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QUIS CUSTODIET IPSOS CUSTODES?[1] SURVEILLANCE AND SEPARATION OF POWERS AT THE FOUNDING

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INTRODUCTION

Slush funds,[2] propaganda in the foreign press,[3] letter-opening campaigns,[4] and plots to overthrow foreign governments.[5] Are these

[1] Juvenal's *Satire VI*. Translation: Who will watch the watchmen?

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[2] An Act Providing the Means of Intercourse Between the United States and Foreign Nations, ch. 22, 1 Stat. 128–29 (1790) (also known as the Contingency Fund for Foreign Intercourse).

[3] STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 64 (1996).

[4] *Id.* at 22.

[5] *Id.* at 72–79.

the actions of an imperial President[6] intent on flouting the structure of the Constitution to accomplish the political ends of any given moment? No. They were the actions of our first Presidents, men who—though they had a personal distaste for "the business of intelligence"[7]—believed that the chief executive of the young American republic should possess every power necessary to secure its existence.[8] Though many in the Founding generation fought and died to "secure the [b]lessings of [l]iberty"[9] for themselves and their posterity, their leaders did not hesitate to take dramatic action when they thought it necessary to advance American interests at home and abroad.

Despite modern assertions to the contrary,[10] American presidents from Washington to Biden have always seen the need for—and have always interpreted the Constitution to provide—authority to act unilaterally to protect the interests of the United States against enemies foreign and domestic. One such authority? The ability to surveil for national security purposes.

Depending on the surveillance program or the era of American history in mind, surveillance can mean different things to different people. Therefore, defining the term at the outset is prudent. For purposes of this essay, executive surveillance refers to the authority—whether directed at targets at home or abroad—to initiate, structure, prioritize, and execute surveillance programs as a constitutional entitlement of the executive branch *without*

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[6] ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973) (coining the term).

[7] THE FEDERALIST NO. 64 (John Jay).

[8] THE FEDERALIST NO. 23 (Alexander Hamilton) ("The principal purposes to be answered by union are these—the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks . . . the superintendence of our intercourse, political and commercial, with foreign countries. . . . These powers ought to exist without limitation . . . .").

[9] U.S. CONST. pmbl.

[10] ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., MEMORANDUM, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION (Jan. 5, 2006).

authorizing legislation from Congress.[11] It is the contention that surveillance is, by nature, an executive act, and discretion to conduct lawful surveillance is rightfully lodged with the President instead of the Congress, the court system, or the state governments by the Constitution—for it surely must vest somewhere.

It is equally important to understand what this essay is *not*. Here, I make no pretension of analyzing the complicated relationship between executive surveillance and the scope of the Fourth Amendment, or for that matter, any other constitutional restraint. The Fourth Amendment's original public meaning is hotly debated, and depending on the view taken, it may externally constrain the President's Article II authority in more or less substantial ways.[12] This essay explicitly puts those debates aside, proceeding instead on the reasoning that—regardless of what the Fourth Amendment actually means—it is imprudent to consider an external limitation to any given authority before its scope and source are delimited on their own terms.

Abstracting from the thorny problems caused by the original public meaning of the Fourth Amendment clears the debate stage for a separation of powers showdown between Articles I and II, creating an analytical framework than can be used to more easily assess whether *Congress*, and not the Constitution itself, has any authority to limit the executive surveillance power. In the present work, my much more modest objective is to exhaustively canvas the relevant legal history with the goal of showing that, as a matter of original meaning, the executive branch has a much better claim to the

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[11] For example, in the wake of 9/11, the Bush Administration justified its surveillance activities based on both the Constitution and statutes—namely, the AUMF and FISA. BAZAN & ELSEA, *supra* note 10, at 2–3. The concept of "executive surveillance," as defined here, would delimit how much authority the President has based on the Constitution alone, assuming that Congress rescinded the authorizations it provided in the AUMF and FISA.

[12] Here, an "external" restraint is one outside of the confines of Article II but extant in the Constitution itself.

surveillance powers than the legislative branch does. The implications of such a claim can and should be exposited in further academic work.

The answers to these fundamental questions of executive power have weighty policy consequences. The United States has entered the twentieth year of its formal war on terror, and as boots leave the ground in the Middle East, the executive may soon be unable to rely on the AUMF to justify its snooping.[13] It faces many future decades of great power competition with China[14] and a present wave of domestic faction and violence at home.[15] To meet these challenges, the United States relies on an undertheorized and often misunderstood executive branch: As has been noted elsewhere, constitutional scholars have yet to agree even on the constitutional *sources* of executive authority, let alone the *extent* of authority those sources provide.[16]

Building on the unitary theory of the executive first offered in the academic context by Steven Calabresi and Kevin Rhodes[17] and expounded in the context of foreign affairs by Sai Prakash, Michael Ramsey,[18] and Gary Lawson,[19] this essay provides an analysis of the

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[13] Jennifer Steinhauer, *As Wars Wind Down, Congress Revisits Presidential Powers*, N.Y. TIMES (June 17, 2021) [https://perma.cc/7Q6C-TBSS].

[14] Bruce Jones, *China and the Return of Great Power Strategic Competition*, BROOKINGS INST. (Feb. 2020) [https://perma.cc/P3NC-S943].

[15] David Graham, *America is Having a Violence Wave, Not a Crime Wave*, THE ATLANTIC (Sept. 29, 2021) [https://perma.cc/95JU-EU74].

[16] Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375 (2008).

[17] Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995). Though the idea of a unitary executive made its way into the academy in the 1990s, its origins trace back at least to the Reagan administration, and possibly earlier. Some contend that it was a reaction to "the political setting the Reagan administration faced." Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 313 (2010).

[18] *See generally* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) *and* Lawson, *supra* note 16.

[19] Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 34 (2006).

historical pedigree of executive surveillance in hopes of concluding where and to what extent the President is constitutionally empowered to surveil on the basis of his office alone. Specifically, it seeks to answer three questions: (1) where, if anywhere, does the Constitution grant the President authority to conduct surveillance and (2) if such an authority exists, what does the historical record before, during, and after the Revolution have to say about its use.

To accomplish these tasks, Part I examines each of the possible textual hooks in Article II that might justify a warrantless surveillance power and concludes that the Vesting Clause is the most likely candidate. Part II.A makes the argument that the Vesting Clause does convey *some* unenumerated powers, and Part II.B concludes that, as a matter of original public meaning, the Vesting Clause vests the surveillance power with the President and not Congress. Part III examines contemporaneous developments in privacy law to show that it was the Fourth Amendment (and, impliedly, not any intrinsic limitation on executive power) that acted as a specific response to perceived oversteps of the English government. This is followed by a brief conclusion.

Before we begin, a few words in defense of the approach taken here. Some scholars writing about Article II claim the primacy of "textual, intratextual, and structural arguments" at the expense of "historical surveys," which are "strictly secondary considerations."[20] But the former tools can only carry the analysis so far. They may be sufficient to conclude that the Vesting Clause conveys *some* otherwise ungranted executive authority, but without an adequate account of history, one is left to wonder what authority was actually conveyed. Indeed, to determine the legal effect of the phrase "[t]he executive Power shall be vested in a President of the United States of

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[20] Lawson, *supra* note 16, at 386.

America,"[21] one must first determine what the Framers understood "the executive Power" to mean.

Doing so requires more than a long, hard look at the text of Article II, which, though necessary, is ultimately insufficient. Providing complete answers to the questions left by textual analysis requires scrutiny of English legal history, the conduct of the Revolutionary War under the Articles of Confederation, the ratification debates, and the authority actually exercised by the first Presidents. Resort to historical practice is especially appropriate because the Founders saw intelligence as a necessary[22] but distasteful tool for national defense and the secrecy inherent to the nature of surveillance means it is not discussed unless absolutely necessary.

Admittedly, resort to post-ratification history to interpret the Constitution is problematic when seeking its original meaning. Even so, some originalists, citing James Madison, have argued that the meaning of indeterminate textual provisions of the constitution can be "liquidated" by practice.[23] Professor Baude would require three elements to show that something has been liquidated: (1) textual indeterminacy, (2) a course of deliberate practice, and (3) "a real or imputed popular ratification." [24] While no formal attempt at liquidation is made here, the liquidation theory itself tends to show that post-ratification history can be relevant, especially when expositing a provision as general and indeterminate as the Vesting Clause of Article II.

I. WHERE IS THE SURVEILLANCE POWER FOUND IN ARTICLE II?

Presidents have long claimed and exercised authority to act unilaterally to protect the nation's security interests. In 1936,

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[21] U.S. CONST. art. II, § 1, cl. 1.

[22] *Infra* Part II. 2.

[23] THE FEDERALIST NO. 37 (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications.").

[24] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019).

President Roosevelt—citing no statute—empowered J. Edgar Hoover's FBI to investigate links between the Soviet Union and the American Communist Party.[25] Under that authority and bolstered by the Supreme Court's decision in *Olmstead v. United States*,[26] the FBI engaged in widespread wiretapping of American communists and fascists.[27]

Subsequent presidents memorialized this claimed constitutional authority in a series of executive orders directed at the intelligence community. Presidents Ford, Carter, and Reagan reformed the intelligence community by banning political assassinations and requiring Attorney General approval for intelligence operations "within the United States or against a United States person abroad," among other things.[28]

After 9/11, the Stellar Wind program "resurrected Cold War tactics with twenty-first century technology," collecting phone and email metadata at scale as part of the international War on Terror.[29] Multiple OLC opinions from 2002–2004 affirmed the program on the basis of the President's "inherent constitutional authority as Commander in Chief and sole organ for the nation in foreign affairs."[30] The Bush administration also made these assertions in letters to the Foreign Intelligence Surveillance Court (FISC),[31] but those claims were not examined in reference to any specific grant of

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[25] TIM WEINER, ENEMIES: A HISTORY OF THE FBI 74–75 (2012).

[26] 277 U.S. 438 (1928).

[27] WEINER, *supra* note 25, at 75–76.

[28] *See* Exec. Order No. 11,905, 3 C.F.R. 90 (1976) *reprinted in* 50 U.S.C. § 401 (1976); Exec. Order No. 12,036, 3 C.F.R. 112 (1978); and Exec. Order 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000). Note that the cited portion of the Exec. Order No. 12,333 has been replaced by FISA.

[29] WEINER, *supra* note 25, at 241.

[30] U.S. DEP'T OF JUSTICE, MEMORANDUM FOR THE ATTORNEY GENERAL RE: REVIEW OF THE LEGALITY OF THE STELLAR WIND PROGRAM 4 (May 6, 2004); *see also* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (2006) (same).

[31] U.S. DEP'T OF JUSTICE, LETTER FROM JOHN C. YOO, DEPUTY ASSISTANT ATT'Y GEN., TO JUDGE COLLEEN KOLLAR-KOTELLY (May 17, 2002).

executive power in Article II, nor were they vetted as a matter of original public meaning.[32]

What, then, are the constitutional bases for these assertions? Four possibilities are considered in turn: (1) the Commander-in-Chief Clause, (2) the Take Care Clause, (3) structural considerations, and (4) the Vesting Clause.

THE COMMANDER-IN-CHIEF CLAUSE

It may be the case that surveillance authority attaches incident to the Commander-in-Chief Clause. The argument in support of this theory is simple: During times of war, the President has the authority to use the nation's whole military force to fight and win. Since intelligence-gathering is a useful tool, the President must have the authority to avail himself of it. This position draws full support from scholars such as John Yoo and John Eastman,[33] support from the

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[32] For example, the "sole organ" language, initially derived from *Curtiss-Wright Export Corp.*, *infra* note 56, is dubious on the sole basis of the Constitution's text, which clearly gives Congress a role to play in the conduct of foreign affairs. U.S. CONST. art. I, § 8, cls. 3, 10, 11. Many of the authorities claimed by the President in executive orders and in OLC letters following 9/11 were statutorily granted by Congress in the FISA Amendments Act of 2008. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, 122 Stat. 2436. Of note is Section 702. *Id.* at 2438. Unlike the probable cause requirements of the Fourth Amendment, Section 702 is status-based, allowing the government to attain sweeping warrants "targeting . . . persons reasonably believed to be located outside the United States to acquire foreign intelligence information." *Id.* Once obtained, authorization is effective "for a period of up to 1 year." *Id.*

[33] John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 37 HARV. J.L. & PUB. POL'Y 903, 926 (2013); John Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 1 (2007) [https://perma.cc/P62H-ZNMZ]. *But see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that the Commander-in-Chief Clause was not a sufficient basis to infer a unilateral power to seize the nation's steel mills); *see also id.* at 644 (Jackson, J., concurring) (inferring that, because the war powers are split between Congress and the President, the President can claim no unilateral authority over the conduct of war and instead, Congress "should control utilization of the war power as an instrument of domestic policy.").

Supreme Court's opinion in *Totten v. United States*,[34] mixed support from the Department of Justice,[35] and even implied support from the Authorization for Use of Military Force itself, which recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[36] Further, a majority of historical exercises of executive power by American Presidents have been incident to military engagements, declared or otherwise.[37]

The theory is not without its critics. First, the Commander-in-Chief Clause, even when combined with other substantive grants of authority in Article II, Section 2, cannot "be stretched to cover all, or even most, of the powers commonly assumed to lie with the President."[38] Where, for example, would the President infer his "lead role" in declaring the foreign policy of the United States or his power to make executive agreements without the advice and consent of the Senate? Additionally, interpretative questions immediately arise as to the geographic extent of the granted authority: Would the President only be able to authorize battlefield surveillance, or would the surveillance power extend out of the theater of war?[39] To avoid

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[34] 92 U.S. 105, 106 (1875) ("We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy . . . .").

[35] *See* DEP'T OF JUSTICE Memos, *supra* note 30 (arguing partly from the Commander-in-Chief Clause and partly from the sole organ doctrine).

[36] Authorization for Use of Military Force, S.J. Res. 23, 107th Congress, Pub. L. No. 107–40 § 2(a), 115 Stat. 224, 224 (as passed by Senate, Sept. 18, 2001).

[37] *See infra* Part II.B 2, II.B.4, and II.B. 5.

[38] Sai Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 238 n.9 (2001).

[39] In other words, the Commander-in-Chief Clause theory does not solve the difficulties posed by *Youngstown*, as Professor Laurence Tribe has argued. Letter from Laurence H. Tribe, Professor, Harvard University, to Honorable John Conyers, Jr., U.S. Congressman 3 (Jan. 6, 2006) (arguing that, on the terms of *Youngstown*, a domestic surveillance program is just as unconstitutional as a steel mill seizure).

these interpretive difficulties, Professor Lawson has instead suggested that the Commander-in-Chief Clause "reads far less like a grant of presidential power than like a specification of decision-making hierarchy."[40]

What's more, wartime surveillance accounts for most—but not all—historical examples of surveillance power. It accounts for substantially less when counting only those wars declared by Congress. So, the Commander-in-Chief Clause theory cannot adequately explain all early exercises of the surveillance power.[41] Worse, it fully fails to explain why, in discussing the treaty-making power, John Jay argued that the President needed to "manage the business of intelligence in such a manner as prudence may suggest."[42] Even the most generous reading of Article II, Section 2 requires the conclusion that, to fully exercise his share of the treaty-making power, the President would be forced to rely on separate authority granted somewhere other than the Commander-in-Chief Clause.

Practically speaking, the President is likely to rely on the Commander-in-Chief Clause to conduct surveillance during times of declared war, and for those exercises of the surveillance power, such claims very well might pass constitutional muster. But, because the clause does not answer every constitutional question that may arise, consider that other, more general grants of executive power might resolve the interpretative difficulties outlined here.

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[40] Lawson, *supra* note 16, at 382. It is possible to read the other major foreign power granted to the President in Article II, Section 2—the treaty-making power—in a similar light. The President's power to make Treaties, instead of being seen as a substantive grant of power on its own, might instead be seen as establishing an agent-principal relationship, where the President, as agent, represents the best interests of the Senate and negotiates accordingly, subject to final approval by the Senate, as principal.

[41] For example, it could not explain Jefferson's attempts to acquire Spanish maps of South America and plans to build the Panama Canal and Madison's purchase of correspondence between John Henry and the Governor-General of Canada, a purchase that played a major role in fomenting the War of 1812. *See infra* Part II.B.5.

[42] THE FEDERALIST NO. 64 (John Jay).

THE TAKE CARE CLAUSE

It might instead be the case that surveillance authority attaches incident to the Take Care Clause. Under that view, the President is authorized to surveil only incident to the enforcement of laws passed by Congress. At first glance, the theory appears to have some basis in practice. From time to time, Congress passes laws that might be interpreted to delegate surveillance authority. For example, in Title III, Congress purportedly authorized the FBI to wiretap for investigations in a sweeping range of crimes, including murder, treason, espionage, human trafficking, kidnapping, racketeering, and many others.[43]

But to apply the Take Care Clause theory outside of the law enforcement context, Congress would need to be the body charged with primacy over matters of intelligence and foreign affairs, since much of the modern intelligence community is devoted to surveillance in support of these two areas. As the following sections set out to show, significant evidence indicates that it was the President, and not Congress, that was historically tasked with surveillance. Furthermore, while debates continue to rage about the residual foreign affairs powers of the United States, a substantial body of academic literature, case law, and historical practice seems to support the President.[44]

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[43] 18 U.S.C. §§ 2516(1)(a)–(1)(u). To be clear, even though the section is entitled "Authorization for interception of wire, oral, or electronic communications," the best reading of that provision is as a substantive *limitation* on Presidential authority. If one were to accept that the Take Care Clause is the appropriate constitutional provision from which to read an executive surveillance authority, one would have to read 18 U.S.C. §§ 2516(1)(a)–(1)(u) to be a *grant* of authority, which is a strained reading of the text, and one would have to accept that all prior uses of the wiretapping authority were unconstitutional, which casts doubt on decades of wiretapping, including wiretapping conducted after *Olmstead* (*see supra* note 26) and before *Katz v. United States*, 389 U.S. 347 (1967). Both assertions are difficult to accept.

[44] *Compare* Prakash & Ramsey, *supra* note 18; Yoo, *supra* note 33; H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV.

Perhaps Congress's defined roles in declaring wars and confirming treaties are enough to justify laws authorizing and governing foreign surveillance. But even granting that, the Take Care Clause still runs into issues with the historical record. Surveillance incident to a declared war could be justified under the Take Care Clause since the Constitution vests the power of declaring war exclusively with Congress.[45] But what about hostilities resulting from an undeclared war? And what about examples of surveillance not incident to any existing hostility at all? These independent exercises of surveillance authority—funded by Congress almost immediately after the Founding[46] and not questioned by that body for decades[47]—cast doubt on the proposition that the surveillance power is drawn up in the Take Care Clause.

The Take Care Clause theory raises more questions than it answers about the relationship between Congressional and Presidential power. If the President can surveil only because he has a duty to "take Care that the Laws be faithfully executed,"[48] then Congressional statutes must be viewed as "flipping a switch" so that the President may exercise a constitutionally delegated authority. That in itself is odd. But another issue arises when Congress (as it often does) *limits* the surveillance power in the very same act where it implicitly—and sometimes explicitly—authorizes it.[49] Such a

1471 (1999); DEP'T OF JUSTICE memos, *supra* note 30; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *and* Dames & Moore v. Regan, 453 U.S. 654 (1981) *with* GERHARD CASPER, SEPARATING POWER 68 (1997); EDWARD CORWIN, THE PRESIDENT 1787–1984, at 177 (Randall Bland et al. eds., 5th ed. 1984); HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION 75 (1990). For the latter view expressed succinctly in popular culture, *see also* KANYE WEST, POWER (Def Jam Records 2010) ("No one man should have all that power.").

[45] U.S. CONST. art. I, § 8, cl. 11.

[46] Contingency Fund for Foreign Intercourse, *supra* note 2.

[47] Congress finally intervened with the Contingency Fund in 1842, when it very nearly impeached Secretary of State Daniel Webster after a particularly egregious covert operation to bribe newspapers in Maine to positively affect local sentiment over the Webster–Ashburton Treaty of 1842. For a concise summary of those events, *see* KNOTT, *supra* note 3, at 120–27.

[48] U.S. CONST. art. II, § 3.

[49] *Supra* note 43.

limitation is constitutionally suspect not only because Article I, Section 8 is devoid of any power to pass laws regulating surveillance,[50] but also because a theory that empowers Congress to tell the President *when* and *how* to exercise his own constitutional authority raises severe separation of powers concerns.[51] Given these difficulties, it is unclear whether the President would be bound by such restrictions at all, leading to an absurd result in which the President claims constitutional authority to surveil due to the existence of one, constitutional part of a statute but refuses to be bound by another, unconstitutional part of the same statute.

EXTRATEXTUAL STRUCTURAL CONSIDERATIONS

A third option is that no textual basis for the surveillance authority exists, and instead, structural concerns militate that the authority must be given to one branch or another of the federal government.[52] If that is the case, three possibilities emerge: (1) authority is more appropriately vested with Congress, (2) authority is more appropriately vested with the President, or (3) the structure of the Constitution presupposed that the authority would be distributed based on conflicts between the two.

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[50] *See* U.S. CONST. art. I, § 8. *See also* BAZAN & ELSEA, *supra* note 10, at 4.

[51] As opposed to restrictions on delegated legislative authority commonly given to administrative agencies, which seem inherently less problematic because the authority is legislative, not executive, in character. Overbroad delegations of legislative authority may raise separation of powers concerns of their own, but that is far afield of the scope of the present essay.

[52] To be clear, the idea that the federal government was to be clothed with every concomitant power of nationality was controversial at the Founding. The Federalist Papers equivocate on the topic. *See infra* Part II.B.3. Even where that view was accepted, prominent Founders still advanced the position that both the President and Congress needed to be involved, and not just the President alone. James Madison, HELVIDIUS NO. 1 (Aug. 24, 1793) ("It will be found, however, I believe that all of [the contemporary experts on the Law of Nations] speak of the powers to declare war, to conclude peace, and to form alliances, as among the highest acts of the sovereignty; of which the legislative power must at least be an integral and preeminent part.") [https://perma.cc/G77B-CZC4].

The first view—that the President and Congress are equally entitled to the surveillance authority—assumes that the Constitution's text is indifferent as to which branch is lodged with the surveillance power.[53] This view encounters all the same difficulties that the Take Care Clause does,[54] but with an added affront to federalism. It seems to violate the assumptions of our constitutional system—one where "the powers not delegated to the United States . . . are reserved to the States respectively"[55]—to argue that a power is delegated to the United States without bothering to argue that it is delegated to any one branch in particular.

The theory of unenumerated executive surveillance power is analogous to the Supreme Court's decisions about other aspects of executive power, namely the President's primacy over matters of foreign affairs. That line of doctrine is lengthy and stems back to the Court's landmark decision in *United States v. Curtiss-Wright Export Corp.*[56] There, the Court held that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[57] As a result, the foreign affairs powers, which were "the powers of external sovereignty,"[58] passed to the colonies collectively, then to the united colonies under the Articles of Confederation, and finally to the United States under the Constitution.[59] Importantly, these powers "did not depend upon the affirmative grants of the Constitution" but

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[53] This is reminiscent of Professor Corwin's view of the foreign powers of the United States, in which the Constitution "is an invitation to struggle for the privilege of directing American foreign policy." CORWIN, *supra* note 44, at 201.

[54] As does the second view: of unenumerated Congressional supremacy. Therefore, it is disposed of without further discussion.

[55] U.S. CONST. amend. X.

[56] 299 U.S. 304 (1936).

[57] *Id.* at 315–16.

[58] *Id.* at 316.

[59] *Id.* at 316–18.

were instead "necessary concomitants of nationality."[60] Therefore, because the President is the "constitutional representative of the United States with regard to foreign nations," he is the "sole organ of the federal government" on matters of foreign affairs.[61]

In opinion after opinion, the Supreme Court has reaffirmed its commitment to this doctrine.[62] And it is easy to see why: The notion that the President has sole authority over the "concomitants of nationality" has intuitive appeal, especially to proponents of the unitary executive theory. Functionally, since the President is unitary, he alone can exhibit the characteristics of "[d]ecision, activity, secrecy, and despatch [sic]" that are required to preserve a nation in the face of foreign threat and intrigue.[63] It should come as no surprise, then, that intuition matches practice, and "distinguished Founding-era constitutionalists" demonstrated executive primacy over foreign affairs "in the exercise of their duties as officials or officers of the United States government."[64]

The same functional arguments can be made in support of an independent executive power to conduct surveillance in support of national security. After all, if surveillance and covert action are not the type of activities that can benefit from a President's "decision, activity, secrecy, and dispatch," what are? From a policy perspective, it is critically important that our federal government be able to spy, and spy well. Entrusting these functions to Congress—a deliberative body with 535 public-facing members—hardly seems like a recipe for

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[60] *Id.* at 318.

[61] *Id.* at 319–20.

[62] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 188 (1993); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964); Chicago & Southern Air Lines, Inc., v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948).

[63] THE FEDERALIST NO. 70 (Alexander Hamilton).

[64] H. Jefferson Powell, *The Founders and The President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1475 (1999).

success, let alone secrecy.[65] But where the Court has gone wrong is assuming the need to fall back on functional arguments or concomitants of nationality when an explicit-but-undertheorized grant of authority in Article II might provide the textual basis for its intuition.

THE VESTING CLAUSE

That clause is the Vesting Clause. From a textual standpoint, the Vesting Clause must mean *something*. As Professors Calabresi and Prakash argue at length, strong intra-textual and definitional evidence supports a substantive Executive Vesting Clause.[66] For example, the Vesting Clauses of Articles II and III are nearly identical,[67] and the Judicial Vesting Clause is the only plausible source of judicial authority contained in Article III.[68] Further, the plain meaning of the word "vest" at the time of the Founding was "to place in possession of."[69]

Placing the surveillance power in the Vesting Clause alleviates many of the logical difficulties caused by its placement in the

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[65] In the words of Senator John Forsyth: "[I]f a desire was felt that any subject should be bruted about in every corner of the United States, should become the topic of universal discussion, nothing more was necessary than to close the doors of the Senate chamber, and make it the object of secret, confidential deliberation." KNOTT, *supra* note 3, at 49.

[66] *Compare* Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541 (1994) (arguing in favor of a substantive Vesting Clause) *with* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (arguing against) *and* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (same).

[67] The difference amounts to the addition of one comma in Article III not present in Article II. *Compare* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.") *with* U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."). For a fuller formulation of this argument, *see* Calabresi & Prakash, *supra* note 66, at 570–72.

[68] *See generally* U.S. CONST. art. III. This argument depends on both the harmonious-reading canon, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 155 (2012), and the absurdity doctrine. *Id.* at 193.

[69] Calabresi & Prakash, *supra* note 66, at 572, quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2102 (Libraire du Liban cd. 1978) (4th ed. 1773).

Commander-in-Chief Clause, the Take Care Clause, or in the vagaries of extratextual constitutional theorizing. To start, recognizing a free-standing surveillance power puts us in the very favorable position of not having to label many actions taken by the Washington administration as blatantly unconstitutional.[70] It also alleviates the federalism-based objections to an unenumerated-but-unquestionably-federal surveillance power. Finally, unlike under the Take Care Clause theory, the President is not put in the awkward position of waiting for a statutory trigger to use his constitutional ability to surveil.[71]

To be clear, these benefits only accrue to the Vesting Clause theory if that clause encompasses something more than the defined powers in Article 2, Sections 2 and 3. If it does not, then the President is left to rely on the narrower sources of authority and all the problems and limitations that come with them. For the Vesting Clause theory of surveillance power to hold water, then, two things must be true. First, the Vesting Clause must convey those powers that are executive in nature but otherwise unenumerated in Article II.[72] Second, surveillance for national security purposes must have

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[70] *See infra* Part II.B.4 (detailing the surveillance actions taken by the Washington administration).

[71] It does not, however, remove all separation-of-powers concerns with Congressional limitations on the surveillance power. If that power is encompassed by the Vesting Clause, then the President has the sole and exclusive authority to surveil. Limitations from Congress cannot be founded on their independent authority to surveil, because no such authority exists. Without another source, substantive Congressional limitations on the surveillance power are on shaky constitutional footing. *See infra* Part III.

[72] Though this essay proceeds largely with historical analysis, there are also textual reasons to believe that the Vesting Clause conveys powers otherwise unenumerated in Article II. For example, unlike Article I's Vesting Clause, Article II does not limit the executive Power to those "herein granted." U.S. CONST. art. I, § 1, cl. 1. *See also* Calabresi & Prakash, *supra* note 66, at 574–76 (making this argument in greater detail). Therefore, reading Article II's Vesting Clause to convey only those powers explicitly granted in Sections 2 and 3 would render it redundant, which violates the surplusage canon. SCALIA & GARNER, *supra* note 68, at 150.

been one of those powers understood to fall under "the executive Power" at the time of the Founding. If both of these points are established, the Vesting Clause theory is proven, and the President has textual support for executive primacy over the federal government's powers of surveillance.

Even then, further interpretative work remains. A second, more searching inquiry should follow, asking not only whether the surveillance power is executive in nature but also whether such executive power is independent or subsidiary. Though the colonists rejected certain aspects of the royal prerogative, the King's use (and abuse) of his executive power became the backdrop against which the Founders wrote Article II.[73] Blackstone classified the King's prerogatives as either "direct or incidental."[74] "The direct are such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person."[75] "But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person."[76]

Consider the problem by analogy to Article I, which includes both the defined powers[77] and the Necessary & Proper Clause.[78] The question, framed in these terms, is whether the power to surveil is a direct, defined power, or whether it is incidental to other powers, defined or undefined. The former poses significantly fewer limitations on the President, but in the latter case, surveillance would only be warranted in service of a direct executive power. Weighty though these questions are, they are irrelevant unless surveillance is first shown to be power that is executive in nature. And in the case

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[73] CATO NO. 4 (Nov. 8, 1787) (decrying Article II for allegedly granting many of the King's prerogative powers) [https://perma.cc/8XS8-DX2T].
[74] 1 WILLIAM BLACKSTONE, COMMENTARIES *239.
[75] *Id.* at *239-40.
[76] *Id.* at *240.
[77] U.S. CONST. art. I, § 8, cls. 1–17.
[78] U.S. CONST. art. I, § 8, cl. 18.

of the surveillance power, the best guide for original meaning is historical practice.

II. THE TWO ELEMENTS OF THE VESTING CLAUSE THEORY OF SURVEILLANCE

A. DOES THE VESTING CLAUSE CONVEY ANY OTHERWISE-UNENUMERATED POWERS?

John Locke divided the powers of government into legislative, executive, and federative.[79] The legislative and executive powers are cognizable in their modern sense, but the federative power was conceived as a "natural" power, derived from the state of nature, that contained "the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the commonwealth."[80] Even though the executive and federative powers are "distinct in themselves," Locke argued that they were better left in the same hands.[81]

By the time of Montesquieu and Blackstone, the more general idea of executive power had completely enveloped Locke's notion of federative power. Montesquieu, when discussing the separation of powers, wrote that "[i]n every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law of nations; and the executive in regard to things that depend on civil law."[82] And Blackstone, in his discussion of the royal prerogative, listed the prerogative powers of sending and receiving

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[79] JOHN LOCKE, *Second Treatise on Government* (1689) *in* 4 THE WORKS OF JOHN LOCKE IN NINE VOLUMES 338, 424 (C. & J. Rivington et al. eds., 12th ed. 1824).

[80] *Id.* at 425.

[81] *Id.* at 426. "Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated, and placed at the same time in the hands of distinct persons; 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."

[82] Baron de Montesquieu, The Spirit of the Laws (1748) *in* 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU 198 (1777).

ambassadors;[83] making treaties, leagues, and alliances;[84] waging war and making peace;[85] and issuing letters of marque and reprisal[86] as functions of the "the executive part of government."[87]

Granted, the Constitutional Convention placed some traditionally executive powers into the hands of Congress. For example, the President cannot make treaties or appoint ambassadors without the advice and consent of the Senate.[88] And only Congress can declare war or grant letters of marque.[89] But what about the executive powers that remained unenumerated, like setting the foreign policy goals of the United States, communicating with foreign nations, entering into nontreaty "executive agreements," receiving ambassadors, or terminating treaties?[90] As exhaustive academic work by Professors Prakash and Ramsey demonstrates, these powers are more appropriately placed within Article II's Vesting Clause.[91]

It is important for present purposes not that the residual foreign affairs powers are placed in the hands of the executive, but the reasons *why* that is the case. The Helvidius–Pacificus debates between Hamilton and Madison about President Washington's authority to issue a Proclamation of Neutrality in response to war in Europe are instructive. Contending that Washington was within his constitutional rights as President, Hamilton primarily framed the inquiry as a functional, separation-of-powers analysis.[92] The

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[83] 1 WILLIAM BLACKSTONE, *supra* note 74, at *253.
[84] *Id.* at *257.
[85] *Id.* at *257.
[86] *Id.* at *258.
[87] *Id.* at *250.
[88] U.S. CONST. art. II, § 2, cl. 2.
[89] U.S. CONST. art. I, § 8, cl. 11.
[90] Prakash & Ramsey, *supra* note 18, at 246–49.
[91] *See generally* Prakash & Ramsey, *supra* note 18.
[92] PACIFICUS NO. 1 (1793) (Alexander Hamilton) [https://perma.cc/E9U8-DJ43]. "The inquiry then is—what department of the Government of the U. States is the proper one to make a declaration of Neutrality in the cases in which the engagements of the Nation permit and its interests require such a declaration. James Madison,

Legislature, not charged with making treaties or enforcing their obligations, is "not naturally that organ of the government which is to pronounce the existing condition of the nation with regard to foreign policy."[93] Nor could the power extend to the judiciary, which only has authority "[w]here contending parties bring before it a specific controversy."[94] Because the power to declare the foreign policy of the United States could "belong neither to the Legislative nor Judicial Department," it "must belong to the Executive."[95]

In light of the preceding documents, it seems that the majority of leading thinkers on executive power, including Locke, Blackstone, Montesquieu, and Hamilton, thought about it and its relationship with other powers functionally. When the constitution grants the "executive Powers," then, it is inviting an inquiry into which powers would have been considered executive in character at the time of the Founding. The following analysis proceeds under that analytical framework.

though he disagreed with Hamilton's ultimate conclusion, generally accepted Hamilton's framing of the separation-of-powers problems being debated. HELVIDIUS NO. 1, *supra* note 52 ("whatever doubts may be started as to the correctness of [Hamilton's] reasoning against the legislative nature of the power to make treaties: it is clear, consistent and confident, in deciding that the power [to declare neutrality] is plainly and evidently not an executive power."). *See also* James Madison, HELVIDIUS NO. 2 (Aug. 31. 1793) ("Legislative power may be concurrently vested in different legislative bodies. Executive powers may be concurrently vested in different executive magistrates. In legislative acts the executive may have a participation, as in the qualified negative on the laws. In executive acts, the legislature, or at least a branch of it, may participate, as in the appointment to offices. Arrangements of this sort are familiar in theory, as well as in practice. But an independent exercise of an *executive act*, by the legislature *alone*, or of a *legislative act* by the executive *alone* . . . is contrary to one of the first and best maxims of a well-organized government.").

[93] Hamilton, *supra* note 92.

[94] *Id.*

[95] *Id.*

B. DOES THE VESTING CLAUSE CONVEY ANY OTHERWISE-UNENUMERATED POWERS?

1. Earliest Origins of Surveillance

The history of clandestine surveillance dates to time immemorial. Biblical accounts of the Jewish Exodus from Egypt recount that Moses sent twelve spies ahead into the land of Canaan to gather intelligence for future military conquest.[96] Joshua sent spies into Jericho before laying siege to the city.[97] Though the Romans initially abhorred covert action, Julius Caesar brought the art of intelligence to Rome, and by 100 A.D., its emperors employed a well-developed secret service.[98]

It is not until Tudor-Era England, however, that the surveillance state emerged in its now-recognizable form. Then, as now, the need for intelligence developed out of a bitter sectarian religious conflict.[99] In 1534, King Henry VIII brought the Protestant Reformation across the channel, splitting from the Catholic Church and establishing the Church of England. To say the least, these reforms were not universally accepted,[100] and Catholic-Protestant in-fighting

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[96] "Moses sent them to spy out the land of Canaan and said to them, "Go up into the Negeb . . . and see what the land is, and whether the people who dwell in it are strong or weak, whether they are few or many." *Numbers* 13:17–18 (English Standard Version).

[97] "And Joshua the son of Nun sent two men secretly from Shittim as spies, saying, 'Go, view the land, especially Jericho.'" *Joshua 2:1* (English Standard Version).

[98] Rose Mary Sheldon, *Tinker, Tailor, Caesar, Spy: Intelligence in Ancient Rome*, 7 AM. INTELLIGENCE J. 3–4 (1986).

[99] Jean-Baptiste Alphonse Karr (1849): "plus ça change, plus c'est la même chose." [The more things change, the more they stay the same.]

[100] Sir Thomas More, for example, was convicted of treason and executed for refusing to take the Oath of Supremacy in support of the Church of England. 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 389–90 (R. Bagshaw 1809).

dominated the English political scene until the Glorious Revolution.[101]

Amidst this religious strife, Queen Elizabeth I, a Protestant, took the throne from the Catholic Queen Mary I in 1558. The unsettled religious situation created problems at home and abroad: "[W]ithin . . . the Catholics had been so exalted in the last reign that they were not likely to submit tamely to the rule of their opponents . . . . Without, England had to face hostility from [Catholic] France, Spain, and Scotland."[102] The greatest threat was Mary, Queen of Scots, who had a strong claim to the throne.[103] Determined to return the English Crown to Catholic hands, English forces sympathetic to Mary hatched three separate plots to overthrow Queen Elizabeth by force.[104] In each case, the crown's secret service agents—coordinated by two of Elizabeth's ministers, William Cecil and Francis

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[101] After the Church of England was founded, the Crown shifted back and forth between Protestant and Catholic monarchs until Protestant forces ultimately won out in the Glorious Revolution of 1688. Briefly, the line after Henry VIII and before William & Mary was as follows: Edward VI (Protestant), Mary I (Catholic), Elizabeth I (Protestant), James I (Protestant), Charles I (Protestant), Interregnum, Charles II (Catholic convert), James II (Catholic convert). It is well documented that sectarian religious strife set off by the Protestant Reformation also encouraged some of the first colonists to emigrate to the Americas.

[102] LIONEL CECIL JANE, COMING OF PARLIAMENT: ENGLAND FROM 1350 TO 1660 214 (1905).

[103] The Catholic daughter of Henry VIII and his first wife Catherine of Aragon, Mary had a strong claim to the throne. She married the head of the English Catholics, Lord Darnley, and demanded that she be recognized as Elizabeth's heir to the throne. *See* CECIL JANE, *supra* note 102, at 218.

[104] The first, the Ridolfi Plot (1571), came at the behest of a papal bull declaring Elizabeth deposed. Galvanized by support from Rome, the Italian banker Ridolfi and the Duke of Norfolk plotted to overtake the crown "by force of arms." *See* CECIL JANE, *supra* note 102, at 222–23. The second, the Throckmorton Plot (1583), was organized by Jesuit priests with the aid of the Spanish ambassador and with support promised by the French and Spanish governments. *See* CECIL JANE, *supra* note 102, at 225. Neither of the previous plots included plans to kill Queen Elizabeth, but the Babington Plot (1586) included an explicit threat on her life. *See* CECIL JANE, *supra* note 102, at 226–27.

Walsingham[105]—ferreted out the plots, seized the papers of those involved, and executed the conspirators.

After the failure of the Throckmorton Plot, Protestants and Catholics that remained loyal to the Queen joined together to form the Bond of Association, an informal agreement to "withstand and pursue, as well by force of arms as by all other means of revenge, all manner of persons . . . that shall attempt any act . . . that shall tend to the harm of her majesty's royal person."[106] This document, which later received statutory approval from Parliament, recognized that the Crown and those loyal to it had sweeping authority to root out and destroy national security threats to the English government.[107]

The English government continued to exercise broad surveillance powers up until the time of the Founding. For example, in 1764, spies infamously followed John Wilkes, "dogging his steps like shadows, and reporting every movement of himself and his friends to the Secretaries of State."[108] During the reign of George III, the Secretary of State had "a power of opening letters" to uncover "crimes dangerous to the State or society."[109]

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[105] History shows that the Queen's advisors did much more than snoop out assassination attempts against the Queen. In the early 1570s, Sir William Cecil "conceived, organized, directed, and financed" a black-bag kidnapping and extradition of John Story, a Catholic English expatriate and supporter of Queen Mary I who left the country after the ascension of Queen Elizabeth. Ronald Pollitt, *The Abduction of Doctor John Story and the Evolution of Elizabethan Intelligence Operations*, 14 THE SIXTEENTH CENTURY JOURNAL 131, 140 (1983).

[106] HENRY HALLAM, 1 CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 162–63 (A.C. Armstrong ed., 5th ed. 1846).

[107] An Act for Provision to be Made for the Surety of the Queen Majesty's Most Royal Person, and the Continuance of the Realm in Peace, 27 Elz. c. 1 (1584–85) (Eng.) in 4 STATUTES OF THE REALM 704–05.

[108] THOMAS ERSKINE & FRANCIS HOLLAND MAY, CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 150 (1760–1860).

[109] ERSKINE & MAY, *supra* note 108, at 153. These practices were undoubtedly objectionable to the English and their colonial counterparts. Some have argued that Wilkes's treatment at the hands of the English government was a key inspiration for our Fourth Amendment. But to say that the Founding generation solved a perceived problem by externally restraining the executive power is not to say they intrinsically limited it. *See infra* Part III.

The Law of Nations confirms that powers of deception, covert action, and surveillance were as competent to face external threats as they were internal ones. Admittedly, most formulations of the Law of Nations limit the acceptable use of covert action to wartime.[110] Grotius laid the groundwork, counseling that "[h]istory furnishes us with innumerable examples of deceptions practiced with success upon an enemy, by assuming his arms, ensigns, colors, or uniforms; all which may be justified [as a feint]."[111] Samuel von Pufendorf agreed: "Though it be also common to all sorts of war, that the particular nature . . . of them is violence and terror; yet it is also lawful to make use of stratagem and fraud, against any enemy; provided there be no treachery or violation of compact and faith in it."[112]

Emer de Vattel made the point much more forcefully, arguing that where, "by a stratagem, . . . we can make ourselves masters of a strong place, surprise the enemy, and overcome him, *it is much the better*," because it accomplishes the same task while minimizing the loss of life.[113] He recognized that employing spies was a lawful, if distasteful, form of clandestine practice,[114] and he also endorsed the use of double agents.[115] In conclusion: a nation "may lawfully endeavor to weaken the enemy by all possible means, provided they

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[110] Note that, despite the assertions of natural law theory in the 17th and 18th centuries, customary international law now prohibits perfidy.

[111] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 298 (M. Walter Dunne ed., 1901) (1625).

[112] SAMUEL VON PUFENDORF, 8 OF THE LAW OF NATURE AND NATIONS 687 (Basil Kennett & William Percivale trans., Oxford 2nd ed. 1710) (1672).

[113] EMER DE VATTEL, THE LAW OF NATIONS 579 (Knud Haakonssen ed., Thomas Nugent trans., Liberty Fund, Inc. 2008) (1758).

[114] Spies "find means to insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then give intelligence to their employer. Spies are generally condemned to capital punishment, and with great justice, since we have scarcely any other means of guarding against the mischief they may do us. For this reason, a man of honor, who is unwilling to expose himself to an ignominious death from the hand of a common executioner, ever declines serving as a spy: and moreover he looks upon the office as unworthy of him." *Id.* at 582.

[115] *Id.* at 580.

do not affect the common safety of human society, as do poison and assassination."[116] Jean-Jacques Burlamaqui largely agreed with his predecessors 'statements of the legality of using deceit during war,[117] and alluded to the fact that ambassadors might be sent "as a spy, to pry into [a nation's] affairs, and to sow the seeds of sedition."[118]

This evidence has its limitations. For one, it is limited on its own terms to wartime, and it also says nothing about the ability to collect domestic intelligence or to collect intelligence outside of a declared war. That said, it does go to show that the Law of Nations granted broad powers of self-protection to states at the time of the Founding and that there was general consensus that it was not always unlawful for nations to act surreptitiously.

The pre-Founding period provides three primary sources of evidence. By 1789, the history of surveillance dated back hundreds of years—at least to Biblical times. Spycraft formally found its way into the English legal tradition during the Tudor Era, during which the Crown engaged secret service agents, spies, and letter-opening campaigns to preserve its existence. And, although they do not speak in terms that can be directly analogized to the modern surveillance state, every influential exposition of the Law of Nations near the time of the Founding confirmed that states could act clandestinely to preserve their interests. Some supported sending spies to provide foreign intelligence. But, the colonists did not unquestioningly adopt

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[116] *Id.* at 582. The United States made the same value judgment. *See, e.g.*, Exec. Order No. 12,333 § 2.11 (prohibiting assassination).

[117] Though he disagreed with de Vattel as to whether poison was a lawful strategy. JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 494 (Peter Korkman, ed., Thomas Nugent trans., Liberty Fund, Inc. 2006) (1747).

[118] Burlamaqui cast no judgment on the legality of that practice, only stopping to note that it was proper grounds for diplomatic expulsion. In any event, its mention suggests that it was a foreseeable, if not common, practice at the time of the Founding. Jean-Jacques Burlamaqui, *supra* note 117, at 555. Burlamaqui was a scholar of considerable–if underappreciated–influence on the Founders. *See* RAY FORREST HARVEY, JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM 105 (1937) ("His books were imported to this country before 1757. He was cited as early as 1761. . . . He was to be found not in one area but scattered throughout the Colonies. . . . It was required reading for all law students.").

every aspect of the English system of government, and it remains to be seen whether the Founding generation embraced their heritage of clandestine action during the American Revolution or rejected those practices to chart a new path forward.

2. The Revolutionary War and the Continental Congress

The colonies provided an answer before the Declaration of Independence was even drafted. Once installed as Commander-in-Chief of the Continental Army, George Washington's first official expenditure was $333.33 to establish a secret intelligence network in Boston.[119] Many colonies entered the Revolutionary War with preexisting committees of safety and correspondence, some of which ran aggressive intelligence campaigns of their own. For example, the South Carolina Secret Committee sifted through Loyalist mail and passed letters on to the Continental Congress for publication as propaganda.[120] In 1775, the Continental Congress consolidated these efforts into three committees—the Secret Committee, the Committee of Secret Correspondence, and the Committee on Spies, tasked with arms procurement, foreign relations with allies, and counterintelligence, respectively.[121]

Eleven percent of Washington's wartime expenditures went to intelligence generation.[122] The first formal appropriation was made in November 1776, and most of Washington's subsequent requests

[119] KNOTT, *supra* note 3, at 13.

[120] *Id.* at 22. Obviously, these practices occurred before the Fourth Amendment's ratification. Neither the South Carolina Constitution of 1776 nor the Articles of Confederation included a rights-protecting provision comparable to the Fourth Amendment. This evidence is not included as evidence that such practices would be lawful today—in fact, the plain terms of the Fourth Amendment place mail opening on shaky constitutional ground—but as indicia of the *extent* of surveillance authority the colonists were comfortable employing.

[121] *Id.* at 14–15.

[122] *Id.* at 14.

for additional funds were approved without debate.[123] Oversight was negligible, and Washington authorized himself to draw upon the funds "as occasion may require."[124] When Washington did account for funds, he did so as a matter of grace and not obligation.[125] His attitude regarding Congressional oversight was consistent with his general attitude about spying: the less said, the better. The general preferred the use of aliases and disguised intelligence correspondence as his own private correspondence to minimize its circulation among his aides-de-camp.[126]

Washington's habits made him an extremely successful spymaster. His efforts to form and maintain the famous Culper spy ring in New York City gave him direct insights into British plans and strategies throughout the war.[127] Time and again, Washington's successful efforts to create and manage intelligence allowed him to deceive the British as to his own relative weakness and prevent them from pressing their substantial numerical advantage.[128] It is no surprise, then, that upon the war's conclusion, a British intelligence officer, Major George Beckwith, reportedly said "Washington did not really outfight the British; he simply out spied us."[129]

A skeptic of executive authority might view this evidence and think that, because the Continental Congress assumed responsibility for matters of surveillance during the Revolutionary War, early American practice favors modern Congressional control. But that

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[123] *Id.* at 14, 22.

[124] Letter from George Washington to the President of the Continental Congress (May 11, 1779).

[125] KNOTT, *supra* note 3, at 23.

[126] *Id.* at 18. Secrecy was paramount, "for upon secrecy, success depends in most enterprises of the kind, and for want of it, they are generally defeated." Letter from George Washington to Colonel Elias Dayton (June 26, 1777).

[127] KNOTT, *supra* note 3, at 16.

[128] *Id.* at 20.

[129] *See* Raymound J. Fount, *George Washington's Application of Denial and Deception Operations Supported by a Multifaceted Mix of Defensive and Offensive Counterintelligence Measures*, 35 AM. INTELLIGENCE J. 51–52 (2018) (discussing British attitudes towards George Washington). The British allegedly labelled Washington "the fox" because of his continuing ability to out-spy and out-maneuver the British Army. *Id.*

argument misunderstands the nature of the Continental Congress, which was widely understood to exercise the "external executive" powers as well as the legislative powers under the Articles of Confederation.[130] So, though the *location* of the powers had momentarily shifted, the conception of their *nature* had not. At the very least, evidence from the Revolutionary War era shows that the colonists were comfortable with a robust wartime intelligence structure, the use of spy rings behind enemy lines, and little if any legislative oversight over money spent on intelligence matters. It also shows that George Washington, the man in the mind of many of the Framers when drafting Article II, was extremely comfortable resorting to the use of spies when the situation demanded it. Still, it remains to be seen whether these were temporary measures, taken out of necessity, or whether the Constitution sanctioned continued surveillance after its ratification.

3. The Ratification Debates

The Constitutional Convention itself spent very little time on the unenumerated powers of the executive, and "questions concerning the degree of power turned chiefly on the appointment to offices, and the control on the Legislature."[131] As such, very little useful evidence can be drawn from the Convention itself about the specific intelligence-gathering powers of the President. The delegates were not, however, blind to the threat of foreign interference in domestic affairs. Some of the delegates worried that European powers, who

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[130] "The executive power is sometimes divided into the external executive, and internal executive. The former comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state. The confederation of the United States of America hath lopped off this branch of the executive, and placed it in Congress." THEOPHILUS PARSONS, THE ESSEX RESULT (Apr. 29, 1778) [https://perma.cc/WL66-KRBB].

[131] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) [https://perma.cc/3MYC-DKEG].

spent "vast sums" for secret services, would use covert action to "intermeddle in [American] affairs."[132]

These concerns were echoed in the Federalist. For example, Alexander Hamilton warned that a strong national government was necessary to fend off "enterprises to subvert [a firm Union that] will sometimes originate in the intrigues of foreign powers."[133] Madison was particularly worried that insidious foreign influence would drive states to insurrection or at least faction, and argued for a strong national government to put down rebellions when they arose.[134] These documents provide some evidence that the Founders meant to create a national government competent to address domestic threats caused by foreign influence.

A thornier question, though, is which branch was vested with the power to deal with such threats. On this point, the post-ratification debates provide mixed evidence. In Federalist 70, Hamilton's language seems to favor the executive branch: "[Energy] is essential to the protection of the community against foreign attacks."[135] The

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[132] Speech by Elbridge Gerry, summarized by Madison in his Notes on the Convention (Aug. 13, 1787) *in* 4 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE 172–73 (Galliard Hunt ed., G.P. Putnam's Sons 1900). These concerns influenced the residency requirements that the Constitution places on federal office holders. U.S. CONST. art. I, § 2, cl. 2, art. I, § 3, cl. 3, and art. II, § 1.

[133] THE FEDERALIST NO. 59 (Alexander Hamilton); *see also* THE EXAMINATION NO. 8 (Alexander Hamilton) (Jan. 12, 1802), ("[t]he United States have already felt the evils of incorporating a large number of foreigners into their national mass; it has served very much to divide the community and to distract our councils."). Additionally, *see* FEDERALIST NO. 2, 3, 4, and 5 (which are all concerned with the dangers posed by foreign influence).

[134] *See* THE FEDERALIST NO. 43 (James Madison) ("May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? . . . Among the advantages of a confederate republic, enumerated by Montesquieu, an important one is, 'that should a popular insurrection happen in one of the states, the others are able to quell it.'").

[135] THE FEDERALIST NO. 70 (Alexander Hamilton) (comparing the English system to the American system years after the Founding, St. George made the same conclusions). *See also* ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803) ("The advantages of

executive's strength came in its unity, because "unity is conducive to energy" because it provides "[d]ecision, activity, secrecy, and dispatch."[136] To effectively wage the intelligence battle against the British during the Revolutionary War, Washington relied on secrecy and dispatch, and as his *aide-de-camp*, Hamilton had the necessity of these attributes impressed upon him first hand.

Just two essays later, Hamilton lays out a blueprint for understanding executive power, arguing that it is especially interested in "the administration of government," including "[1] the actual conduct of foreign negotiations, [2] the preparatory plans of finance, [3] the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, [4] the arrangement of the army and navy, [5] the direction of the operations of war; [6] these and other matters of a like nature constitute what seems to be most properly understood by the administration of government."[137]

Is intelligence collection the type of uniquely executive task contemplated by Hamilton? There are reasons to think so. For one, adequate intelligence is a prerequisite for many of the other enumerated functions, including conducting foreign negotiations, directing the armed forces, and waging war. Structuring intelligence operations implicates the unique skill of the executive branch in the same way that many of the enumerated functions do. Like any other executive program, it requires adequate financial and personnel management, foresight, dispatch, and strategy. Finally, John Jay seemed to think so:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are

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information, and dispatch, are probably equally in favor of the constitution of the American executive.") [https://perma.cc/XSF3-6356].

[136] THE FEDERALIST NO. 70 (Alexander Hamilton).

[137] THE FEDERALIST NO. 72 (Alexander Hamilton).

> sometimes requisite. There 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 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 [sic] 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.[138]

Notice that Jay's argument is ultimately functional. From the advantages that naturally accrue to the office because of its stature and its unity, the executive is most *fit* to hold the treaty power. He makes no normative arguments about why the President should "be able to manage the business of intelligence."[139] That is a *premise* of his argument, not its *conclusion*, and is taken as assumed, presumably because Jay considers it entirely executive in character.[140]

Elsewhere, however, the Federalist Papers equivocate on enumerated powers more generally, which seem inconsistent with the common conception that the Constitution was a document granting only limited and enumerated powers. For example, in rejecting that the Necessary & Proper Clause posed the dangers that

[138] THE FEDERALIST NO. 64 (John Jay).

[139] *Id.*

[140] It is worth noting that the Antifederalists, too, saw that the Constitution vested sweeping power in the President. CATO NO. 4, *supra* note 73 ("The direct prerogatives of the president, *as springing from his political character*, are among the following: . . . he is the generalissimo of the nation, and of course, has the command and control of the army, navy and militia; he is the general conservator of the peace of the union." (emphasis added). Unlike Hamilton, the Antifederalists saw this as a reason to oppose the new Constitution.

the Anti-Federalists claimed it did, Hamilton argued that the clause existed "expressly to execute these powers [declared in the constitution] . . . . If there be any thing exceptionable, it must be sought for in the *specific* powers, upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless."[141] In a later essay, Hamilton makes the point even more strongly, arguing that a Bill of Rights is unnecessary and would in fact imply that the federal government had been granted powers that in actuality it had not.[142] These objections though weighty, are answerable on the ground that it is primarily Congress's powers, and not the President's or the court system's, that are limited and enumerated by the Constitution.

If Article II does not give the executive power to gather intelligence, then it must be subsumed by Congress in Article I.[143] But that view finds little support from Founding documents, which were skeptical of Congress's ability to act with the necessary "decision, activity, secrecy, [and] dispatch."[144] In Federalist 75, for example, Hamilton argued that the body's composition was "fluctuating," "multitudinous," and therefore ill-suited to fully exercise the treaty-making power.[145] Anybody vested with that power needed foreign

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[141] THE FEDERALIST NO. 33 (Alexander Hamilton).

[142] THE FEDERALIST NO. 84 (Alexander Hamilton) ("I go further, and affirm, that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do?").

[143] This author believes that it is safe to assume that no reading of "the Judicial power," however capacious, would stretch far enough to allow the Supreme Court's justices to moonlight as the nation's top spymasters. Another option is that the power was not granted to any branch of the national government at all, a position that, from this author's research, has never received support in the academic literature or in actual practice.

[144] THE FEDERALIST NO. 70 (Alexander Hamilton).

[145] THE FEDERALIST NO. 75 (Alexander Hamilton).

policy expertise, consistency, a "uniform sensibility to the national character," decision, secrecy, and dispatch.[146] For many of the same qualities it lacked *vis-à-vis* the treaty power, Congress is ill-suited to exercise the nation's surveillance powers.[147]

Similar criticisms were lodged against Congress on the question of their proper role in providing the President advice and consent on executive appointments. Thomas Jefferson characterized the Senate as generally incapable of acting with the requisite secrecy on sensitive matters. Therefore, insofar as appointments were for "special or secret circumstances," for example, the selection of secret diplomatic envoys, that body's purpose was only "to see that no unfit person be employed."[148]

The academic debates during and after the Convention ultimately do not speak with a clear voice on where the new nation's surveillance powers were entrusted. However, where they do speak to secrecy, dispatch, and managing the business of intelligence, the debates seem to favor the executive branch more often than not. Many Founders recognized that, structurally, the Presidency is best suited to act in the nation's interests with respect to intelligence, especially when compared to Congress, an inherently political body with many parts and an ever-changing composition. The great drawback to these debates, of course, is that the Founders never had them in the *context of surveillance itself*, and therefore, we are left to speculate or argue by analogy. In this constitutional debate, resort to practice is a more reliable guide as to what the Founders thought was captured under the auspices of executive power.

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[146] *Id.*

[147] John Forsyth, *supra* note 65.

[148] Thomas Jefferson, Opinion on Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790) [https://perma.cc/V432-A2XQ]. In this document, Jefferson makes the remarkable statement that "[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 them." As will be seen, this view is quite consistent with the view of executive power he took during his Presidency.

4. The Washington Presidency

Despite the fact that the nation was no longer in a battle for its continued existence, Washington's appetite for intelligence picked up right where it left off at the conclusion of the Revolutionary War. He continued to see intelligence—namely, foreign intelligence—as essential to the young republic's existence. In his first State of the Union Address, Washington politely (and indirectly) asked for secret service money: "The interests of the United States require . . . a competent fund designated for defraying the expenses incident to the conduct of foreign affairs."[149]

Congress responded with the Contingency Fund for Foreign Intercourse, providing $40,000 in 1790 for payment in "support of such persons as the President shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they may be employed."[150] Oversight provided by the bill was generally very weak: line-item reporting was only required for those expenditures that the President "in his judgment" believed "may be made public."[151] Congress's initial appropriations were insufficient for Hamilton, who, in response to the 1798 Quasi War between the United States and France, requested "that the Executive should have half a million of secret service money."[152]

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[149] Washington's First State of the Union Address (Jan. 8, 1790) [https://perma.cc/TW9C-2ZBU].. This may sound like a standard request for foreign relations money, and it indeed it was—most of the money spent from the Contingency Fund went to above-ground actors. But, as will be seen, the Contingency Fund was meant at least in part to quietly fund secret service operations. As debates about the funding bill show, Congress was aware that they were granting the President significant discretionary authority by choosing to fund diplomatic efforts generally, and not on an ambassador-by-ambassador basis. KNOTT, *supra* note 3, at 50–54.

[150] An Act Providing the Means of Intercourse Between the United States and Foreign Nations, *supra* note 2, at 128.

[151] *Id.* at 129.

[152] Letter from Alexander Hamilton to Oliver Wolcott, Jr. (June 5, 1798), *in* 21 THE PAPERS OF ALEXANDER HAMILTON 485–86 (Harold C. Syrett ed., Columbia University Press 1974).

President Washington was quick to put this money into action. Indeed, before the funding bill was even approved, President Washington sent Gouverneur Morris to England as a "private [a]gent" to assess America's reputation in England.[153] He was commissioned without the consent of Congress, which was only later informed,[154] and paid directly from the Contingency Fund.[155]

He was also comfortable conducting surveillance to secure the nation's borders from foreign encroachment. In 1791, British troops repeatedly discouraged American settlement near the border of Quebec and operated military installations with the territorial boundaries of the United States—both violations of the Treaty of Paris.[156] Governor George Clinton wrote the President threatening to use the state's militia to repel the British by force.[157] In response, the President chose to gather more intelligence: "I have concluded to send a gentleman to the spot, who will be charged to ascertain and report to me whatever may take place."[158]

Washington displayed a similar willingness to spy on the military capabilities and movements of Native American tribes on the Western Frontier. In a series of letters during Washington's first

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[153] Enclosure in Letter from George Washington to Gouverneur Morris (Oct. 13, 1789), *in* 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 179–83 (Dorothy Twohig ed., University Press of Virginia 1993).

[154] KNOTT, *supra* note 3, at 55.

[155] *Id.*

[156] Letter from George Clinton to George Washington (Sept. 7, 1791) *in* 8 THE PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 501–02 (Mark Mastromarino ed., University of Virginia Press 1999). How probative such evidence is might fairly be debated. Even though the surveillance Washington discusses here is technically on domestic soil, it is primarily focused on the military actions of a foreign military. Applying antiquated examples such as these to the modern context—where borders are more permeable, military theaters less-defined, and enemy combatants more difficult to root out—certainly creates analogical imprecision between then and now, but what we can say with absolute confidence is that President Washington had no dogmatic resistance to the idea of collecting intelligence he deemed relevant simply because that intelligence was to be found on American soil.

[157] *Id.*

[158] Letter from President George Washington to Governor George Clinton (Sept. 14, 1791), *in* 8 GEORGE WASHINGTON PAPERS PRESIDENTIAL SERIES 527–31 (Mark Mastromarino ed., University of Virginia Press 1999).

term, military leaders, including Secretary of War Henry Knox, conveyed intelligence to Washington from all around the country. In 1791, he received reports about the movements of Miami tribal forces and the successes of American expeditionary forces in Kentucky.[159] In 1792, Washington received the detailed intelligence reports of Major John Hamtramck informing him of the intentions of many Native American tribes in the Northwest Territory.[160] And, later that year, he received letters containing substantially similar intelligence reports from General Anthony Wayne detailing the situation in western Pennsylvania[161] and from General Pickens and Colonel Anderson in the Southwest Territory.[162] Indeed, it appears that there were no regions of the United States frontier where spies were *not* being used in the early 1790s, despite the fact that no formal declaration of war had been made against the British or any hostile Native American tribe.

George Washington's inaugural term in office set precedents that influenced the structure of the American presidency for centuries to come. His aggressive actions to establish a competent system of intelligence collection were no exception. He recognized that threats might come either from abroad, in the form of European intermeddling, or from European or Native American forces on his borders. In each case, President Washington acted on the assumption that his executive branch was competent to initiate the collection of

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[159] Letter from Henry Knox to George Washington (June 27, 1791), *in* 8 THE PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 303–05 (Mark Mastromarino ed., University of Virginia Press 1999).

[160] Letter from Henry Knox to George Washington (May 15, 1792), *in* 10 THE PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 175–80 (Robert F. Haggard & Mark Mastromarino eds., University of Virginia Press 2002).

[161] Letter from Henry Knox to George Washington (Aug. 17, 1792), *in* 11 THE PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 10–12 (Christine Sternberg Patrick ed., University of Virginia Press 2002).

[162] Letter from Henry Knox to George Washington (Sept. 30, 1792), *in* 11 THE PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 175–80 (Christine Sternberg Patrick ed., University of Virginia Press 2002).

intelligence—especially on or around the nation's borders and in arenas of active military combat—on these threats with or without the approval of Congress. Later Presidents followed his lead.

5. Subsequent Presidents

For example, Thomas Jefferson had a penchant both for intelligence-gathering and covert action.[163] His predilection for spycraft dated back to before his presidency, when as minister to France, he procured a map of Spanish South America[164] and unsuccessfully sought a copy of the Spanish government's early plans to build the Panama Canal.[165] He also utilized his contacts in the Netherlands to plant stories sympathetic to American independence in Dutch newspapers and to acquire intelligence attained by the Dutch government.[166] During his presidency, Jefferson's expansionist policy goals fueled his intelligence priorities. The Lewis and Clark Expedition, billed publicly as a scientific and geographic expedition, was in reality an intelligence operation intended to reconnoiter Spanish military strength in the newly purchased Louisiana Territory.[167]

As President, Jefferson also closely guarded the executive's right to keep secrets. During the administration's prosecution of Aaron

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[163] Some of the most interesting and outlandish stories about the Jefferson Presidency are worth a mention but ultimately do not relate to intelligence collection. For example, Jefferson plotted to overthrow the King of Tripoli in what is apparently the first attempt at regime change by the young republic (unless, of course, the Revolutionary War is counted). KNOTT, *supra* note 3, at 72–79. In a letter to then-President Madison, he encouraged him to plan a covert operation to burn down St. Paul's Cathedral in London. *Id.* at 80.

[164] *Id.* at 63.

[165] *Id.* at 63–64.

[166] *Id.* at 64.

[167] *See id.* at 69 (explaining that the Louisiana territory was of long-time interest to the Founders, and Thomas Jefferson and James Madison had already sent Daniel Clark to New Orleans as a secret correspondent in 1793). *See also* Letter from Thomas Jefferson to James Madison (May 27, 1793) ("We want an intelligence prudent native, who will go to reside at N. Orleans as a secret correspondent . . . . He might do a little business, merely to cover his real office.").

Burr for treason, Burr requested a letter written to President Jefferson that he asserted would be material in his defense.[168] After that request was refused, Burr made a motion for a subpoena *duces tecum* to compel that the government appear with the requested documents.[169]

The government, in turn, asserted that, because the letters contained confidential information and possibly state secrets, a subpoena could not issue against the President.[170] The court, in an opinion authored by Chief Justice Marshall, held that the subpoena could issue,[171] but Jefferson later "overlooked the order, and instead turned over the letter and other documents to the federal prosecuting attorney in what he viewed as a voluntary act."[172]

In a letter written to the United States Attorney prosecuting the case, George Hay, Thomas Jefferson summed up the position of the Jefferson administration:

> 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.[173]

President Madison picked up where his successor left off. In the months leading up to the War of 1812, he purchased an exchange of letters written between the British spy John Henry and the Governor-

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[168] United States v. Burr, 25 F. Cas. 30, 30 (C.C.D. Va. 1807).

[169] *Id.*

[170] *Id.* at 30.

[171] *Id.* at 38.

[172] TODD GARVEY, CONG. RESEARCH SERV., COMPELLING PRESIDENTIAL COMPLIANCE WITH A JUDICIAL SUBPOENA 2 (May 4, 2018) [https://perma.cc/9ULK-GPFK].

[173] Letter from Thomas Jefferson to George Hay (June 17, 1807) [https://perma.cc/X799-PM36].

General of Canada for $50,000 pulled from the Contingency Fund.[174] These letters, which purportedly showed close ties between New England Federalists and the English government, helped turn public opinion in favor of a war declaration.[175] Later Presidents, like John Tyler, made even more aggressive use of the Contingency Fund, tasking his Secretary of State Daniel Webster to essentially mount a propaganda campaign in Maine in support of the Webster–Ashburton Treaty of 1842.[176] Webster arranged for a private agent, paid from the Fund, to plant articles favorable to the treaty in prominent Maine newspapers.[177] For his efforts, Webster was very nearly impeached by Congress, but he was not, and the executive branch escaped the misadventure without any serious legal consequences.[178]

III. CONTEMPORANEOUS DEVELOPMENTS IN PRIVACY RIGHTS

While the preceding sections trace executive power to surveil all the way back Tudor-era England, it is certainly not the case that the exercise of such a power was always well-received. Generations of English subjects jealously guarded their liberties, and at many times in our early history, the value rightly perceived in both a powerful executive and strongly felt privacy interests clashed. In our system, this rhetoric contributed to the inclusion of the Fourth Amendment in the Bill of Rights.

Montesquieu saw virtually no role for domestic spies in a well-functioning society. He lodged three complaints: (1) those frequently employed in the profession were dishonest,[179] (2) their methods

[174] KNOTT, *supra* note 3 at 101.
[175] *Id.*
[176] *Id.* at 122.
[177] *Id.*
[178] *Id.* at 126.
[179] "When a man obeys the laws, he has discharged his duty to his prince: he ought at least to have his own house for an asylum, and the rest of his conduct should be exempt from inquiry." Montesquieu, *supra* note 82, at 266.

violated the sanctity of the home,[180] and (3) their employ signaled a degree of distrust towards the citizen on behalf of the ruler.[181] Indeed, a constant surveillance state seemed incompatible with the contemporaneous definitions of liberty:

> Men may be without restrains upon their liberty: they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators—who shall say that they are free? . . . It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth.[182]

Eventually, these ideas crept into English case law. For example, in 1763, John Wilkes sued officers of the English Secretary of State for trespass after they entered him home and carried off his papers on a general warrant.[183] The jury returned a verdict for Wilkes,[184] and his treatment at the hands of the English government became a *cause celebre* in the colonies. Two years later, Lord Camden declared general warrants inconsistent with the right to property, that "great end, for which men entered into society," arguing that "papers . . . are his dearest property . . . so far from enduring a seizure, that they will hardly bear an inspection."[185]

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[180] "The trade of a spy might perhaps be tolerable were it practiced by honest men; but the necessary infamy of the person is sufficient to make us judge of the infamy of the thing." *Id.*

[181] "A prince ought to act towards his subjects with candor, frankness and confidence. He that has so much disquiet, suspicion, and fear, is an actor embarrassed in playing his part. When he finds that the laws are generally observed and respected, he may judge himself safe. The behavior of the public answers for that of every individual." *Id.*

[182] ERSKINE & MAY, *supra* note 108, at 149–50.

[183] Wilkes v. Wood (1763), 98 Eng. Rep. 489.

[184] *Id.*

[185] Entick v. Carrington (1765), 95 Eng. Rep. 807.

This sentiment was echoed in the colonies. For example, arguing against writs of assistance, James Otis argued that "[a] man's house is his castle," and these writs, which allowed universal and perpetual access to that innermost sanctum, "would totally annihilate this privilege."[186] The discomfort continued in the early republic. For example, Thomas Jefferson and Edmund Randolph opposed Hamilton's plan to have customs collectors report breaches of Washington's neutrality policy to the Department of Treasury, objecting to it on the grounds that "the collectors would become spies working for the secretary . . . against American citizens."[187]

Quite understandably, liberty-loving Americans have not always taken kindly to the infringement on their liberties that effective surveillance programs sometimes entail. However, the Founders—members of a generation who forged a nation only by successfully defying the nation's hegemonic superpower—saw the necessity of balancing the security needs of a new nation with the liberties that nation was founded to provide. In response to these competing concerns, the preponderance of the evidence shows that the Founders created a strong, powerful executive capable of initiating, organizing, and prioritizing surveillance programs, then constitutionalized a powerful remedy against that executive in the Bill of Rights: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

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[186] James Otis, Argument against Writs of Assistance in the Superior Court of Massachusetts (1761).

[187] Letter from Alexander Hamilton from George Washington (May 4, 1793) (explanatory footnote 1), *in* 12 PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 511–12 (Christine Sternberg Patrick & John C. Pinheiro eds., University of Virginia Press 2005). David Humphrey, Washington's Minister to Portugal, conveyed a similarly distrustful sentiment about Spain's government in a letter to Washington: "The suspicious temper of Government, by keeping spies & other checks upon free intercourse, in order to prevent the introduction of political innovations, destroys the sociability which was heretofore to be found in private circles." Letter from David Humphrey to George Washington (Feb. 16, 1791), *in* 7 PAPERS OF GEORGE WASHINGTON PRESIDENTIAL SERIES 358–66 (Jack D. Warren ed., University of Virginia Press 1998).

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[188]

By comparison, the Founding generation was generally skeptical of Congress's ability to operate in the field of intelligence. Then (and now, for that matter), the body lacked the requisite secrecy and dispatch to adequately regulate the nation's intelligence needs. That is not to say, however, that Congress is without any leverage—as the Contingency Fund shows, the executive is completely powerless to effect his surveillance agenda without appropriations from Congress, and as Secretary of State Daniel Webster's escapades in Maine show, the threat of impeachment can theoretically provide a real threat of discipline, even if left unused.

What remains unclear, however, is whether Congress—with the goal of limiting the executive's use of its surveillance power—can provide standards other than the reasonableness and warrant requirements provided by the Fourth Amendment, which is exactly what FISA, and specifically Section 702 of the FISA Amendments Act of 2008, purport to do.[189] In the absence of any specific constitutional grant of authority to do so, and given the relative lack of trust that the Founders placed in Congress in this field, I am inclined to conclude that such attempts create separation of powers issues.

CONCLUSION

Throughout much of the 20th century and continuing into the 21st, American presidents have consistently made broad claims about the scope of their constitutional surveillance authority. By abstracting from the Fourth Amendment's external limitations on such claimed authority (whatever they may be), which only tend to confuse the issues if the full extent of executive power is not first

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[188] U.S. CONST. amend. IV. This is the view taken by John C. Yoo in his 2002 letter to FISC Judge Colleen Kollar-Kotelly, *supra* note 31.

[189] *See supra* note 32.

understood, this essay has sought to put such claims of presidential authority into historical context. After surveying the available textual hooks in Article II, textual and historical arguments militate in favor of choosing the Vesting Clause as the most defensible source of otherwise-unenumerated executive power, should any exist.

As to whether the power to surveil is such a power, the historical record dating back to English theory and practice and continuing the presidencies of Washington, Jefferson, and Madison suggests that such a power is more likely than not vested in the President. That conclusion is made only more likely in light of the lack of evidence that a putative surveillance power was given to Congress, the courts, or the states. The historical evidence is not unequivocal, and the case is not open and shut—especially because the record provides relatively few examples of domestic surveillance conducted outside of a declared war—and when such surveillance did appear, it was fiercely resisted as repellent to Founding-era notions of liberty.

What does all of this mean for the modern surveillance state? That is hard to say, and in any event is out of the scope of the present work. All that can be said for sure is that our Founding generation—a group of statesmen who were well-versed in the regular practice of espionage—displayed a comparative confidence in the executive and concomitant distrust of Congress when it came to managing matters of intelligence. The full implications of these historical facts should be weighed out in further work, particularly as they pertain to FISA and Section 702. But no matter what those implications may be, the claims to power made by Presidents Washington, Jefferson, Roosevelt, Reagan, Bush, and their counterparts stand on historical ground considerably more solid than prevailing wisdom has previously assumed.