How the Supreme Court Promotes Independent Presidential Power

Louis Fisher

For the first century and a half of our constitutional history, the Supreme Court did not advocate independent or exclusive presidential power in external affairs. On a regular basis it recognized that Congress possesses express and implied authority in matters of war and foreign commerce. The treaty power is assigned to the President and the Senate. If a collision occurred between executive military initiatives and statutory policy, the latter prevailed. Yet with *United States v. Curtiss-Wright* (1936), the Court endorsed the notion of plenary and exclusive presidential power in foreign affairs. This determination to elevate the president above Congress relied on a series of judicial errors and misconceptions that have inflicted substantial damage to democratic principles, the system of separation of powers and checks and balances, and constitutional government.

Constitutional Principles

The Framers understood that the decision to initiate military actions against foreign nations should not be left to single executives. They knew that war is the nurse of executive aggrandizement and a threat to individual liberties. John Jay's expertise in foreign affairs

---

Cato Journal, Vol. 39, No. 3 (Fall 2019). DOI: 10.36009/CJ.39.3.10.

Louis Fisher is a Visiting Scholar at the William and Mary Law School. From 1970 to 2010, he served as Senior Specialist in Separation of Powers with the Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress.

might have made him sympathetic to unilateral executive actions, but he bluntly warned in Federalist No. 4 that absolute monarchs "will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans." Those and other motives led single executives "to engage in wars not sanctified by justice or the voice and interest of his people" (Wright 2002: 101).

In the period after World War II, the cost of presidential errors, misjudgments, and deceptions has been heavy, both in material terms and constitutional values of self-government and checks and balances. Peter Shane pointed out that "time and time again, it has become evident that Presidents, left relatively unchecked by dialogue with and accountability to the other two branches, behave disastrously" (Shane 2009: 5). Harold Bruff expressed concern about how presidents interpret their constitutional powers: "Even in ordinary times, our system has recently become similar enough to a permanent constitutional dictatorship to give deep pause" (Bruff 2015: 465).

Initially, the Supreme Court interpreted constitutional disputes between the two elected branches without favoring presidential power over Congress. In *Little v. Barreme* (1804), it recognized that, when a presidential proclamation in time of war conflicts with congressional language expressed in a statute, the legislative position prevails.[1] In 1806, a federal circuit court reviewed the indictment of Colonel William S. Smith for engaging in military action against Spain. He claimed that his military enterprise "was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government."[2] The court rejected the argument that presidents or executive officials could waive statutory policy, in this case the Neutrality Act of 1794. A president may not "authorize a person to do what the law forbids."[3]

During the extraordinary conditions of the Civil War, President Abraham Lincoln understood and respected the powers of Congress.

[1]6 U.S. (2 Cr.) 169 (1804).
[2]United States v. Smith, 27 Fed. Cas. 1192, 1229 (C.C.N.Y. 1806) (No. 16,342).
[3]Id., 1230.

He never claimed exclusive, plenary, or independent authority over military actions. When the insurrection began with Congress out of session, he called out the militia, withdrew money from the Treasury, suspended habeas corpus in various districts, and placed a blockade on the rebellious states. But he did not claim full authority to act as he did. When Congress returned, he explained on July 4, 1861, that his actions, "whether strictly legal or not, were ventured upon what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them" (Richardson 1897–1925, vol. 7: 3225).

Lincoln told Congress that he believed his actions were not "beyond the constitutional competency of Congress" (ibid.) With those clear words, he admitted he had exercised not only his Article II powers but those of Article I as well. He understood that the only branch of government capable of making his acts legal was Congress. Lawmakers debated his request for retroactive authority with the explicit understanding that his acts had been illegal. Congress passed legislation approving Lincoln's actions "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[4]

Another issue concerns Lincoln's decision to place a blockade on ports in the rebellious states. In *The Prize Cases* (1863), the Supreme Court upheld his action.[5] Although this decision has been cited to uphold a broad interpretation of independent presidential power over war (Yoo 2009: 212–13), both the Lincoln administration and the Court read that power narrowly. Lincoln acted in a purely internal, domestic matter of civil war, having nothing to do with exercising the war power outside the United States.

Richard Henry Dana, Jr. provided legal analysis for Lincoln in this case. During oral argument, he explained that Lincoln's blockade had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress."[6] The Supreme Court embraced those principles. Writing for a 5–4 Court, Justice Robert Grier upheld the blockade but carefully limited the president's power to defensive actions, noting that he "has no power to initiate

[4]12 Stat. 326 (1861).

[5]67 U.S. 635, 671 (1863).

[6]The Prize Cases, 67 U.S. 635, 660 (1863), emphasis in original.

or declare a war against either a foreign nation or a domestic state." Those powers are reserved to Congress, which "alone has the power to declare a national or foreign war."[7]

From the Civil War to 1935, the relative powers of Congress and the president remained steady. Throughout the 1800s, the Supreme Court decided a number of immigration cases to place limits on state and local government treatment of aliens. The pattern was to defer to the constitutional authority of Congress under Article I, Section 8, to "regulate Commerce with foreign Nations, and among the several States."[8] No Justice made the slightest mention of some kind of inherent or exclusive presidential power over external affairs, as would be advanced in *Curtiss-Wright*. Immigration decisions in 1876 and 1884 continued to look to Congress for guidance.[9]

The Teapot Dome scandal during the Harding-Coolidge administrations marked an occasion where the Supreme Court had to weigh congressional and presidential powers. It chose to support legislative authority to investigate fraud and corruption within the executive branch. Eventually, Secretary of the Interior Albert Fall was tried and convicted of bribery. Harry Sinclair, who received from Secretary Fall the U.S. naval petroleum reserve at Teapot Dome, Wyoming, without any competitive bidding, was found guilty of contempt of Congress and later criminal contempt of court (Diner 2011, vol.1: 460–99).

When the issue first reached the Court in 1927, it had to decide the scope of the Senate's investigative power into executive branch activities. The Court explored whether each House of Congress has power to compel a private individual to appear before it or one of its committees and give testimony "needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution."[10] A unanimous Court held that this implied power

[7]Id., 668.

[8]Passenger Cases, 48 U.S. (7 How.) 283, 392–409, 411–12, 421, 442–43, 455, 462–64 (1849).

[9]Henderson v. Mayor of N.Y., 92 U.S. 259, 271–72, 274 (1976); Chy Lung v. Freeman et al., 92 U.S. 275, 280 (1876); Head Money Cases, 112 U.S. 580, 591, 596 (1884).

[10]McGrain v. Daugherty, 273 U.S. 135, 154 (1927).

flows from the express power in Article I that grants "all legislative powers" to Congress.[11] Such power, said the Court, dates back to the House investigation of the St. Clair military expedition in 1792.[12] In two other unanimous decisions, the Court underscored the full legislative authority of Congress to conduct investigations.[13]

The Erroneous "Sole Organ" Doctrine

In the 1936 *Curtiss-Wright* case, all that was necessary was for the Supreme Court to uphold the right of Congress to delegate to the president authority to place an arms embargo in a region in South America. After upholding the delegation, however, Justice George Sutherland proceeded to add pages of dicta (extraneous matter) that wholly misrepresented a speech given by John Marshall in 1800. The result: judicial support for a vast source of independent and plenary presidential power in external affairs.

The issue before the Court concerned legislation passed by Congress in 1934 that authorized the president to prohibit the sale of arms in the Chaco region of South America whenever he found it "may contribute to the reestablishment of peace" between belligerents.[14] In imposing the embargo, President Franklin D. Roosevelt did not claim any inherent, plenary, exclusive, or extraconstitutional power over external affairs. His proclamation prohibiting the sale of arms and munitions to the Chaco rested entirely on authority granted him by Congress. He acted "under and by virtue of the authority conferred in me by the said joint resolution of Congress."[15]

None of the parties in *Curtiss-Wright* discussed the availability of independent or inherent powers for the president (Fisher 2016a: 165–68) A district court held that the 1934 statute represented an unconstitutional delegation of legislative authority but said nothing about any reservoir of exclusive presidential power.[16] That decision was taken directly to the Supreme Court. Writing for the Court,

[11]Id., 160.

[12]Id., 161.

[13]Sinclair v. United States, 279 U.S. 263 (1929); Pan American Co. v. United States, 273 U.S. 456 (1927).

[14]48 Stat. 811, ch. 365 (1934).

[15]Id., 1745.

[16]United States v. Curtiss-Wright Exp. Corp., 14 F. Supp. 230 (S.D.N.Y. 1936).

Justice Sutherland reversed the district court and upheld the delegation of legislative power to the president to place an embargo on arms or munitions to the Chaco.[17] That should have been the end of the decision, but Sutherland proceeded to add pages of dicta to develop for the first time a theory of independent presidential power in external affairs.

He relied on a speech given by John Marshall in 1800 during service in the House of Representatives, attributing to Marshall a belief in independent presidential power over external affairs that Marshall never held. In 1800, President John Adams was running for reelection and opposed by Thomas Jefferson. Jeffersonians in the House urged that Adams be either impeached or censured for turning over to Great Britain an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to sanction Adams for encroaching on the judiciary and violating the doctrine of separation of powers.[18]

In the course of defending Adams, Marshall referred to the president as "the sole organ of the nation in its external relations."[19] As interpreted by Sutherland, that language gave the president "plenary and exclusive" authority over foreign affairs.[20] But that theory is contradicted by the plain text of the Constitution, which places many duties of foreign affairs in Congress. Moreover, the term "sole organ" is ambiguous. "Sole" suggests plenary and exclusive but what is meant by "organ"? Merely the president's authority to announce to other nations U.S. foreign policy after it has been decided by the two elected branches? The only way to understand Marshall is to read his entire speech to put those words in proper context. It is apparent that Sutherland and the colleagues who joined his opinion failed to do that.

Marshall defended Adams not on the grounds of some kind of independent presidential power but for an entirely different reason. Adams had turned over to England Thomas Nash, a native Irishman charged with murder. In doing so, Adams acted under Article 27 of the Jay Treaty, which specifically authorized the president to

[17]United States v. Curtiss-Wright, 299 U.S. 304 (1936).
[18]10 Annals of Cong. 533 (1800).
[19]Id., 614.
[20]United States v. Curtiss-Wright, 299 U.S. at 319–20.

extradite to England British citizens charged with murder or forgery.[21] Marshall did not champion plenary or exclusive presidential power over external affairs. He simply defended Adams for carrying out a treaty provision. Marshall was clear on that point.

Although Sutherland's sole-organ theory was patently false, the error remained in place decade after decade, eagerly cited by the executive branch, scholars, and the judiciary to promote independent presidential power in external affairs. In 1941, Attorney General Robert Jackson described Sutherland's opinion as "a Christmas present to the President" (Jackson 1941: 201). Peter Irons described *Curtiss-Wright* as the "birth of the imperial presidency" (Irons 2005: 120). Executive branch attorneys turned to the decision with great frequency. As noted by Harold Koh, 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—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief" (Koh 1990: 94).

Sutherland committed two other errors in *Curtiss-Wright* that promote independent presidential power in external affairs: (1) the theory that when the United States separated from Great Britain the field of external sovereignty moved directly from the Crown to the United States (and by implication to the president), and (2) the assertion that the president "alone negotiates" treaties and into that field "of negotiation the Senate cannot intrude."[22]

In an article published in 1938, Julius Goebel Jr. unmasked the error about external sovereignty coming directly to the U.S. national government and bypassing the states. In analyzing Sutherland's understanding of America's war of independence, he explained that after the separation from Great Britain the power of external sovereignty passed from the crown to the colonies "in their collective and corporate character as the United States of America" (Goebel 1938: 571). As Goebel pointed out, the Supreme Court in 1795 noted that states did in fact exercise what Justice Iredell called "high powers of what I may perhaps with propriety for distinction call external sovereignty" (ibid., 571, n.46). The treaty with Great Britain on September 3, 1783, acknowledged that fact: "said United States viz.

[21]8 Stat. 129 (1794).

[22]United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316–19 (1936).

New Hampshire, Massachusetts Bay, Rhode Island etc. to be free sovereign and independent States" (ibid). After breaking with England, several states entered into treaties.

As to Sutherland's claim that the president "alone negotiates" treaties and into that field the Senate may not intrude, Goebel dismissed that assertion as a false understanding of presidential authority in foreign affairs, pointing to early examples of presidents consulting with Senators over treaty negotiation (ibid, 572, n. 47). If one wants an ironic source to demolish Sutherland's theory of treaty negotiation, it would be his book published in 1919, reflecting on his 12 years as a U.S. Senator. He explained in clear terms that Senators do in fact participate in the negotiation phase and that presidents often accede to this "practical construction" (Sutherland 1919: 122–24).

Nazi Saboteur Case

In the years following the outbreak of World War II, the Supreme Court in several decisions failed to perform its role as an independent branch of government. Instead of upholding the system of checks and balances, it regularly deferred to presidential initiatives in the field of national security. That pattern is evident in the Nazi saboteur case of 1942, the Japanese-American internment cases of 1943–44, and subsequent decisions. In those cases the Supreme Court chose to perform as an arm of the executive branch.

In June 1942, eight German saboteurs landed on the East Coast of the United States, prepared to use explosives, fuses, and detonators against railroads, factories, bridges, and other strategic targets. Two of the men, George John Dasch and Ernest Peter Burger, decided to turn themselves in and help the FBI round up the others (Fisher 2003: 28–29, 32–34). Initially they were to be tried in civil court, but the Justice Department concluded that the maximum punishment could only be for about three years (Biddle 1962: 328). As Attorney General Francis Biddle recalled, President Franklin D. Roosevelt regarded the death penalty as "almost obligatory" (Roosevelt 1942).

Instead of relying on civil courts, Roosevelt created a military tribunal composed of seven generals. Before the tribunal could swear itself in, one of the defense attorneys, Kenneth Royall, announced that the tribunal was "invalid and unconstitutional." Drawing on the

principles established by the Supreme Court in *Ex parte Milligan* (1866), he stated that the civil courts in the District of Columbia were open and therefore challenged the jurisdiction of the tribunal. Furthermore, he charged that Roosevelt's order "violates in several specific particulars congressional enactments as reflected in the Articles of War" (Nazi saboteur trial: 5).

As the tribunal moved ahead, Royall began contacting Justices of the Supreme Court to see if they were willing to meet in special session in the middle of the summer to hear the case. After much discussion, the Court scheduled oral argument for Wednesday, July 29 (Danelski 1996: 68). The timing is quite extraordinary. The Court accepted the case without any action in the lower courts. A district court ruled against Royall on July 28 at 8 p.m.[23] Oral argument began at noon the following day and continued an additional day, for a total of nine hours. Justices usually receive briefs far in advance to give them time to study the issues, conduct independent research, and decide what kinds of questions to put to counsel. In the Nazi saboteur case, the briefs submitted by the two sides are dated the same day as oral argument.

At noon on July 31, Chief Justice Stone read a short per curiam that allowed the military tribunal to proceed. Papers from the D.C. Circuit reached the Supreme Court only a few minutes before Stone spoke. The petition for certiorari was filed in the Court at 11:59 a.m. on July 31. One minute later the Court convened, granted cert, and issued its per curiam. In making this announcement, the Court said it was acting "in advance of the preparation of a full opinion which necessarily will require a reasonable period of time for its preparation and which, when prepared, will be filed with the Clerk." In other words, the per curiam lacked analysis, reasoning, and justification. The Court regarded the per curiam as necessary because the military tribunal had been put on hold while defense attorneys sought relief in the civil courts. The Court ruled that the military tribunal was lawfully constituted, the defendants were held in lawful custody, and they had not shown cause for being discharged by writ of habeas corpus.[24]

[23]Ex parte Quirin, 47 F. Supp. 431 (D.D.C. 1942).

[24]Ex parte Quirin, 63 S.Ct. 1-2 (1942). The per curiam is also reproduced in a footnote in Ex parte Quirin, 317 U.S. 1, 18–19 (1942).

The military trial, concluding on August 1, decided that all eight men were guilty and deserved the death penalty. Roosevelt agreed on the death penalty for six but assigned prison sentences for Dasch and Burger. Six of the saboteurs were electrocuted on August 8. The Supreme Court now had to produce its "full opinion," a task that fell to Chief Justice Stone. He said it "seems almost brutal" to announce a decision after six of the petitioners had been executed "and it is too late for them to raise the question if in fact the articles [of war] as they construe them have been violated." Only after the war, he said, would the facts be fully known, with public release of the trial transcript and other documents. By that time, Dasch and Burger could raise legal questions successfully, which "would not place the present Court in a very happy light" (Stone 1942). Having issued the per curiam allowing the tribunal to proceed, resulting in the execution of six men, the Justices were not in a position to closely and independently analyze whether Roosevelt had violated the Articles of War.

In 1953, the Court considered whether to sit in summer session to hear the espionage case of Ethel and Julius Rosenberg. One Justice recalled that the Court sat in summer session in 1942 to hear the Nazi saboteur case. Should the Court once again issue a judgment and file a reasoned opinion later? Justice Jackson opposed this suggestion. Justice Frankfurter referred to *Ex parte Quirin* as "not a happy precedent" (Frankfurter 1953). In an interview on June 9, 1962, Justice Douglas remarked that the experience with *Quirin* "indicated, I think to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds, the examination of the grounds that has been advanced is made, sometimes those grounds crumble" (Douglas 1962). In a dissenting opinion in 2004, Justices Scalia and Stevens referred to *Ex parte Quirin* as "not this Court's finest hour."[25]

Japanese-American Internment Cases

On February 19, 1942, President Roosevelt issued Executive Order 9066, leading to a curfew ordered by the military on all persons of Japanese ancestry within a designated area, requiring them to "be within their place of residence between the hours of 8 p.m.

[25]Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004).

and 6 a.m."[26] A month later, Congress enacted legislation to ratify the executive order.[27] Gordon Hirabayashi, a U.S. citizen of Japanese descent, was prosecuted in federal district court for violating the curfew order. A unanimous Supreme Court upheld the order.[28]

In this case and the subsequent *Korematsu* decision, the Court failed to exert an independent judicial check on presidential power. It was unwilling to challenge and analyze various executive claims and assertions. In upholding the curfew, Chief Justice Stone said that, under the conditions presented in the case, it was "not for any court to sit in review of the wisdom" of what President Roosevelt and Congress decided "or substitute its judgment for theirs."[29] To Stone, the policy of General John L. DeWitt, who established the curfew, "involved the exercise of his informed judgment."[30] DeWitt's judgment was not informed. He believed that all Japanese, by race, are disloyal. There could be no such thing as "a loyal Japanese."[31] Deferring to a military judgment might be justified. Deferring to racism is not.

In one of three concurrences, Justice Douglas wrote, "If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency."[32] *If? Belief?* Courts are expected to operate on the basis of evidence, not suppositions, claims, and assertions. Douglas succumbed to the broadest proposition: "The point is that we cannot sit in judgment on the military requirements of that hour."[33]

President Roosevelt's executive order led to the transfer of Americans of Japanese descent to what were euphemistically called "relocation centers." With no evidence of disloyalty or subversive activity and without benefit of any procedural safeguards, they were imprisoned solely on grounds of race. Divided 6 to 3, the Court

[26]7 Fed. Reg. 1407 (1942).
[27]56 Stat. 173 (1942).
[28]Hirabayashi v. United States, 320 U.S. 81 (1943).
[29]Id., 93.
[30]Id., 103.
[31]Hirabayashi v. United States, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).
[32]Hirabayashi v. United States, 320 U.S. at 106.
[33]Id.

supported their transfer to detention camps located in various parts of the country. Writing for the Court, Justice Black noted, "In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did."[34]

In dissent, Justice Murphy protested that the exclusion order resulted from an "erroneous assumption of racial guilt" found in General DeWitt's report, which referred to all individuals of Japanese descent as "subversives" belonging to "an enemy race" whose "racial strains are undiluted."[35] He dissented from "this legalization of racism."[36] A dissent by Justice Jackson remarked that "here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents to which he had no choice, and belongs to a race from which there is no way to resign."[37] Yet he promoted judicial subservience to the executive branch with this reasoning: "the Court, having no real evidence before it, had no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable."[38]

Jackson claimed the Court had "no choice." Justices always have a choice. Certainly they had a choice when Jackson described DeWitt's statement as unsworn, self-serving, and untested by cross-examination. The Justices had a duty to insist: "We decide cases based on evidence. You have provided none, other than crude assertions of racism." The Court was not faced with what might be called a "military judgment." There was no reason to defer to DeWitt's purely prejudiced and ignorant beliefs about race and sociology.

In 1962, Chief Justice Warren reflected on the Japanese-American decisions. In times of emergency, he suggested that the judiciary could not function as an independent and coequal branch: "The consequence of the limitation under which the Court must sometimes operate in this area is that other agencies of government

[34]Korematsu v. United States, 323 U.S. 214, 217–18 (1944).
[35]Id., 235–36.
[36]Id., 242.
[37]Id., 243.
[38]Id., 245.

must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution" (Warren 1962: 192). In so many words: Don't expect the Court to deliver reliable, persuasive, and authoritative decisions on certain constitutional questions. Warren offered a provocative sentence: "To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is" (ibid., 192–93). In short, the Court held that the government's action was constitutional when it was not.

On February 20, 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese Americans, resulting in the "uprooting of loyal Americans."[39] In 1980, Congress established a commission to gather facts to determine the wrong done by Roosevelt's order. Released in 1982, the report stated that the order "was not justified by military necessity." The policies that followed from it—curfew and detention—"were not driven by analysis of military conditions." Instead, the factors that shaped those decisions were "race prejudice, war hysteria and a failure of political leadership."[40] Missing from that list: a surrender of judicial independence and a willingness to defer to executive assertions unsupported by any reliable evidence.

In the 1980s, Gordon Hirabayashi and Fred Korematsu returned to court after newly discovered documents revealed the extent to which executive officials had deceived federal courts. At the time of Korematsu's case in 1944, Justice Department attorneys were aware that a 618-page document called *Final Report*, prepared by the War Department for General DeWitt, contained erroneous claims about alleged espionage efforts by Japanese Americans. The FBI and the Federal Communications Commission rejected War Department assertions that some Japanese Americans had sent signals from shore to assist Japanese submarine attacks along the Pacific coast (Irons 1983: 278–84).

The administration had a professional obligation to inform the judiciary about those false allegations but failed to do so (id., 278).

[39]Proclamation 4417, 42 Fed. Reg. 7741 (1976).

[40]Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (1982), 18.

A district court in 1984 concluded that the executive branch had "knowingly withheld information from the courts when they were considering the critical question of military necessity in this case."[41] On that basis, the district court vacated Korematsu's conviction. The Justice Department did not appeal.

Hirabayashi also challenged his conviction for violating the curfew order. The Justice Department had argued that the government lacked time to separate loyal Japanese Americans from those who might be subversive. However, General DeWitt believed that, because of racial ties, filial piety, and a strong bond of common tradition, culture, and customs, it was "impossible to establish the identity of the loyal and the disloyal with any degree of safety."[42] For DeWitt, there was no "such a thing as a loyal Japanese."[43] The initial draft report contained his remarks. The final report, after War Department editing, did not. The Justice Department received the final report but not the draft version.

In 1986, a district court ruled that, although the Justice Department "did not knowingly conceal" from Hirabayashi's counsel and the Supreme Court the reasons DeWitt offered, it was necessary to charge the executive branch with concealment because the information was known to the War Department. The failure of the executive branch to disclose DeWitt's position "was an error of the most fundamental character" and Hirabayashi was "seriously prejudiced."[44] The district court vacated that conviction but declined to vacate his conviction for violating the curfew order.[45] On appeal, the Ninth Circuit vacated both convictions.[46] These challenges by Hirabayashi and Korematsu in the 1980s are carefully analyzed by Eric Yamamoto (Yamamoto 2018: 37–50).

The Supreme Court now had sufficient evidence that its decisions in *Hirabayashi* and *Korematsu* were defective and needed to be repudiated. However, that step was not taken until June 28, 2018, when the Court in *Trump v. Hawaii* announced that a dissenting

[41]Korematsu v. United States, 584 F. Supp. 1406, 1417 (D. Cal. 1984).
[42]Hirabayashi v. United States, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986).
[43]Id., 1452.
[44]Id., 1457.
[45]Id., 1457–58.
[46]Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).

opinion by Justice Sotomayor "affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided."[47] If it was defective in 1944, why did it take 74 years to announce a correction? Why not also renounce *Hirabayashi*? Does that decision remain "good law"?

Judicial Limits on Executive Power

After *Curtiss-Wright*, the Supreme Court at times pushed back against assertions of independent presidential authority in external affairs. In the 1937 *Belmont* case, the Supreme Court recognized broad presidential power in a case involving President Roosevelt's recognition of Soviet Russia, leading to the "Litvinov Assignment" in 1933 and subsequent property claims in the courts. A unanimous Supreme Court upheld the agreement as a valid international compact.[48] Written by Justice Sutherland, the Court said that no state policy (in this case New York) "can prevail against the international compact here involved."[49]

Subsequent decisions on executive agreements began to challenge claims of independent presidential power. In writing for the Court in *United States v. Pink* (1942), Justice Douglas referred several times to the president as the "sole organ" of the national government in external affairs,[50] but also said that "the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government."[51] Thus, authority was committed to both elected branches, not simply to the president. A dissent by Harlan Fiske Stone, joined by Owen Roberts, objected that the majority improperly relied on *Belmont*, a decision they said lacked "the support of reason or accepted principles of law."[52] It would be difficult to more thoroughly discredit a judicial ruling.

The State Department has acknowledged that an executive agreement cannot be "inconsistent with legislation enacted by Congress in

[47]Trump v. Hawaii, 585 U.S. ____ (2018).
[48]United States v. Belmont, 301 U.S. 324 (1937).
[49]Id., 327.
[50]United States v. Pink, 315 U.S. 203, 223, 229 (1942).
[51]Id., 222–23.
[52]Id., 244.

the exercise of its constitutional authority."[53] That position gained strength in 1955 when the Supreme Court struck down an executive agreement because it contravened an existing U.S. commercial statute with Canada. Imports from a foreign country represented foreign commerce "subject to regulation, so far as this country is concerned, by Congress alone."[54]

Other decisions placed limits on executive agreements. In one case, the United States agreed to pay Austria a flat sum to settle all obligations incurred by U.S. armed forces. A naturalized American citizen sued to recover damages to her home in Austria, which had been used by American troops as an officers' club. The Court of Claims held in 1955 that the woman was entitled to compensation under the Fifth Amendment: "We think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights."[55] Also in 1955, the Supreme Court considered the use of a court-martial to try Robert W. Toth after he had been honorably discharged from the Air Force. He was apprehended by Air Force police at his job in Pittsburgh and flown to Korea to be tried for murder while he was an airman. The Court held that a military tribunal was not a constitutional substitute for trial by jury.[56]

Several other cases were decided in 1956 and 1957. One involved Dorothy Krueger Smith, wife of an officer of the U.S. Army living in Japan. Pursuant to an executive agreement with Japan, she was tried and convicted by court-martial in Japan for the murder of her husband. Sentenced to life imprisonment, she was brought to a federal prison in the United States. Divided 6–3, the Supreme Court in *Kinsella v. Krueger* held that a civilian dependent on an American serviceman accompanying him on foreign duty may constitutionally be tried by an American court-martial in a foreign country for an offense committed there.[57]

This decision had a short shelf life. The dissent by Earl Warren, Hugo Black, and William Douglas noted that this case, followed by a

[53]11 Foreign Affairs Manual 723.1–2 (C).

[54]United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955).

[55]Seery v. United States, 127 F. Supp. 601, 606 (Ct. Cl. 1955).

[56]Toth v. Quarles, 350 U.S. 11 (1955).

[57]Kinsella v. Krueger, 351 U.S. 470, 474 (1956).

similar case decided the same day, *Reid v. Covert*, gave the military "new powers not hitherto thought consistent with our scheme of government."[58] A second case involved Clarice Covert, wife of a U.S. Air Force sergeant. She was tried and convicted by court-martial in England for murdering her husband there, sentenced to life imprisonment, and brought to a federal prison in the United States. A brief opinion upheld her court-martial, with Warren, Black, and Douglas again in dissent.[59]

A year later, the Supreme Court chose to reverse course. For a 6–2 Court, Black held that "Mrs. Smith [Krueger] and Mrs. Covert could not constitutionally be tried by military authorities." He rejected the idea that "when the United States acts against citizens abroad it can do so free of the Bill of Rights."[60] Part of the Bill of Rights included the right to a jury trial under the Fifth Amendment. To Black, an executive agreement with a foreign nation could not confer power "which is free from the restraints of the Constitution."[61]

The Steel Seizure Case

For Supreme Court actions against the president involving external affairs, scholars turn frequently to the 1952 decision striking down President Truman's seizure of steel mills needed to prosecute the war in Korea. At a news conference on April 17, Truman was asked if he could seize steel mills under the administration's theory of presidential power, could he "also seize the newspapers and/or radio stations?" He responded: "Under similar circumstances the President of the United States has to act for whatever is for the best of the country."[62]

During oral argument in district court, Assistant Attorney General Holmes Baldridge pointed to two limitations on the president: "One is the ballot box and the other is impeachment." But if a president decided an emergency exists, he said courts had no authority to even review the president's judgment (House of

[58]Id., 486.
[59]Reid v. Covert, 351 U.S. 487 (1956).
[60]Reid v. Covert, 354 U.S. 1, 5 (1957).
[61]Id., 16.
[62]Public Papers of the Presidents, 1952, 273.

Representatives 1952: 371–72). Baldridge relied heavily on the claim of "inherent" powers for the president (ibid., 386–86, 401–06). On April 29, 1952, District Judge David Pine wrote a blistering opinion, wholly rejecting the Justice Department's claim of inherent presidential power. In finding Truman's seizure of the steel mills to be unconstitutional, Pine acknowledged that a nationwide strike could do extensive damage to the country but said a strike would be less injurious than "a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power."[63] To Pine, the administration's theory of presidential emergency power "spells a form of government alien to our Constitutional government of limited powers."[64]

This forthright repudiation of independent presidential power was not matched by the Supreme Court when it sustained Pine's decision. Writing for a 6-3 Court, Justice Hugo Black held fairly close to Pine's reasoning, but each of the five concurring Justices in their separate opinions advanced a variety of views regarding the scope of the president's emergency power. The disciplined nature of Pine's opinion was lost among rambling concurrences that often gave a green light to independent presidential power unchecked by the judiciary.

A concurrence by Robert Jackson presented conflicting views on the president's constitutional authority. He remarked that a judge, like an executive adviser, "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[65]

Here Jackson let his literary efforts outrun his judicial duty to analyze the Constitution. The intent of the Framers was not nearly as cloudy as Jackson suggested. Indeed, as to war powers it is clear the Framers placed on Congress sole authority to take the country from a state of peace to a state of war. At the end of Jackson's opinion,

[63]Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 577 (D.D.C. 1952).
[64]Id., 576.
[65]Youngstown Co. v. Sawyer, 343 U.S. 579, 634–35 (1952).

he broke free of Joseph trying to interpret dreams and stated with confidence and eloquence a fundamental principle held by the Framers: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[66]

Judicial Deference to Executive Claims

Other cases in the 1950s highlight the willingness of the Supreme Court to relinquish its constitutional duty to evaluate and judge executive actions in external affairs. In *Knauff v. Shaughnessy* (1950), the Court deferred to executive judgments about deporting Ellen Knauff. Born in Germany of Jewish parents, she managed to escape to England where she worked during World War II. After the war, she returned to Germany and married Kurt Knauff, a U.S. citizen and veteran who had been honorably discharged. Intent on becoming a U.S. citizen, she booked a ship to America and arrived in New York Harbor on August 14, 1948. Instead of being permitted to land and meet her husband's family, she was taken to Ellis Island (Knauff 1952). On October 6, an immigration official recommended that she be permanently excluded from America. There was no hearing. The official justified exclusion because her admission would be "prejudicial" to the United States. No evidence was offered. On that same day, Attorney General Tom Clark entered a final order for exclusion (ibid., 78).

After obtaining legal assistance, Knauff filed a habeas petition with a district court. It dismissed the petition, as did the Second Circuit.[67] Neither court objected to basing her exclusion on confidential information withheld from her attorney and federal judges. The Second Circuit was willing to defer entirely on unsupported and uncorroborated executive claims. On January 16, 1950, the Supreme Court decided 4 to 3 in favor of the Truman administration.[68]

In a powerful dissent, Justice Jackson found no evidence that Congress had authorized "an abrupt and brutal exclusion of the wife

[66]Id., 655.

[67]United States ex rel. Knauff v. Watkins, 173 F.2d 599 (2d Cir. 1949).

[68]Knauff v. Shaughnessy, 338 U.S. 537 (1950). Justices Douglas and Clark took no part.

of an American citizen without a hearing."[69] To Jackson, the claim that evidence of guilt "must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." He added, "Security is like liberty in that many are the crimes committed in its name."[70] He would have directed the Attorney General "either to produce his evidence justifying exclusion or to admit Mrs. Knauff to the country."[71]

On August 29, 1951, an immigration appeals board held there was not adequate evidence to justify her exclusion. The appeals board ordered Knauff admitted for permanent residence (Knauff 1952: Appendix). To the appeals board, the statements of the three witnesses produced by the administration were pure hearsay. As to anything dealing with espionage or subversive activities by Knauff, they had no personal knowledge (id., 16). On November 2, 1951, Attorney General J. Howard McGrath approved the decision of the appeals board (id., final page, unnumbered). Ellen Knauff left Ellis Island to begin her life in America.

The Supreme Court's decision in the *Knauff* case is regrettable, but there were no long-term consequences. Quite the opposite occurred with the Court's decision in the state secrets case of *United States v. Reynolds* (1953), which opened the door to executive abuse for decades to come, particularly during the Bush II and Obama administrations (Fisher 2019: 183–202). Three widows sought an accident report after their husbands died in the crash of a B-29 on October 6, 1948. Five of eight crew members perished. Also on board were five civilian engineers who provided technical assistance regarding secret equipment being tested on the flight. Four of the engineers died (Fisher 2008: 1–2). Widows of three civilian engineers sued under the Federal Tort Claims Act of 1946, which authorized federal agencies to settle claims against the United States caused by negligent or wrongful acts of federal employees acting within the scope of their official duties.[72] The widows requested several key

[69]Id., 550.
[70]Id.
[71]Id., 552.
[72]60 Stat. 843, sec. 403(1) (1946).

documents, including the official accident report and depositions of the three surviving crew members.

Deciding access to evidence is central to judicial duties. John Henry Wigmore, author of the standard treatise on evidence, recognized the existence of state secrets but insisted that the scope of that privilege must be determined by a judge, not executive officials (Wigmore 1940, vol. 8: §2212a). In both district court and appellate court, federal judges in the *Reynolds* case fully recognized the independent duty of the judiciary to decide questions of secrecy by personally examining documents claimed by the executive branch to contain confidential information. On September 12, 1950, District Judge Kirkpatrick directed the government to produce for his examination *in camera* several documents, including the accident report and statements of the three surviving crew members. When the government failed to produce the documents, Kirkpatrick ruled in favor of the three widows (Fisher 2008: 56–57).

On December 11, 1951, the Third Circuit upheld Kirkpatrick's decision. It explained that granting the government its "sweeping privilege" would be "contrary to a sound public policy."[73] It would be a small and easy step, it said, "to assert a privilege against any disclosure of records merely because they might prove embarrassing to governmental officers."[74] To allow the government as a party to "conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[75]

The Supreme Court decided to act not as a coequal branch of government but as a facilitator of executive claims and assertions. It never looked at the accident report to see if it contained state secrets or evidence of government negligence. The government's brief described the accident report in this manner: "To the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with the factors in relation to projected or suggested secret improvements it falls

[73]Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951).
[74]Id.
[75]Id., 997.

within the judicially recognized 'state secrets' privilege."[76] "To the extent"? In the case of the accident report and the survivor statements, the extent was zero.[77]

In its decision issued on March 9, 1953, a 6–3 Supreme Court ruled that the government had presented a valid claim of privilege. In doing so, it offered conflicting principles of judicial authority: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[78] If the government can withhold a document from a court, even for *in camera* inspection, a judge would be unable to determine if circumstances "are appropriate for the claim of privilege." Moreover, there are no grounds to regard *in camera* inspection by a judge as "disclosure."

The Supreme Court cautioned that judicial control "over the evidence of a case cannot be abdicated to the caprice of executive officers."[79] If executive officers did act capriciously, as they did in *Reynolds*, a court would not know unless it independently examined the documents. Through the procedures followed by the Court, judicial control was clearly "abdicated to the caprice of executive officers." The Court chose to serve not justice but the executive branch. It announced that, in this type of national security case, the courtroom tilts away from the statutory rights of private litigants in a tort claims case and provides a safe haven for executive assertions and deception.

In 1995, the federal government declassified a number of documents, including the accident report on the B-29 that crashed in 1948. Five years later the three widows discovered the report and decided to return to court (Fisher 2008: 165–66). They filed a motion for a writ of *coram nobis*, charging that the government had misled the Supreme Court and committed fraud against it. The writ is a motion asking a court to review and correct its judgment because it was based not on error of law but rather on error of fact. Courts need

[76]Brief for the United States, United States v. Reynolds, No. 21, U.S. Supreme Court, Oct. Term, 1952, 45.

[77]For access to the report, see pages 10a–68a of www.fas.org.sgp/othergov/reynoldspetapp.pdf.

[78]United States v. Reynolds, 345 U.S. 1, 8 (1953).

[79]Id., 9–10.

to revisit a judgment when they discover that fraud has cast a shadow over a ruling. Tolerating fraud undermines respect for the judiciary and reduces public confidence in the courts.

On March 4, 2003, the three widows and their attorneys petitioned the Supreme Court for a "writ of error *coram nobis* to remedy fraud upon this Court." The petition asked the court to vacate its decision in *Reynolds*, compensate the widows and their families for their losses, and award them attorney fees and single or double costs to sanction the government's misconduct.[80] Without explanation, the Court on June 23, 2003 denied the petition.[81] The three families lost in district court and in the Third Circuit.[82] On December 21, 2005, the three families filed a cert petition with the Supreme Court. The case went to conference on April 28, 2006, and on May 1 the Court refused to take the case.[83] Fundamental values were given short shrift throughout this *coram nobis*: the need to protect the integrity, independence, and reputation of the federal judiciary and the right of citizens to sue for relief.

The scope of the state secrets privilege increased substantially after the terrorist attacks of September 11, 2001. The Bush administration invoked the privilege to prevent litigants from challenging the practice of the executive branch to transfer suspects to other countries for interrogation and torture ("extraordinary rendition"). The Obama administration continued to rely on the state secrets privilege. Federal courts largely deferred to executive branch claims about privileged documents and state secrets (Fisher 2016b; Fisher 2017: 275–79, 280–83; Fisher 2018: 168–85).

Consider the case of Maher Arar, a Canadian citizen. In attempting to return home to Ottawa in September 2002, he was pulled aside for questioning at JFK airport and then sent to Syria where he was subjected to physical abuse for nearly a year before being released. He filed a civil suit but the Bush administration invoked the state secrets privilege and a federal district court held he

[80]Petition for a Writ of Error *Coram Nobis* to Remedy Fraud upon This Court, In re Patricia J. Herring, No. 02M76, March 4, 2003.

[81]In re Herring, 539 U.S. 940 (2003).

[82]Memorandum and Order, Herring v. United States, Civil Action No. 03-CV-5500-LDD (E.D. Pa. Sept. 10, 2004); Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005).

[83]Herring v. United States, 547 U.S. 1123 (2006).

lacked standing.[84] Canada conducted an investigation and discovered that its intelligence officials had shared with the United States false and unreliable information about Arar. On January 26, 2007, Prime Minister Stephen Harper released a public apology.[85] No such apology came from the United States, responsible for Arar's suffering.

A number of Supreme Court decisions have pushed back against presidential claims of authority in the field of external affairs. Prominent examples include the Court's decision in 1971 to allow publication of the Pentagon Papers and permit access to the Watergate Tapes that led to impeachment actions against President Nixon. Unfortunately, in deciding those cases Justices created confusion and uncertainty about basic constitutional principles by offering support for independent presidential authority.

For example, Justice Stewart in a concurrence in the Pentagon Papers case said, "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations."[86] In subsequent years, those remarks could be cited to promote independent presidential authority in external affairs. In the Watergate Tapes case, the Court opened the door to absolute presidential privilege in a number of exceedingly broad areas: "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide."[87] Here the Court invited presidents to invoke the nebulous domains of military, diplomatic, and "sensitive" national security secrets.

In several cases after 9/11, the Supreme Court rejected presidential claims of constitutional authority to create military tribunals and to hold detainees, including U.S. citizens, without access to habeas

[84]Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D. N.Y. 2006).

[85]"Harper's Apology 'Means the World': Arar," CBS News, January 26, 2007; http://www.cbc.ca/news.canada/harper-s-apology-means-the-world-arar-1.64681.

[86]New York Times Co. v. United States, 403 U.S. 713, 727 (1971).

[87]United States v. Nixon, 418 U.S. 683, 706 (1974).

corpus and federal courts.[88] As explained by Allan Ryan, each of the decisions "significantly altered the course that the president had set in what he called the 'global war on terrorism'" and each "significantly expanded the rights under American law of enemy detainees" (Ryan 2015: 189).

The Jerusalem Passport Case

In signing legislation in 2002, President George W. Bush raised objections about language in Section 214(d), which provided that, for purposes of registration of birth, certification of nationality, or issuance of a passport to a U.S. citizen born in Jerusalem, the Secretary of State "shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[89] Bush objected that, if the language were construed to impose a legislative requirement, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states."[90] The language "speak for the Nation" was an apparent allusion to John Marshall's "sole organ" speech in 1800, given prominence by the *Curtiss-Wright* decision.

Litigation on Section 214(d) took many years, in part because the D.C. Circuit decided in 2009 that the issue was a "political question," only to be turned back by the Supreme Court in 2012. The Court ordered the D.C. Circuit to decide the constitutional issue: Was the statutory provision valid or should it be struck down in light of authority the Constitution grants to the president?[91] On July 23, 2013, the D.C. Circuit relied five times on the sole-organ doctrine in *Curtiss-Wright* to hold that Section 214(d) "impermissibly infringes" on the president's power to recognize foreign governments.[92] Acknowledging that the doctrine was dicta, the

[88]Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

[89]115 Stat. 1366, § 214(d) (2002).

[90]Public Papers of the Presidents, 2002, II, 1698.

[91]Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012).

[92]Zivotofsky v. Kerry, 725 F.3d 197 (D.C. Cir. 2013).

D.C. Circuit explained it was Supreme Court dicta and had been relied on many times over subsequent decades. It did not occur to the D.C. Circuit to read John Marshall's speech to see if the dicta constituted plain error.

On July 17, 2014, I filed an amicus brief with the Supreme Court, explaining why the sole-organ doctrine was erroneous dicta and should be corrected in order to protect the constitutional system of checks and balances. I identified two other errors in *Curtiss-Wright* and asked that they be corrected also (Fisher 2014). When the Court is in session, the *National Law Journal* each week selects a brief that merits attention. On November 3, 2014, it selected mine, featuring this heading: "Can the Supreme Court Correct Erroneous Dicta?" (Schuman 2014).

The following year, in *Zivotofsky v. Kerry*, the Supreme Court finally jettisoned the sole-organ doctrine but decided to continue in place other erroneous dicta inserted in *Curtiss-Wright*. Writing for the Court, Justice Anthony Kennedy reviewed the position of Secretary of State John Kerry who relied on *Curtiss-Wright* language describing the president as "the sole organ of the federal government in the field of international relations."[93] The Court said it "declines to acknowledge that unbounded power. . . . The *Curtiss-Wright* case does not extend so far as the Secretary suggests."[94] At the same time, the Court decided to give new life to the *Curtiss-Wright* error that the president "has the sole power to negotiate treaties."[95]

Having supposedly discredited the sole-organ doctrine, the Court proceeded to create a close cousin that endorsed independent presidential power in external affairs. First, it stated that the recognition of foreign governments "is a topic on which the Nation must 'speak . . . with one voice,'" citing *American Ins. Assn. v. Garamendi* (2003), and that "voice must be the President's."[96] Having attributed to the president the quality of unity, the Court cited Alexander Hamilton's Federalist No. 70 to identify four other presidential qualities: decision, activity, secrecy, and dispatch.[97] The Court

[93]Zivotofsky ex rel. Zivotofsky, 135 S.Ct. 2076, 2089 (2015).
[94]Id.
[95]Id., 2086.
[96]Id.
[97]Id.

presented those qualities, along with unity, as though they are invariably salutary in advancing national and constitutional interests.

However, those same five qualities can result in actions highly damaging to the country, both politically and constitutionally. Consider presidential initiatives from 1950 to the present time: President Truman ordering U.S. troops in Korea to travel northward, prompting Chinese forces to enter and create a costly stalemate; President Johnson's decision to escalate the war in Vietnam; President Reagan's involvement in Iran-Contra, leading to prosecution of those involved and risking his impeachment; President Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction, with all six claims found to be empty; and President Obama ordering military action against Libya in 2011, leaving behind a country broken legally, economically, and politically (Fisher 2013: 97–98, 132–34, 216–21, 238–47, 282–86).

Conclusion

Judicial decisions that vest independent power in the president in external affairs come at high cost to constitutional principles, congressional authority, the system of checks and balances, and public trust in government. There should be little doubt that the Framers expressly rejected the British model of John Locke and William Blackstone that placed all of external power in the Executive (Fisher 2013: 1–6). Yet beginning in 1936 with *Curtiss-Wright*, the Supreme Court advanced that doctrine on the basis of various arguments that were repeatedly shown by scholars to be erroneous and fabricated. Writing in 2016, David Rudenstine pointed out that decisions by the Supreme Court in the field of national security have denied a remedy to injured individuals, insulated unlawful conduct, needlessly reinforced a secrecy system, undercut the need for transparency, and eroded democratic values (Rudenstine 2016: 316). As a result, the Court has "effectively elevated the executive in national security cases above the law" (id., 8).

The record from *Curtiss-Wright* to the present time reflects a Supreme Court that regularly idealizes the president as equipped to act responsibly and competently in external affairs. The Court's orientation mirrors a number of scholars after World War II who championed the president as uniquely qualified to act in the

national interest. That academic theory has been subjected to vigorous critiques within the scholar community, leading some, such as Arthur S. Schlesinger, Jr., to reverse course and warn about independent presidential power (Schlesinger 1973). Unfortunately, little of that debate and reconsideration takes place in the Supreme Court. Implicit trust and confidence in the presidency remains a prominent value in its decisions, doing damage to constitutional government and individual rights.

References

Biddle, F. (1962) *In Brief Authority*. New York: Doubleday.

Bruff, H. H. (2015) *Untrodden Ground: How Presidents Interpret the Constitution*. Lawrence: University Press of Kansas.

Danelski, D. J. (1996) "The Saboteurs' Case." *Journal of Supreme Court History* 21 (1): 61–82.

Diner, H. (2011) "The Teapot Dome Scandal, 1922–24." In R. A. Bruns, D. L. Hostetter, and R. W. Smock (eds.) *Congress Investigates: A Critical and Documentary History*, Revised ed., Vol. 1: 460–99. New York: Facts On File, Inc.

Douglas, W. O. (1962) "Conversation with Justice Walter F. Murphy, June 9, 1962," 204–5. Seeley G. Mudd Manuscript Library, Princeton University.

Fisher, L. (2003) *Nazi Saboteurs on Trial: A Military Tribunal and American Law*. Lawrence: University Press of Kansas.

_____ (2008) *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*. Lawrence: University Press of Kansas.

_____ (2013) *Presidential War Power*, 3rd ed. Lawrence: University Press of Kansas.

_____ (2014) "Brief Amicus Curiae of Louis Fisher in Support of Petitioner." *Zivotofsky v. Kerry*, No. 13–628, July 17, 2014. Available at www.loufisher.org/docs/pip/Zivotofsky.pdf.

_____ (2016a) "The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*." *Constitutional Commentary* 31(Summer): 149–219.

_____ (2016b) "The State Secrets Privilege: From Bush II to Obama." *Presidential Studies Quarterly* 46 (March): 173–93.

_____ (2017) *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings*. Lawrence: University Press of Kansas.

_____ (2018) *President Obama: Constitutional Aspirations and Executive Actions*. Lawrence: University Press of Kansas.

_____ (2019) *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution*. Lawrence: University Press of Kansas.

Frankfurter, F. (1953) "Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952," June 5, 1953, Vol. 8; Frankfurter Papers, Harvard Law School, Part1, Reel 70, Library of Congress.

Goebel, J. Jr. (1938) "Constitutional History and Constitutional Law." *Columbia Law Review* 38: 555–77.

House of Representatives (1952) "The Steel Seizure Case," H. Doc. No. 534, Part I, 82d Sess., 2d Sess.

Irons, P. (1983) *Justice at War: The Story of the American Internment Cases*. New York: Oxford University Press.

_____ (2005) *War Powers: How the Imperial Presidency Hijacked the Constitution*. New York: Metropolitan Books.

Jackson, R. H. (1941) *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*. New York: Vintage Books.

Knauff, E. R. (1952) *The Ellen Knauff Story*. New York: W.W. Norton.

Koh, H. H. (1990) *The National Security Constitution: Sharing Power After the Iran-Contra Affair*. New Haven: Yale University Press.

Nazi saboteur trial. Held on the fifth floor of the Justice Department from Wednesday, July 8 to Saturday, August 1, 1942. Copies of this 2,967-page transcript are located in several places. I used the one at National Archives, College Park, Md., identified as "RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 334178, 1942 German Saboteur Case."

Richardson, J. D., ed. (1897–1925) *A Compilation of the Messages and Papers of the Presidents*. New York: Bureau of National Literature.

Roosevelt, F. D. (1942) "Memo to Francis Biddle, June 30, 1942, PSF." Departmental File, Justice, 1940–44, Box 56, FDR Library.

Rudenstine, D. (2016) *The Age of Deference: The Supreme Court, National Security, and the Constitutional Order*. New York: Oxford University Press.

Ryan, A. A. (2015) *The 9/11 Terror Cases: Constitutional Challenges in the War against Al Qaeda*. Lawrence: University Press of Kansas.

Schlesinger, A. S. Jr. (1973) *The Imperial Presidency*. Boston: Houghton Mifflin.

Schuman, J. (2014). "Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?" *National Law Journal* (November 3). Available at www.loufisher.org/docs/pip/fisherbrief.pdf.

Shane, P. M. (2009) *Madison's Nightmare: How Executive Power Threatens American Democracy*. Chicago: University of Chicago Press.

Stone, H. F. (1942) Letter to Felix Frankfurter, September 10, 1942, Frankfurter Papers, Library of Congress.

Sutherland, G. (1919) *Constitutional Power and World Affairs*. New York: Columbia University Press.

Warren, E. (1962) "The Bill of Rights and the Military." *New York University Law Review* 37: 181–203.

Wigmore, J. H. (1940) *Evidence in Trials at Common Law*. Boston: Little, Brown.

Wright, B. F., ed. (2002) *The Federalist*. New York: Metrobooks.

Yamamoto, E. K. (2018) *In the Shadow of* Korematsu: *Democratic Liberties and National Security*. New York: Oxford University Press.

Yoo, J. (2009) *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*. New York: Kaplan Publishing.