

## Cooper: Comment on Schlesinger

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## COMMENT

CHARLES J. COOPER\*

Professor Schlesinger's paper reads to me like two papers. The first half is devoted largely to defending our constitutional system of separation of powers against the arguments favoring establishment of a new order based more nearly on the parliamentary model. He cites the work of the Commission on the Constitutional System, which has managed to attract a good deal of attention to its ideas in this bicentennial year. I agree with Professor Schlesinger's conclusion—which occurs about midway in the paper—that “the separation of powers has caused its share of problems. But in the main it has worked well enough.”<sup>1</sup>

I agree with Professor Schlesinger that the founders were wise to create a system of separated powers because the risks of tyranny are too high if all governmental power is concentrated in one individual or institution. Moreover, the system of checks and balances that they developed, on the whole, strikes the right balance. (I have had my doubts, however, about whether the Constitution should permit the Senate to give its advice and consent to the appointment of Assistant Attorneys General!) In particular, the veto power has surely saved the American people from many bad laws, and the ratification power has equally surely saved the American people from many bad treaties.

But while I find nothing particularly objectionable in the first half of the paper, neither do I find anything which is particularly profound or illuminating—in marked contrast to many of Professor Schlesinger's other writings which have earned him a well-deserved scholarly reputation. Indeed, the first half of his paper seems designed not so much to examine the constitutional issues, as to provide a quasi-academic background, or excuse, to share with us in this academic forum the ideological polemic that is the second half of his paper.

With respect to the latter half of his paper, I have several partic-

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1. Schlesinger, *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 64 (1987).

ular objections and one general objection. Let me begin with my particular objections—objections which concern Professor Schlesinger's frenzied effort to show that President Ronald Reagan violated numerous laws and his constitutional oath of office.<sup>2</sup>

First, I would like to comment on Professor Schlesinger's discussion of the "Intelligence Finding," a mechanism by which the President and only the President may authorize a covert intelligence activity. Professor Schlesinger describes the Intelligence Finding as "[a]n especially pernicious device, unknown to the Constitution and very far indeed from the original intent about which the Attorney General lectures us so often."<sup>3</sup> "[T]he Intelligence Finding," he continues, "offers a negligent or unscrupulous President a way of secretly and unilaterally violating the law. As employed by President Reagan this device is a blow to the system of accountability and to the balance of the Constitution."<sup>4</sup> Indeed, according to Professor Schlesinger, the current administration has seized on this "pernicious device" to establish "a government of decrees—and secret decrees at that."<sup>5</sup>

But where—one may ask—did this extraordinary instrument of tyranny originate? Is this some nefarious creation of the Executive? It might surprise Professor Schlesinger's readers to discover that the "Intelligence Finding" is, in fact, a congressional invention. Specifically, it is contained in a 1974 federal statute that prohibits the use of appropriated funds to support covert intelligence projects "unless and until the President finds that each such operation is important to the national security of the United States."<sup>6</sup> This 1974 law is the so-called Hughes-Ryan Amendment, which was enacted to ensure Presidential decisionmaking and thus accountability in the aftermath of revelations regarding CIA activities in the 1970s.

How, in Professor Schlesinger's description, this quite reasonable statutory provision becomes the tool for unscrupulous and unilateral violations of law is something to behold. Because the

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2. Many of the statutory issues raised by Professor Schlesinger are discussed more fully in two memoranda which I prepared for Attorney General Edwin Meese III. These memoranda have been released to the public. See Memorandum for the Attorney General: The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act (Dec. 17, 1986); Memorandum for the Attorney General: Legal Authority for Recent Covert Arms Transfers to Iran (Dec. 17, 1986) (both available at the *Maryland Law Review*) [hereinafter Legal Authority].

3. Schlesinger, *supra* note 1, at 67.

4. *Id.* at 68.

5. *Id.* at 67.

6. 22 U.S.C. § 2422 (a) (1982).

requirement is not inherently evil, Professor Schlesinger is forced to invent violations of it. He focuses, for instance, on the "celebrated" Finding of January 17, 1986, in which the President authorized the Iran initiative. In that Finding, according to Schlesinger,

the President "found" that selling arms to Iran was important to the national security and found also that the Finding should be kept secret from the congressional intelligence committees that the law obligated him to inform. The Tower Commission reproduces the Finding, including this interesting sentence: "I . . . direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress."<sup>7</sup>

Professor Schlesinger's truncated quotation is seriously misleading, for it suggests that the President permanently enjoined disclosure of the Finding to Congress. The sentence that Professor Schlesinger finds so "interesting" is less so when read in full:

[D]ue to its extreme sensitivity and security risks, I determine it is essential to limit *prior notice*, and direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress as *provided in Section 501 of the National Security Act of 1947, as amended, until I otherwise direct.*<sup>8</sup>

Thus, as is indicated by the portion of the text that Professor Schlesinger fails to quote, section 501 of the National Security Act expressly *authorizes* the President to do precisely what he did in the January 17 Finding—withhold prior notice from Congress. Congress itself recognized that there would be instances in which national security considerations would make it inadvisable to provide prior notice. Therefore, it authorized the President, in section 501, to provide subsequent notice of intelligence operations to Congress when, in his judgment, national security considerations did not permit prior notice.<sup>9</sup> Moreover, it is worth noting that this was the only

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7. Schlesinger, *supra* note 1, at 67.

8. *Finding Pursuant to Section 662 of the Foreign Assistance Act of 1961 as Amended, Concerning Operations Undertaken by the Central Intelligence Agency in Foreign Countries, Other Than Those Intended Solely for the Purpose of Intelligence Collection* (Jan. 17, 1986) (emphasis added).

9. National Security Act § 501(a), 50 U.S.C. § 413(a) (1982), provides for prior notice to Congress. National Security Act § 501(b), 50 U.S.C. § 413(b) (1982), then makes specific provisions for situations in which "prior notice was not given under subsection (a)." Because subsection (a) includes situations in which the President provides notice to the full Intelligence Committees under subsection (a)(1)(A) and situations in which he provides prior notice restricted to designated members of Congress, including the chairmen and ranking members of the House and Senate Intelligence Committees under subsection (a)(1)(B), it is clear that subsection (b) contemplates situations in which no prior notice has been given under either of the provisions.

instance in which this President has determined that it was necessary to withhold prior notice from Congress.

Professor Schlesinger next accuses the President, wrongly, of not even reading the Finding before signing it. Quoting the *Tower Commission Report*, he states:

[A]s the President himself confessed, without, it must be said, great shame, "though he was briefed on the contents of the memorandum [he signed] . . . he did not read it." This is an old Hollywood habit. When a well-known film producer, who was contemplating a film based on Henry James' *The Wings of a Dove*, was asked whether he had read the book, he answered, "Well, not personally."<sup>10</sup>

What the relevant page of the *Tower Commission Report* said is this:

The President signed a new Finding, . . . on January 17. He told the Board on January 26, 1987, that the Finding was presented to him under cover of a memorandum from Poindexter of the same date. The President said he was briefed on the contents of the memorandum but stated that he did not read it.<sup>11</sup>

The *Tower Commission Report* is quite clear—not easily mistaken is the distinction between the January 17 Finding, which the President read and signed, and the cover memorandum, which he did not read. Perhaps Professor Schlesinger himself did not have the time to get around to reading the page of the *Tower Commission Report* which he cites for the proposition that the President did not read the Finding. Perhaps that's an old Cambridge habit.

Furthermore, Professor Schlesinger says that the law requires that Findings be reduced to writing. Unfortunately, there is a problem with Professor Schlesinger's criticism—he's wrong on the law. A careful review of the text and legislative history of the Hughes-Ryan Amendment yields the confident conclusion that it was carefully worded to ensure that a written Finding would not be required.<sup>12</sup>

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10. Schlesinger, *supra* note 1, at 67-68 (footnote omitted).

11. *Report of the President's Special Review Board* at B-65 (1987) [hereinafter *Tower Commission Report*].

12. Schlesinger, *supra* note 1, at 67; Schlesinger, *Response to Comments*, 47 MD. L. REV. 113, 114 (1987). The Hughes-Ryan Amendment, § 501, 50 U.S.C. § 413 (1982), does not require any written report of Presidential Findings. Professor Schlesinger relies on section 654 of the Foreign Assistance Act, 22 U.S.C. § 2414 (1982), for the proposition that written findings are required. That Congress did not intend section 654 to apply to

Professor Schlesinger sees other violations of law. He begins by noting that the Iran initiative "very likely" violated the Export Administration Act, the Arms Export Control Act, the Omnibus Anti-Terrorism Act, the National Security Act, the Hughes-Ryan Amendment, the Boland Amendment, and the Neutrality Act.<sup>13</sup> Later, however, any doubt vanishes, as he charges: "One reason why the administration has violated these laws with impunity is that violation incurs no punishment. . . . Reagan . . . evidently supposed that the election sweep empowered [him] to do whatever [he] thought necessary for the safety of the Republic without regard to obligations imposed by the Constitution or by the statute book."<sup>14</sup>

It may be that some laws were violated by the manner in which the Iran initiative was implemented. This question is being examined thoroughly and soberly by various bodies, and there are as yet no clear answers. Some of the legal issues raised by the matter are difficult and close. Yet Professor Schlesinger renders his conclusions about alleged lawbreaking without any analysis of the statutes allegedly violated and without any recitation of the factual basis for his conclusions—as though the truth of this gravely serious charge were self-evident. Nor does Professor Schlesinger bother to note that any laws which may have been violated were violated by people who were acting without President Reagan's knowledge or authorization. Instead, he implies that President Reagan personally participated in these alleged violations of law.

How does one explain the errors, distortions, and bold, unsupported assertions of lawbreaking, and the departures they represent from the scholarly and nuanced analysis for which Professor Schlesinger is justly renowned? The explanation becomes apparent in the latter half of his paper, but is best captured, I think, in the following sentence: "When an administration's conduct of foreign affairs is incoherent, incompetent, duplicitous, and dedicated to rash and

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intelligence findings made under the Hughes-Ryan Amendment is rather clearly suggested by the fact that section 654 also requires the Findings to which it applies to be published in the Federal Register. Congress can hardly have intended that secret intelligence findings be published in the Federal Register. While it is true that section 654 would permit publication of only the fact of the Finding and the section of the Act under which made, some covert operations could well be so sensitive that the mere publication of the section of the act under which a Presidential finding was made could in some circumstances serve to alert a foreign intelligence agency to the possible existence of the operation.

For a more extensive discussion of the Hughes-Ryan Amendment and section 654 of the Foreign Assistance Act, see Legal Authority, *supra* note 2, at 7-12.

13. Schlesinger, *supra* note 1, at 66.

14. *Id.* at 68.

mindless policies, what is so terrible about a crippled Presidency?"<sup>15</sup> This is the language of editorial pages and fundraising letters, not of academic enterprise. And when one understands that the nature of a piece is political rather than academic, one naturally holds the writer to the standards of political rather than academic debate.

The essence of Professor Schlesinger's complaint then is political. He disagrees with the current administration's policies; therefore the institution of the Presidency should rightly be crippled. Issues of constitutional authority, however, transcend partisan politics. The Constitution grants the President certain powers, and it does so irrespective of whether one agrees with the political choices the President makes. But it is always tempting to couch one's political disagreements in constitutional terms. Professor Schlesinger has himself observed: "[N]othing has been more characteristic of the perennial debate [concerning the constitutional allocation of power between the President and Congress] than the way in which the same people, in different circumstances and at different points in their lives, have argued both sides of the issue."<sup>16</sup> In his zeal to denounce President Reagan, Professor Schlesinger has fallen victim to the same temptation he has criticized.

In particular, Professor Schlesinger's desire to portray President Reagan as having acted illegally has led him to present a distorted view of the constitutional power of the President in the field of foreign affairs. This is my general objection to his paper—and ultimately it is the most important one precisely because we should not allow fundamental issues of constitutional authority to be distorted in the course of partisan political disputes. Thus, I want to devote the remainder of my comments to addressing the basic constitutional issues. In particular, I want to address what I take to be Professor Schlesinger's principal constitutional argument: that the President has no power in the field of foreign affairs independent of Congress, and that independent Presidential action—particularly if it is secret—is in some way fundamentally incompatible with the Constitution and the intention of the framers.<sup>17</sup> In contrast to Professor Schlesinger, I believe that the Constitution grants the Presi-

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15. *Id.* at 68-69.

16. Schlesinger, *Congress and the Making of American Foreign Policy*, 51 *FOREIGN AFF.* 78, 105 (1972).

17. See Schlesinger, *supra* note 1, at 62 ("The framers saw foreign policy, not as the exclusive possession of the President, but as a power shared with Congress. . . ."); *id.* at 70 ("The framers explicitly rejected the idea that the President owned American foreign policy."); *id.* at 73 ("So long as we have a messianic foreign policy, any President will be tempted to develop capabilities for secrecy, disinformation (*i.e.*, lying), covert action,

dent a dominant, and in some areas, exclusive role in the field of foreign affairs, and that secrecy—far from being antagonistic to the Constitution—was understood by the framers as an integral and necessary part of the conduct of foreign affairs.

As always, we should begin our analysis with the text of the Constitution. Article II, which creates and defines the office of the President, begins with the affirmative declaration: "The Executive Power shall be vested in a President of the United States of America."<sup>18</sup> This is a plenary grant of power, and part of the President's responsibility as Chief Executive is to transact the American people's business with foreign sovereigns.<sup>19</sup>

In contrast to the plenary grant of power to the Executive, the Constitution grants the legislative branch only specific, enumerated powers in the field of foreign affairs. For instance, Congress is given the power "[t]o declare War, grant letters of Marque and Reprisal, and make rules concerning Capture on Land and Water."<sup>20</sup> The enumerated constitutional grants of power to the legislative branch to act in the field of foreign affairs limit the plenary grant of power to the Executive, but only to the extent of the enumerated power. In the words of Thomas Jefferson: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specifically submitted to the Senate. Exceptions are to be construed strictly. . . ."<sup>21</sup>

The independent and plenary power of the Executive in the field of foreign affairs has been recognized by the Supreme Court. The leading case is *United States v. Curtiss-Wright Export Corp.*<sup>22</sup> in which the Court drew a sharp distinction between the President's

and armed violence that are incompatible with the Constitution of 1787 and that would undermine and nullify the separation of powers.").

18. U.S. CONST. art. II, § 1, cl. 1.

19. In addition to this plenary grant of powers, the Constitution also makes the President Commander-in-Chief of the armed forces, *id.* at § 2, cl. 1, gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate, *id.* at cl. 2, and to receive ambassadors and other public ministers, *id.* at § 3. The Constitution also requires that the President "take Care that the Laws be faithfully executed." *Id.* These specific grants of authority supplement and, to some extent, clarify the plenary discretion given to the President by the executive power clause.

20. *Id.* at art. I, § 8, cl. 11. Congress is also given the power "[t]o define and punish Piracies and Felonies committed on the high seas, and offenses against the Law of Nations," *id.* at cl. 10, and the power "[t]o regulate commerce with foreign nations, *id.* at cl. 3. In addition, congressional power to appropriate funds can involve it in questions of foreign affairs.

21. 5 WRITINGS OF THOMAS JEFFERSON 161 (W. Ford ed. 1895).

22. 299 U.S. 304 (1936).

relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country.<sup>23</sup> The Court emphatically declared that this discretion derives from the Constitution itself and that congressional efforts to act in this area must be evaluated in the light of the President's constitutional ascendancy. As the Court stated:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an execution of legislative power, but with such an authority plus the very delicate plenary and executive power of the President as the *sole* organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like any other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>24</sup>

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23. The precise issue in *Curtiss-Wright* was whether a statute granting the President the power to ban arms shipments to the countries engaged in the Chaco War (Bolivia and Paraguay) should he make a finding that such a ban would contribute to peace was an unconstitutional delegation of power by Congress. See *id.* at 314-15. Thus, the decision has been viewed as a narrow one. Professor Schlesinger, for instance, has stated: "Its actual holding was restricted. Its expansive contentions were in the nature of *obiter dicta*." A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 103 (1973) [hereinafter *IMPERIAL PRESIDENCY*].

However, the Court's view of the inherent power of the President was not dicta. The Court assumed in its analysis of the case that the statute would have been unconstitutional absent the President's inherent power in the field of foreign affairs. See 299 U.S. at 315. Thus, the Court's expansive view of the President's constitutional power was essential to its decision.

24. 299 U.S. at 319 (emphasis added). See also *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (President "possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."); *id.* at 109-12 (refusing to read literally a statute that seemed to require judicial review of a Presidential decision taken pursuant to his discretion to make foreign policy); *id.* at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.") (quoted with approval in *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

In explaining why the Constitution granted the President this plenary and discretionary power, the Court pointed to the need for unity of purpose, for dispatch, and for secrecy, quoting approvingly from a report issued by the Senate Committee on Foreign Relations in 1816:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. . . . [The Committee] think[s] the interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.<sup>25</sup>

Elsewhere in the opinion the Court also stressed the need for secrecy in the conduct of foreign relations:

[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.<sup>26</sup>

Was the Court incorrect? Is this notion of an Executive who acts independently and, when necessary, secretly in the conduct of foreign affairs somehow inconsistent with the constitutional system of government created by the framers? Not at all. It is instructive to quote the words of John Jay in *The Federalist* No. 64:

It seldom happens in the negotiations of treaties of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases when the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehension of discovery. Those apprehensions will operate on those persons

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25. 299 U.S. at 319 (quoting 8 U.S. Sen. Reports, Comm. on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)).

26. *Id.* at 320.

whether they be actuated by mercenary or friendly motives and there doubtless are many of both descriptions who would rely on the secrecy of the President but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties that although the President must in forming them act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

. . . [S]o often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.<sup>27</sup>

Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations make it clear that he was speaking not of treaty negotiations in the narrow sense, but of the whole process of diplomacy and intelligence gathering.

Alexander Hamilton made similar remarks in explaining why the House of Representatives was not given a role in the formation of treaties:

The fluctuating and . . . multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decisions, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous.<sup>28</sup>

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27. *The Federalist* No. 64, at 434-35 (J. Jay) (J. Cooke ed. 1961) (emphasis in original). Jay went on to note that "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them." *Id.* at 436. Jay did not, however, suggest that the President would be obliged to seek such advice and consent for actions other than those specifically enumerated in the Constitution.

28. *Id.*, No. 75, at 452 (A. Hamilton) (emphasis in original). Hamilton was distinguishing the Senate from the House of Representatives in this passage, but his statement reflects his understanding of the qualities inherent in the Executive, qualities which suited it for the principal role in the conduct of foreign affairs, and of the necessity for secrecy.

The recognition by the framers of a need for a strong Executive—one who could act independently and with secrecy in the conduct of foreign affairs—is hardly surprising given the world in which they lived. The existence of the United States was still precarious in 1787. When the Constitutional Convention met, the United States was a weak nation, looking uneasily across the Atlantic at the great power conflict between England and France—a conflict that was to result in Washington's unilateral neutrality proclamation in 1793, naval clashes between the United States and France and England in the 1790s and early 1800s, and, finally, the War of 1812. Thus, the framers created an Executive that had the strength and the flexibility to respond to the exigencies of foreign relations.

That independent Presidential action in the field of foreign affairs is not some recent and unconstitutional aberration is demonstrated by historical practice. Beginning with George Washington and his unilateral neutrality proclamation,<sup>29</sup> American Presidents exercised a forceful independent role in the conduct of foreign affairs, and they acted with secrecy when necessary. Indeed, in defending the Presidency from the charge that it is weakened by our constitutional system of separation of powers, Professor Schlesinger remarks: "The separation of powers did not disable Washington or Jefferson or Jackson or Lincoln or Wilson or Truman or the two Roosevelts."<sup>30</sup>

Professor Schlesinger is, of course, correct—the constitutional system of separation of powers did not disable these Presidents in their conduct of foreign affairs. But it did not disable them precisely because the Constitution gives the Executive the power to exercise independent discretion in the conduct of foreign affairs. Indeed, every President that Professor Schlesinger mentions is notable for having embraced—if not in theory, then in practice—a concept of independent Presidential prerogative, particularly in the field of foreign affairs.

Even Jefferson, who was generally consistent in expressing the view that the Constitution granted the Executive only limited powers, exercised much greater authority as President than his theoretic-

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29. Washington's neutrality proclamation engendered controversy both because it was unilateral and because, arguably, it entailed a repudiation of American obligations to France under the Treaty of 1778. The controversy led to the famous debate between Hamilton, writing as "Pacificus," and Madison, writing as "Helvidius," over the extent of Congress' power to declare war. Portions of their debate are reprinted in E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 8-27 (1917).

30. Schlesinger, *supra* note 1, at 60.

cal conception of Executive power would have allowed. A detailed study by then Professor Abraham Sofaer of Presidential action in the field of foreign and military affairs during the early history of the Republic—a study which was praised by Professor Schlesinger<sup>31</sup>—concluded:

Jefferson . . . broadly construed his authority to conduct foreign and military affairs. He conducted diplomacy with vigor and secrecy, making informal threats and promises to obtain concessions. He unilaterally authorized seizures of armed vessels in waters extending to the Gulf Stream under circumstances that might have led to conflicts, and otherwise condoned military movements and actions that could have caused serious complications.<sup>32</sup>

In general, Professor Sofaer's conclusion was that Jefferson in practice failed "to adhere to the constitutional philosophy he inflicted upon himself."<sup>33</sup>

Similarly, Lincoln, whose 1848 letter on the Mexican War, stating that the Constitution did not give any "one man" the power to bring the Republic into war,<sup>34</sup> is quoted approvingly by Professor Schlesinger,<sup>35</sup> is the President who in 1861—without congressional authorization—established a military blockade of the southern ports. Despite the lack of congressional approval, the legality of Lincoln's blockade was upheld by the Supreme Court in the *Prize Cases*.<sup>36</sup>

The claimants in the *Prize Cases* were shipowners, including foreigners as well as United States citizens, who argued that Lincoln had no authority to order the blockade, and thus, that the seizure of their ships and confiscation of their cargoes were illegal. The Court rejected these claims, holding that the President had the power independent of Congress to take whatever action he deemed necessary in the circumstances. The Court stated that actions of the southern states had created a de facto state of war and that "[t]he President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."<sup>37</sup> Moreover,

31. See *IMPERIAL PRESIDENCY*, *supra* note 23, at 51.

32. A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 225 (1976).

33. *Id.*

34. Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), *reprinted in* 1 *THE COLLECTED WORKS OF ABRAHAM LINCOLN 1824-1848*, at 451-52 (R. Basler ed. 1953).

35. Schlesinger, *supra* note 1, at 70.

36. 67 U.S. (2 Black) 635 (1862).

37. *Id.* at 669.

the Court pointed out that whether such a state of insurrection existed was "a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."<sup>38</sup> It concluded: "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized recourse to such a measure, under the circumstances peculiar to the case."<sup>39</sup>

It is, of course, true that the *Prize Cases* involved a national emergency. Nonetheless, the case represents a significant statement of inherent Presidential power. In *The Imperial Presidency*, however, Professor Schlesinger states: "Since the majority in the *Prize Cases* confined its endorsement of the war power to the circumstances of ongoing domestic insurrection (or invasion), it is hard to see, as later commentators have claimed, that the decision conferred special authority on Presidents in peacetime or in relation to foreign wars."<sup>40</sup>

Two points should be made in response to Professor Schlesinger's comment on the *Prize Cases*. First, although the insurrection was domestic, the action at issue in the case—the blockade of southern ports and the concomitant seizure of foreign vessels—was international, with significant foreign policy consequences. Indeed, it was precisely such a blockade and seizure of neutral vessels by the British that had led to the War of 1812. Second, few would question the proposition that the President has greater authority to act in the field of foreign affairs than he does in domestic matters. Thus, to the extent that the *Prize Cases* deals solely with the President's domestic powers, it would only suggest that the President would have even greater powers in an international context. Professor Schlesinger himself, for instance, does not question the constitutionality of President Kennedy's blockade of Cuba during the 1962 missile crisis even though he notes that the decision was made in secrecy, without consultation with congressional leaders, and "by Executive order, Presidential proclamation and inherent powers, not under any resolution or act of Congress."<sup>41</sup>

Similar issues arose in 1940 when Franklin Roosevelt, despite significant congressional opposition, entered into an agreement whereby United States destroyers were exchanged for the right to

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38. *Id.* at 670 (emphasis in original).

39. *Id.*

40. *IMPERIAL PRESIDENCY*, *supra* note 23, at 65.

41. *Id.* at 175 (quoting T. SORENSON, *KENNEDY* 702 (1965)).

use British bases. In his discussion of this episode in *The Imperial Presidency*, Professor Schlesinger concludes that the Senate would not have approved the exchange if it had been submitted to them in the form of a treaty.<sup>42</sup> Nonetheless, he concludes that it was not an "exercise in presidential usurpation."<sup>43</sup> While pointing to Roosevelt's informal consultations with congressional leaders and with leaders of the opposition party, Professor Schlesinger seems to place principal emphasis on the state of national emergency that existed and the importance of the destroyer transfer in preventing the fall of Britain in justifying his conclusion that President Roosevelt acted constitutionally.<sup>44</sup>

Most of us would agree with Professor Schlesinger's historical evaluation—there are few today who question the wisdom of Roosevelt's decision to come to the aid of Britain in 1940. Roosevelt's judgment has been vindicated by history. But it is important to remember that his judgment was challenged by his contemporaries. As noted above, Professor Schlesinger himself concedes that Congress did not support Roosevelt's exchange of destroyers for military bases. Similarly, he acknowledges that many congressional leaders objected to Kennedy's blockade of Cuba.<sup>45</sup>

In my view, the Constitution granted Lincoln the power to order a blockade of southern ports, Roosevelt the power to exchange destroyers for military bases, and Kennedy the power to blockade Cuba.<sup>46</sup> It also gave President Kennedy the power to sponsor a se-

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42. *Id.* at 108 ("To have tried to get destroyers to Britain by the treaty route was an alternative only for those who did not want Britain to get destroyers at all.")

43. *Id.* at 109.

44. *See id.* at 105-09. At the time the destroyer exchange was denounced by many as an unconstitutional action that violated several statutes. The Department of Justice, however, in an opinion written by then Attorney General and later Supreme Court Justice Robert Jackson concluded that President Roosevelt's action was authorized by the Constitution and did not violate any statutory prohibitions. *See* 39 Op. Att'y Gen. 484, 489-90 (1940).

In addition to the destroyer exchange, Roosevelt sent troops to Greenland and Iceland in 1941 despite the fact that Congress had provided that members of the forces inducted under the Selective Service Act, ch. 720, § 3(e), 54 Stat. 886 (1940), might be sent only to U.S. territories or countries within the Western Hemisphere. *See* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 106 & n.42 (1972). In his discussion of these actions in *The Imperial Presidency*, Professor Schlesinger does not mention the existence of the statute, but notes cryptically that only Robert Taft and one other Senator objected to the dispatch of troops to Iceland, even though Iceland "was not, like Greenland, part of the [Western] [H]emisphere." *See* *IMPERIAL PRESIDENCY*, *supra* note 23, at 111.

45. *IMPERIAL PRESIDENCY*, *supra* note 23, at 175. At least some objected because they wanted more vigorous action—an invasion rather than a blockade. *Id.*

46. It is important to keep in mind, however, that with the possible exception of the destroyer exchange, there appears to have existed no contrary legislation in any of these

cret military action against Cuba in an attempt to overthrow its government—as he did in the ill-fated Bay of Pigs invasion in 1961. I reach this conclusion, however, not because of any judgment as to the merits of those actions—the Bay of Pigs invasion, for instance, is now universally condemned as an ill-conceived and ill-executed action—but because the Constitution grants the President the power to exercise independent discretion in the area of foreign affairs.<sup>47</sup>

The Constitution grants the President that power because the framers recognized that the conduct of foreign policy above all other exercises of sovereignty requires the characteristics of the Executive—in Hamilton's words, "decision, secrecy and dispatch."<sup>48</sup> Thus, the Constitution committed the direction of our foreign policy to the discretion of the President. Whether the President exercises that discretion wisely is a question to be answered ultimately by the judgment of history. But there is no doubt that under the Constitution the direction of our foreign policy is within his discretion.

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situations. The existence of any such legislation would necessarily alter the analysis of Presidential power. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-38 (Jackson, J., concurring).

47. Professor Schlesinger himself participated in the planning of the Bay of Pigs invasion and provides an extensive discussion of the event in A. SCHLESINGER, *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* 250-97 (1965). He concludes that, in hindsight, the invasion was unwise, but nowhere suggests that he thinks it was unconstitutional. His later work, *The Imperial Presidency*, contains only a passing reference to the Bay of Pigs invasion.

48. *THE FEDERALIST* No. 74, at 415 (A. Hamilton) (G. Smith ed. 1901) (emphasis omitted).