showed a Congress willing to forgo a constitutional struggle and defer to the expertise of bureaucrats and the leadership of the President.

For example, in a clear act of deference to Presidential expertise, the Espionage Act provided for the control of exports from the United States, but did not create an administrative agency to exercise such control, rather it merely specified that such activities be carried out “under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe.” Congress thus chose not to fight the President over the power and authority to control exports, or over the details under which that control of exports would be conducted. It was a complete abdication of responsibility for how the nation would engage in the expertise based task of controlling the flow of goods out of the United States. Likewise, The Lever Food and Fuel Control Act was a dramatic expansion of administrative authority which empowered the president to “regulate the production, distribution, and price of food, as well as to control the price and production of all other products, including fuel, used in raising food.” The Food and Fuel Control Act, set up no administrative machinery, instead it authorized the President “to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act,” and further, “to create and use any agency or agencies” for the same purpose. This abdication of authority on the part of the legislature, in favor of Executive power and expertise was unprecedented, and allowed the President to control some of the nation’s most essential commodities. The agencies created by Wilson under this authority included the Food Administration led by Herbert Hoover, and a Fuel Administration led by Harry Garfield—each agency was staffed with experts, and each was created through a broad delegation of authority. These administrative agencies, modeled on the delegated expertise model

116 Clements, supra note 103, at 330.
117 BERDAHL, supra note 22, at 170.
120 Clements, supra note 103, at 331.
122 Id.
of the late 1800s and early 1900s had their Constitutional roots in the concepts of unity, speed, and dispatch discussed earlier. The nation faced unanticipated threats, just as were predicted in The Federalist No. 23. And just as Locke suggested, certain matters would need to be subjected to the "prudence and wisdom" and managerial "skill" of those who are entrusted to act because "it is almost impracticable to place the force of the Commonwealth in distinct and not subordinate hands." Similarly, The Trading with the Enemy Act provided for the regulation and control of imports and exports and allowed for the censorship of foreign communications and foreign-language publications. The broadest grant in the act was the empowerment of the President "to exercise any power or authority conferred by this Act through such officer or officers as he shall direct." To raise troops, Congress passed the Selective Service Act of 1917 which entrusted Presidential expertise in carrying out the administrative details of registering military aged males. The President was empowered to designate the time and place for registrations, and President Wilson did so by thirteen presidential proclamations and a series of detailed regulations. The establishment of selective service boards and their duties were generally outlined in the Selective Service Act, but "the President was authorized to prescribe the rules and regulations under which the boards should operate, to make rules and regulations governing their organization and procedure, and to make 'all other rules and regulations necessary to carry out the terms and provisions of this section.'" The President was further "empowered to affirm, modify or reverse any decisions" made by the boards, thus making it clear "that while the administrative machinery of conscription was provided for and barely outlined by statute, its creation, supervision, method of operation, and control were in the hands of the President." In fact, the President even created several war agencies without any statutory authority, relying instead on his powers as chief executive and commander-in-chief. The acts detailed above were unprecedented expansions of executive and administrative expertise in matters of national security, each with founding

123 THE FEDERALIST No. 23, supra note 18, at 153 (Alexander Hamilton) (stating "because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them; The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power which the care of it is committed").
124 Locke, supra note 38.
125 BERDAHL, supra note 22, at 170 (internal quotations omitted)
127 BERDAHL, supra note 22, at 168 n.6 (listing all thirteen proclamations).
128 Id. at 169 (internal quotations omitted).
129 Id. at 170.
130 Id. at 172 (listing, specifically, the Committee on Public Information and the War Industries Board as examples).
era roots in debates over authority and expertise.

In fact, of all the expert agencies created during World War I, most were not expressly created by statute, rather Congress passed broad enabling acts, empowering the President to take certain actions (raising troops, controlling imports and exports, etc.) and left it to the expertise of the President and his subordinates to construct appropriate agencies, define their responsibilities, and enforce their regulations.131

The expansion of presidential powers during this period of time caused administrative expertise proponent Wilson to pause and consider how the expansion of administrative expertise (even within the Executive’s control) could be reconciled with democratic control of government.132 Because he could not reconcile the two, he ultimately sought to dismantle many of the reforms he implemented during World War I, seeking the sunset of powers once the emergencies of war subsided.133 While many expanded powers did expire, the idea of expanding national security expertise sat waiting to be reinvigorated, which, as Rana notes, Pendleton Herring was able to do in the lead up to World War II.134

VI. CONCLUSION

What do these historical examples tell us about Rana’s question of who should decide on matters of national security? Whose expertise should we trust? The examples and history outlined above demonstrate that the Founders were in fact uncertain about the answers to these questions. Returning to The Federalist No. 23, we can recall that:

[It is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power which the care of it is committed.135

This passage has been subjected to extensive scholarly commentary, with advocates using it to support and defend a variety of viewpoints with

131 Id. at 172 (noting “very few were expressly created by statute, Congress thus apparently recognizing [sic] the importance of entrusting the details of war administration to the President”).
132 Clements, supra note 103, at 333
133 Id. at 332.
134 Rana, supra note 1, at 1458–68.
135 THE FEDERALIST NO. 23 supra note 18, at 153 (Alexander Hamilton).
regard to legislative or executive primacy in matters of national security. Such ambiguity and disagreement is telling, as it suggests that perhaps the Founders intended conflict and invited a struggle over authority and expertise in matters of national security. If that is the case, then who should decide on matters of security is itself a question purposefully left for conflict. In the early years of the nation, the conflict was resolved through a legislature and people exercising a greater role in decisions about security; as threats to the nation increased, the requirements of unity, speed, dispatch, and secrecy resulted in less involvement of the people in national security matters and greater reliance on expert bureaucrats. Perhaps if such threats subside, we may see a retreat to the prior position of legislative and popular control over matters of national security, similar to the sunset of powers following World War I. Nothing in the Constitution forecloses this possibility, in fact it seems all the Constitution requires is a constant struggle over who should decide.

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136 See Cara-Ann M. Hamaguchi, Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During "Contingency Operations," 86 N.C. L. REV. 1047, 1064 (2008) (discussing the quote in support of government authority over private civilian contractors in Iraq and Afghanistan military operations); J. Andrew Kent, A Textual Historical Case Against a Global Constitution, 95 GEO. L.J. 463, 502 (arguing that the passage supports the view that power over foreign affairs must be discretionary, and that the Constitution "should not provide rigid, enforceable legal limits to the powers that the federal government might need to defend against external aggression"); John Yoo, The Terrorist Surveillance Program and the Constitution, 14 GEO. MASON L. REV. 565, 594–95 (2007) (arguing that unrestricted executive power is necessary because of "[w]ar’s unpredictability[, which] makes unique demands for decisive and often secret action").
