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Responses to the Ten Questions

Robert N. Strassfeld

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RESPONSES TO TEN QUESTIONS

Robert N. Strassfeld[†]

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Certainly, Justice Sutherland's statement in *United States v. Curtiss-Wright Export Corp.*¹ that the President's power regarding the conduct of foreign affairs is plenary and exclusive is not the most unfortunate language in the Supreme Court repertoire.² Other contenders quickly come to mind. Justice Henry Brown caused far more harm when he wrote in *Plessy v. Ferguson*:³

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁴

On the other hand, in *Buck v. Bell*,⁵ Justice Oliver Wendell

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1. 299 U.S. 304 (1936).
2. *Id.* at 320.
3. 163 U.S. 537 (1896).
4. *Id.* at 551.
5. 274 U.S. 200 (1927).

Holmes, Jr. demonstrated a remarkable combination of wrongheadedness and brevity in his assertion, “Three generations of imbeciles are enough.”⁶ The examples quickly multiply, and Justice Sutherland’s *Curtiss-Wright* “dicta” may not even make a list of the top twenty-five Supreme Court flubs.⁷ Regardless of whether it makes a top twenty-five or a top one hundred list, much mischief has occurred under the banner of *Curtiss-Wright*.

The case arose in the context of the Chaco War, a protracted and bloody dispute between Bolivia and Paraguay over what was mistakenly believed to be oil-rich land known as the Gran Chaco.⁸ International efforts to mediate the dispute failed. As the casualties mounted, President Franklin Delano Roosevelt sought the authority to embargo the sale of weapons to the combatants. The result was a joint congressional resolution on May 24, 1934 that criminalized the sale of arms to the combatants upon certain findings and actions of the President.⁹ Four days later, President Roosevelt signed the resolution and issued the requisite proclamation making the necessary findings.¹⁰

There was, of course, good money to be made supplying arms to Bolivia and Paraguay. Curtiss-Wright Export Corporation was quick to exploit this opportunity and became a major arms supplier to Bolivia. Among the weapons that it supplied to Bolivia were fifteen machine guns that were intended to be mounted on planes that the company had also sold to Bolivia. The sale of those

6. *Id.* at 207. While this most memorable sentence of the decision was pithy and, incidentally, factually incorrect, Justice Holmes had laid out less tersely his disturbing argument upholding both the legality and appropriateness of eugenic sterilization. For a discussion of the case, see PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND BUCK V. BELL* (2008).

7. The scare quotes around the word *dicta* foreshadows one of the many problems with *Curtiss-Wright*. Seventy years after the decision, there is still no consensus over whether or not its most famous passage was *dicta* or not. I will discuss this question, *infra* at notes 19–33 and accompanying text.

8. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 311 (1936). For a helpful discussion of the history underlying the case, see H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, in *PRESIDENTIAL POWER STORIES*, 195–231 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

9. H.R.J. Res. 347, 73d Cong. (1934). Specifically, the embargo and criminal provisions would go into effect if the President determined that the prohibition of such arms sales within the United States “may contribute to the reestablishment of peace” and, “after consultation with the governments of other American Republics” and relevant governments, he issued a proclamation to that effect. *Id.*

10. Proclamation No. 2086, 48 Stat. 1744 (May 28, 1934).

machine guns formed the basis of the prosecution of Curtiss-Wright and others for conspiracy to violate the joint resolution.¹¹

Curtiss-Wright and its codefendants sought a demurrer to the indictment, which a federal district court granted.¹² Relying on the recent Supreme Court decisions in *Panama Refining Company v. Ryan*¹³ and *A.L.A. Schechter Poultry Corporation v. United States*,¹⁴ the district court concluded that the indictment was invalid because the joint resolution had unlawfully delegated congressional power to the President.¹⁵ On appeal to the United States Supreme Court, the principal issue was, therefore, whether the nondelegation doctrine precluded the indictment, or whether the indictment was valid because the resolution met the requirements of that doctrine.

The Supreme Court, in a seven-to-one decision written by Justice George Sutherland, reversed the decision of the district court and remanded the case for prosecution.¹⁶ In upholding the joint resolution against a nondelegation doctrine challenge, Justice Sutherland first concluded that:

The investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.¹⁷

Turning to the question of where this power regarding foreign relations resided within the federal government, Justice Sutherland famously wrote:

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 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,

11. *Curtiss-Wright*, 299 U.S. at 311.

12. *United States v. Curtiss-Wright Exp. Corp.*, 14 F. Supp. 230, 235 (S.D.N.Y. 1936).

13. 293 U.S. 388 (1935).

14. 295 U.S. 495 (1935).

15. *Curtiss-Wright*, 14 F. Supp. at 235.

16. *Curtiss-Wright*, 299 U.S. at 333.

17. *Id.* at 318.

but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.¹⁸

There are three important points that Justice Sutherland was making in these passages. First, under his analysis, the federal government's power regarding international relations was extraconstitutional in its origin. As an inherent attribute of sovereignty, it passed seamlessly from the British government to the union of former colonies in the instant of their independence. There was no intermediate time during which the states themselves were sovereign in the sense of having foreign relations powers. Second, within the federal government, except where otherwise indicated by the Constitution, this foreign relations power was vested in the President. This is the aspect of *Curtiss-Wright* that supporters of executive power have asserted aggressively, and which has, at times, been the source of much mischief. Finally, Justice Sutherland noted that, although the foreign-relations power of the federal government was extraconstitutional in origin, it was also subordinate to the Constitution in all instances where the Constitution addressed the subject. Thus, notwithstanding his conclusion that the power of the President in this area was exclusive and plenary, he acknowledged that where the Constitution had given specific powers in this area to Congress or had created an area of concurrent power, that assignment governed. Similarly, other constitutional limitations, such as provisions of the Bill of Rights, would presumably limit the extraconstitutional power that he believed resided in the President.

I. IS IT DICTUM?

The vast majority of commentators have treated Justice Sutherland's analysis, and most importantly, his description of presidential power regarding international relations as exclusive and plenary, as dictum. Courts generally have similarly seen this part of the analysis as nonbinding dictum, though they have sometimes adopted a very sympathetic approach. Nevertheless, it is hardly clear whether Justice Sutherland's language can be dismissed as mere dictum.

There are good reasons to characterize the notorious passage as dictum. An examination of the United States' brief shows that it

18. *Id.* at 319–20.

did not think that the case revolved around whether or not the President's power regarding foreign affairs was exclusive and plenary. Rather, the Government's focus was on the nondelegation doctrine. Specifically, the United States argued that it had been the settled practice of Congress since as early as 1794 to make similar delegations of authority to the President in areas of foreign policy, where the President was best able to make certain factual determinations, often on the basis of secret information, that would then trigger some statutory provision.¹⁹ It further argued that the Supreme Court had repeatedly upheld such delegations of authority to the President, even in cases where the delegation was far broader than the delegation under the joint resolution.²⁰ In other words, the United States argued that whatever the meaning of *Schechter Poultry* for domestic legislation, the record of congressional delegation to the President in instances involving foreign policy was too well established by congressional practice and Court approval for the joint resolution to be constitutionally infirm.²¹ Even if the Court did not accept its argument based on settled practice and prior Court approval, the United States argued, the resolution did not fall afoul of the requirements of *Schechter Poultry*.²² Thus, it was certainly possible for the Court to uphold the joint resolution without opining on the distribution of foreign policy power between the President and Congress.

Most commentators have since treated Justice Sutherland's language as dictum. So, too, have the courts. Notably, none of the authors of any opinion in the *Steel Seizure Case*²³ accorded Justice Sutherland's discussion of presidential power the status of a holding. Indeed, the Justices barely mentioned *Curtiss-Wright* at all, even though one of the Solicitor General's arguments in support of President Truman's takeover of the steel industry was his inherent,

19. Brief for the United States at 7–12, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (No. 98), 1936 WL 39952 at *7–12.

20. *Id.*, at 12–17.

21. Indeed, one of the cases relied upon by the United States had been decided less than a decade earlier. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (upholding statute that allowed the President to alter tariffs upon making certain findings of fact).

22. This last argument rested on the distinction between a finding of present fact, which the United States argued was all that the joint resolution required of the President and the determination of future possibilities, which would amount to setting policy by the President in violation of the nondelegation doctrine. Brief for the United States, *supra* note 19, at 17–19.

23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

nontextual power as President. In the opinion of the Court, Justice Black made no express mention of the case. Implicitly, however, he treated the Sutherland language as dictum. Otherwise, he could not have written that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself” without expressly overruling the “holding” of *Curtiss-Wright*.²⁴

In his concurrence, Justice Jackson left no doubt that he saw the discussion of the President’s extraconstitutional power to be dictum.²⁵ In addition to describing much of the opinion as dictum, Justice Jackson rejected the Solicitor General’s argument that the President had foreign-policy powers that were not textually based. In rejecting this argument, Justice Jackson wrote, “Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. ‘Inherent’ powers, ‘implied’ powers, ‘incidental’ powers, ‘plenary’ powers, ‘war’ powers and ‘emergency’ powers are used, often interchangeably and without fixed or ascertainable meanings.”²⁶ In rejecting this line of argument, Justice Jackson made no direct reference to *Curtiss-Wright*, something he would have felt compelled to do had he thought that the Sutherland language about presidential power was a necessary part of the decision. Moreover, even the three dissenters grounded their decision in a textual analysis of Article II of the Constitution rather than in the extraconstitutional power advanced by Justice Sutherland.²⁷

Despite these strong reasons to conclude that the offending or insightful, depending on one’s perspective, passages from *Curtiss-Wright* are dictum, there is reason to think that Justice Sutherland thought otherwise. In a sense, Justice Sutherland had been preparing to decide *Curtiss-Wright* for a substantial part of his life. As Professor H. Jefferson Powell has described, Sutherland had wrestled with the problem of the sources of American foreign-policy power for nearly thirty years. The problem was of sufficient interest to him that when Nicholas Murray Butler, the president of Columbia University, invited him to deliver a series of lectures at Columbia, he chose the topic for his lectures. Soon thereafter, he

24. *Id.* at 585.

25. *Id.* at 637 n.2 (Jackson, J., concurring).

26. *Id.* at 646–47 (Jackson, J., concurring).

27. *Id.* at 667–710 (Vinson, C.J., dissenting). Justices Reed and Minton joined Chief Justice Vinson’s dissent.

turned those lectures into the book, *Constitutional Power and World Affairs*.²⁸

By the time Justice Sutherland faced the task of writing for the Court in *Curtiss-Wright*, his thinking on the issue had further evolved from what he had said in his lectures and book. Yet, much of his analysis in *Curtiss-Wright* flowed directly from his book. His premise that the sources of the federal government's domestic and foreign powers were different, with the latter derived not from the constitutional text but from nationhood and sovereignty, drew directly from his earlier thinking. The important innovation of *Curtiss-Wright* was to assign this power to the President.²⁹ As Professor Powell shows, even though Justice Sutherland would also describe the settled practice of congressional delegation to the President in matters of foreign affairs, his long-percolating theory was fundamental to his analysis. Historian Charles Lofgren likewise concludes that for Justice Sutherland, the theoretical underpinnings of the decision, including his claims that plenary and exclusive presidential power over foreign affairs is inherent in sovereignty itself, were a necessary component of the decision.³⁰ While Justice Sutherland ultimately described the decision as both grounded in "principle and in accordance with precedent,"³¹ Professor Lofgren concludes that "there is no basis for regarding as dictum *Curtiss-Wright's* contention that federal power involving foreign affairs rests on a different base than federal power in domestic affairs."³² Whether his brethren read the opinion the same way is, however, questionable.³³

II. THE HARMFULNESS OF *CURTISS-WRIGHT*

Were the only problem with *Curtiss-Wright* the ambiguous status of Justice Sutherland's characterization of executive power, nobody would much care about the case. Those of us who remember its invocation by Colonel Oliver North and its trumpeting by the minority report of the Iran-Contra

28. See Powell, *supra* note 8, at 217–21.

29. *Id.* at 222–23.

30. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 31 (1973).

31. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936).

32. Lofgren, *supra* note 30, at 31.

33. David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467, 494 (1946).

Congressional Committee have a vivid sense of the harm that Justice Sutherland unleashed.³⁴ The minority report embraced a reading of *Curtiss-Wright* that permitted virtually unchecked presidential power in the realm of foreign affairs. Reciting Justice Sutherland's quotation and mischaracterization of Congressman (and subsequently Chief Justice) John Marshall's identification of the President as the "sole organ of the nation in its external relations,"³⁵ the committee minority found that President Reagan and his agents were free to disregard congressional restrictions on sales of arms to Iranian "moderates" and aid to the Contras in Nicaragua because Congress had no constitutional authority under which to limit the President's plenary and exclusive power.³⁶

The ranking Republican House member on the committee and a principal architect of the minority report was Congressman Dick Cheney.³⁷ The lessons of Iran-Contra were not lost on Congressman Cheney, and as Vice President he was generally regarded as the fiercest advocate for expansive presidential power within the George W. Bush administration.³⁸ The reverberations of the minority report are discernible in such disregard for congressional limits as the Bush administration's warrantless wiretaps in disregard of the Foreign Intelligence Surveillance Act of 1978³⁹ under its terrorist surveillance program.⁴⁰ One early critic of

34. See *Minority Report*, in REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 471-78 (1987) [hereinafter *Minority Report*]. And those of us who watched both the Watergate hearings and the Iran-Contra hearings experienced a vivid demonstration of Karl Marx's comment, "Hegel remarks somewhere that all facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce." KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 15 (International Publishers Co. paperback ed. 1963) (1852).

35. *Curtiss-Wright*, 299 U.S. at 319.

36. *Minority Report*, *supra* note 34, at 473-74. It should be remembered that this argument presses Justice Sutherland's analysis beyond his apparent intent, since he recognized that his extraconstitutional power was subject to constitutional limitations, including grants of authority to Congress.

37. Sean Wilentz, *Mr. Cheney's Minority Report*, N.Y. TIMES, July 9, 2007, <http://www.nytimes.com/2007/07/09/opinion/09wilentz.html>.

38. See *id.*

39. 50 U.S.C. §§ 1801-71 (2006). Under 18 U.S.C. § 2511(f) (2006), FISA provides the only means under which such surveillance should have been permissible.

40. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=1>. Karl Marx did not think to describe history's second repetition. Perhaps he would have said that it repeats itself as

the decision characterized it as dangerously antidemocratic. According to Charles Levitan, Justice Sutherland's theory "is the furthest departure from the theory that United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power."⁴¹

Curtiss-Wright's mischievous reach has not been limited to justification for rogue covert operations emanating from the White House. It has also been a source of legal overreach by U.S. Attorneys, the Justice Department, and other law-enforcement arms of the federal government. As Dean Harold Koh has noted, "Among government attorneys, Justice Sutherland's lavish description of the President's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right, cite.'"⁴² One example of such overreach is the Office of Foreign Assets Control ("OFAC") of the Treasury Department's attempt to block the assets of Kindhearts for Charitable Humanitarian Development, Inc., pending its determination of whether or not the charity is a "specially designated global terrorist."⁴³ Relying on *Curtiss-Wright's* assertion of the President's plenary power over foreign affairs, the Government argued that OFAC need not operate under Fourth Amendment constraints, an argument that Judge Carr rejected.⁴⁴

Finally, while not necessarily expressly invoked by the Court in its avoidance of deciding cases involving claims of misuse of presidential power in foreign affairs, the deferential spirit of *Curtiss-Wright* seems to haunt the Court's political-question decisions. For example, during the Vietnam War, federal courts invoked the political-question doctrine, along with such other justiciability barriers as standing and ripeness rules, to avoid consideration of challenges to the lawfulness of the war.⁴⁵

opera buffa, or, had he been able to foretell the future, as an Eug ne Ionesco play.

41. Levitan, *supra* note 33, at 493.

42. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990).

43. *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

44. *Id.* at 876-88.

45. *See, e.g., Orlando v. Laird*, 443 F.2d 1039, 1043 (2d. Cir 1971), *cert. denied*, 404 U.S. 869 (1971) (beyond determination that there was "some mutual participation between the Congress and the President," issue of legality of the war is a nonjusticiable political question).

III. BUT DID HE GET HIS ANALYSIS RIGHT?

The short answer is that Justice Sutherland's analysis was deeply flawed and incorrect. Perhaps the most significant wrong turn was to abandon constitutional text (despite its scantness regarding some foreign affairs matters) in favor of a theory of an extraconstitutional basis for the nation's foreign affairs powers. Once launched on a search for an extraconstitutional solution, Justice Sutherland was almost certain to engage in shoddy law office history with perverse results.⁴⁶

Historian Paul Finkelman has warned us of the difficulties of uncovering a meaningful and reliable understanding of original intent of the authors and ratifiers of the Constitution. He doubts that "we can safely rely on such an investigation for a dispositive interpretation of the Constitution today."⁴⁷ He further notes that most historians of the period concern themselves with different questions from the lawyers' debates about original meaning because "the debate seems far removed from what historians do," and "most historians believe that the quest for original intent is futile at best."⁴⁸ Once again, it is useful to turn to Justice Jackson as a source of eloquently stated wisdom. In the *Steel Seizure* case he writes:

Just what our forefathers did envision or would have envisioned had they foreseen modern conditions, must be

46. Law-office history refers to the practice of lawyers, judges, and sometimes law professors, to cherry pick bits of historical evidence with little understanding of context or historical practice for the purposes of advancing a particular client's position or cause. In one other area where the Supreme Court has relied on its understanding of the preconstitutional understanding of sovereignty, the Court's Eleventh Amendment jurisprudence, the Court has made a doctrinal, textual, and historical hash, as a result of an amateurish, ideologically driven attempt to do history. This reign of error, which is beyond the scope of this essay, began in *Hans v. Louisiana*, 134 U.S. 1 (1890) with an abandonment of any fealty to constitutional text and has culminated in the Court's decisions in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999). Those seeking a more reliable historical treatment of this area can profitably begin with the works of Professors John Orth and Edward Purcell. JOHN ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987); Edward A. Purcell, Jr., *Ex Parte Young and the Transformation of the Federal Courts, 1890-1917*, 40 U. TOL. L. REV. 931 (2009); Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts"*, 81 N.C. L. REV. 1927 (2003).

47. Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 444 (1996).

48. *Id.* at 437, 438.

divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.⁴⁹

Yet, since Justice Sutherland has, in effect, thrown down the gauntlet, we have little choice but to try to make sense of constitutional (and perhaps extraconstitutional) history to test his theory. Fortunately, the task of debunking purported definitive readings of original intent may be easier than that of providing a dispositive reading of the text or urtext. The historical commentary has not been kind to Justice Sutherland's analysis and has left it pretty much in tatters.

The earliest critiques of Justice Sutherland's analysis took him on his own terms and reexamined his historical evidence and argument. They found his history "shockingly inaccurate."⁵⁰ They have uncovered considerable evidence that after the break with Britain, the states did consider themselves as sovereign and the union of the states through the Continental Congress a marriage of convenience that might be temporary.⁵¹ Nor did his use of Justice Story's writings on sovereignty or of then-Congressman Marshall's comment regarding the President as the sole organ support Justice Sutherland's analysis.⁵² More recently, Professor Michael Ramsey has argued quite powerfully that whatever the view on the possession and meaning of sovereignty at the time of the Declaration of Independence and the Revolutionary War, neither the constitutional text nor the practices of the states and of Congress under the Articles of Confederation support Justice Sutherland's interpretation.⁵³

In the end, Justice Sutherland's theory stands up badly. His notion of an extraconstitutional source of the nation's foreign relations power leads into a metaphysical and an historical rat hole.

49. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

50. Lofgren, *supra* note 30, at 32 (quoting Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 76 (1963)).

51. See Levitan, *supra* note 33, at 480–90.

52. Lofgren, *supra* note 30, at 13–17, 24–25.

53. Michael Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 395–431 (2000).

Despite some care on his part to recognize constitutional limitations on the President's power, his theory and language have been used for constitutionally indefensible purposes.⁵⁴ Certainly, the Constitution intends for the President to wield considerable power in certain aspects of foreign affairs, from serving as commander in chief to negotiating treaties on behalf of the United States. Nonetheless, it is also clear that the Framers were deeply concerned about unchecked presidential power in the realm of foreign affairs. This concern was most clearly true regarding the power to initiate war and to maintain a military force.⁵⁵

As most commentators have argued (at least until they are employed in some administration's Department of State or Department of Justice), the Constitution creates a system of concurrent, and sometimes conflicting, power over foreign affairs.⁵⁶ Each of the coordinate branches has a role to play. As Professor Edward Corwin noted over fifty years ago, "the Constitution . . . is an invitation to struggle for the privilege of directing American foreign policy."⁵⁷

Justice Sutherland's theory and assumptions are wrong. That does not mean that they will quietly fade away. They will not, because they represent one side of the struggle that Professor Corwin described so long ago. It is important not to exaggerate the importance of Justice Sutherland's dictum. Had he not written the opinion, the impulse on the part of the executive to stretch its powers would still have required an ideological and doctrinal rationale, as would the impulse of Congress to at times flex its muscles in this area and at others to flee responsibility and

54. As Antonio said, "Mark you this Bassanio, the devil can cite Scripture for his purpose . . . O, what a goodly outside falsehood hath." WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 3.

55. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1603–06 (2002) (arguing that the framers intended the Declare War Clause to give Congress the broad power over acts of war, rather than just proclamations of war); Michael D. Ramsey, *Text and History in the War Powers Debate: A Response to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1703 (2002) (arguing that the commander-in-chief power is distinct from the broader power to initiate war, which the framer's reserved to Congress); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 21–28 (1972) (arguing that under the original meaning of the Constitution, the President's continuing use of military forces in Vietnam was unauthorized after congressional repeal of the Gulf of Tonkin Resolution).

56. This is the general theme of Harold Koh's book. KOH, *supra* note 42, 2–3.

57. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, 201 (1984).

acquiesce in the desires of the President. That battle will continue.

In the end, it may be bad history, but at least five members of the Supreme Court and the acceptance of their decision by the American people determines whether or not it is good law. There is every reason to think that this will remain contested terrain for a long time.

6. SHOULD KHALID SHEIKH MOHAMMED EVER BE BROUGHT TO TRIAL?

The question contains a suggestive negative pregnant. If not a trial, what? Presumably the old-standby methods of totalitarian regimes, defenestration, the terrible “fall” down the stairs in an “escape attempt,” or purported death by suicide are off the table.⁵⁸ Since no one has suggested simply releasing Khalid Sheikh Mohammed (KSM), that would leave the alternative of indefinite detention as a prisoner of war for the remainder of a war with no end in sight. The alternative, however, is a depressingly bad one.

Towards the end of World War II, the victorious allies confronted the question of what to do with the Nazi leadership. Winston Churchill was loathe to try these men and strongly advocated for summary execution. Stalin, apparently in jest, declared that 50,000 German general staff officers should be killed.⁵⁹ The genius of Nuremberg was the rejection of this idea and the insistence that the trials be credible. The four prosecuting nations certainly had reason to seek vengeance and reason to want to eliminate the Nazi leadership quickly and efficiently, thereby minimizing any future threat of a Nazi resurgence. Nevertheless, at Nuremberg, they chose to substitute the rule of law over vengeance and efficiency.

As a nation, we try those whom we suspect of having committed a crime. Since we believe to a near certainty that KSM masterminded the September 11 attacks, we might do better to reverse the question. Why wouldn't we bring him to trial? Because a trial (or at least a plea agreement) is our norm, the burden

58. One thinks of Jan Masaryk in post-World War II Czechoslovakia found in his courtyard a purported suicide by a leap from his bathroom window and Steven Biko in South Africa, killed by an aggressive interrogation and torture session in the custody of South African police, passed off as the result of a hunger strike and suicide attempt.

59. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 30 (1993).

should rest on advocates of indefinite detention without trial to show why a trial would be inappropriate.

The question as posed begs the question of where to try KSM, and, in large measure, so will I. Much has been written about the relative virtues and flaws of Article III courts, specialized hybrid courts created to try terror cases, and military commissions as venues for suspects in terror cases. The question does not beckon me to join that argument, and I will happily let the opportunity pass. Nevertheless, without delving into the reasons for my preference, I will note that I have a strong preference for a federal district court as the appropriate forum. Regrettably, in the short term, it has become politically impossible to try KSM in a federal district court. I will, nevertheless, assume that the politically impossible is indeed possible, and in arguing that we must try KSM, I will assume that such a trial would take place in a federal district court.

Some of the arguments that have been made against trial are specific to federal district courts. Some concerns, such as the costs of security and traffic control, seem greatly overstated. All but a handful of terrorism prosecutions have happened in federal district court without the parade of horrors, suggested by opponents of trials in civilian courts, having occurred. Other prosecutions, such as those involving organized crime or drug gangs, also pose security issues, but the federal district courts have proven to be up to the challenge. Nor is there much reason to credit the concern that were KSM to be tried in Manhattan, al Qaeda would be prompted to target Manhattan. They have shown that they already have New York City in their sights without any additional encouragement.

One reason why a government might decide to avoid trial, at least temporarily, is because the particular detainee has become an intelligence asset and taking him to trial is likely to end any intelligence value the person might have. It is hard to know how valuable KSM was as an intelligence source, since he is reputed to have given us bad intelligence intermingled with accurate intelligence. At this point, however, he has been in custody for so long that it is unlikely that he has any information that would still be fresh and useful.

Other objections to trial stem from the difficulty that we created for ourselves by subjecting KSM to cruel, inhuman, or degrading treatment in addition to torture. First, there is the problem of further embarrassment. It will be impossible to try

KSM in any venue without broaching the subject of his treatment in detention. This is unfortunate, but, I believe, unavoidable. We have not faced our own behavior in this matter and have held virtually no one accountable for any acts of torture or mistreatment done by us or on our behalf, except for mostly low-level implementers of the practice of torture rather than those who crafted the policy, as we saw in response to the Abu Ghraib scandal. Given this flight from accountability, there may be a beneficial, if painful, effect of an official discussion of our behavior toward detainees.⁶⁰ Further, there is little that the world has not heard about our use of cruel, inhuman, or degrading treatment or, indeed, torture, and probably less that they have not imagined. Any discussion of the mistreatment of KSM in our hands can only reveal so much that is new. One might say that this is all water, towel, and detainee under the bridge, and in the rushing river.

The world, in other words, and those who might be persuaded not to side with our enemies against us, already has a certain narrative in mind regarding the United States and torture. By facing our behavior soberly and honestly, and by trying to create the atmosphere where a fair and credible trial can occur, we might shift the narrative in our favor.

There is the very practical question of the legal impact of the abusive treatment and torture on any evidence, including any confession, obtained later by other interrogators using traditional policing methods. The issue is, of course, whether a “clean-team” of interrogators can be understood as sanitizing the record, allowing any subsequent confession to be introduced at trial.⁶¹ The law is not terribly clear on this matter. This might present a problem no matter what venue we decide to try KSM or even if we decide to hold him in administrative detention as a POW and allow him periodic reviews of his status. While we know that the required minimal process protections may vary from circumstance to circumstance, we also know that some degree of fairness and reliability will be demanded by the court of any procedure we used to hold KSM.

60. For a discussion of our national difficulty with facing unpleasant aspects of our past and current behavior and the strategies of avoidance that we adopt to avoid self-understanding or accountability, see Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT'L L. 277 (2006).

61. For a thoughtful exploration of these issues, see Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943 (2010).

Finally, a frequently voiced objection is the likelihood that defendants such as KSM would use the platform of the trial to put the United States on trial and to propagandize for their cause. We should not assume that any judge tasked with trying such a case is incapable of controlling her or his courtroom. Nevertheless, it is true that a public trial will afford KSM a platform and there is no reason to think that he would not attempt to take advantage of it. Are we so frightened, however, that we would lose that argument? Do we have any doubt that we do not have the more compelling case to most of those whom we would hope to influence?

In the end, that is why we do trials. They are, of course, means for resolving disputes, righting wrongs, and uncovering the truth (within the limits of the rules of procedure and evidence). They are also public performances through which we announce to the world something about our beliefs and values and our sense of ourselves and our society. We engage in the trial process, in other words, not only in the hope of finding the truth and rectifying wrongs, but for the expressive impact of the trial.⁶² And we engage in the trial process to give voice to those who have been wronged. We create a public record for those victims to acknowledge their sense of injury.

None of this happens perfectly. Establishing a historical record is no guarantee that those who have done wrong or have tolerated it will come to see their past in a new light. The record of Holocaust denials reminds us that no amount of evidence will satisfy those who are intent on their own distorted and hateful understanding of the past. Because we expect to accomplish a variety of things by holding trials, not simply the public performance of a particular account of events, our rules of trial may advance one end at the expense of another.⁶³ Nor are victims made instantly and magically whole. Yet, despite the imperfections, the victims almost always see revelation and acknowledgement to be critical to any attempt at justice.⁶⁴

62. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 17–18 (2007).

63. *See id.* at 173–79 (explaining the central goal of “expressivism” is the crafting of a historical narrative, but, at the same time, that goal is hindered by four aspects of the criminal trial process: production of only selective truths, interruptions during the trial process, poor management strategies, and plea bargains).

64. Peter R. Baehr, *How to Come to Terms with the Past*, in *ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE* 6, 18 (Edel

Were we to forego a trial of KSM, the republic would not fall. Nevertheless, we would have failed to create a public record of the crimes that were committed on September 11, 2001, and KSM's role in those crimes. We would also have failed the surviving victims by denying them their voice.

Events have partly overtaken this essay as it moves towards publication. On Monday, April 4, 2011, Attorney General Eric Holder announced that KSM and four others would stand trial for the September 11 attacks.⁶⁵ Notably, Attorney General Holder underscored the need "to bring the conspirators to justice"⁶⁶ without further delay either for the victims' families or for the defendants. Regrettably, because of congressional opposition the most appropriate forum for these trials, a federal district court, is unavailable. While the current iteration of the military commissions is an improvement over the earlier versions, questions remain about the constitutionality of aspects of their procedure. Further, they are tainted both by their association with the earlier versions of the military commissions and by their association with Guantanamo, as well as by arguments made by any number of their supporters that they are a preferable forum because they are more likely to guarantee convictions. Attorney General Holder has concluded that this is an instance where we should not make the perfect the enemy of the good. The challenge will be to prove his intuition right.

Hughes, William A. Schabas, and Ramesh Thakur, eds. 2007).

65. Eric Holder, Att'y Gen., *Statement of the Attorney General on the Prosecution of the 9/11 Conspirators* (Apr. 4, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>. In addition to KSM, the indictments included charges against Walid Muhammad bin Attash, Ramzi bin al-Shibh, Ali Abdul-Aziz Ali and Mustafa Ahmed al Hawsawi.

66. *Id.*