

# President's Game?

History refutes claims of unlimited presidential power over foreign affairs.

BY LOUIS FISHER

Advocates of unchecked presidential power in the post-9/11 period rely heavily on the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.* (1936). In dicta, Justice George Sutherland cited a statement in 1800 by then-Rep. John Marshall (the future Supreme Court chief justice) that the president "is the sole organ of the nation in its external relations."

By this statement, Marshall meant merely that when the United States enters into a treaty with an extradition provision, it is the president's duty under the Constitution to see that the treaty is faithfully carried out. He meant that, and nothing more.

Nevertheless, Marshall's language recently has been manipulated to defend inherent, exclusive, and extra-constitutional powers for the president, placing that office outside the control of Congress and the courts. This distortion is unfortunate, particularly given the importance of the constitutional issues at stake, and a more accurate understanding of both Marshall and *Curtiss-Wright* would help avoid confusion about the true balance of power in the federal government.

## OVERREACHING CLAIMS

The "sole organ" doctrine appears in three recent legal arguments: the first from the Bush administration, the second from Judge Richard Posner, and the third from law professor John Yoo. All three invoke *Curtiss-Wright* to vindicate inherent presidential power in foreign affairs and national security.

First, after *The New York Times* broke the story about the eavesdropping by the National Security Agency, the Office of Legal Counsel in the Justice Department issued a 42-page white paper on Jan. 19 justifying the legality of the NSA's program. The office pointed to the "President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs."

In a California lawsuit that challenges the constitutionality of the NSA operation, the Justice Department argues that the state-secrets

privilege "embodies central aspects of the Executive's responsibilities under Article II of the Constitution as Commander-in-Chief and as the Nation's organ for foreign affairs."

Second, Posner, of the U.S. Court of Appeals for the 7th Circuit, writes in his book *Not a Suicide Pact* (2006): "In *United States v. Curtiss-Wright Export Corp.* (1936), the Supreme Court held that the United States acquired the powers of a sovereign nation by its successful revolution against Great Britain rather than by a grant in the Constitution; the nation is prior to the Constitution."

Yet that was not the "holding" of the Court. It was dicta. Moreover, sovereign powers in 1776 came initially to the Continental Congress and the separate states, not to the president, a position that did not exist at that time.

Posner also claims, "National defense, not limited to defense against human enemies, is a core sovereign power and moreover one that traditionally is exercised by the executive." The British king did indeed exercise the core sovereign power over national defense, but the Framers repudiated that model. Sovereignty over national security is placed in the American people and divided among Congress, the president, and the courts.

Posner's book specifically explores the president's power to limit or suspend the First Amendment: "It is one thing to say that 'freedom of speech' is a vague term that can expand and contract accordion-like as circumstances dictate. It is another to say that the president can suspend the First Amendment during a national emergency. Perhaps he can do *anything* if the emergency is dire enough—the *Curtiss-Wright* principle mentioned in the Introduction."

Yet nothing in *Curtiss-Wright* or in Marshall's speech in 1800 offers any support for the president doing whatever he wants in time of emergency, particularly with something as crucial as the First Amendment.

Finally, John Yoo, a law professor at the University of California, Berkeley, in *War by Other Means* (2006), writes: "[T]he Constitution grants the President the leading role in foreign affairs. The statement that the President is the 'sole organ for the nation in foreign affairs'

was not manufactured by the Bush administration, but in fact comes from a 1936 Supreme Court case that recognized the President's control over diplomacy and the setting of foreign policy."

Yoo neglects to mention that Sutherland's dicta in *Curtiss-Wright* mangles John Marshall's expression "sole organ." Here's what Marshall really meant:

During House debate on March 7, 1800, Marshall called the president "the sole organ of the nation in its external relations, and its sole representative with foreign nations." It was never his intent to promote inherent, exclusive, or extra-constitutional power for the president. His objective was merely to defend the authority of President John Adams to carry out an extradition treaty.

The president was not the "sole organ" in formulating a treaty or foreign policy in general. He was the sole organ in *implementing* it. Article II of the Constitution calls upon the president to "take Care that the Laws be faithfully executed," while Article VI makes all treaties "the supreme Law of the Land." In carrying out the extradition provision (Article 27) of the Jay Treaty, Adams turned over to English authorities a British citizen charged with murder on a British ship. In the situation Marshall was addressing, the president was the "sole organ" in interpreting and enforcing an extradition provision in a treaty with Great Britain.

Marshall never implied that the president was the leading voice in shaping and articulating foreign policy. At no time during his service as a member of Congress, secretary of state, or chief justice did Marshall ever argue for inherent or independent power of the president to make foreign policy.

To the contrary, in *Talbot v. Seeman* (1801) he understood that Congress possessed the power to take the country to war: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry." And in *Little v. Barreme* (1804) he stated that when a presidential proclamation in time of war conflicts with a statute enacted by Congress, the statute prevails.

#### WHAT THE COURT DECIDED

If Marshall's statement does not justify unchecked executive power, what about the *Curtiss-Wright* decision itself?

Although this decision is routinely cited for the existence of inherent executive power in the field of foreign affairs, the case did not concern independent presidential power. The issue was whether Congress had delegated legislative power too broadly when it authorized President Franklin Roosevelt to declare an embargo against selling weapons to countries in South America.

A joint resolution by Congress allowed Roosevelt to prohibit the sale of arms to that region whenever he found that it "may contribute to the reestablishment of peace" between belligerents. In imposing the embargo, Roosevelt relied solely on statutory—not inherent—authority. Nowhere in his proclamation is there any hint of inherent, independent, extra-constitutional, or exclusive presidential power.

A district court, holding that the joint resolution represented an unconstitutional delegation of legislative authority, said nothing about any reservoir of inherent presidential power. When the district court decision was taken to the Supreme Court, none of the briefs, including by the Justice Department, argued in favor of independent or inherent powers of the president.

In reversing the district court, the Supreme Court merely rejected

the notion that the joint resolution passed by Congress gave too much discretion to the president. That was the decision.

Yet having ruled on the merits, Justice Sutherland proceeded to add 19 pages of dicta that championed inherent, independent, and extra-constitutional presidential powers.

Other courts have recognized the lack of authority of these dicta. In a concurrence in the steel seizure case, *Youngstown Sheet and Tube Co. v. Sawyer* (1952), Justice Robert Jackson observed that the most that can be drawn from *Curtiss-Wright* is the intimation that the president "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress." He noted that much of the Sutherland opinion was dicta.

In 1981, the D.C. Circuit cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization."

#### WHAT SCHOLARS WROTE

Nor has Sutherland's dicta in *Curtiss-Wright* about the sole organ stood up under scholarly scrutiny.

An article by Julius Goebel in the *Columbia Law Review* in 1938 attacked the principal tenets of Sutherland's opinion, concluding that his view of sovereignty "passing from the British crown to the union appears to be a perversion" of a dictum by Chief Justice John Jay in *Chisholm v. Georgia* (1793). To Goebel, Sutherland's inspiration in foreign affairs was the royal prerogative, not the limited delegation of power to the U.S. president in the Constitution.

Writing for the *Texas Law Review* in 1944, C. Perry Patterson regarded Sutherland's position on the existence of inherent presidential powers to be "(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous."

For the *Yale Law Journal* in 1946, David Levitan picked apart Sutherland's distinction between internal and external affairs and the belief that sovereignty flowed from the British crown directly to the national government and somehow to the president. He expressed alarm about the implications of Sutherland's position for democratic government. *Curtiss-Wright* marked "the furthest departure from the theory that [the] United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power."

More recently, Charles Lofgren, Michael Glennon, Michael Ramsey, and other scholars have written devastating critiques of Sutherland's analysis. Nevertheless, presidential advocates continue to rely on dicta in *Curtiss-Wright*—dicta regularly exploded as false—to give wings to a doctrine that is alien to democratic government and the American system of checks and balances.

This misuse of *Curtiss-Wright* is irresponsible and should stop. Neither John Marshall nor this Supreme Court decision supports unchecked presidential power—something that must be remembered in our current debates about the constitutional balance of powers.

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