

Two Views of Presidential Foreign Affairs Power: *Little v. Barreme* or *Curtiss-Wright*?†

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Imagine, if you will, the following facts: During a period of congressionally authorized hostilities against a foreign state, Captain South, a United States naval officer, receives a Presidential order to seize certain vessels found trading with the enemy. The order itself is not authorized by Congress, but neither is it expressly prohibited: the law is silent concerning the President's authority to issue the order. Captain South carries out the President's order, and the owners of the seized vessel bring an action in damages against him protesting the seizure. The theory of the suit: the President's order, not having been authorized by Congress, is illegal. And the main question: Should Captain South be held personally liable for damages?

For several reasons, one's immediate reaction might be to answer in the negative. First, one might be inclined to agree with Lewis A. Tambs, former U.S. Ambassador to Costa Rica. Tambs testified to Congress that he was ordered by Lt. Col. Oliver North to open a new military front in southern Nicaragua.¹ The order may well have violated the law—the so-called Boland Amendment²—which Tambs testified he had never read.³ The Ambassador said:

The people in the field who are trying to do a job are going to assume that orders from Washington are legal and legitimate. I certainly do not want to see the United States government brought to paralysis while people are getting private legal counsel before they carry out orders from their legitimate superiors.⁴

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1. N.Y. Times, May 30, 1987, at A8, col. 3.

2. The "Boland Amendment" is actually a series of several amendments to appropriations and authorization acts enacted by Congress between 1982 and 1986. These amendments restrict or outrightly bar the use of funds by the Departments of State and Defense, the CIA, and other intelligence entities of the U.S. government for military or paramilitary operations in Nicaragua. For a chart of the unclassified "Boland Amendments," see 133 CONG. REC. H4982-87 (daily ed. June 15, 1987).

3. N.Y. Times, May 30, 1987, at A8, col. 3.

4. *Id.*

One might further argue that it is hardly practicable to have a lawyer aboard every naval vessel, and that, consequently, naval officers ought not be penalized for assuming executive orders to be legal. Captain South might do well to rely upon the immortal guidance of Fawn Hall: "I did as I was told."⁵

Second, one might think that this is a foreign relations controversy to be left for the political branches to work out, and not one for the courts to decide.⁶

Third, one might contend that the order at issue is not at all unlawful. According to this argument, the order did not contravene the will of Congress since Congress did not prohibit it—Congress merely failed to authorize it.⁷

Finally, one might respond that the President's enumerated constitutional power as commander-in-chief of the armed forces⁸ permits him to order the seizure of foreign vessels. Under this view, to the extent that a congressional enactment precludes the President from ordering such a seizure, it might be regarded as unconstitutional.⁹

In fact, the dispute sketched out above is not at all hypothetical. It occurred—in 1799. And it was adjudicated. The case: *Little v. Barreme*.¹⁰ The author of the opinion: Chief Justice John Marshall. The decision: judgment for the plaintiff ship owners, affirmed by a unanimous United States Supreme Court.¹¹

The facts were fairly simple. During the administration of President John Adams, the United States fought an undeclared naval war with France.¹² Although the war itself was not declared, Congress did enact statutory restrictions on commerce and navigation with France, and prohibited American vessels from sailing to French ports.¹³ Congress also enacted the means to carry out those restrictions. Specifically, it authorized the President to order U.S. naval officers (a) to stop any American

5. N.Y. Times, June 9, 1987, at A15, col. 4.

6. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

7. See generally Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982) (where constitutional text is vague, congressional inaction would not necessarily constitute prohibition of executive action).

8. U.S. CONST. art. II, § 2.

9. See, e.g., T. FRANCK & M. GLENNON, UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 125-28 (1981) (War Powers Resolution vetoed by President Nixon as unconstitutional imposition on his power as commander-in-chief).

10. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

11. *Id.* at 179.

12. *Id.* at 173, 177; see also H. BLUMENTHAL, FRANCE AND THE UNITED STATES: THEIR DIPLOMATIC RELATIONSHIP 1789-1914, at 13-17 (1970); D. MCKAY, THE UNITED STATES AND FRANCE 81-83 (1951).

13. Non-Intercourse Act, ch. 2, § 1, 3 Stat. 613 (1799) (expired 1800).

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ship if there existed reason to suspect the ship to be bound for a French port,¹⁴ and (b) to seize the ship if, upon searching it, it appeared to be so bound.¹⁵ Congress further provided that the captured ship be condemned and, rather generously, that the proceeds be shared between the United States and the person initiating the seizure, presumably the warship's captain.¹⁶

When the Secretary of the Navy issued orders a month after the law was enacted, he included a copy of the law along with the orders, which incorporated it by reference.¹⁷ One recipient of those orders was Captain George Little, commander of the U.S. frigate *Boston*. Unknown to Little, however, the orders departed from the law in two key respects. First, they directed the seizure not only of ships that were clearly American, but also of ships that appeared to be foreign but might *really* be American or even merely carrying American cargo.¹⁸ Second, they directed the seizure not only of ships bound to French ports, but also of those sailing *from* French ports.¹⁹ The order therefore expanded Little's authority, and the United States' risk of involvement in hostilities, significantly beyond what Congress had contemplated.

Pursuant to his instructions, Little seized the *Flying Fish*, a vessel carrying Danish papers and sailing from a French port, and sought to have her condemned.²⁰ The central issue in the condemnation proceedings was not whether the *Flying Fish* should be condemned; Marshall agreed with the courts below that the seizure of a neutral vessel was unlawful.²¹ Rather, the issue was whether the Danish owners of the *Flying Fish* should be awarded damages for the injuries they suffered.²² Little's defense was that he merely followed orders, and that those orders excused him from liability.²³ Because the *Flying Fish* fell squarely within the class of ships that the President had ordered seized, the Supreme Court had to consider whether the President's orders immunized his officer personally from an action for damages arising under the statute.²⁴

14. *Id.* § 5.

15. *Id.*

16. *Id.* § 1.

17. *Little*, 6 U.S. (2 Cranch) at 171, 178.

18. *Id.* at 171.

19. *Id.*

20. *Id.* at 176. Little had some reason to suspect the *Flying Fish*'s true nationality: "[D]uring the chase by the *American* frigates, the [*Flying Fish*'s] master threw overboard the logbook, and certain other papers." *Id.* at 173 (emphasis in original).

21. *Id.* at 172, 175-76.

22. *Id.*

23. *Id.* at 178-79.

24. *Id.*

The Supreme Court affirmed the Circuit Court's judgment awarding damages to the ship's owners.²⁵ Marshall's first reaction, he confesses in the opinion, was that, given Little's orders, a judgment against him for damages would be improper. It is "indispensably necessary to every military system," Marshall writes, that "military men usually pay implicit obedience . . . to the orders of their superiors."²⁶ He changed his mind, however, when he considered the character of Little's act: it stood in direct contravention of the will of Congress. "[T]he legislature seems to have prescribed the manner in which this law shall be carried into execution," and in so doing "exclude[d] a seizure of any vessel not bound to a French port."²⁷ Under the law enacted by Congress, therefore, Little "would not have been authorized to detain" the *Flying Fish*.²⁸ "[T]he instructions [from the Secretary of the Navy]," Marshall concludes, "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."²⁹ Marshall thus forthrightly rejects the so-called "good soldier" defense: it is of no consequence that Little was merely following orders.³⁰

25. *Id.* at 179.

26. *Id.*

27. *Id.* at 177-78.

28. *Id.*

29. *Id.* at 179.

30. It is most extraordinary that the "good soldier" defense should have been addressed and disposed of by no less than John Marshall. The Chief Justice's finding that no executive immunity exists apparently had no statutory or common law basis. In fact, in a later opinion, *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), Marshall implied that a certain amount of executive immunity was *required* by the Constitution. While acknowledging that executive branch immunity from civil suits is not explicitly granted by the Constitution, Marshall held in *Osborne* that because of the faithful execution clause, immunity may be impliedly granted by Congress in statutes creating public agencies. *Id.* at 865-66; *accord* *Nixon v. Fitzgerald*, 457 U.S. 731, 748-49 n.27 (1981) ("[T]he President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress."). Modern Supreme Court opinions find executive immunity required by the "inherent" or "'structural' assumptions of our scheme of government." *Id.* at 748 n.26; *see also* *Butz v. Economou*, 438 U.S. 478, 508-10 (1978). Congress has never expressly granted nor limited presidential immunity, nor is it clear that it has the power to do so. *Nixon v. Fitzgerald*, 457 U.S. at 748 n.27.

In *Little*, Marshall's distinction between lawful and unlawful orders was not supported by the statutes in force at the time the cause of action arose. On March 2, 1799, when Little was given his orders, a recently enacted law read: "Any officer . . . who shall disobey the orders of his superior . . . on any pretence [sic] whatsoever, shall suffer death, or such other punishment as a court martial shall direct." Act of March 2, 1799, ch. 24, § 24, 1 Stat. 709, 711 (1799). Also, the oath of office which Little took upon appointment to the Navy included the promise "to observe and obey the orders of the President . . . and the orders of the officers appointed over me." Act of Sept. 29, 1789, ch. 25, § 3, 1 Stat. 95, 96 (1789). After the seizure of the *Flying Fish* but before the decision in *Little*, the Act of 1799 was repealed. Under the new law, military men could be penalized only for disobeying "lawful" orders. Act of Apr. 23, 1800, ch. 33, art. 14, 2 Stat. 45, 47 (1800). Thus, Little's paramount duty was to obey without question. By disobeying even an unlawful order he would have risked execution. It is difficult to believe

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It is, in all, an extraordinary opinion—not only for what it says, but also for what it does not say, on issues that might have provided Little with a plausible defense: nonjusticiability of political matters,³¹ ambiguity of congressional intent,³² and infringement upon the President’s “sole organ” power.³³

Marshall does not consider the possibility that the dispute might have constituted a political issue unsuitable for judicial resolution. The great Chief Justice well knew that such suits did exist, having written less than a year before, in *Marbury v. Madison*,³⁴ that “the President is invested with certain important political powers” with respect to which “the decision of the executive is conclusive” and which, therefore, “can never be examined by the courts.”³⁵

Nor does Marshall address the argument that, absent some explicit prohibition against actions such as Little’s, the President’s orders might not be contrary to the will of Congress. Yet the problem of ascertaining congressional intent in the face of congressional silence was not foreign to Marshall. In the *Little* opinion itself, he considers the question whether the President would have had the authority to issue Little’s orders had Congress remained completely silent on the issue. The Chief Justice says he is not sure:

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, . . . have empowered the officers commanding the armed vessels of the *United States*, to seize . . . *American* vessels . . . engaged in this illicit commerce.³⁶

that Marshall would impose his ruling knowing the consequences of disobeying illegal orders. Yet, he cited none of these statutes in his opinion.

At common law no distinction existed between legal and illegal orders. The common law of Great Britain was received into American law at Independence. These common law rules, however, may have been superceded by later statutes. The British Military Code of 1715 required obedience to superior officers, with disobedience punishable by death. See Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War*, 63 JURID. REV. 234, 235 (1951). In 1749 the Code was revised to render a capital offense disobedience only of *lawful* orders. *Id.* However, the American Acts of 1789 and 1799 superceded the British law. Thus, Marshall could not rely on the common law to distinguish between legal and illegal orders.

31. See *supra* note 6 and accompanying text.

32. See *supra* note 7 and accompanying text.

33. See *supra* notes 8-9 and accompanying text.

34. 5 U.S. (1 Cranch) 137 (1803).

35. *Id.* at 165. Eighty-seven years later, the Supreme Court cited *Little* as authority for declining to find a political question. In *Re Cooper*, 143 U.S. 472 (1891), construed *Little* as asserting that executive action, especially in matters dealing with persons and property, finds little protection in the political question doctrine. *Id.* at 499-501.

36. *Little*, 6 U.S. (2 Cranch) at 177 (emphasis in original). Corwin suggests, wrongly, that Marshall believed the President would have had the power to order such seizures in the ab-

Thus, Marshall did not feel compelled in *Little* to define the limits of presidential power in the face of congressional inaction. His decision indicates that congressional authorization of a specified scope of executive action is an implicit denial to the President of authority to order action outside that scope. Marshall's understanding of congressional intent thus sets a stage for direct confrontation between the executive and legislative branches over foreign affairs, and on that stage he unfolds the central meaning of his decision, and the proposition that gives it an abiding timeliness: *The will of Congress controls*.

Finally, nowhere in *Little* does Marshall consider the possibility that the President's order might have fallen within independent powers the Executive might enjoy as "sole organ" of the United States in its foreign relations. Yet it was none other than John Marshall, speaking only two years earlier on the floor of the House of Representatives, who coined the term. In the context of a debate as to whether President Adams had the power to extradite to Britain an individual charged with murder, Marshall declared: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."³⁷ Although we might imagine that such rhetoric, if taken seriously, would lead Marshall to declare the statute to be an unconstitutional infringement of presidential powers, such an interpretation could not have been further from Marshall's meaning. Far from arguing in his speech that President Adams had an "inherent" or "independent" power to order the extradition, Marshall in fact contended that it was Adams' *duty* faithfully to execute the Jay Treaty,³⁸ and that it was that Treaty, not the President's exclusive constitutional power, that authorized and indeed required the extradition in question.³⁹ The truth is, therefore, that it probably never occurred to John Marshall or to any of his colleagues in 1804 that the President, acting within the Constitution that many of them had helped write, could disregard this congressional limitation. That, most likely, is why Marshall's opinion in *Little* is silent on the issue. The argument for a royal prerogative was not one with which these Founding Fathers were unfamiliar: while they had not encoun-

sence of an implied statutory prohibition. See H. CHASE & C. DUCAT, CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 198 (14th ed. 1978).

37. 6 ANNALS OF CONG. 613 (1800). Marshall delivered his "sole organ" speech on March 7, 1800.

38. Jay Treaty, Nov. 19, 1794, United States-United Kingdom, 8 Stat. 116, T.S. No. 105.

39. See *supra* note 37 and accompanying text.

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tered Oliver North, they had encountered his ideological if not genealogical ancestor, Lord North.⁴⁰

Marshall's opinion in *Little* is, therefore, one approach to the question of the President's foreign affairs power. It views presidential power as largely dependent upon the will of Congress. Very different is the extravagant scheme concocted by Justice George Sutherland, first unveiled in his earlier writings⁴¹ and later, in 1936, transposed into a Supreme Court opinion and unleashed upon the nation in *United States v. Curtiss-Wright Export Corp.*⁴² Congress had earlier enacted a very ordinary law making certain arms sales illegal upon a finding by the President that a ban on those sales would serve the cause of peace.⁴³ President Roosevelt made the finding, and defendant Curtiss-Wright violated the law.⁴⁴ Curtiss-Wright was indicted and convicted, and on appeal challenged the constitutionality of the law on the ground that it violated the delegation doctrine.⁴⁵

Sutherland, speaking for the Court, says that the law is not "vulnerable to attack under the rule that forbids a delegation of the law-making power."⁴⁶ A law that would be invalid under the delegation doctrine if directed at internal affairs, he suggests, is not necessarily invalid if directed at external affairs.⁴⁷

Sutherland's central rationale is that, in the field of foreign affairs, the President exercises powers not set forth in the Constitution. The source of those powers? "External sovereignty." "When . . . the external sovereignty of Great Britain in respect of the colonies ceased," he writes, "it immediately passed to the Union."⁴⁸ Sutherland further maintains that, "[a]s a member of the family of nations," the United States assumed the full "right and power of the other members of the international family."⁴⁹ Otherwise, the United States would not be completely sovereign.

40. Lord Frederick North, Prime Minister of George III at the time of the War of Independence, was seen by many Englishmen and Americans alike as subverting the British Constitution with the aim of achieving royal absolutism. S. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 198-99 (1965).

41. "Mr. Justice Sutherland, when called upon to decide the issue [in *Curtiss-Wright*] simply quoted his earlier writings—apparently with little *de novo* research." Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467, 478 n. 30 (1946).

42. 299 U.S. 304 (1936).

43. *Id.* at 311-13.

44. *Id.*

45. *Id.* at 314.

46. *Id.* at 315.

47. *Id.* at 315-16.

48. *Id.* at 317.

49. *Id.* at 318.

Sutherland then introduces the "sole organ" quote from Marshall, with no reference to its limiting context, and follows by quoting a paragraph from an 1816 Senate Foreign Relations Committee report to the effect that the "President is the constitutional representative of the United States with regard to foreign nations."⁵⁰ He then draws these elements into the following climax:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion 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.⁵¹

The first thing to be said about this breathtaking exegesis concerning "plenary powers" is that it is the sheerest of *dicta*. *Curtiss-Wright* is demonstrably not a plenary powers case. A "plenary" presidential power is one that is not susceptible to congressional limitation: plenary power refers to the exclusive presidential power to act without regard to congressional action.⁵² What plenary power did President Roosevelt exercise under the facts of *Curtiss-Wright*? It is emphatically the task of Congress to legislate.⁵³ At a minimum, this includes the power to enact statutes imposing criminal penalties. One wonders what Sutherland had in mind, therefore, when he announced that "we are here dealing" not with statutory power alone, but with statutory power "plus the very delicate, plenary and exclusive power of the President . . . which does not require as a basis for its exercise an act of Congress . . ."⁵⁴ Does Sutherland seriously mean to suggest that the President could have imposed criminal penalties on *Curtiss-Wright* without any statutory basis? Can he truly mean that, in the absence of any trace of congressional authorization, the Executive could somehow have fined or jailed the defendants? Suppose under the facts of this case that Congress had taken a contrary position, and, instead of *prohibiting* the arms sales in question, had affirmatively *permitted* them. If "[w]e are here dealing" with a plenary power, as Sutherland says, then the President could, by fiat, criminalize arms sales even over Congress' statutory opposition, and prosecute viola-

50. *Id.* at 319.

51. *Id.* at 320.

52. "Plenary" has been defined as "full, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1313 (4th ed. 1968).

53. U.S. CONST. art. I, § 1.

54. *Curtiss-Wright*, 299 U.S. at 320.

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tors. Perhaps Sutherland meant for this impressionistic essay to be read less rigorously. Perhaps by “here” he does not mean “here in this *case*,” but rather “here” in these generalized flights of fancy about the manifold delicacies of plenary power. A little precision would have gone a long way. In any event, one is compelled to conclude that the discussion of plenary power has no place in the *Curtiss-Wright* case since the posture of Congress was support for the President, not opposition.

Sutherland’s opinion is a muddled law review article wedged with considerable difficulty between the pages of the United States Reports. That a nation enjoys certain prerogatives under international law logically says nothing about which branches of its government, under its domestic law, are accorded the power to exercise them. From the time of the Magna Carta, the history of constitutionalism is in no small part the history of the domestic control and allocation of sovereign prerogatives.⁵⁵ It is the history of rulers accepting limitations upon their sovereign prerogatives at the behest, and at times under the duress, of their people.⁵⁶ The United States surely has the right, as a sovereign member of the international community, to impose an exorbitant, discriminatory tax on all tea entering Boston harbor and to eliminate Boston’s representation in Congress—to impose taxation without representation. The existence of that international prerogative, however, hardly means that the federal government, much less the President acting alone, has the constitutional authority to exercise it. The answer depends not upon international law, but upon the U.S. Constitution.

What about the limitations in the Constitution? Sutherland professes to believe that presidential powers deriving from “external sovereignty” must still be exercised “in subordination to the applicable provisions of the Constitution.”⁵⁷ But it is hard to see why that follows. Indeed, it seems fundamentally inconsistent with the whole theory. There is no logical reason why a power flowing from a source that transcends the Constitution should be subject to the prohibitions and limitations prescribed by the Constitution. Such a power should be immune from mere constitutional limits, such as those guaranteeing freedom of the press, prohibiting unreasonable searches and seizures, and outlawing cruel and unusual punishment. Properly understood, Sutherland’s theory thus dangerously undermines cherished freedoms safeguarded in the Bill of

55. See generally C. MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 22 (1947) (“[T]he most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.”).

56. *Id.*

57. *Curtiss-Wright*, 299 U.S. at 320.

Rights. The precedent, as Justice Jackson wrote in reference to another such decision, "lies around like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."⁵⁸

Curiously, Sutherland's theory is easily flipped on its head. The theory might just as easily be seen as requiring the application of restrictions inherent in external sovereignty to the federal government. If the powers common to all sovereign states under international law become powers of the federal government, why should not the limitations imposed by sovereignty also apply domestically to the federal government? If sovereign states, for example, are precluded by international law from waging aggressive war, that prohibition should also be seen as applicable, domestically, to the exercise of presidential power. If, as Sutherland suggests in *Curtiss-Wright*, international law permits the United States to "expel undesirable aliens,"⁵⁹ why should it not be regarded as prohibiting their torture or prolonged, arbitrary detention?

Sutherland offers no explanation. Nor does he explain how powers incident to sovereignty happened to end up exclusively at 1600 Pennsylvania Avenue. Even if the federal government is somehow the beneficiary of powers bestowed by international law, why would Congress be prevented from partaking in the exercise of at least *some* of those powers? This question is particularly apt since, as Sutherland himself notes, a number of those powers, such as the power to declare war, are expressly conferred by the Constitution upon Congress rather than upon the Executive. Did the Framers not possess the right to allocate the powers of sovereignty as they wished?

It does not do to say that such powers devolved upon the Executive because the Executive is the United States' representative to the community of nations. Aside from begging the question, the argument mistakes policy communication for policy formulation. Few would now quarrel with Sutherland's assertion that "the President alone has the power to speak or listen as a representative of the nation."⁶⁰ But the power to say what? The power to say that the United States will raise protectionist tariffs against foreign imports? The power to promise allies, in response to an international crisis, that 18-year-olds will be drafted into the armed forces? The power to say that the United States will wage war against Nicaragua if Honduras agrees to stage a provocation? Of course not. These powers, and many others, are allocated among the branches of

58. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

59. 299 U.S. at 318.

60. *Id.* at 319.

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government by the Constitution,⁶¹ and policies concerning such matters must be made in the manner prescribed by the Constitution. The President may execute some of these policies with relative autonomy;⁶² in pursuing others he may be closely constrained by specific congressional authorization.⁶³ The point is that the President's power to act as the "sole organ" or "representative of the United States" in communicating with foreign countries does not allow him to formulate all foreign policy by himself. When the Foreign Relations Committee in 1816⁶⁴ referred to the President's sole power to communicate, it was not suggesting that he retained the prerogative powers of George III. This means, in our day, that the President was clearly limited as to where, with whom, and about what he could send Oliver North to negotiate. Could he, for example, send North's successor to negotiate with a terrorist leader concerning the assassination of a political opponent? Of course not.

Sutherland gives two fairly familiar reasons for delegating broad foreign policy powers to the President. The first is avoiding international embarrassment. "[E]mbarrassment—perhaps serious embarrassment—is to be avoided in the maintenance of our international relations," Sutherland writes.⁶⁵ This is achieved by according the President "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."⁶⁶

Yet is it politically or constitutionally desirable for the President to escape embarrassment for pursuing policies proscribed by Congress as foolish or halted by the courts as illegal? In international law, as well as in these frequently non-justiciable stretches of constitutional terrain, embarrassment is the principal, and sometimes the only, sanction that the law can impose. It often is the central means of maintaining the integrity of the legal system, of preserving the rule of law. To eliminate embarrassment is to eliminate the rule of law. A President who violates the law *should* be embarrassed. And if presidential embarrassment over illegality

61. U.S. CONST. art. I, § 8, cl. 3 (congressional power to regulate commerce with foreign nations); *id.* at cl. 12 (congressional power to raise and support armies); *id.* at cl. 11 (congressional power to declare war).

62. See *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (upholding Lincoln's blockade of seceding southern states' ports). Few would deny the President the broadest discretion to direct military action under Article II, § 2 of the Constitution following a congressional declaration of war.

63. The recent history of congressional tailoring of the President's authority to negotiate international trade agreements provides a dynamic example. See Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 201-10 (1987).

64. See *supra* note 50 and accompanying text.

65. *Curtiss-Wright*, 299 U.S. at 320.

66. *Id.*

affects the "maintenance of our international relations," then the Constitution is operating as it should.

Sutherland advances a second reason for positing broad presidential powers: the institutional attributes of the President. "[H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries," Sutherland writes. "He 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."⁶⁷

Now, no one can dispute that "confidential sources of information" pose a tremendous advantage in a wide gamut of diplomatic activity, ranging from treaty-making and negotiations to covert action and war. But why are these the President's sources? Why are they "his" agents? The officers of the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, and other entities of the intelligence community are employees of the government of the United States; they are not the personal minions of the individual who happens to be sitting in the Oval Office. They are paid by the United States Treasury. Their intelligence "take" is the property of the U.S. government, and not exclusively of the President. It begs the question to assert, as Sutherland does, that only the President has access to their work product. It would be peculiar indeed should Congress be entrusted with the constitutional responsibility of making laws while at the same time being constitutionally denied the information indispensable for determining the need for legislation.

Sutherland's cursory discussion of the advantages of executive secrecy is similarly circular. It assumes that the Executive, but not Congress, can be trusted with classified intelligence. Yet to this day no one has presented empirical data establishing a greater likelihood of "leaks" by Congress than by the Executive.⁶⁸

Sutherland completely ignores the functional attributes that commend Congress as a foreign policy decision-maker. A policy normally cannot be sustained for any significant period without broad public support. If Congress cannot be persuaded to support a policy, neither, probably, can the public. Congress acts as the public's representative. It brings to foreign policy-making the nation's diversity of views. Executive officials are

67. *Id.*

68. See Ornstein, *North Errs on Leaks by Congress*, N.Y. Times, July 17, 1987, at A35, col. 6 (citing Sen. Inouye's statement that more leaks derive from the "Presidential end of Pennsylvania Avenue than the Congressional end").

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normally chosen for their support of the administration's policies; "no" men quickly become former executive officials. In Congress, in sharp contrast, virtually every significant opinion on foreign policy issues is usually represented. Such diversity of views is a mechanism for avoiding error and achieving consensus. The greater the number of viewpoints heard, the greater the likelihood that the resultant policy will reflect accurately the common interests of the whole.

Diversity of viewpoints in foreign policy decision-making is equally useful as an end in itself: it gives members of the public a sense that their viewpoints have been heard and considered. Diversity is thus crucial for purposes of *legitimacy*. When the range of opinion voiced in the decision-making process is seen by the public as overly narrow, its legitimacy suffers. A case in point is the Reagan Administration's diversion of funds from Iranian arms sales to the Nicaraguan *contras*. A decision-making process removed from the full panoply of public, or at least congressional, opinion easily falls prey to the peculiar distortions of "group-think," a process that causes the myopia of the quick fix to be mistaken for the insight of statesmanship.

These are, then, in broad outline, two widely divergent approaches to the question of presidential foreign relations power. Which has prevailed?

In 1952, *Youngstown Sheet & Tube Co. v. Sawyer*⁶⁹ presented the Supreme Court with a stark choice. At the height of the Korean War, a nationwide strike broke out against the steel industry. According to the *Youngstown* court:

The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.⁷⁰

President Harry S Truman consequently issued an executive order directing the Secretary of Commerce to take possession of most of the mills and keep them running, arguing that the President had "inherent power" to do so. The steel companies objected, complaining in court that the seizure was authorized neither by the Constitution nor by statute.

Congress had never statutorily authorized the seizure. It had enacted three statutes providing for governmental seizure of the mills in certain specifically prescribed situations, but the Administration never claimed

69. 343 U.S. 579 (1952).

70. *Id.* at 583.

any of those conditions had existed prior to its action. More important, Congress had in fact considered, and rejected, authorization for the sort of seizure Truman actually ordered.⁷¹

Justice Hugo Black delivered the opinion of the Court. The President, Black wrote, had engaged in law-making, a task assigned by the Constitution to Congress.⁷² The seizure was therefore unlawful, since the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."⁷³ Recall that it had been sixteen short years before, as the clouds of a greater war loomed, that Justice Sutherland had written of "the very delicate, plenary and exclusive power of the President."⁷⁴ Had it so wished, the Court in 1952 might well have relied upon *Curtiss-Wright*, holding the seizure valid as an executive prerogative incident to "external sovereignty." Yet the Court never considered Sutherland's theory.

Notwithstanding the elegant simplicity of Black's opinion, the *Youngstown* case is remembered mostly for the concurring opinion of Justice

71. Justice Frankfurter described the consideration of those amendments at some length: Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special congressional enactment to meet each particular need. . . . No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress [N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words. The authoritatively expressed purpose of Congress to disallow such power to the President and to require him, when in his mind the occasion arose for such a seizure, to put the matter to Congress and ask for specific authority from it, could not be more decisive if it had been written into §§ 206-210 of the Labor Management Relations Act of 1947.

Id. at 598-602 (Frankfurter, J., concurring) (footnotes omitted).

72. *Id.* at 585, 587-89.

73. *Id.* at 585.

74. *Curtiss-Wright*, 299 U.S. at 320.

Presidential Foreign Affairs Power

Robert Jackson.⁷⁵ In reasoning strikingly reminiscent of Marshall's in *Little*, Jackson wrote that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁷⁶ He continued:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁷⁷

The opinion is thus notable for its unwillingness to decide the case by reference to "inherent" presidential power, and in the weight it accords congressional will.⁷⁸ It remained for a former Jackson clerk, Justice William Rehnquist, to give Jackson's concurrence the status of law. In *Dames & Moore v. Regan*,⁷⁹ Rehnquist applied Jackson's test to hold that the Iranian hostage settlement agreement made by President Jimmy Carter had been authorized by Congress.⁸⁰ In so doing, Rehnquist wrote that Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area."⁸¹ Rehnquist then quoted from Jackson a passage that, today, is as significant as it is timely. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."⁸²

These are wise words. The Constitution, no doubt, confounds both America's friends and allies from time to time, who must with good cause wonder: To whom do we listen, Congress or the President? Our friends' task would surely be easier if our Founding Fathers *had* created the President in the image of George III—if his word could not be questioned, if his act could not be challenged—if his power were not limited.

75. 343 U.S. at 634 (Jackson, J., concurring); see, e.g., G. GUNTHER, CONSTITUTIONAL LAW 346 n.4 (11th ed. 1985).

76. 343 U.S. at 635 (Jackson, J., concurring).

77. *Id.* at 637-38 (Jackson, J., concurring).

78. No opinion in *Youngstown* makes explicit reference to *Curtiss-Wright's* theory of "external sovereignty"—even though, if any act can be justified under Sutherland's theory, it would seem to be one directed at maintaining "the national defense" in time of actual war.

79. 453 U.S. 654 (1981).

80. *Id.* at 674.

81. *Id.* at 661.

82. *Id.* at 662.

We pay a price for our system, in inefficiency at home and in misunderstanding abroad.

But it is a price incurred deliberately for a benefit sought successfully. No one explained the benefit of our system of divided authority better than Justice Louis Brandeis:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.⁸³

Arbitrary exercise of power, and the concomitant danger of autocracy, pose an ever-present danger to democratic processes. In the United States, the central safeguard against that danger is the cornerstone of the Framers' political architecture: a structured equilibrium of power that derives from setting ambition against ambition.⁸⁴ The teaching of Justices Marshall, Jackson, and Brandeis—the jurisprudence of the Supreme Court—is that there is seldom reason for upsetting that balance in the realm of foreign policy-making. An executive order issued in the face of congressional disapproval is presumptively invalid: it “cannot change the nature of [a] transaction, or legalize an act which without those instructions would have been a plain trespass.”⁸⁵

83. *Myers v. United States*, 272 U.S. 52, 293 (1926).

84. See *THE FEDERALIST* No. 51, at 356 (J. Madison) (Belknap Press ed. 1961) (“Ambition must be made to counteract ambition.”).

85. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).