The Law: Presidential Inherent Power: The "Sole Organ" Doctrine

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The executive branch relies in part on the "sole organ" doctrine to define presidential power broadly in foreign relations and national security, including assertions of an inherent executive power that is not subject to legislative or judicial constraints. The doctrine draws from a statement by John Marshall as a member of the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." In dicta, the Supreme Court, in United States v. Curtiss-Wright *(1936), cited Marshall's speech to support an independent, extra-constitutional, or exclusive power of the president. When read in context, however, Marshall made no such claim.*

In a series of confidential memos written after 9/11, later released to the public, the Justice Department wrote: "We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States" (U.S. Justice Department 2001, 1). On January 19, 2006, the Justice Department defended the authority of the National Security Agency (NSA) to intercept international communications coming into and going out of the United States of persons allegedly linked to al Qaeda or related terrorist organizations. The department pointed to "the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs" (U.S. Justice Department 2006a, 1). In cases challenging NSA eavesdropping, the government argued in court that the state secrets privilege "embodies central aspects of the Nation's responsibilities under Article II of the Constitution as Commander-in-Chief and as the Nation's organ for foreign affairs" (U.S. Justice Department 2006b, 4).

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Referred to in this manner, the "sole organ" doctrine seems to support a plenary, exclusive, and inherent authority of the president in foreign relations and national security, an authority that overrides conflicting statutes and treaties. The theory appears to carry special weight because its author is John Marshall, a member of the House in 1800 and later chief justice of the Supreme Court. The theory is developed in an important foreign affairs case, *United States v. Curtiss-Wright*.[1] However, when Marshall's speech is read in context, he did not advocate an independent, inherent presidential power over external affairs. That scope of power did exist in foreign constitutions and precedents, such as in British law, but the Framers rejected the model of an executive empowered to exercise exclusive control over external relations (Fisher 2004, 1-16).[2]

Marshall's Speech

On March 7, 1800, in the House of Representatives, John Marshall called the president "the sole organ of the nation in its external relations, and its sole representative with foreign nations."[3] The context of his speech demonstrates that his intent was not to advocate inherent or exclusive executive power, much less the powers of a British monarch. As shown below, Marshall's objective was to defend the authority of President John Adams to carry out an extradition treaty. The president was not the sole organ in formulating the treaty. He was the sole organ in *implementing* it. Article II of the Constitution specifies that it is the president's duty to "take Care that the Laws be faithfully executed," and in Article VI, all treaties made "shall be the supreme Law of the Land."

During the debate, opponents of President Adams insisted that he should be impeached or censured for turning over to England someone charged with murder. Because the case was already pending in an American court, some lawmakers urged that action be taken against him for encroaching upon the judiciary and thus violating the doctrine of separation of powers. Yet Adams had operated under the extradition article (Article 27) of the Jay Treaty, which provided that the United States and Great Britain would deliver up to each other "all persons" charged with murder or forgery.[4] The debate began with a member of the House requesting that President Adams provide documents "relative to, the apprehension and delivering of Jonathan Robbins, under the twenty-seventh article" of the treaty (10 Annals of Cong. 511). Although critics of Adams claimed that Robbins was "a citizen of the United States" (ibid., Representative Edward Livingston), Secretary of State Timothy Pickering regarded Robbins as an assumed name for Thomas Nash, a native Irishman (ibid., 515). U.S. District Judge Thomas Bee, who was asked to turn the prisoner over to the British, considered the individual to be Thomas

1. 299 U.S. 304, 319 (1936).

2. By the 1600s, the British Parliament had begun to exercise some foreign affairs power through the withholding and conditioning of funds, investigations, and impeachment of cabinet officials (Sofaer 1976, 6-15).

3. 10 Annals of Cong. 613 (1800), cited in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936).

4. Article 27 of the Treaty with Great Britain, November 19, 1794, 8 Stat. 129.

Nash.[5] A House resolution described President Adams's decision to turn the accused over to the British as "a dangerous interference of the Executive with Judicial decisions" (ibid., 533). Some members questioned whether the House had authority "to censure or to approbate the conduct of the Executive" (ibid., 551, statement by Representative William Craik). Others saw the debate heading in the direction of impeachment (ibid., statement by Representative Robert Harper).

Five months before the House debate, Marshall wrote an article for the *Virginia Federalist* (Richmond) on September 7, 1799, setting forth his analysis of the dispute over what he called "the case of Robbins" (Cullen 1984, 23). He explained that on matters of extradition, nationals communicate with each other "through the channel of their governments," and the "natural, and obvious and the proper mode is an application on the part of the government (requiring the fugitive) to the executive of the nation to which he has fled, to secure and cause him to be delivered up" (ibid., 25). The concept of sole organ, then, included this capacity of the president to act as the channel for communicating with other nations. In carrying out Article 27 of the Jay Treaty, Marshall said that President Adams "[u]pon the whole . . . appears to have done no more than his duty" (ibid., 28). By implementing this treaty provision, Adams had "execute[d] one of the supreme laws of the land, which he was bound to observe and have carried into effect" (ibid.). Nothing in this analysis suggested an inherent or extraconstitutional role for the president. Once the president and the Senate had agreed on a treaty, it was the president's duty to see that the treaty was faithfully executed, as with any other law.

Having honed his major arguments, Marshall was fully prepared to respond to the House resolutions of possible censure or impeachment. After listening to preceding speakers, he took the floor to say that there were no grounds to rebuke the president. In matters such as carrying out an extradition provision in a treaty, "a case like that of Thomas Nash is a case for Executive and not Judicial decision" (10 Annals of Cong. 611). Here is the sole-organ comment in full:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
>
> He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.
>
> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and

5. 10 Annals of Cong. 515; see *United States v. Robins* [sic], 27 Fed. Cas. 825, 832 (1799) (Case no. 16, 175). The proceedings before Judge Bee are also reprinted in Wharton (1849, 392-457).

> Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses. (ibid., 613-14)

Marshall emphasized that President Adams had not attempted to make foreign policy single-handedly. He was carrying out a policy made jointly by the president and the Senate (for treaties). Only after the policy had been formulated through the collective effort of the executive and legislative branches, either by treaty or by statute, did the president emerge as the sole organ in implementing national policy. Although it was the president's constitutional duty to carry out the law, including treaties, "Congress, unquestionably, may prescribe the mode." For example, legislation in 1848 provided that in all cases of treaties of extradition between the United States and another country, federal and state judges were authorized to determine whether the evidence was sufficient to sustain the charge against the individual to be extradited.[6]

Marshall also recognized that there were limits on the president's authority to make law where Congress had not provided it: "And although the Executive cannot supply a total Legislative omission, yet it is not admitted or believed that there is such a total omission in this case" (ibid., 614). What if Thomas Nash had been an American and pressed into service on the British ship *Hermione*, where he committed murder? Could he have been transferred to England and tried and executed there? Marshall denied it could be so: "Had Thomas Nash been an impressed American, the homicide on board the Hermione would, most certainly, not have been a murder. The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of the violence, and an additional outrage" (ibid., 617).

Edward S. Corwin, in his classic work *The President*, said that what Marshall had "foremost in mind" in describing the president as the sole organ "was simply the President's role as *instrument of communication* with other governments" (Corwin 1957, 178, emphasis in original). He concluded: "*There is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations*" (ibid., 184, emphasis in original). This emphasis on communication of national policy with other countries did not include a form of inherent power incapable of being checked by other branches of government.

In his capacity as chief justice of the Supreme Court, Marshall held to his position that the making of foreign policy is a joint exercise by the executive and legislative branches (through treaties and statutes), not a unilateral or exclusive authority of the president. Blackstone's theory of external relations, the British royal prerogative, and the concept of inherent executive power in foreign affairs do not appear in Marshall's decisions. With the war power, for example, Marshall looked solely to Congress—not the president—for the authority to take the country to war. Marshall had no difficulty in identifying the branch that possessed the war power: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone

6. 9 Stat. 320 (1848); *In re Kaine*, 55 U.S. 103, 111-14 (1852).

be resorted to as our guides in this enquiry."[7] In an 1804 case, Marshall ruled that, when a presidential proclamation issued in time of war conflicts with a statute enacted by Congress, the statute prevails.[8]

In *Marbury v. Madison* (1803), Chief Justice Marshall recognized a field of presidential actions that was political, exclusive in nature, and not subject to checks from the judiciary. Those actions, however, did not create a privileged area for the president with regard to foreign affairs, external affairs, or national security. Congress can impose on executive officers a range of statutory duties that trump presidential preferences: "Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[9] Courts are available to interpret statutory duties and the individual rights attached to them. Marshall said that, if the head of an executive department "commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law."[10] That principle applied to both domestic and external affairs, as can be seen in the 1804 case of *Little v. Barreme*.

The *Curtiss-Wright* Case

Although the Court's decision in *Curtiss-Wright* is a standard citation for the sole-organ doctrine and the existence of inherent executive power in the field of foreign affairs, the case itself did not concern independent presidential power. The issue before the judiciary was whether Congress had delegated *legislative* power too broadly when it authorized the president to declare an arms embargo in South America. A joint resolution by Congress allowed the president to prohibit the sale of arms in the Chaco region whenever he found that it "may contribute to the reestablishment of peace" between belligerents.[11]

In imposing the embargo, President Franklin D. Roosevelt relied solely on statutory—not inherent—authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco begins: "NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress."[12] Nowhere in that proclamation is there any assertion of inherent, independent, extraconstitutional, or exclusive presidential power.

Litigation on the proclamation focused on legislative power because, during the previous year, the court twice struck down the delegation by Congress of domestic power

7. *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); see also *Bas v. Tingy*, 4 U.S. 37 (1800).
8. *Little v. Barreme*, 2 Cr. (6 U.S.) 170, 179 (1804).
9. *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 165-66 (1803).
10. Ibid., 170.
11. 48 Stat. 811, ch. 365 (1934).
12. Ibid., 1745.

to the president.[13] The issue in *Curtiss-Wright* was whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court, holding that the joint resolution impermissibly delegated legislative authority, said nothing about any reservoir of inherent presidential power.[14] It acknowledged the "traditional practice of Congress in reposing the widest discretion in the Executive Department of the government in the conduct of the delicate and nicely posed issues of international relations."[15] Recognizing that need, however, did not save the delegation.

The district court decision was taken directly to the Supreme Court, where none of the briefs on either side discussed the availability of independent, inherent, or extra-constitutional powers for the president. As to the issue of jurisdiction, the Justice Department advised that the question for the Court went to "the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose" (U.S. Justice Department 1936, 7). The joint resolution passed by Congress, said the government, contained adequate standards to guide the president and did not fall prey to the "unfettered discretion" found by the Court in the two 1935 decisions (ibid., 16).

The brief for the private company, Curtiss-Wright, also focused on the issue of delegated legislative power and did not explore the existence of independent or inherent presidential power (Brief for Appellees 1936, 3). A separate brief, prepared for other private parties, concentrated on the delegation of legislative power and did not attempt to locate any freestanding executive authority (Brief for Appellees Allard 1936). Given Roosevelt's stated dependence on statutory authority and the lack of anything in the briefs about inherent presidential power, there was no need for the Supreme Court to explore the existence of independent sources of executive authority.

Nevertheless, in extensive dicta, the decision by Justice George Sutherland went far beyond the specific issue before the Court and discussed extraconstitutional powers of the president. Many of the themes in this decision were drawn from his writings as a U.S. senator from Utah. According to his biographer, Sutherland "had long been the advocate of a vigorous diplomacy which strongly, even belligerently, called always for an assertion of American rights. It was therefore to be expected that [Woodrow] Wilson's cautious, sometimes pacifistic, approach excited in him only contempt and disgust" (Paschal 1951, 93).

Sutherland's Preparation

Justice Sutherland had been a two-term senator from Utah, serving from March 4, 1905 to March 3, 1917, and a member of the Senate Foreign Relations Committee. His opinion in *Curtiss-Wright* closely tracks his article, "The Internal and External Powers of

13. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

14. *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230 (S.D.N.Y. 1936).

15. Ibid., 240.

the National Government," printed as a Senate document in 1910 (S. Doc. No. 417, 61st Cong., 2d sess.). The article began with this fundamental principle: "That this Government is one of *limited* powers, and that absolute power resides nowhere except in the people, no one whose judgment is of any value has ever seriously denied" (ibid., 1, emphasis in original).

Yet subsequent analysis in the article moved in the direction of independent presidential power that could not be checked or limited by the other branches, even by the people's representatives in Congress. He first faulted other studies for failing "to distinguish between our *internal* and our *external* relations" (ibid., emphasis in original). As to the first category, he said the states possessed "every power not delegated to the General Government, or prohibited by the Constitution of the United States or the state constitution" (ibid., 3). With regard to external relations, however, Sutherland argued that, after the Declaration of Independence, the American colonies lost their character as free and independent political bodies and national sovereignty passed then to the central government. He offered this argument: "The Declaration of Independence asserted it when that great instrument declared that the *United* Colonies as free and independent States (that is, as *United* States, not as *separate* States) 'have full power to levy war, conclude peace, contract alliances, establish commerce, and *to do all other acts and things which independent States may of right do*.' And so national sovereignty inhered in the United States from the beginning. Neither the Colonies nor the States which succeeded them ever separately exercised authority over foreign affairs" (ibid.). As will be noted, this theory has been repudiated by scholars.

In his article, Sutherland connected external matters with the *national government*: "Over *external* matters, however, no residuary powers do or can exist in the several States, and from the necessity of the case all necessary authority must be found in the National Government" (ibid., 12, emphasis in original). In *Curtiss-Wright*, he would associate national sovereignty and external affairs with the president, greatly expanding executive power. In addition to identifying express and implied constitutional powers in the article, Sutherland spoke of "inherent" and "extra-constitutional" powers (ibid., 8-9).

The same themes appear in Sutherland's book, *Constitutional Power and World Affairs* (1919). He again distinguishes between external and internal affairs (Sutherland 1919, 26). When Great Britain entered into a peace treaty with America following the war for independence, "it is impossible to escape the conclusion that all powers of external sovereignty finally passed from the Kingdom of Great Britain to the people of the thirteen colonies as one political unit, and not to the people separately as thirteen political units" (ibid., 38). In carrying out military operations, the president "must be given a free, as well as a strong hand. The contingencies of war are limitless—beyond the wit of man to foresee. . . . To rely on the slow and deliberate processes of legislation, after the situation and dangers and problems have arisen, may be to court danger—perhaps overwhelming disaster" (ibid., 111). As explained later in this article, scholars have overwhelmingly rejected his analysis of the Declaration of Independence, national sovereignty, and the sources and scope of presidential authority.

As to popular sovereignty, Sutherland was as inconsistent in his book as he was in his article. Early passages in the book state that "sovereignty—the plenary power to

determine all questions of government without accountability to any one—is in the people and nowhere else" (ibid., 2). The American Revolution "proceeded upon the principle that sovereignty belongs to the people, and it is by their consent, either express or implied, that the governing agency acts in any particular way, or acts at all. This is the animating principle of the Declaration of Independence. It is the very soul of the Constitution" (ibid., 10). In an apparent rejection of inherent or extraconstitutional powers, Sutherland wrote about the Constitution: "One of its great virtues is that it *fixes* the rules by which we are to govern" (ibid., 13, emphasis in original). He warned against "the danger of centralizing irrevocable and absolute power in the hands of a single ruler" (ibid., 25). On "all matters of external sovereignty" and the general government, the "result does not flow from a claim of inherent power" (ibid., 47).

Further into the book, however, Sutherland begins to flesh out the concepts of inherent and extraconstitutional power as applied to external affairs and presidential authority. He described the Louisiana Purchase "as an exercise of the *inherent right of the United States as a Nation*" (ibid., 52, emphasis in original). What he attributed here to national power (exercised by both elected branches) he later attributed solely to independent presidential power. He acknowledged that the Framers broke with Blackstone by placing many powers of external affairs with Congress in Article I (ibid., 71). Yet once war is declared or waged, he saw in the president as commander in chief a power that is supreme: "Whatever any Commander-in-Chief may do under the laws and practices of war as recognized and followed by civilized nations, may be done by the President as Commander-in-Chief. In carrying on hostilities he possesses sole authority, and is charged with sole responsibility, and Congress is excluded from any direct interference" (ibid., 75).

In time of war, Sutherland argued that traditional rights and liberties had to be relinquished: "Individual privilege and individual right, however dear or sacred, or however potent in normal times, must be surrendered by the citizen to strengthen the hand of the government lifted in the supreme gesture of war. Everything that he has, or is, or hopes to be—property, liberty, life—may be required" (ibid., 98). Freedom of speech "may be curtailed or denied," along with freedom of the press (ibid.). Congress "has no power to directly interfere with, or curtail the war powers of the Commander-in-Chief" (ibid., 109). Statutes enacted during World War I invested President Wilson "with virtual dictatorship over an exceedingly wide range of subjects and activities" (ibid., 115). Sutherland spoke of the need to define the powers of external sovereignty as "unimpaired" and "unquestioned" (ibid., 171).

The Decision

Writing for the Court, Justice Sutherland reversed the district court and upheld the delegation of legislative power to the president to place an embargo on arms or munitions to the Chaco. Whether the joint resolution "had related solely to internal affairs" would be open to the challenge of unlawful delegation he found "unnecessary to determine." The "whole aim of the resolution is to affect a situation entirely external to the United

States, and falling within the category of foreign affairs."[16] Sutherland argued that the two categories of external and internal affairs are different "both in respect of their origin and their nature."[17] The principle that the federal government is limited to either enumerated or implied powers "is categorically true only in respect of our internal affairs."[18] The purpose, he said, was "to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states."[19] But that doctrine, Sutherland insisted, "applies only to powers which the states had . . . since the states severally never possessed international powers."[20] Although the states may not have possessed "international powers," they did, as will be explained, possess and exercise sovereign powers.

To reach his conclusion, Sutherland said that, after the Declaration of Independence, "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[21] "Even before the Declaration," he said, "the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence."[22] By transferring external or foreign affairs directly to the national government, and then associating foreign affairs with the executive, Sutherland put himself in a position to argue for a broad definition of inherent presidential power.

There are two problems with his analysis. First, external sovereignty did not circumvent the colonies and the independent states and pass directly to the national government. When Great Britain entered into a peace treaty with America, the provisional articles of November 30, 1782 were not entered into with a national government. Instead, "His Brittanic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia," and referred to them as "free, sovereign and independent States."[23] The colonies formed a Continental Congress in 1774 and it provided for a form of national government until passage of the Articles of Confederation (ratified in 1781) and the U.S. Constitution. Until that time, the states operated as sovereign entities in making treaties and exercising other powers that would eventually pass to the new national government in 1789.

Second, sovereignty and external affairs did not pass from Great Britain to the U.S. president. In 1776, as the time of America's break with England, there was no president

16. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315 (1936).
17. Ibid.
18. Ibid., 316.
19. Ibid. (emphasis in original).
20. Ibid.
21. Ibid.
22. Ibid.
23. 8 Stat. 55 (1782).

and no separate executive branch. Only one branch of government, the Continental Congress, functioned at the national level. It carried out all governmental powers, including legislative, executive, and judicial (Fisher 1972, 1-27, 253-70). When the new national government under the U.S. Constitution was established in 1789, sovereign powers at the national level were not placed solely in the president. They were divided between Congress and the president, with ultimate sovereignty vested in the people.

Much of *Curtiss-Wright* is devoted to Sutherland's discussion about independent and inherent presidential powers, but this part of the decision is entirely dicta and wholly extraneous to the question before the Court: the delegation of legislative power. Having distinguished between external and internal affairs, Sutherland wrote: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[24] In his book, Sutherland took a less rigid view. He recognized that senators did in fact participate in the negotiation phase and presidents often acceded to this "practical construction" (Sutherland 1919, 122-24). It was at this point in his decision that Sutherland quoted John Marshall's sole-organ remark out of context, implying a scope of presidential power that Marshall never embraced. Sutherland proceeded to develop for the president a source of power in foreign affairs that was not grounded in authority delegated by Congress:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an assertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[25]

In freeing the president from statutory grants of power and legislative restrictions, Sutherland did not explain how the exercise of presidential power would be constrained by requiring that it "be exercised in subordination to the applicable provisions of the Constitution." Which provisions in the Constitution could check or override presidential initiatives? On that point he was silent. Justice James McReynolds's dissent was brief: "He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed."[26]

24. 299 U.S. 319 (emphasis in original).
25. Ibid., 319-20.
26. Ibid., 333.

Justice Harlan Fiske Stone did not participate. He later wrote to Edwin M. Borchard, a prominent law professor: "I have always regarded it as something of a misfortune that I was foreclosed from expressing my views in . . . *Curtiss-Wright* . . . because I was ill and away from the Court when it was decided" (Stone 1942). In another letter to Borchard, Stone said he "should be glad to be disassociated" with Sutherland's opinion (Stone 1937). Borchard later advised Stone that the Court, in such cases as *Curtiss-Wright*, "has attributed to the Executive far more power than he had ever undertaken to claim" (Borchard 1942).

Scholarly Evaluations

Most of the scholarly studies of *Curtiss-Wright* in professional journals and books have been highly critical of Sutherland's decision. An article by Julius Goebel in 1938 attacked the principal tenets of the opinion, concluding that Sutherland's view of sovereignty "passing from the British crown to the union appears to be a perversion of the dictum of Jay, C. J. in *Chisholm's Executors v. Georgia*, 3 Dall. 419, 470 (U.S. 1799) to the effect that sovereignty passed from the crown to the people" (Goebel 1938, 572, Note 46). As to Sutherland's comment that the president "alone negotiates" treaties and that into this field the Senate "cannot intrude," Goebel regarded such views as "a somewhat misleading description of presidential authority in foreign affairs," citing earlier examples of presidents consulting the Senate before negotiation (ibid., 47). To Goebel, Sutherland chose "to frame an opinion in language closely parallel to the description of royal prerogative in foreign affairs in the *Ship Money Case*" of 1637 (ibid., 572-73). This British case is considered a landmark decision in defending the exercise of the royal prerogative to raise revenues against perceived dangers, notwithstanding statutory limitations.[27]

Writing in 1944, C. Perry Patterson regarded Sutherland's position on the existence of inherent presidential powers to be "(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous" (Patterson 1944, 297). The doctrine of *Curtiss-Wright* "that Congress acquired power over the entire field of foreign affairs as a result of the issue of the Declaration is contrary to the facts of American history" (ibid., 308). Also writing in 1944, James Quarles objected to Sutherland's reasoning that foreign affairs, as distinguished from domestic affairs, invests the federal government with "powers which do not stem from the Constitution, are not granted, but are inherent" (Quarles 1944, 376-77). He noted that the question of inherent presidential power was not "raised by counsel for either side, either in the District Court or in the Supreme Court; nor is there any allusion to any issue of that sort in the opinion of the District Judge. Indeed, the pages of Mr. Justice Sutherland's opinion devoted to a discussion of that question appear to the present writer as being little, if any, more than so much interesting yet discursive *obiter*" (ibid., 378).

David M. Levitan, in 1946, not only found fault with Sutherland's distinction between internal and external affairs and the belief that sovereignty flowed from the

27. 3 St. Tr. 825, 1125-1243 (1816) (*State Trials*, 21 vol. series, edited by T. B. Howell. London: T. C. Hansard).

British crown directly to the national government, but expressed alarm about the implications for democratic government. Sutherland's theory marked "the furthest departure from the theory that [the] United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power" (Levitan 1946, 493). Levitan's review of the political and constitutional ideas at the time of the American Revolution and the Constitutional Convention left "little room for the acceptance of Mr. Justice Sutherland's 'inherent' powers, or, in fact, 'extra-constitutional' powers theory" (ibid., 496). The Sutherland doctrine "makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol" (ibid., 497).

Charles Lofgren and other scholars have pointed out that sovereignty in 1776 lay with the people and the states, which operated as independent bodies and not as part of a collective union, as Justice Sutherland claimed. The creation of a Continental Congress did not disturb the sovereign power of the states to make treaties, borrow money, solicit arms, lay embargoes, collect tariff duties, and conduct separate military campaigns (Lofgren 1973; Levitan 1946; Van Tyne 1907). The Supreme Court has recognized that the American colonies, upon their separation from England, exercised the powers of a sovereign and independent government.[28] To Lofgren, the historical evidence did not support Sutherland's reliance on inherent or extraconstitutional sources: "Federal power in foreign affairs rests on explicit and implicit constitutional grants and derives from the ordinary constitutive authority" (Lofgren 1973, 29-30). Further: John Marshall in 1800 "evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker" (ibid., 30).

Even if sovereignty had somehow passed intact from the British crown to the national government, the U.S. Constitution allocates that power both to Congress and the president. The president and the Senate share the treaty power and the House of Representatives has discretion in deciding whether to appropriate funds to enforce treaties. The president receives ambassadors from other countries but the Senate must approve U.S. ambassadors as part of the confirmation process. Congress has the power to declare war, issue letters of marque and reprisal, raise and support military forces, make rules for their regulation, provide for the calling up of the militia to suppress insurrections and repel invasions, and provide for the organization and disciplining of the militia. The Constitution explicitly grants to Congress the power to lay and collect duties on foreign trade, regulate commerce with other nations, and establish a uniform rule of naturalization.

Conclusions

Other scholars have taken exception to the line of reasoning found in the dicta prepared by Justice Sutherland in *Curtiss-Wright* (Glennon 1988, 13; Ramsey 2000, 382;

28. *United States v. California*, 332 U.S. 19, 31 (1947); *Texas v. White*, 74 U.S. 700, 725 (1869); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cr.) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222-24 (1796).

Brownell 2000, 40-41). Anthony Simones, after reviewing the academic literature and judicial decisions flowing from Sutherland's opinion, concluded that "for every scholar who hates *Curtiss-Wright*, there seems to exist a judge who loves it" (Simones 1996, 415). Robert Jackson, as attorney general, relied on *Curtiss-Wright* to defend the destroyers bases agreement entered into by President Franklin D. Roosevelt in 1940. At the same time, he drew some boundaries to cabin executive power: "The President's power over foreign relations while 'delicate, plenary, and exclusive' is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress."[29] In a number of cases, the Supreme Court has cited *Curtiss-Wright* to limit the role of the judiciary—but not of Congress—in the field of foreign affairs.[30]

In the Steel Seizure Case of 1952, Justice Jackson observed that the most that can be drawn from *Curtiss-Wright* is the intimation that the president "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress."[31] He noted that "much of the [Justice Sutherland] opinion is *dictum*."[32] In 1981, a federal appellate court cautioned against placing undue reliance on "certain dicta" in Justice Sutherland's opinion: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization."[33] *Curtiss-Wright* remains a frequent citation used by the judiciary to support not only broad delegations of legislative power to the executive branch, but also the existence of independent, implied, inherent, and extra-constitutional powers for the president. Although some justices of the Supreme Court have described the president's foreign relations power as "exclusive," the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs.

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29. *Opinions of Attorneys General*, 39: 487. Washington, DC: Government Printing Office.

30. *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948); *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring); *Carlson v. Landon*, 342 U.S. 524, 534 (1952).

31. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring).

32. Ibid.

33. *American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

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