

REQUIEM FOR A HEAVYWEIGHT: THE NONDELEGATION DOCTRINE, PRESIDENTIAL INTELLIGENCE, AND COVERT ACTION

Despite long being heralded for its “one good year,”¹ the nondelegation doctrine may be yet far from its final requiem: Recent opinions by Supreme Court Justices have vested fresh vim into the once moribund doctrine.² Beyond highlighting the perils of improper congressional authorizations to the Executive, these opinions have uniquely recognized the distinct manner in which the doctrine interacts with matters of foreign affairs and national security.³ Indeed, taken together, the opinions advance a new doctrinal framework for understanding nondelegation in the context of foreign affairs.⁴

The Court’s recent interest in the nondelegation doctrine is potentially relevant to U.S. covert action, which operates pursuant to broad statutory authorizations to the Executive.⁵ Yet, given the strong deference to the Executive in the context of national security, it appears unlikely the covert action statute will be invalidated by a nondelegation challenge. This Note probes this curious paradox — between a viable challenge under the Court’s renewed nondelegation doctrine and its near certain failure in the context of covert action. Drawing on this tension, the Note offers a case study in nondelegation by clarifying the relationship between the nondelegation doctrine and the President’s intelligence power. The Note examines the historical foundations of the President’s intelligence power to present a means of understanding how covert action escapes the reach of a plausible nondelegation challenge. At bottom, the Note argues that a formalist approach would treat national security as an enclave of executive authority, where, as other scholars have argued, legislative authorization can unlock the President’s independent powers over intelligence.⁶ Unlocking such independent power, in turn, serves to obviate nondelegation concerns with the covert action statute.

This Note proceeds in five parts. Part I orients the Court’s recent opinions concerning the nondelegation doctrine with particular focus on how these approaches operate in the context of foreign affairs and national security. Part II locates the President’s independent powers over intelligence through examining historical practice and case law. Part III introduces the modern U.S. covert action program. Part IV posits how

¹ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

² See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment); *Gundy v. United States*, 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

³ See *Ass’n of Am. R.Rs.*, 575 U.S. at 80 n.5 (Thomas, J., concurring in the judgment).

⁴ See *id.*; *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

⁵ See 50 U.S.C. § 3093.

⁶ See Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1769 (2024).

the covert action program could be challenged on nondelegation grounds, yet proceeds to show that such a challenge is unlikely to prevail in light of the framework developed in Part I.

I. THE NONDELEGATION DOCTRINE REVISITED

As a threshold matter, two recent opinions involving the nondelegation doctrine — *Department of Transportation v. Association of American Railroads*⁷ and *Gundy v. United States*⁸ — reflect distinct revived visions of impermissible delegations of legislative power to the Executive.

In *Association of American Railroads*, Justice Thomas invoked “the original understanding of the Constitution” to suggest that “formulat[ing] generally applicable rules of private conduct” implicated legislative power.⁹ Distinguishing these “generally applicable rules” from moments of executive fact-finding,¹⁰ Justice Thomas observed that an intelligible principle was no panacea in instances involving the regulation of private conduct.¹¹ Statutes that involved generally applicable rules of private conduct touched on “core legislative power,” necessarily requiring congressional involvement.¹² By defining what the legislature *must* do, Justice Thomas thereby defined what the Executive could not: “[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.”¹³

In contrast, Justice Gorsuch advanced a different approach to impermissible delegations by Congress to the Executive. Dissenting in *Gundy*, Justice Gorsuch offered three ways in which Congress could properly “delegate” authority. At one end of the spectrum, when regulating private conduct, Congress may declare a policy decision and direct the Executive to “fill up the details.”¹⁴ Under Justice Gorsuch’s second approach, when “Congress prescribes [a] rule governing private conduct, it may” also condition “the application of that rule . . . on executive fact-finding.”¹⁵ At the other end of the spectrum, Justice Gorsuch recognized overlapping authorities, where “Congress’s legislative

⁷ 575 U.S. 43 (2015).

⁸ 139 S. Ct. 2116 (2019).

⁹ *Ass’n of Am. R.Rs.*, 575 U.S. at 70 (Thomas, J., concurring in the judgment).

¹⁰ *See id.* at 70, 78–79.

¹¹ *Id.* at 77.

¹² *Id.* at 80.

¹³ *Id.* at 70. *But see* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) (noting that whether power is considered legislative or executive “depend[s] on the nature of the power, not on the identity of the person exercising it”).

¹⁴ *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

¹⁵ *Id.*; *see also* *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) (noting “we can see no sufficient reason, why the legislature should not exercise its discretion . . . either expressly or conditionally”).

authority . . . overlaps with authority the Constitution separately vests in another branch.”¹⁶ In such instances, there is no separation of powers issue if Congress provides the President with discretion over “matters already within the scope of executive power.”¹⁷ Justice Gorsuch’s approach appears to have gained purchase among members of the Court. In *Paul v. United States*,¹⁸ for example, Justice Kavanaugh noted “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”¹⁹

These distinct visions of impermissible delegations to the Executive, in turn, shape the way in which Justices Thomas and Gorsuch approach a foreign affairs or national security “exception” to the nondelegation doctrine.²⁰

For Justice Thomas, the exceptionalism of the foreign affairs context arises *outside* the Constitution given the history of external relations law.²¹ Even in matters involving private conduct, the definition of “law” in England at the ratification did not encompass external relations.²² Echoing the logic of the conservative Court in *United States v. Curtiss-Wright Export Corp.*,²³ Justice Thomas suggested such a subject matter–based exception was appropriate notwithstanding any concerns regarding “generally applicable rules.”²⁴ Specifically, given that matters of foreign affairs were uniquely vested in the King, Justice Thomas suggested they could rightly be considered outside the scope of the doctrine.²⁵ Such an approach would be reasonable given that “the King ‘by his royal prerogative, [could] issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence.’”²⁶

For Justice Gorsuch, the foreign affairs “exception” arises *within* the Constitution from the concurrent powers of the legislature and

¹⁶ *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (citing *Loving v. United States*, 517 U.S. 748, 768 (1996); *id.* at 776 (Scalia, J., concurring in part and concurring in the judgment); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

¹⁷ *Id.* (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)).

¹⁸ 140 S. Ct. 342 (2019) (mem.).

¹⁹ *Id.* at 342 (Kavanaugh, J., respecting the denial of certiorari).

²⁰ Although observations of the nondelegation doctrine’s foreign affairs exceptionalism are not new, see, e.g., Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1133 (2021), this Part focuses on more recent developments in the Court’s nondelegation jurisprudence as they relate to national security.

²¹ See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 80–81 (2015) (Thomas, J., concurring in the judgment).

²² *Id.* at 80 n.5.

²³ 299 U.S. 304, 320 (1936).

²⁴ *Ass’n of Am. R.Rs.*, 575 U.S. at 70, 80 n.5 (Thomas, J., concurring in the judgment).

²⁵ See *id.* at 80 n.5.

²⁶ *Id.* (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *133).

executive. Drawing on the third prong of his permissible legislative delegation, Justice Gorsuch looked to the Constitution's allocation of authorities in Articles II and III to justify a foreign affairs exception.²⁷ Justice Gorsuch argued, for example, that the "foreign-affairs-related statute" at issue in *The Cargo of the Brig Aurora*²⁸ could have been justified by the power already possessed by the President in the domain of foreign affairs.²⁹ In Justice Gorsuch's framing, because "foreign affairs powers are constitutionally vested in the president under Article II," Congress may permissibly confer on the Executive greater discretion in those matters.³⁰

Extending Justice Gorsuch's analysis to the context of intelligence, however, requires recognizing that Article II does not contain a general "foreign affairs" or "national security" power.³¹ The President's offensive war power, for example, requires a congressional declaration, which serves to "unlock[]" a series of independent powers "informed by historical practice and the laws of war."³² Put differently, a more faithful formalist perspective would take Justice Gorsuch's approach to recognize enclaves of executive authorities arising from the Constitution. Within this enclave, legislative authorization can serve to unlock the President's independent powers as recognized through historical practice and case law.³³ Presidential authority may also arise from "redundant" or "independent discretion" authorizations.³⁴ Given the relevance of the "unlocking" framing to the covert action statute, this Note focuses narrowly on unlocking authorizations here. When such independent power is unlocked, nondelegation concerns may be diminished.

The President's "intelligence" powers neatly dovetail with this reframing. Despite lacking clear Article II support, government officials have stated the President is "authorized by the Constitution" to engage in intelligence-related activities.³⁵ Indeed, unlike the President's defensive war powers, which could be supported by the Commander in Chief Clause, there is less textual support for the President's intelligence powers.³⁶ Intelligence powers emerge, however, when one considers the

²⁷ *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

²⁸ *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382–83 (1813).

²⁹ See *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

³⁰ *Id.*

³¹ See Bradley & Goldsmith, *supra* note 6, at 1763 & n.114.

³² *Id.* at 1773–74 (emphasis omitted).

³³ See *id.* at 1748, 1774.

³⁴ See *id.* at 1769 (emphases omitted).

³⁵ *Nomination of Kate E. Heinzelman to Be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intel.*, 117th Cong. 61 (2022) [hereinafter *Nomination of Kate E. Heinzelman*] (statement of Kate E. Heinzelman).

³⁶ See Bradley & Goldsmith, *supra* note 6, at 1764. The paradigm offered by the President's war power — rarely challenged on nondelegation grounds — reflects a parallel to the foreign policy "exceptionalism" of the nondelegation doctrine. See Michael D. Ramsey & Matthew C. Waxman, *Delegating War Powers*, 96 S. CAL. L. REV. 741, 743 (2023).

authorities possessed by the legislature and Executive, between Congress's power to declare war and the President's power pursuant to the Take Care and Commander in Chief Clauses. As discussed in the following Part, within this enclave, the President's powers over intelligence may be identified through historical practice and case law.³⁷

II. PRESIDENT'S INDEPENDENT POWERS & INTELLIGENCE

A. *Historical Practice*

The President's independent power to deploy intelligence agents, and take intelligence actions, reflects settled historical practice. This section presents the origins of this authority by closely examining the role of intelligence at the Founding.

The import of intelligence at the Founding opens with the French and Indian War, when George Washington learned firsthand of the value of intelligence in the Ohio Valley. In 1753, a fresh-faced Major Washington had set off on a mission to persuade the French to leave the Ohio Valley.³⁸ Washington's negotiations provided cover to collect intelligence regarding the movements of French and Indian forces in the region.³⁹ On one occasion, for example, he warned the Lieutenant Governor of Pennsylvania, James Hamilton, of a potential ambush, noting that he had uncovered "[i]ntelligence that 600 of the Chippoways and Ottoways are Marching down Scioto C[ree]k."⁴⁰ As time progressed, Washington grew increasingly focused on dispatching intelligence updates to his superiors and relatives back in Virginia. On June 7, 1755, for example, Washington dispatched two letters — one to Virginia politician William Fairfax and another to his younger brother John Augustine — relaying fresh "intelligence" that "a body of 300 French" was approaching an encampment.⁴¹

Indeed, apart from personally collecting intelligence, Washington soon became involved with creating intelligence-collecting apparatuses within the militia. On September 17, 1755, for example, Washington prepared a memorandum listing several military officers who he noted were "absolutely necess[ary]" to stand up a "Company of Scouts for

³⁷ See Bradley & Goldsmith, *supra* note 6, at 1763.

³⁸ See Letter from George Washington to Horatio Sharpe (Apr. 24, 1754), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-01-02-0044> [<https://perma.cc/D9YH-NLDE>]; RON CHERNOW, WASHINGTON: A LIFE 31 (2010).

³⁹ See Letter from George Washington to James Hamilton (Apr. 24, 1754), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-01-02-0043> [<https://perma.cc/9P3U-WV46>].

⁴⁰ *Id.*

⁴¹ See Letter from George Washington to William Fairfax (June 7, 1755), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-01-02-0148> [<https://perma.cc/Y672-H22C>]; Letter from George Washington to John Augustine Washington (June 7, 1755), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-01-02-0154> [<https://perma.cc/9JVL-3YEH>].

Intelligence.”⁴² Soon, the scouts he “hired to bring Intelligence” were delivering critical information that translated into military advantage.⁴³ Writing to the Governor of Pennsylvania in early 1756, Washington underscored the importance of intelligence, noting:

There is nothing *more* necessary than good intelligence to frustrate a designing Enemy: and nothing that requires greater pains to obtain. I shall therefore cheerfully come into any measures you can propose to settle a correspondence for this salutary end: and you may depend upon receiving (when the provinces are threatened) the earliest and best intelligence I can procure.⁴⁴

Analyzing the letters sent by Washington to spies, military officers, and officials between 1754 and 1757 reveals the degree of precision in Washington’s use of intelligence. In June 1757, for example, Washington directed Nicholas Minor, a captain in the Virginia militia, to “procur[e] what intelligence you can of the enemys numbers, motions, and intentions” including “an exact return of all the ammunition and Stores you find at that place.”⁴⁵ Such precision was also reflected in the letters sent to Washington. On November 2, 1757, for example, Washington’s aide-de-camp Captain George Mercer bemoaned having received “very little fresh Intelligence,” claiming he knew only that a British “[f]leet of at least 30 Men of War, 400 Transports & 10,000 Troops” was readying at Plymouth.⁴⁶

On June 17, 1775, the Second Continental Congress selected Washington as the Commander in Chief of the Continental Army.⁴⁷ As the first Commander in Chief, Washington shaped the expectations and responsibilities associated with the role in ways that would emerge even as soon as the Constitutional Convention. Notably, the Continental

⁴² Memorandum (Sept. 17, 1755), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-02-02-0035> [<https://perma.cc/XUB4-WKG2>].

⁴³ Letter from George Washington to Robert Dinwiddie (Oct. 11–14, 1755), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-02-02-0099> [<https://perma.cc/97YF-3HGV>].

⁴⁴ Letter from George Washington to Robert Hunter Morris (Jan. 1, 1756), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-02-02-0255> [<https://perma.cc/6B7X-DMU3>]. A later letter to Washington reflected the breadth of his sources. On February 2, 1756, Governor Morris noted that he had “sent two trusty Indians to procure [him] intelligence of the number and particular situation of the enemy” and underscored that these agents would deliver him, and consequently Washington, insight into the construction of a garrison at Fort Duquesne. See Letter from Robert Hunter Morris to George Washington (Feb. 2, 1756), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-02-02-0314> [<https://perma.cc/93EH-7JDT>].

⁴⁵ Letter from George Washington to Nicholas Minor (June 24, 1757), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-04-02-0161> [<https://perma.cc/FBU3-9SDZ>].

⁴⁶ Letter from George Mercer to George Washington (Nov. 2, 1757), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/02-05-02-0026> [<https://perma.cc/P3XK-Q4UD>].

⁴⁷ See 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 96 (Worthington Chauncey Ford ed., 1905).

Congress's resolutions left much of the Commander in Chief role up to Washington.⁴⁸ Apart from setting forth the basic structure of the new Continental Army — which consisted of “six companies of expert riflemen” under the command of a single captain — the enabling resolutions did little beyond direct the Army to decamp to Boston.⁴⁹

Intelligence would soon appear to be an integral part of Washington's role as Commander in Chief during the Revolution.⁵⁰ Drawing on his experience directing intelligence-gathering operations during the French and Indian War, Washington committed his personal funds toward designing and financing the Continental Army's intelligence operations.⁵¹ And a little over a week after the Continental Army was established, on June 27, 1775, Major General Philip Schuyler was directed “to obtain the best intelligence he can of the disposition of the Canadians and Indians of Canada.”⁵² By early 1776, Washington had created a special detachment of rangers, led by Thomas Knowlton, to engage in espionage-related activities in New York.⁵³

I. Washington and the Hendrickses. — The case of John and Baker Hendricks serves as a microcosm for Washington's intelligence-related efforts during the Revolutionary War. In 1777, Washington began directing the pair of brothers to collect intelligence on behalf of American forces.⁵⁴ On September 29, 1777, for example, Washington urged his military officers to supply provisional passports for “John Hendricks and Baker Hendricks” to carry goods into British-dominated areas.⁵⁵ In later instructions sent to the Hendrickses, Washington specifically identified intelligence objectives for the spies.⁵⁶ Washington, for example, directed the Hendrickses to collect the “earliest intelligence of any thing material from New York,”⁵⁷ to include the “preparations for a Move

⁴⁸ *Id.*

⁴⁹ *Id.* at 89. The resolution adopted on June 14, 1775, provided:

That six companies of expert riflemen, be immediately raised in Pennsylvania, two in Maryland, and two in Virginia; that each company consist of a captain, three lieutenants, four serjeants, four corporals, a drummer or trumpeter, and sixty-eight privates. That each company, as soon as compleated, shall march and join the army near Boston, to be there employed as light infantry, under the command of the chief Officer in that army. *Id.*

⁵⁰ See Stephen F. Knott, *America Was Founded on Secrets and Lies*, FOREIGN POL'Y (Feb. 15, 2016, 9:14 AM), <https://foreignpolicy.com/2016/02/15/george-washington-spies-lies-executive-power> [<https://perma.cc/3U3F-C832>].

⁵¹ *Id.*

⁵² 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 47, at 109.

⁵³ Letter from George Washington to John Hancock (Sept. 18, 1776), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-06-02-0264> [<https://perma.cc/XM38-USJ4>].

⁵⁴ Letter from George Washington to John Clark, Jr., Major (Sept. 29, 1777), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-11-02-0370> [<https://perma.cc/3YFZ-MGFN>].

⁵⁵ *Id.*

⁵⁶ See, e.g., Spy Instructions from George Washington to John Hendricks (July 1780), https://www.loc.gov/resource/mgw4.068_0925_0926/?sp=1&st=image [<https://perma.cc/HX4F-ZA4J>].

⁵⁷ Letter from George Washington to John Clark, Jr., Major, *supra* note 54.

either by Land or Water” by the British Army encamped in Staten Island.⁵⁸ Washington’s instructions for John Hendricks in 1780 similarly requested specific information on the “movements” of particular British troops located in New York.⁵⁹

When the two spies were arrested, Washington himself intervened. In late 1777, locals in Elizabethtown had grown suspicious of the brothers, who used the passports supplied by Washington to smuggle contraband to and from the British in Staten Island.⁶⁰ Although the smuggling provided a suitable cover to collect intelligence,⁶¹ the brothers had inadvertently become, per one of Washington’s officers, “the most abandoned Banditti in the Country under pretence of being employed by our Army as Spies.”⁶² Unable to escape the public outrage over their profiteering, the Hendrickses were caught and detained by New Jersey officials.⁶³ Within a day of being notified of the arrest, Washington, on January 20, 1778, dispatched a letter to William Livingston, the Governor of New Jersey,⁶⁴ elaborating that the brothers’ intelligence collecting merited dismissing the proceedings against them⁶⁵:

In justice to these Men I am bound to take this earliest opportunity of informing you that they were employed by Colo. Dayton last summer to procure intelligence of the movements of the Enemy while upon Staten Island . . . Upon these Considerations I hope you will put a stop to the prosecution, unless other matters appear against them. You must be well convinced that it is indispensably necessary to make use of these means to procure intelligence.⁶⁶

Livingston’s response underscores the emerging executive role in intelligence-related matters. Noting that “[t]here is no Power in this State to grant a *nola Prosequi*,” Livingston nonetheless assured Washington that his influence would ensure the spies were spared.⁶⁷ The

⁵⁸ Letter from Francis Barber, Lieutenant Colonel, to George Washington (July 13, 1778), reprinted in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-16-02-0070> [<https://perma.cc/9Y84-ZBJP>].

⁵⁹ See Spy Instructions from George Washington to John Hendricks, *supra* note 56.

⁶⁰ Letter from William Livingston to George Washington (Nov. 22, 1777), reprinted in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-12-02-0350> [<https://perma.cc/8Y9V-RE6G>].

⁶¹ See Letter from George Washington to William Livingston (Jan. 20, 1778), reprinted in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-13-02-0257> [<https://perma.cc/44W9-9T8M>].

⁶² Letter from William Livingston to George Washington, *supra* note 60.

⁶³ *Id.*

⁶⁴ *William Livingston*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/figure/william-livingston> [<https://perma.cc/5J68-VMY7>].

⁶⁵ See Letter from George Washington to William Livingston, *supra* note 61.

⁶⁶ *Id.*

⁶⁷ Letter from William Livingston to George Washington (Jan. 26, 1778), reprinted in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-13-02-0311> [<https://perma.cc/H7F5-EHCK>].

Hendrickses' trial never commenced and, true to Livingston's word, the brothers were let go.⁶⁸

2. *Washington and the Culper Ring.* — Soon after Washington intervened to save the Hendrickses, on August 25, 1778, a letter from Benjamin Tallmadge, a decorated officer and would-be spy, arrived.⁶⁹ Tallmadge was critical to helping Washington start the Culper Spy Ring, a network of spies who funneled information on loyalist movements to the frontlines of the American Revolution.⁷⁰ As to the Culper Ring's success, Tallmadge was far from bashful: "How beneficial [the Ring] was to the Commander-in-Chief is evidenced by his continuing the same to the close of the war."⁷¹

Washington's involvement with the Culper Ring underscored not only the sophistication of the intelligence network — which involved elaborate tradecraft and cyphers⁷² — but the degree to which such operations became part and parcel of the Commander in Chief's duties. Washington's diary entry from May 1, 1781, for example, included concern for "the inefficacy, & bad tendency of pushing Military Impresses too far," updates from the Culper Ring, and designs to expand an intelligence collection effort in "New York, by way of Elizabeth Town."⁷³ Washington's battlefield priorities operated in tandem with the reports of intelligence. Within three days of receiving one dispatch from Tallmadge,⁷⁴ for example, Washington had written back pressing for an "expeditious way of communicating [the Culper ring's] intelligence" and requiring details regarding "Naval as well as Land strength."⁷⁵ As the war bore on, obtaining this intelligence became a substantial part of the military effort. By 1779, members of the Culper Ring were coordinating logistics to deliver "Weekly Intelligence" updates to Washington's senior

⁶⁸ See *id.* ("The . . . men appear never to have come to trial.").

⁶⁹ See Letter from George Washington to Benjamin Tallmadge, Major (Aug. 25, 1778), reprinted in *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-16-02-0411> [<https://perma.cc/49U7-E23B>]. John Bolton was Tallmadge's alias. See Victoria Williams, *Culper Spy Ring*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/culper-spy-ring> [<https://perma.cc/VE86-66YL>].

⁷⁰ See Williams, *supra* note 69.

⁷¹ BENJAMIN TALLMADGE, MEMOIR OF COLONEL BENJAMIN TALLMADGE 42–43 (Henry Phelps Johnston ed., Gilliss Press 1904) (1858).

⁷² Williams, *supra* note 69.

⁷³ Diary Entry of George Washington (May 1, 1781), reprinted in *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/01-03-02-0007-0001-0002> [<https://perma.cc/QZ3J-9DLY>].

⁷⁴ Letter from Benjamin Tallmadge, Major, to George Washington (May 26, 1779), reprinted in *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-20-02-0587> [<https://perma.cc/EC5M-NV3G>].

⁷⁵ Letter from George Washington to Benjamin Tallmadge, Major (May 29, 1779), reprinted in *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-20-02-0628> [<https://perma.cc/T8RV-KYPQ>].

military officials.⁷⁶ Military officers like Caleb Brewster began shepherding a steady stream of boats that would pick up letters along Long Island and carry them across the sound to Washington's forces in Connecticut.⁷⁷ As such, Washington's role as Commander in Chief simultaneously incorporated intelligence regarding the movement of boats setting sail from New York ports, the armaments of different British vessels, and even the contents of Tory letters.⁷⁸

Washington's experiences during this period also involved proto-covert action operations, running disinformation campaigns targeting British and domestic anxieties. Based on the Culper Ring's intelligence, Washington became intensely focused on developing sources for the British movements in New York, from where he feared an invasion of the rather "defenceless" Georgia or South Carolina would be launched.⁷⁹ A concern for the fate of the southern states soon led Washington to run covert action campaigns directed at obfuscating the strength of the Continental forces.⁸⁰ Washington directed "fictitious communications" and strategically positioned boats and supplies in British-dominated neighborhoods to shape perceptions regarding the breadth and capability of the Continental Army.⁸¹

On the home front, Washington intentionally amplified news of a looming attack on New York to boost enlistments from mid-Atlantic residents.⁸² Convinced these individuals would otherwise care less about the fate of their southern neighbors,⁸³ Washington would confess in 1788 that, "pains [were] taken to deceive our own Army; for I had always conceived, when the imposition did not completely take place at home, it could never sufficiently [sic] succeed abroad."⁸⁴ Indeed, in the same letter to Noah Webster, Washington would acknowledge the extent of these misinformation efforts: "Many circumstances will unavoidably

⁷⁶ See Letter from Samuel Culper to Benjamin Tallmadge, Major (July 9, 1779), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-21-02-0576-0002> [<https://perma.cc/8U6L-RKTB>].

⁷⁷ See Letter from Caleb Brewster, Captain Lieutenant, to George Washington (Feb. 14, 1781), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-30-02-0406> [<https://perma.cc/3T89-6B53>].

⁷⁸ See Letter from George Washington to Louis Le Bègue Du Portail, Brigadier Gen., and Alexander Hamilton, Lieutenant Colonel (Nov. 2, 1779), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-02-02-0518> [<https://perma.cc/4TB8-B6FD>].

⁷⁹ Letter from George Washington to Samuel Huntington (Nov. 29, 1779), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-23-02-0370> [<https://perma.cc/GP7N-CCFG>].

⁸⁰ See Knott, *supra* note 50.

⁸¹ Letter from George Washington to Noah Webster (July 31, 1788), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/04-06-02-0376> [<https://perma.cc/WKH9-JUPE>].

⁸² See Knott, *supra* note 50.

⁸³ See *id.*

⁸⁴ Letter from George Washington to Noah Webster, *supra* note 81.

be misconceived & misrepresented. Notwithstanding most of the Papers which may properly be deemed official are preserved yet the knowledge of innumerable things, of a more delicate & secret nature, is confined to the perishable remembrance of some few of the present generation.”⁸⁵

The impact of Washington’s efforts on the overall trajectory of the war was evident when, after the conclusion of the Revolutionary War, British Major George Beckwith begrudgingly acknowledged, “Washington did not really outfight the British, he simply outspied us.”⁸⁶

B. The Commander in Chief Clause & the Convention

The Constitutional Convention and ratifying debates emerged, therefore, against a backdrop where the most recent Commander in Chief had been intimately involved with intelligence. But unlike the explicit power to appoint ambassadors,⁸⁷ the President’s authorities over intelligence obtained no clear Article II hook. Looking to the records of the Constitutional Convention and ratification debates, however, suggests that discussions of Article II’s Commander in Chief Clause⁸⁸ provide critical context for understanding what textual basis — if any — there is to consider intelligence a part of the Executive’s powers.⁸⁹

The decision to enshrine an executive also empowered as “Commander in Chief” broadly accorded with America’s experience during the Revolution. The power previously vested in George Washington offered a helpful paradigm.⁹⁰ While the Commander in Chief was the subject of little debate during the Constitutional Convention, the topic emerged more frequently in the ratifying state conventions.⁹¹ During the North Carolina ratifying convention, for example, James Iredell noted the practical necessity served by the Commander in Chief Clause.⁹² Iredell noted that “the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which

⁸⁵ *Id.*

⁸⁶ *George Washington: More than a General and a President*, DEF. INTEL. AGENCY (Apr. 20, 2014), <https://www.dia.mil/News-Features/Articles/Article-View/Article/566965/george-washington-more-than-a-general-and-a-president> [https://perma.cc/N233-MSV8].

⁸⁷ See U.S. CONST. art. II, § 2, cl. 2.

⁸⁸ See *id.* cl. 1.

⁸⁹ To be sure, the process of determining Founding-era practice is, itself, the subject of scholarly debate. While this Note has not surveyed the many approaches for engaging in such work, its methodology was shaped by the works of Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Julian Davis Mortenson and Nicholas Bagley, Essay, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022); and Kellen R. Funk and Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816 (2024).

⁹⁰ See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot 2d ed., Washington, D.C., 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS] (describing Commander in Chief powers vested in one Executive and distinguishing such powers from the ability to declare war).

⁹¹ See Ernest R. May, “The President Shall be Commander in Chief,” in THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 1, 5–6, 10 (Ernest R. May ed., 1960).

⁹² See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 90, at 107.

are necessary in military operations, can only be expected from one person.”⁹³ Relatedly, during the Pennsylvania ratifying convention, James Wilson noted the independence of the President’s judgment arose from his role as “commander-in-chief.”⁹⁴ Arguing the President was far from a mere “tool” of Congress, Wilson cited the Commander in Chief Clause⁹⁵ and the Take Care Clause⁹⁶ as clear indicators the President’s actions required a degree of deference.⁹⁷ More tangibly, the delegates had ample recent events to support vesting the President with military power. Richard Spaight, for example, reminded the North Carolina convention that had the Continental Congress not “given the exclusive command of the army to the commander-in-chief . . . perhaps the independence of America would not have been established.”⁹⁸

Yet the vision of an omnipotent Commander in Chief sat uneasily with the specter of a despotic sovereign. For example, during the Virginia ratifying convention, Governor Edmund Randolph argued that a commander would doubtless be exposed to “corruptions and passions incident to other men,” cautioning that any executive with a dash of “military genius, address, and ambition” might be carried away “to proclaim him[self] king.”⁹⁹ Echoing this fear, Robert Miller of North Carolina feared that the Commander in Chief Clause vested far too much power in the President, and considered it a constitutional defect “that it was not expressly provided that Congress should have the direction of the motions of the army.”¹⁰⁰

The Framers’ view of executive control over intelligence at ratification reflected these twin positions: On one hand, an unquestioned premise that such power was properly vested in the President; and on the other, that such authority must be checked by Congress’s Article I powers. James Iredell, for example, noted the President’s primacy in intelligence arose from his duty “to regulate all intercourse with foreign powers.”¹⁰¹ Yet, Iredell noted the receipt of such intelligence was circumscribed by the President’s obligation to share with “the Senate every material intelligence he receives.”¹⁰² For Iredell, and others, the duty to inform Congress was necessary given Congress’s role in declarations of war. In one hypothetical, Iredell speculated darkly about the possible consequences if Congress failed to receive “certain intelligence that the British government had formed a scheme to attack New York” — a

⁹³ *Id.*

⁹⁴ *See 2 id.* at 512.

⁹⁵ U.S. CONST. art. II, § 2, cl. 1.

⁹⁶ *Id.* art. II, § 3.

⁹⁷ *See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra* note 90, at 512–13.

⁹⁸ *4 id.* at 115.

⁹⁹ *3 id.* at 117.

¹⁰⁰ *4 id.* at 114.

¹⁰¹ *Id.* at 127.

¹⁰² *Id.*

lapse with grave consequences for defensive preparation.¹⁰³ So substantial was Congress's role in this system, Iredell argued, that the concealment of "important intelligence" by the President could be sufficient to trigger impeachment.¹⁰⁴ Congress's power to declare war and raise armies,¹⁰⁵ therefore, served as a coda to the Executive's power over intelligence.

C. *Executive Tradition of Covert Action*

Since Washington's early exploits at the Founding, an unbroken tradition of the Executive using intelligence agents for various ends continued through the twentieth century without congressional authorization.

The President's structured use of intelligence agents abroad emerged from the Executive's control over U.S. ambassadors and consuls. Illustrative of this point is Gouverneur Morris's April 7, 1790, letter to Washington, which provided the Executive with updates on conversations with Ministers of Foreign Affairs in London, where he lamented he had not been able to meet with as many foreign officials as he would have hoped.¹⁰⁶ Indeed, a few days later, Morris would write to Washington that, he was "still waiting for Intelligence from the Ministers, who to judge by appearances slumber profoundly upon the Application made to them."¹⁰⁷

Notably, during the Civil War, Union diplomats stationed in Europe began to create an intelligence-gathering network, collecting reports of Confederate agents operating abroad and keeping tabs on foreign allegiances during the war.¹⁰⁸ The U.S. Consul in Liverpool, Thomas Haines Dudley, along with Harlow Morse, U.S. Consul in London, soon became in charge of directing the intelligence network headquartered in Britain.¹⁰⁹ Apart from drawing on information gathered from British shipyard workers who were sympathetic to the Union to discern Confederate naval operations, Dudley was also involved with thwarting Confederate covert action programs.¹¹⁰ Confederate intelligence agents themselves had begun hiring writers in the daily London press, using payments of Havana cigars and cash in exchange for favorable stories regarding life in the South.¹¹¹ The President's authority to direct U.S.

¹⁰³ *Id.* at 96.

¹⁰⁴ *Id.* at 127.

¹⁰⁵ See U.S. CONST. art. I, § 8.

¹⁰⁶ Letter from Gouverneur Morris to George Washington (Apr. 7, 1790), *reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/05-05-02-0209> [https://perma.cc/LT38-JJHP].

¹⁰⁷ *Id.*

¹⁰⁸ See THOMAS ALLEN, INTELLIGENCE IN THE CIVIL WAR 38 (2006).

¹⁰⁹ See DAVID HEPBURN MILTON, LINCOLN'S SPYMASTER: THOMAS HAINES DUDLEY AND THE LIVERPOOL NETWORK 31 (2003).

¹¹⁰ See *id.* at 33.

¹¹¹ See ALLEN, *supra* note 108, at 37.

ambassadors, consuls, and ministers overseas included, therefore, efforts to counteract propaganda campaigns abroad using covert action programs of the Union's own. As U.S. Minister to Belgium,¹¹² Henry Shelton Sanford reported, overseas operations could come in many forms, be they carried out by a "pretty mistress" or "spying landlord."¹¹³

Executive control over covert action continued during the twentieth century, where intelligence operations intensified in Asia and the European theater.¹¹⁴ In 1947, for example, in the midst of growing communist sentiment in Italy, the National Security Council (NSC) convened to discuss the United States position "With Respect to Italy."¹¹⁵ The conclusion of the November 14, NSC meeting was to authorize the use of covert psychological warfare to "actively combat communist propaganda in Italy by an effective information program and by all other practical means."¹¹⁶ As President Truman adopted National Security Council Paper NSC-68 in 1950, it ushered in a new period of amplifying activities to disrupt Soviet influence overseas.¹¹⁷ This unbroken tradition from the Founding through the Cold War, in turn, serves to inform the nature of the delegation.¹¹⁸

D. Case Law

Apart from historical practice, the President's independent power in the realm of intelligence has also been enshrined in case law. In *Curtiss-Wright*, for example, the Court recognized: "[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."¹¹⁹ *Curtiss-Wright* would go on to note that in the context of foreign affairs the legislature must reasonably factor in the "confidential information which [the President] has or may thereafter receive."¹²⁰ This explicit recognition of the

¹¹² See *Henry Shelton Sanford (1823-1891)*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/departmenthistory/people/sanford-henry-shelton> [<https://perma.cc/D897-BR6A>].

¹¹³ Letter from Henry S. Sanford, U.S. Minister to Belgium, to William H. Seward, U.S. Sec'y of State (July 4, 1861), <http://www.loc.gov/resource/mal.1064500> [<https://perma.cc/L59B-3UX3>].

¹¹⁴ See generally SARAH-JANE CORKE, *US COVERT OPERATIONS AND COLD WAR STRATEGY* (2008) (describing U.S. covert operations from 1945 to 1953).

¹¹⁵ *Id.* at 48.

¹¹⁶ *Id.*

¹¹⁷ See *NSC-68, 1950*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/NSC68> [<https://perma.cc/T7PJ-ERHD>].

¹¹⁸ See generally Bradley & Goldsmith, *supra* note 6.

¹¹⁹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

¹²⁰ *Id.* at 321.

intelligence power possessed by the President, in turn, shaped the outcomes both in *Haig v. Agee*¹²¹ and *Zemel v. Rusk*.¹²²

In *Haig*, a former CIA employee challenged the Secretary of State's revocation of his passport.¹²³ The employee, who had defected and openly declared a "campaign to fight the United States CIA"¹²⁴ in Europe, maintained that the Secretary's revocation exceeded the authority conferred by the 1926 Passport Act.¹²⁵ In upholding the Secretary's decision, the Court reaffirmed the primacy of executive authority in questions involving intelligence and national security. Specifically, the Court recognized that the issuance of a passport was "committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security . . . of the United States."¹²⁶ Moreover, the power to revoke passports was coterminous with the President's intelligence power: Such decisions reflected a "measure[] to protect the secrecy of our Government's foreign intelligence operations."¹²⁷

Such considerations were reflected in *Zemel*, too. In *Zemel*, a U.S. citizen challenged the State Department's decision to deny validating his passport in advance of a trip to Cuba.¹²⁸ Noting the trip would "satisfy [his] curiosity about the state of affairs in Cuba," Zemel questioned whether the Executive could permissibly reject his passport.¹²⁹ The Court, however, suggested that the Executive's intelligence power resulted in greater deference in the arena of foreign affairs. The Court invoked *Curtiss-Wright* for the proposition that "the Executive is immediately *privy to information* which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress — *in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas*."¹³⁰

As such, the *Zemel* Court reaffirmed *Curtiss-Wright*'s position that the Executive possessed unique power, which properly enabled the President to have final authority in matters involving intelligence.

¹²¹ 453 U.S. 280 (1981).

¹²² 381 U.S. 1 (1965).

¹²³ See *Haig*, 453 U.S. at 286–87.

¹²⁴ *Id.* at 283.

¹²⁵ See *id.* at 287.

¹²⁶ *Id.* at 293 (citing *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)).

¹²⁷ *Id.* at 307.

¹²⁸ *Zemel v. Rusk*, 381 U.S. 1, 3–4 (1965).

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 17 (emphases added).

III. COVERT ACTION PROGRAM

The current covert action statute was promulgated by Congress as part of the National Security Act of 1947¹³¹ and refined in the 1991 Intelligence Authorization Act.¹³² Broadly, 50 U.S.C. § 3093 provides that the President may authorize covert action and must report such authorizations to Congress.¹³³ For the President to authorize covert action, § 3093(a) requires she determine “such an action is necessary to support identifiable foreign policy objectives” and is “important to the national security of the United States.”¹³⁴ At no point does § 3093 present a narrowly framed factual question for executive determination — such as whether Great Britain’s actions ceased to be non-neutral¹³⁵ or whether arms sales to Bolivia or Paraguay may destabilize peace.¹³⁶ Instead, the additional conditions circumscribing such a presidential covert action finding can be grouped into those regulating the form of such a presidential finding,¹³⁷ the specifications of entities affected by such a finding,¹³⁸ and those barring covert action that run afoul of the Constitution and U.S. statutes.¹³⁹

Sections 3093(a)(1)–(2) provide that a presidential finding must generally be in writing and may not authorize past covert activities.¹⁴⁰ Both sections (1) and (2) contemplate a degree of flexibility in this requirement, noting that writing may not be required if “time does not permit.”¹⁴¹ Section 3093(a)(3) provides that a presidential finding contain the sources of funding and subject those participating in the covert action activity to the CIA’s policies or regulations.¹⁴² Finally, § 3093(a)(5) notes a presidential covert action finding “may not authorize any action

¹³¹ Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. §§ 3001–3244).

¹³² See *id.*; Pub. L. No. 102-88, 105 Stat. 429 (codified as amended in scattered sections of 10 and 50 U.S.C.). A series of National Security Council directives issued in the wake of the National Security Act illustrate the ambiguity surrounding the scope of “covert action.” See *Note on U.S. Covert Action Programs*, U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN (Dec. 9, 1947), <https://history.state.gov/historicaldocuments/frus1964-68v26/actionsstatement> [<https://perma.cc/UU62-EJ9Y>]. Notably, the first such memorandum, issued on December 9, 1947, directed the National Security Council to initiate conducting “covert psychological operations designed to counteract Soviet and Soviet-inspired activities.” See 253. *Memorandum from the Executive Secretary (Souers) to the Members of the National Security Council*, U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/frus1945-50Intel/d253> [<https://perma.cc/96RD-J7AR>].

¹³³ See 50 U.S.C. § 3093(b)(1).

¹³⁴ *Id.* § 3093(a).

¹³⁵ See *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 383 (1813).

¹³⁶ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312–13 (1936).

¹³⁷ 50 U.S.C. § 3093(a)(1)–(2).

¹³⁸ *Id.* § 3093(a)(3)–(4).

¹³⁹ *Id.* § 3093(a)(5).

¹⁴⁰ *Id.* § 3093(a)(1)–(2).

¹⁴¹ *Id.*

¹⁴² *Id.* § 3093(a)(3).

that would violate the Constitution or any statute of the United States.”¹⁴³

Equally relevant, § 3093(e)’s definition of covert action is presented largely in terms of what it is *not*. At bottom, covert action is defined as an activity to “influence political, economic, or military conditions abroad” without the public recognition of U.S. government involvement.¹⁴⁴ Apart from this definition, covert action is defined in the alternative. The statute enumerates a series of activities *beyond* the scope of covert action: traditional intelligence gathering operations,¹⁴⁵ diplomatic or military activities,¹⁴⁶ and law enforcement activities.¹⁴⁷ The precise line between what may constitute covert action versus a “traditional” intelligence, counterintelligence, or military operation is, furthermore, unclear.¹⁴⁸ The statute provides no definition of “traditional military activities,” which could be quasi-covert (if the United States’s official role is unacknowledged) or clandestine (if the activities themselves are classified).¹⁴⁹ The congressional record suggests four nondispositive considerations for determining whether an action constitutes “traditional military activity”: whether the activity has customarily been considered a military activity; whether the activity is under the direction and control of a military commander; whether the activity is connected to hostilities involving U.S. military forces; and whether the U.S. government’s role in the overall operation will be apparent or acknowledged publicly.¹⁵⁰ Section 3093(f) bars covert action to “influence United States political processes, public opinion, or media.”¹⁵¹

IV. NONDELEGATION CHALLENGES & COVERT ACTION

At first blush, the covert action program seems to squarely invite a nondelegation challenge.¹⁵² *First*, covert action reflects a subset of intelligence activities where executive discretion has concentrated and

¹⁴³ *Id.* § 3093(a)(5).

¹⁴⁴ *Id.* § 3093(e).

¹⁴⁵ *Id.* § 3093(e)(1).

¹⁴⁶ *Id.* § 3093(e)(2).

¹⁴⁷ *Id.* § 3093(e)(3).

¹⁴⁸ See *Questions for the Record (Senator Wyden), Nomination of Courtney Simmons Elwood to Be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. 10 (2017) [hereinafter *Elwood Questions for the Record (Senator Wyden)*].

¹⁴⁹ See MICHAEL E. DEVINE, CONG. RSCH. SERV., R45191, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED CONGRESSIONAL NOTIFICATION REQUIREMENTS 4 (2023), <https://sgp.fas.org/crs/intel/R45191.pdf> [<https://perma.cc/36FT-VAKE>].

¹⁵⁰ See S. REP. NO. 102-85, at 44, 46–47 (1991).

¹⁵¹ 50 U.S.C. § 3093(f).

¹⁵² This Note does not delve into clear issues of standing (for example, that such a case would inherently raise a political question). Although difficult to establish, the Court in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), did identify scenarios in which litigants may have standing in national security cases. See *id.* at 414 n.5; Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1078 (2015).

congressional oversight has atrophied over time. *Second*, the covert action statute appears to lack limiting principles deemed sufficient in other nondelegation challenges. Yet, as this Part argues, it seems doubtful that a serious nondelegation challenge will succeed, even with a reinvigorated doctrine, in light of the substantial historic practice supporting the President's independent powers over intelligence.

A. Plausible Nondelegation Challenge

Unquestionably, covert action reflects an area where presidential influence is substantial. Whereas the President may be moderately involved in setting intelligence priorities or minimally involved in conducting oversight of intelligence activities, covert action reflects a “historical baseline” of “significant presidential involvement.”¹⁵³ Furthermore, the concentration of presidential power over covert action reflects a trend that has intensified over time.¹⁵⁴

During the early 1950s, Congress largely vested the CIA with determining the “scope and magnitude” of anti-Soviet psychological operations.¹⁵⁵ As covert action soon expanded to include peacetime operations, President Truman set up a Psychological Strategy Board (PSB) to oversee such efforts.¹⁵⁶ The directive defined “covert operations” as:

all activities (except as noted herein) which are conducted or sponsored by this Government against hostile foreign states or groups or in support of friendly foreign states or groups but which are so planned and executed that any US Government responsibility for them is not evident to unauthorized persons and that if uncovered the US Government can plausibly disclaim any responsibility for them. Specifically, such operations shall include any covert activities related to: propaganda, economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and evacuation measures; [and] subversion against hostile states¹⁵⁷

The PSB itself was charged with carrying out “political and paramilitary operations, the general desirability of which have been determined by the senior departments of the Executive Branch of the Government.”¹⁵⁸ A now-declassified memo for the Deputy Director (Plans)

¹⁵³ Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 641 (2016).

¹⁵⁴ See MARSHALL CURTIS ERWIN, CONG. RSCH. SERV., RL33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 1–3 (2013), <https://sgp.fas.org/crs/intel/RL33715.pdf> [<https://perma.cc/26SV-SM74>].

¹⁵⁵ Note on U.S. Covert Action Programs, *supra* note 132.

¹⁵⁶ *Id.*

¹⁵⁷ 292. National Security Council Directive on Office of Special Projects, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN (June 18, 1948), <https://history.state.gov/historicaldocuments/frus1945-50Intel/d292> [<https://perma.cc/C9XC-DTWW>].

¹⁵⁸ Memorandum for Under Sec'y of State, Deputy Sec'y of Def., Dir., Psych. Strategy Bd. Re: Memorandum Dated 28 October 1952, to the Members of the PSB, from the DCI (Oct. 31, 1952), <https://www.cia.gov/readingroom/docs/CIA-RDP80R01731R000700440027-2.pdf> [<https://perma.cc/>]

starkly discussed the hindrance the PSB posed to certain covert action operations: “CIA is a ‘big boy’ now and should be treated as such. Unless the . . . procedures can be clarified and sharply defined with an elimination of present ambiguities and difficulties, CIA operations must inevitably suffer.”¹⁵⁹ In short order, the Eisenhower Administration abolished the PSB.¹⁶⁰ In the wake of the Iran-Contra affair, the 1991 Intelligence Authorization Act firmly retrenched the President’s role in covert action by requiring a written presidential finding prior to the authorization of covert action.¹⁶¹

Indeed, the two most recent confirmation hearings for CIA General Counsels before Congress have underscored the discretion the covert action statute vests in the President and the obstacles such discretion conceivably poses to congressional oversight. Responding to questions regarding covert action from Senator Ron Wyden, for example, President Trump’s nominee for CIA General Counsel, Courtney Elwood, stated, “it is up to the President to define the scope of a covert action activity and to determine whether the U.S. Government’s role in the activity should be publicly acknowledged.”¹⁶² Similarly, President Biden’s nominee for CIA General Counsel, Kate Heinzelman, noted in confirmation proceedings, “[t]he President may direct covert action to the extent authorized by the Constitution.”¹⁶³

Both nominees were also pressed during their confirmations to contemplate what might constitute covert action, and where the limits on such activity may be found. In 2017 during pre-hearing questions, Elwood noted, “Congress did not prohibit the President from authorizing a covert action that would violate a non-self-executing treaty or customary international law.”¹⁶⁴ In 2022, Heinzelman noted “[w]hile treaty obligations implemented in U.S. statutes would be binding under [the covert action] statutory provision, my understanding is that a non-self-executing treaty or customary international law would not.”¹⁶⁵ Although customary international law is far from an intelligible principle,

2DM9-UW76]. The memorandum went on to caution that under the existing framework, “the Agency has continued in the position of having to assume too much responsibility and authority.” *Id.*

¹⁵⁹ Memorandum for Deputy Dir. (Plans) from Chief, Pol. and Psych. Warfare, to Frank Wisner, Deputy Dir. (Plans), CIA 4-5 (May 26, 1953), <https://www.cia.gov/readingroom/docs/CIA-RDP80-01065A000500140003-5.pdf> [<https://perma.cc/NJW8-EBN7>].

¹⁶⁰ *Note on U.S. Covert Action Programs*, *supra* note 132.

¹⁶¹ See William E. Conner, *Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT’L L. 871, 872 (1992); Pub. L. No. 102-88, 105 Stat. 429 (codified as amended in scattered sections of 10 and 50 U.S.C.).

¹⁶² *Elwood Questions for the Record (Senator Wyden)*, *supra* note 148, at 10.

¹⁶³ *Nomination of Kate E. Heinzelman*, *supra* note 35, at 61.

¹⁶⁴ *Additional Prehearing Questions, Nomination of Courtney Simmons Elwood to Be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. 6 (2017).

¹⁶⁵ *Nomination of Kate E. Heinzelman*, *supra* note 35, at 61.

both answers underscore uncertainty over the scale of presidential discretion empowered by the covert action statute. Alongside this seemingly uncertain authority,¹⁶⁶ some senators have claimed covert action stymies congressional oversight by vesting the Executive with discretion to limit access to a finding or notification when “extraordinary circumstances affect[] vital interests of the United States.”¹⁶⁷

Taken together, the covert action statute appears to lack the very features that alleviated nondelegation concerns in *The Cargo of the Brig Aurora* and *Field v. Clark*.¹⁶⁸ In *The Brig Aurora*, for example, the Court recognized that when the legislature sets a “condition” for the President to determine — whether Great Britain ceased to violate neutrality — there is no impermissible delegation of legislative duties.¹⁶⁹ The Court drew no distinction between whether the legislature engages in lawmaking “expressly or conditionally,” following a determination of the President.¹⁷⁰ The narrowly defined condition in *The Brig Aurora* is, therefore, distinguishable from the generalized conditions of § 3093: “[I]dentifiable foreign policy objectives” and import “to the national security of the United States.”¹⁷¹

Field offers a yet closer parallel to § 3093 with its numerous examples of embargoes triggered by a presidential determination of, variously, the “public interest” or “disadvantage of the United States.”¹⁷² Yet the manifold nineteenth-century trade statutes named in *Field*, too, may be distinguished from the covert action statute. Whereas *Field* involved generalized conditions for the presidential determination — much like the covert action statute — each condition triggered a limited, pre-defined action.¹⁷³ Put differently, while the statutes in *Field* conferred substantial discretion over determining whether *conditions* were met, they did not also provide substantial discretion in shaping what *followed* if such conditions were met.

B. Modern Nondelegation Doctrine Applied

Despite the plausible challenge, applying the modern nondelegation doctrine to the covert action statute evinces that such a challenge is unlikely to be successful. As discussed in Part I, Justice Gorsuch’s presentation of the nondelegation doctrine in *Gundy* provides that the

¹⁶⁶ MICHAEL E. DEVINE, CONG. RSCH. SERV., R45175, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED DEFINITIONS 1 (2022), <https://crsreports.congress.gov/product/pdf/R/R45175/8> [<https://perma.cc/PFA8-C435>].

¹⁶⁷ See *Nomination of Kate E. Heinzelman*, *supra* note 35, at 55–56 (quoting 50 U.S.C. § 3093(c)(2)).

¹⁶⁸ 143 U.S. 649 (1892).

¹⁶⁹ See *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386, 388 (1813).

¹⁷⁰ *Id.* at 388.

¹⁷¹ 50 U.S.C. § 3093(a).

¹⁷² *Field*, 143 U.S. at 685–86.

¹⁷³ See *id.* at 680–81.

Constitution includes enclaves of “concurrent” legislative and executive authorities.¹⁷⁴ Extending Justice Gorsuch’s approach, legislative authorization can also serve to unlock the President’s independent powers as recognized through historical practice and case law.¹⁷⁵ And when the President’s independent power is unlocked, nondelegation concerns may be diminished.

The covert action statute emerges in an enclave of legislative and executive authorities given Congress’s control of appropriations and war and the President’s Commander in Chief duties. Congress’s authorization of the President to conduct covert action in § 3093 serves to “unlock” the President’s independent powers over intelligence given historical practice and case law. Indeed, this symbiotic relationship reflects the very views of the ratification debates, where the President’s primacy over intelligence as the Commander in Chief was balanced with Congress’s need to have transparent information to ensure adequate preparation for war.¹⁷⁶ Furthermore, the approach taken in *Haig* and *Zemel* underscores the way congressional authorization can enable the President to take independent action based on intelligence. Specifically, in *Haig*, the Court found that Congress’s delegation to the Executive of certain passport-related matters was part and parcel of the Executive’s duty “to protect the secrecy of our Government’s foreign intelligence operations.”¹⁷⁷

Furthermore, treating the covert action statute as a mechanism that “unlocks” an independent power is consistent with the nature of executive discretion raised in *Martin v. Mott*.¹⁷⁸ In *Martin*, the Court observed that the President possessed “correspondent responsibility” to exclusively determine “whether the exigency has arisen” once authorized by the legislature.¹⁷⁹ *Martin*’s conception of “correspondent responsibility” supports a view of “unlocking authorizations,” where separate congressional action unlocks the President’s independent authority.¹⁸⁰ From this perspective, the covert action statute similarly emerges in an arena of “correspondent responsibility,”¹⁸¹ allowing the Executive, following Congress’s authorization, to determine whether a given program would support “identifiable foreign policy objectives” and “the national security of the United States.”¹⁸²

¹⁷⁴ *Supra* notes 14–19, 27 and accompanying text.

¹⁷⁵ See Bradley & Goldsmith, *supra* note 6, at 1763, 1769.

¹⁷⁶ See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 90, at 127.

¹⁷⁷ *Haig v. Agee*, 453 U.S. 280, 307 (1981).

¹⁷⁸ 25 U.S. (12 Wheat.) 19 (1827).

¹⁷⁹ *Id.* at 29.

¹⁸⁰ See Bradley & Goldsmith, *supra* note 6, at 1769.

¹⁸¹ *Martin*, 25 U.S. at 29.

¹⁸² 50 U.S.C. § 3093(a).

CONCLUSION

This Note starts from the premise that the covert action statute presents a curious paradox. Indeed, if the Court in 1935 was willing to set aside a statute that allowed the President to regulate the poultry industry subject only to a vague principle of “public interest,”¹⁸³ why wouldn’t the Court question a President’s ability to initiate foreign conflicts solely on the basis of national security?¹⁸⁴ Or, in the alternative, how could the President arm guerilla mercenaries in Cambodia and falsify reports about air strikes without congressional notice or approval?¹⁸⁵ Yet farther afield, why might the President be allowed to invest vast sums of money into the Philippines entirely outside the appropriations process?¹⁸⁶ Such examples, all drawn from declassified U.S. covert action programs, would seemingly implicate the separation-of-powers anxieties animating the nondelegation doctrine.

Yet, despite the plausible nondelegation challenge to the covert action statute, this Note identifies that national security reflects an enclave of executive authority, where legislative authorization can unlock the President’s independent powers over intelligence.¹⁸⁷ Examining the rich history of presidential control over intelligence, the Note establishes the presidential independent power through historical practice and case law. Taken together, the covert action statute serves to unlock the President’s independent power, thereby obviating nondelegation concerns.

Although the outcome of a nondelegation challenge to the covert action statute appears clear, further analysis on the possible implications of a challenge under the revived major questions doctrine may be necessary. Given the Court’s growing turn toward the major questions doctrine,¹⁸⁸ it arguably could hold greater sway over the covert action statute in the future. For now, while a nondelegation challenge may not prevail against § 3093, the revitalized framework evinced through this Note suggests the final requiem may yet await.

¹⁸³ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 533, 550 (1935).

¹⁸⁴ See generally STAFF OF S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTEL. ACTIVITIES, 94TH CONG., DECLASSIFIED REP. TO THE CHAIRMAN (Dec. 3, 1975), <https://www.cia.gov/readingroom/docs/letter%20re%20covert%20actions%20%5B15520580%5D.pdf> [<https://perma.cc/9MCX-DKUM>].

¹⁸⁵ See Tad Szulc, *Mum's the War*, NEW REPUBLIC, Aug. 1973, <https://www.cia.gov/readingroom/docs/LOC-HAK-106-1-22-8.pdf> [<https://perma.cc/YZ9D-77E9>].

¹⁸⁶ See Cable to Various District and City Security Sections 3 (Oct. 15, 1971), <https://www.cia.gov/readingroom/docs/CIA-RDP80R01720R001100090010-6.pdf> [<https://perma.cc/FD7Q-TXX6>].

¹⁸⁷ See Bradley & Goldsmith, *supra* note 6, at 1769.

¹⁸⁸ See, e.g., Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 56 (2023).