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RESPONSES TO THE TEN QUESTIONS

Robert D. Sloane[†]

4. IS *CURTISS-WRIGHT*'S CHARACTERIZATION OF EXECUTIVE POWER CORRECT?

THE PUZZLING PERSISTENCE OF *CURTISS-WRIGHT*- BASED THEORIES OF EXECUTIVE POWER

I.

The editors of the *Journal of the National Security Forum* invited a contribution on the (doubtlessly deliberately) broad question of whether the characterization of executive power in *United States v. Curtiss-Wright Export Corp.*¹ is correct. In a purely descriptive sense, I think the answer is clear. As I have said elsewhere, whatever its merits, *Curtiss-Wright*'s robust vision of executive power "accurately reflects the general preeminence of the President in the realm of U.S. foreign affairs."² Whether it *should*, however, is of course a distinct question, the analysis of which begins with *Curtiss-Wright*'s more general thesis about the origin, nature, and scope of U.S. foreign relations power. At the outset, it may therefore be worth

† Visiting Associate Professor, John Harvey Gregory Lecturer in World Organization, Harvard Law School; Associate Professor, Boston University School of Law. The title of this piece has been adapted, of course, from Laurence H. Tribe's well-known article entitled *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980)—for similar reasons. To paraphrase Tribe's concluding inquiry about the persistence of process-based theories of constitutional interpretation, it might, with equal force, be asked about *Curtiss-Wright*-based theories of executive power: What does "it say about our situation . . . that views so deeply problematic continue to exert so powerful a grip upon our thought?" *Id.* at 1080. I acknowledge with gratitude the research assistance of Lindsay Schare.

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

2. Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 *B.U. L. REV.* 341, 349 (2008); see also Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 *WM. & MARY L. REV.* 379, 382 & n.11 (2000) ("It is clear, at least as a practical matter, that the President does play a leading role in foreign affairs, and has done so since the founding.").

emphasizing that, with very few exceptions, legal scholars from across the ideological spectrum agree that *Curtiss-Wright's* broad and general thesis about the source of U.S. foreign relations power—as expressed, among other places, in *Curtiss-Wright*—is misguided, to say the least. Indeed, with the exception of the case's formal holding,³ virtually every aspect of *Curtiss-Wright*—from its history to its constitutional methodology to its political theory—has been subjected to withering criticism.⁴ There is little that I can or would add in this regard.

Yet in the aftermath of what many commentators see as unprecedented and exorbitant assertions of executive power by the Bush administration,⁵ it may be worthwhile to revisit *Curtiss-Wright's* vision of the President in an effort to better understand both its message and why it continues to exert an influence out of proportion to its legal merits, as numerous critics have attested.⁶ Perhaps, that is, the puzzle for national security law today is why “views so deeply problematic continue to exert so powerful a grip upon our thought.”⁷ After exploring the pedigree of *Curtiss-Wright*, and canvassing some of the major criticisms directed at it, I will conclude by venturing a few reflections on why the opinion's vision of executive power persists—both in the law and the popular imagination—despite its considerable flaws.

3. Even the strongest advocates of the nondelegation doctrine agree that the joint resolution of Congress empowering the President to criminalize the sale of arms to states involved in the Chaco War did not violate that doctrine. See *Curtiss-Wright*, 299 U.S. at 329; see, e.g., Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 345–51 (2001) (defending *Curtiss-Wright's* holding despite unequivocally rejecting its extra-constitutional textualist rationale). I thank Gary Lawson for this reference.

4. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990); see also H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, in *PRESIDENTIAL POWER STORIES* 195, 231 (Curtis A. Bradley & Christopher H. Schroeder eds., 2009) (“[N]o one embraces Sutherland's cherished theory about the twofold nature of federal power and the opinion probably doesn't make sense without the theory.”).

5. See, e.g., CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 134–59 (2007); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 153 (2007).

6. Cf. Powell, *supra* note 4, at 231 (concluding that the real question *Curtiss-Wright* poses today is “to what extent do the Constitution's arrangements of institutional responsibility place foreign relations in the president's sphere?”).

7. Tribe, *supra* note †, at 1080.

II.

The origin of *Curtiss-Wright's* general thesis about the source, nature, and scope of U.S. foreign affairs powers dates to George Sutherland's early political career in Congress,⁸ and perhaps even further, to the pedagogical influence of Judge James V. Campbell, one of Sutherland's teachers at the University of Michigan Law School, which he attended nearly sixty years before penning *Curtiss-Wright*.⁹ In 1909, Sutherland, who then served as Utah's junior Senator, wrote *The Internal and External Powers of the National Government*.¹⁰ In it, he sought to resolve a constitutional puzzle, which, at least for those who reject Sutherland's solution, persists to this day, namely, that in the realm of "foreign relations . . . the Constitution seems a strange, laconic document: although it explicitly lodges important foreign affairs powers in one branch or another of the federal government, and explicitly denies important foreign affairs powers to the states, many powers of government are not mentioned."¹¹

For Sutherland, however, the Constitution's apparent lacunae in this regard reflected a "failure to distinguish between our *internal* and our *external* relations."¹² The Constitution, he argued, implicitly distinguishes internal from external sovereignty, as well as their commensurate powers.¹³ Within the internal realm, the Constitution textually enumerates the powers of the federal government so as to distribute internal sovereign powers between the union and the states,¹⁴ which, by virtue of the Tenth

8. On Sutherland's career in Congress, see generally JOEL FRANCIS PASCHAL, *MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE* 36–100 (1951).

9. *Id.* at 226. See also *id.* at 227–28 (quoting Campbell's views and concluding that "it was [he] who planted in Sutherland's brain the ideas that bore fruit in the *Curtiss-Wright* case").

10. George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1909).

11. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 13–14 (2d ed. 1996). See also *id.* at 14 (supplying examples of unenumerated foreign affairs powers).

12. Sutherland, *supra* note 10, at 373–74 (emphasis in original).

13. See *id.* at 379–80 ("The powers of government must be commensurate with the objects of government, else only a semi-government has been created.").

14. Sutherland contended that "as the powers of the general government are diminished those of the several State governments are extended. Such powers are

Amendment, retain any residual powers that the Constitution does not delegate to the federal government.¹⁵ In the external or foreign realm, however, as Louis Henkin aptly described the breathtaking centerpiece of Sutherland's view, it turns out that "the powers of the United States to conduct relations with other nations do not derive from the Constitution!"¹⁶ Rather, the powers of "national sovereignty inhere[] in the United States,"¹⁷ as a corollary of its independence as a sovereign State, quite apart from the Constitution's text or subtext.¹⁸ The sovereign powers of the Union in relation to other States¹⁹ derive not from the Constitution, but from the "law of nations,"²⁰ the old appellation for international law, or perhaps from what Joseph Story called "*resulting* powers—resulting from the whole mass of the power of government, and from the *nature of political society*, rather than as a consequence of any especially enumerated."²¹

A quarter of a century before *Curtiss-Wright*, therefore, and well before his appointment to the Court, Sutherland had formulated the basic thesis that supplies not the rationale, but the backdrop to its conceptually distinct thesis about executive power. This critical distinction is often overlooked in the literature. In his 1909 article, generally regarded as the earliest written expression of *Curtiss-*

not lost, they are only distributed." *Id.* at 375.

15. *Id.* at 379–80.

16. HENKIN, *supra* note 11, at 16. Nor is the emphasis hyperbolic. Justice Sutherland writes in pertinent part, "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

17. Sutherland, *supra* note 10, at 376.

18. *Curtiss-Wright*, 299 U.S. at 318.

19. For the sake of clarity, I will refer to the several states of the union with the lower case and capitalize "State" to refer to nation-states, that is, foreign sovereign countries.

20. Sutherland, *supra* note 10, at 382 (emphasis omitted); *see also id.* at 385 ("The earlier cases upheld the right of *exclusion* under the 'accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe'" (citing *Nishimura Ekiu v. United States.*, 142 U.S. 651, 659 (1892))).

21. Sutherland, *supra* note 10, at 383 (alteration in original) (internal quotation marks omitted) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1256 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1891)).

Wright's theory of foreign affairs power,²² Sutherland in fact took no position whatsoever on either (i) the distribution of foreign relations powers among the executive, legislative, and judicial branches or (ii) the comparative competence of the branches of the federal government in the realm of foreign affairs. And it is proposition (ii), not (i), that supplies the only real rationale found in *Curtiss-Wright* for allocating to the executive branch the overwhelming majority of unenumerated sovereign foreign affairs powers, which the union purportedly has solely by virtue of international law and statehood, quite independently of the Constitution.

In its earliest incarnation, Sutherland's *Curtiss-Wright* thesis is limited to advancing this view of the extra-constitutional origin, nature, and scope of U.S. foreign affairs power generally. To that end, he emphatically insists upon the exclusively national character of such powers.²³ But he does not insist, as he later does, on their exclusively executive character (except as expressly set forth in the Constitution's text). In short, the 1909 article speaks to vertical federalism (between the states and the union) but says nothing about horizontal federalism (between the federal executive, legislative, and judicial branches). Nowhere does it even imply presidential preeminence in foreign affairs. At one point, in fact, Sutherland quotes with apparent approval James Wilson's remark that "[w]henever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in *Congress* assembled."²⁴

22. With the exception, that is, of the writings of Judge James V. Campbell, Sutherland's teacher at the University of Michigan Law School, whose words influenced the justice more than a half a century before he wrote *Curtiss-Wright*. See PASCHAL, *supra* note 8, at 226–28.

23. See, e.g., Sutherland, *supra* note 10, at 389 ("Over external matters . . . 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, such authority being expressly conferred or implied from one or more of the express powers, or from all of them combined, or resulting from the very fact of nationality as inherently inseparable therefrom."). This goes a long way toward explaining Sutherland's consistent support for robust federal power abroad but conservative stance in relation to the scope of federal power at home in the context of President Franklin Delano Roosevelt's New Deal and interpretation of the Interstate Commerce Clause in cases like *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–47 (1935). See Powell, *supra* note 4, at 217–19.

24. Sutherland, *supra* note 10, at 377 (emphasis added) (internal quotation marks omitted).

About a decade later, Sutherland delivered the prestigious Blumenthal Lectures at Columbia Law School and published a manuscript based on them in which he largely expanded on his earlier article.²⁵ Once again, nothing in the manuscript argues for either a constitutional imperative or practical need for executive preeminence in U.S. foreign affairs. Quite the contrary, in *Constitutional Power and World Affairs*, Sutherland goes to great lengths to emphasize, for example, the limits of the Commander-in-Chief Clause, which, he writes, confers “simply those [powers] which belong to any Commander-in-Chief of the military forces of a nation at war. *The Constitution confers no war powers upon the President as such.*”²⁶ He also admonishes his readers to be wary in general of the threat of executive aggrandizement that the U.S. Constitution enables and indeed facilitates, especially in wartime.

Given the striking contrast between his views in 1918, as expressed in *Constitutional Power and World Affairs*, and the sweeping executive-power rhetoric in *Curtiss-Wright* nearly two decades later, one further illustrative passage bears quoting at length:

The office of the President has grown in potency and influence to an extent never dreamed of by those who framed and adopted the Constitution. Even in normal times, Congress has been subjected to such a degree of executive domination as to threaten the stability of the principle of departmental independence involved in the distribution of the several powers among the three branches of government. There is a popular, ever-increasing disposition to regard the President as a superior officer rather than a co-equal member of a tripartite organization. In times of public danger or disorder this tendency is greatly accentuated, and it is under all conditions a matter for serious concern, fraught with grave suggestions of peril. In great crises, the people not only turn to him as their natural leader, which he is, but they are coming more and more to regard him as the sole repository of their power which, very decidedly, he is not.²⁷

25. See Powell, *supra* note 4, at 218. The manuscript codifying and expanding upon his revised lectures is GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1918).

26. SUTHERLAND, *supra* note 25, at 73 (emphasis in original).

27. *Id.* at 75.

It is difficult to believe that this is the same man who would later refer to “the very delicate, *plenary and exclusive* power of the President as *sole* organ of the federal government in the field of international relations,” and then recite a litany of examples and rationales in an effort to establish the need for executive preeminence, and often exclusivity, in the realm of foreign affairs.²⁸ For as Powell rightly observes, “by the standards of early twenty-first century debates, [in *Constitutional Power and World Affairs*,] Sutherland stated a distinctly pro-Congress view of the line between legislative and executive power with respect to involving the United States in armed conflict.”²⁹

III.

Curtiss-Wright gave Justice Sutherland the opportunity to shape U.S. law directly and, as the years since testify, durably in a way that few other Supreme Court justices have enjoyed.³⁰ The opinion itself has been analyzed and critiqued repeatedly,³¹ and so I need not dwell on its details at much length. On May 28, 1934, in the midst of the Chaco War,³² Congress empowered the President to criminalize the sale of arms to the belligerents, Paraguay and Bolivia, provided he first (i) “finds that the prohibition . . . may contribute to the reestablishment of peace”; (ii) consults with

28. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (emphasis added). See also Powell, *supra* note 4, at 222 (“At the heart of Sutherland’s opinion in *Curtiss-Wright* is an account of the constitutional order reoriented from his 1919 defense of the foreign affairs authority of the national government (and Congress in particular) against federalism and narrow-construction attack to an assertion of the foreign affairs authority of the president that stresses its independence of Congress.”).

29. Powell, *supra* note 4, at 220; cf. *Curtiss-Wright*, 299 U.S. at 320.

30. Cf. PASCHAL, *supra* note 8, at 226 (“Sutherland’s success in winning the Court to his view of the foreign relations power was a personal triumph of proportions seldom encountered in judicial biography.”).

31. For a full account of *Curtiss-Wright*’s background and context, see Powell, *supra* note 4.

32. Bolivia and Paraguay fought the Gran Chaco War between 1932 and 1935. It has been largely forgotten today; it should not be. As Powell points out, it “is sometimes thought of as a Western Hemisphere reprise of the First World War,” and in its weaponry, sheer scale of destruction, and tactics, the Chaco War “foreshadowed the Second World War.” Powell, *supra* note 4, at 198. The League of Nations’ failure to prevent or control the Chaco War also “presaged the failures shortly to come over the Spanish Civil War, and Italian, Japanese, and German Militarism.” *Id.*

“other American Republics”; and (iii) “makes proclamation to that effect.”³³ President Franklin Delano Roosevelt did so on the same day.³⁴ The government subsequently indicted the defendants for violating the prohibition,³⁵ and as relevant here, the latter argued in defense that Congress had unconstitutionally delegated its power to the President.³⁶

To the almost certain surprise of both parties, Justice Sutherland began by indicating that the Court would not decide what was, for the administration and its lawyers, the most fundamental issue lurking in the case: “[w]hether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive.”³⁷ Instead, he framed the issue in terms of the paramount theme of his extrajudicial writings, namely, the alleged asymmetry between federal power in the internal and external realms: “assuming . . . that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?”³⁸

Sutherland then set out, in abbreviated form, the theory of U.S. foreign affairs powers he had first expressed in 1909. He began by explaining that the “broad statement” that ours is a federal government of enumerated powers “is categorically true only in respect of our internal affairs,” for in that sphere, the Constitution “carve[d] 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.”³⁹ But the states, Sutherland continued, never possessed external powers, that is, foreign relations powers in the first place; rather they operated, he wrote, as “a unit in foreign affairs, acting through a common agency—

33. *Curtiss-Wright*, 299 U.S. at 312 (citation and internal quotation marks omitted).

34. *Id.* at 311.

35. *Id.*

36. *Id.* at 314.

37. Powell, *supra* note 4, at 221 (internal quotation marks omitted); see *Curtiss-Wright*, 299 U.S. at 315.

38. *Curtiss-Wright*, 299 U.S. at 315.

39. *Id.* at 315–16 (emphasis added).

namely, the Continental Congress.”⁴⁰ Consequently, foreign affairs powers passed directly from Great Britain “to the colonies in their collective and corporate capacity as the United States of America.”⁴¹

What follows is the first of the two core conclusions for which *Curtiss-Wright* is (in)famous: that the Constitution “did not declare or enumerate” the powers of the federal government in the realm of foreign affairs but instead “assumed them.”⁴² Powers that may fairly be characterized as external do not depend on their enumeration *vel non* in the Constitution’s text; they “vest[] in the federal government as necessary concomitants of nationality.”⁴³ Consequently, foreign affairs powers as basic as those related to, for example, war, treaties, diplomatic relations, territorial acquisition, and immigration exist by virtue of their direct transfer from the Crown,⁴⁴ not because of any textual delegation. By this logic, Sutherland justified “a well-nigh limitless power for the federal government in the field of foreign relations—a power, it may be repeated, existing independently of the Constitution.”⁴⁵

As vulnerable to criticism as this logic may be,⁴⁶ it is vital to

40. *Id.* at 316.

41. *Id.*

42. HENKIN, *supra* note 11, at 17; see *Curtiss-Wright*, 299 U.S. at 318 (“It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.”). Henkin suggests that although Sutherland did not explicitly describe foreign affairs powers as “extra-constitutional,” that is the best reading of his history. HENKIN, *supra* note 11, at 18 n.*. I agree. Further support for this view may be found, for example, in Sutherland’s earliest article, in which he explicitly describes the power to acquire territory by discovery, occupation, cession, and conquest, which the Supreme Court had affirmed, see, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890), as “extra-constitutional” but denies that it is for that reason “un-constitutional.” Sutherland, *supra* note 10, at 384.

43. *Curtiss-Wright*, 299 U.S. at 318.

44. See *id.*

45. PASCHAL, *supra* note 8, at 223.

46. See, e.g., Ramsey, *supra* note 2, at 381 (“There was no theory of extraconstitutional power in foreign affairs at the time the Constitution was drafted and ratified. To the contrary, the Constitution’s drafters and ratifiers understood the Constitution as the means to give the national government foreign relations power it would otherwise lack.”). Sutherland’s thesis is also in considerable tension with Supreme Court cases stating that the “Congress and the President, like the courts, possess no power not derived from the Constitution.” *Ex parte Quirin*, 317 U.S. 1, 25 (1942); see also *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”) (footnotes omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (insisting that President Truman’s

appreciate that the allegedly extratextual nature of foreign affairs powers is only the first—and not even a necessary—step in *Curtiss-Wright's* argument in favor of robust, often exclusive, executive power. That the federal government rather than the states possesses the union's foreign relations powers says nothing about how the Constitution—or sovereignty, which has now been cast as the real source of U.S. foreign affairs powers, including many that the Constitution does not enumerate—allocates those powers.⁴⁷ The genesis and persistence of *Curtiss-Wright's* theory of executive power therefore depend as much, if not more, on the second core conclusion for which the opinion is often cited: that it is the President, not Congress or (less controversially) the judiciary, that possesses the vast majority of the unenumerated foreign affairs powers posited by Sutherland.

IV.

Why, after all, should this be? The answer cannot depend, as the first step does, on the meaning of sovereignty, or indeed, on anything in the law of nations. International law—even today,⁴⁸ but certainly in 1936—does not require states internally to allocate foreign affairs powers in any particular way.⁴⁹ Nor can the answer be historical. While the Framers' experience with the Articles of Confederation led them to establish an executive office, "the Framers were hardly ready to replace the representative

challenged power to seize the steel mills must be found in either the Constitution or a statute).

47. HENKIN, *supra* note 11, at 22. As Henkin rightly observes, except as to those foreign relations powers expressly allocated to one branch or another, or reasonably inferable from other allocations, "we are not told how the undifferentiated bundle of federal powers inherent in sovereignty is distributed among the federal branches." *Id.*

48. Today, some argue that international law confers upon peoples a right to democratic governance. See, e.g., Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 541 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 (1992); see generally DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

49. See Michael Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright*, 13 YALE J. INT'L L. 5, 13 (1988) ("That a nation enjoys certain prerogatives under international law logically says nothing about which branches of its government, under its domestic law, are accorded power to exercise them.").

inefficiency of the many with an efficient monarchy.”⁵⁰ The Constitution assigns most of its enumerated foreign affairs powers to Congress,⁵¹ while those “explicitly vested in [the President] are . . . fewer and more modest,”⁵² unless, of course, one accepts the unitary executive thesis that the Vesting Clause itself “is a grant in bulk of all conceivable executive power,”⁵³ including any foreign relations powers not explicitly assigned to Congress.⁵⁴

But *Curtiss-Wright* does not suggest that Justice Sutherland subscribed to this thesis. If he had, it is difficult to see why he felt the need to locate foreign relations powers in a source extrinsic to the Constitution’s text. The real gravamen of *Curtiss-Wright’s* theory of a robust chief executive is a functional or pragmatic argument about the comparative competence and institutional suitability of the President in contradistinction to Congress. The President, unlike Congress, has at his disposal, *inter alia*, “confidential sources of information,” “agents in the form of diplomatic, consular and other officials,” and the ability to act with the confidentiality, discretion, dispatch, and flexibility required in foreign relations.⁵⁵ The combination of *Curtiss-Wright’s* first premise (the federal government’s unenumerated powers in the realm of foreign relations) with its second (the executive’s institutional advantages and suitability to exercise such powers) gives rise to a vision of the Presidency that surely would have astonished the Framers, for “it exists despite the contrary intentions

50. HENKIN, *supra* note 11, at 27.

51. U.S. CONST. art. I, § 8 (vesting in Congress the powers, among others, to provide for the common defense, regulate foreign commerce, define and punish offenses against the law of nations, declare war, grant letters of marque and reprisal, make rules concerning captures, raise and support the army and navy, make rules for the governance of the military forces, and repel invasions).

52. HENKIN, *supra* note 11, at 31 (footnote omitted).

53. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring); *see also id.* at 640–41 (“If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.”). *But see* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 29–34 (2006).

54. U.S. CONST. art. II, § 1. For a general exposition and defense of the unitary executive thesis, see Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994). *But see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

55. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–21 (1936).

of the Philadelphia Convention.”⁵⁶

V.

Yet *Curtiss-Wright* apparently excited little comment in the legal community of the era. This is, at once, understandable and surprising. It is understandable because Sutherland’s thesis in *Curtiss-Wright* built on a number of nineteenth-century precedents,⁵⁷ and his “nationalistic view” of the scope of the federal government’s foreign affairs powers “was hardly novel.”⁵⁸ Furthermore, in the midst of the Great Depression and the years leading up to World War II, constitutional argument tended to focus on the scope of the President’s internal powers and the constitutionality of certain programs forming part of the New Deal.⁵⁹ It is nonetheless surprising that the sweeping vision of executive power sketched out in *Curtiss-Wright* prompted no serious debate at the time, and the first major law review article to examine the decision did not appear until a decade later.⁶⁰

Since then, it is fair to say that Sutherland’s general thesis has been thoroughly debunked. Legal scholars and historians alike have eviscerated his account of constitutional history.⁶¹ And while Henkin is surely correct that Sutherland’s theory need not depend on the accuracy of his history, as he goes on to remark, “Other criticisms . . . are not as readily avoided.”⁶² In particular, most scholars doubt that the Framers thought the new federal government of the United States would possess major powers not set forth in the text of the Constitution.⁶³ From the standpoint of political theory, “it was the heyday of Lockian philosophy,” which

56. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 67 (1991).

57. See Sarah Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1131 (1999).

58. Powell, *supra* note 4, at 219.

59. See *id.* at 225–26.

60. See *id.* at 227 (referencing David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467 (1946)).

61. See, e.g., Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695 (1987); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corp.: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

62. HENKIN, *supra* note 11, at 19.

63. See *id.* at 19–20.

held “that the people were sovereign and that all authority stemmed from them.”⁶⁴ The opinion fares equally poorly as a matter of constitutional theory,⁶⁵ which for the most part is at any rate “the sheerest of *dicta*.”⁶⁶

Also, Sutherland’s apparent conception of sovereignty, while colorful, obscures its complexity. In *Curtiss-Wright*, he wrote: “Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.”⁶⁷ Neither the meaning nor the accuracy of this conception of sovereignty is self-evident. In the first place, at times, sovereignty *is* held in suspense. That would be one way to describe, for example, Somalia’s sovereignty since the ouster of Mohamed Siad Barre two decades ago. Where is the supreme will in Somalia today? While that example may be anachronistic relative to *Curtiss-Wright’s* era, one need not search far to find more contemporaneous ones. Two years before *Curtiss-Wright*, the United States entered into a treaty with Cuba by which it locked into perpetuity its 1903 lease agreement rights to exercise “complete jurisdiction and control over” a portion of Guantanamo Bay, even though Cuba would retain what the parties denominated “ultimate sovereignty.”⁶⁸ The point of emphasis is that the meaning of sovereignty varies, and it does not always require a Hobbesian supreme will. Sovereignty, like property, is better analogized to a

64. Levitan, *supra* note 61, at 480; *cf.* Glennon, *supra* note 49, at 13 (expounding the history of constitutionalism in general as “in no small part the history of the domestic control and allocation of sovereign prerogatives”).

65. *See generally, e.g.,* Ramsey, *supra* note 2.

66. Glennon, *supra* note 49, at 12. Legal scholars differ on the characterization of *Curtiss-Wright* as *dicta*. *Compare, e.g.,* KOH, *supra* note 4, at 94 (“Sutherland’s key language was *dicta*, for Congress had passed a joint resolution . . . that expressly authorized the president to take the action under challenge.”), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring), with Lofgren, *supra* note 61, at 32 (“In sum, it is incorrect to dismiss major segments of *Curtiss-Wright* as *dicta*.”). In fact, it seems accurate to say that parts of the opinion—namely, those needlessly describing the alleged plenary powers of the President and comparative advantages of the executive institution—should be characterized as *dicta*, while others should not be—for example, the *necessary* premise (at least, at the time) that the nondelegation doctrine operates less stringently in the realm of foreign affairs.

67. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316–17 (1936).

68. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (citations and internal quotation marks omitted).

bundle of rights and competences, which can (and should) be disaggregated and need not be transferred or exercised by a single institution.⁶⁹

Furthermore, even the opinion's functional or pragmatic arguments about the comparative advantages of the executive should be tempered. Does the average state governor ascending to the Presidency obviously have a better command of diplomacy and foreign affairs than a senior, long-term member of the Senate Foreign Relations Committee, for example? And while it is doubtless true that the Presidency has both inherent institutional advantages and effective control over the vast majority of the massive U.S. apparatus for diplomacy, intelligence, negotiation, and so forth, mere control of these instruments does not invariably translate into better policy. In the context of the conflict formerly known as the global War on Terror, for instance, some scholars argue that President Bush's refusal to consult or coordinate policy with Congress led to serious and avoidable errors in U.S. national security policy, as well as a patchwork framework for detention, interrogation, trial, and other aspects of the long-term conflict that is widely regarded as illegitimate by large sectors of the public.⁷⁰ In terms of both legitimacy and efficiency, then, what Harold Hongju Koh has called the "balanced institutional participation" theory of national security implicit in Jackson's concurrence in *Youngstown*,⁷¹ in contrast to *Curtiss-Wright's* vision, may well produce demonstrably better results, although it bears stressing here that a results-oriented theory of constitutional interpretation itself would require a substantive defense.

Finally, even if the executive is institutionally better suited for most of the foreign affairs functions of the federal government—and that is, more often than not, accurate—it does not follow that he enjoys *all* related constitutional powers. The Constitution deliberately sacrifices some efficiency in the interest of securing liberty.⁷² As Justice Brandeis wrote:

The doctrine of the separation of powers was adopted by

69. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8–10 (1995).

70. See generally BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

71. KOH, *supra* note 4, at 105.

72. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

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.⁷³

VI.

These critiques only begin to scratch the surface of the full case that can be advanced against Sutherland's views in *Curtiss-Wright*, both as to the pedigree, nature, and scope of U.S. foreign affairs powers and as to their predominant if not exclusive allocation to the President. Yet the Supreme Court continues to cite *Curtiss-Wright* as authority for a variety of diverse propositions. To take one recent and prominent example, in *Boumediene v. Bush*, the Court cited *Curtiss-Wright* for the proposition that in evaluating "both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."⁷⁴ The executive branch, less surprisingly, likewise relies on *Curtiss-Wright* in diverse contexts.⁷⁵ The sheer diversity of legal circumstances in which *Curtiss-Wright* arguably supplies a precedent may begin to explain why "views so deeply problematic continue to exert so powerful a grip upon our thought[.]"⁷⁶ But beyond its utility to the executive branch, the persistence of *Curtiss-Wright*—and, indeed, one might say, its institutionalization as part of the layman's constitutional mythology—may be ascribed to at least three factors.

73. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

74. 553 U.S. 723, 796 (2008); see also *Pasquantino v. United States*, 544 U.S. 349, 351 (2005) (citing *Curtiss-Wright* for the proposition that the President is the "sole organ" of the United States in foreign affairs).

75. See, e.g., Brief for United States, *Flores-Villar v. United States*, 130 S.Ct. 2428 (2010) (No. 09-5801), 2010 WL 3392008 at *17–18 (citing *Curtiss-Wright* for the proposition that sovereignty confers upon the political branches judicially unreviewable power to exclude aliens and to confer or deny citizenship); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act to Acting Legal Adviser, Dep't of State, 2009 WL 2810454, *7 (O.L.C.) (2009) ("The President alone has the power to speak or listen as a representative of the nation Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." (internal citations and quotation marks omitted) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319)).

76. Tribe, *supra* note †, at 1080.

The first is the historical pattern of executive initiative, congressional acquiescence, and judicial tolerance that Koh identified two decades ago.⁷⁷ It is not difficult to see that same pattern at work in the decade since the attacks of 9/11. Second, and related, crisis tends to create a public atmosphere that enables and often encourages the accretion of executive power, while the return to normalcy is seldom accompanied by the surrender of those executive powers acquired or exercised during crisis. Indeed, it is surely one of the enduring ironies of *Curtiss-Wright* that its author, two decades before, had warned readers against the very vision of executive power found in the opinion. In *Constitutional Power and World Affairs*, Sutherland called attention to the “popular, ever-increasing disposition to regard the President as a superior officer rather than a co-equal member of a tripartite organization” and also observed that “[i]n times of public danger or disorder this tendency is greatly accentuated In great crises, the people not only turn to him as their natural leader, which he is, but they are coming more and more to regard him as the sole repository of their power which, very decidedly, he is not.”⁷⁸

Third, as Henkin implicitly suggests in his renowned treatise on foreign relations law, it may be that *Curtiss-Wright* persists because of the absence of another explanation for the Constitution’s notoriously opaque and laconic nature in the realm of foreign affairs. Any effort to confer on *Curtiss-Wright* the status its critics suggest it merits—perhaps that of *Lochner v. New York*⁷⁹—will therefore require an alternative understanding of how the Constitution confers and allocates the federal government’s foreign affairs powers. Koh’s vision of balanced institutional participation, in my judgment, offers one compelling alternative.

Yet in the final analysis, reliance on *Curtiss-Wright* as a precedent for executive power does not depend on the merits of the opinion’s broader claims about the source and nature of U.S. foreign affairs powers. Perhaps the paramount reason for its persistence is that critics tend to focus predominantly—and often exclusively—on this latter claim, leaving the former, namely, about the alleged comparatively greater competence of the executive branch relative to the other branches in the realm of foreign

77. KOH, *supra* note 4, 117–49.

78. SUTHERLAND, *supra* note 26, at 75.

79. 198 U.S. 45 (1905).

affairs, apparently untouched. As I have briefly suggested, however, it is not obvious, a priori, that the executive branch is (invariably) institutionally better suited for—or (always) enjoys inherently greater competence than—its coordinate branches vis-à-vis each and every aspect of U.S. foreign policy. Equally, even assuming that experience demonstrates, a posteriori, that the executive branch enjoys greater comparative competence in some area of foreign affairs, it does not logically or uncontroversially follow, as a matter of constitutional theory, that the President “therefore” enjoys all relevant powers in that area. Both of the foregoing propositions must be established, by argument and evidence, not simply assumed or asserted dogmatically.⁸⁰ For it is on the strength of such argument and evidence that *Curtiss-Wright’s* vision of executive power ultimately stands or falls.

80. For an article evincing the sort of scrutiny of these claims that I have in mind, see, for example, Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011).