

Schlesinger: Response to Comments

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RESPONSE TO COMMENTS

ARTHUR M. SCHLESINGER, JR.

Thank you. The hour is late. My remarks will be brief. I would incorporate everything that Professor Kurland and Professor Greene said by reference.

As to Professor Ceaser, I greatly enjoyed his polemical attack on polemics. I'm not sure that I altogether understood his argument at all times. But if he said—as I gathered him to say—that the Executive has the right to act, in certain circumstances, contrary to congressional will, I'm not sure that he really meant that. I can only recommend to him that, following the example of Professor Greene, he re-read Justice Jackson's concurrence in the *Youngstown* case where Jackson describes the various levels at which independent Presidential power should be exercised.¹ Exercise in defiance of congressional statute is, of course, the level at which the President's power is weakest.

I found more of substance in Mr. Cooper's paper. Mr. Cooper is obviously a good advocate, and, like all good advocates, he tends to overstate his case. I don't know where he got the idea that I am in favor of effectively abolishing the Presidency, or, at least, of abolishing Presidential power or leadership in foreign affairs. I've always been in favor of a strong Presidency—a strong Presidency *within* the Constitution.

The argument of my paper was an argument for Presidential leadership, not an argument against it. If we had truly effective Presidential leadership, we wouldn't have to sneak behind the Constitution and sneak behind the laws, as the current President has been doing.

As to the question of the Intelligence Finding, Mr. Cooper is quite right that the Intelligence Finding was an attempt, through the Hughes-Ryan Amendment and later the Intelligence Oversight Act, to plug a hole in the system. What the Intelligence Oversight Act, by way of the Intelligence Finding, seeks to do is to outlaw the concept of "plausible deniability." The discussion, the other day, by that great constitutional expert Admiral Poindexter on "plausible deniability" was completely oblivious to the fact that "plausible

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-60 (1952) (Jackson, J., concurring).

deniability” has been outlawed by the Hughes-Ryan Amendment and by the Intelligence Oversight Act. The Hughes-Ryan Amendment may not specifically require that findings be reduced to writing, but the Intelligence Oversight Act states that “a report to the Congress, concerning any finding or determination under any section of this chapter . . . shall be reduced to writing and signed by the President.”²

The question of prior notice was not an issue, because the January 17, 1986, Intelligence Finding was retroactive, justifying actions that had already been undertaken. We would not know about them until today had it not been for the fact that everyone in the Middle East knew about them, and, finally, someone published these activities in a newspaper. That is not what Congress meant when it said timely notification.

Really, I think the defenders of President Reagan should stop invoking the *Curtiss-Wright* case.³ The issue decided in *Curtiss-Wright* had absolutely nothing to do with the justification of secret, unilateral Presidential action in defiance of congressional statutes. Rather, what the *Curtiss-Wright* case decided was the President’s power to act, to apply, and to effectuate a resolution passed by Congress. That was the question upon which the *Curtiss-Wright* case turned. As Justice Jackson later put it, *Curtiss-Wright* “involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress.”⁴

The case had absolutely nothing to do with any of the things that Reagan has been doing. The fact that Justice Sutherland threw in a few *obiter dicta* is irrelevant to anything decided by the case. Nor did these *obiter dicta* say anything that would vindicate the kind of secret sneaking behind the Constitution and laws that has been revealed in the last few days.

The Constitution states that the President shall take care that the laws be faithfully executed. Well, if Mr. Cooper thinks that President Reagan has taken care that the laws be faithfully executed, I rather doubt that the men who framed the Constitution two hundred years ago would agree.

Thank you.

2. 22 U.S.C. § 2414(a) (1982). *But see* Cooper, *Comment* 47 MD. L. REV. 84, 87-88 (1987) (questioning Professor Schlesinger’s invocation of this statute).

3. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

4. *Youngstown Sheet & Tube*, 343 U.S. at 635-36 n.2.