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ABSTRACT

A dynamic institutional relationship exists between the United States executive branch and the United States Supreme Court. This Article examines how the Court affects constitutional and political development by taking a leading role in interpreting presidential decisionmaking in the area of foreign affairs since 1936. Examining key cases and controversies in foreign policy-making, primarily in the twentieth and twenty-first centuries, this Article highlights the patterns of intercurrences and the mutual construction process that take place at the juncture of legal and political time. In so doing, it is more than evident that the Court not only sanctions the claims made by executives of unilateral decisionmaking, but also takes a leading role in (re)defining the very scope and breadth of executive foreign policymaking.

I. INTRODUCTION

The Supreme Court of the United States has carved out a constitutional space for executive unilateralism in the area of foreign affairs since rendering its decision in *United States v. Curtiss-Wright Export Corp.*[1] ("*Curtiss-Wright*") in 1936. The Court's decision in *Curtiss-Wright* forever changed the trajectory of the executive branch—prior to 1936, the Court decided cases in favor of a strong Legislature formulating American foreign policy, which undermined a president's claim to executive unilateralism—and placed the Court at the forefront of (re)defining the scope and path of foreign affairs powers. The utilization of this policy-making tool by the Executive cements the dynamic nature of the Court in how it has altered the constitutional and political development of both branches of government.

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1. 299 U.S. 304 (1936).

Scholars that track doctrinal development in the area of foreign affairs simply note a shift in power and explain how this change has resulted in executives claiming broad unilateral powers. To understand this shift, however, we must refocus our analysis to include a more detailed evaluation of judicial decisionmaking and ask: how do we account for the Court's decision to move away from the established constitutional blueprint set by the Court's early judicial rulings, to advocating for a strong presidential presence in foreign policymaking? What is it about this moment in time that prompted the Supreme Court to move away from precedent and assert that the Executive has a leading role in foreign affairs? What factors—internal and external—existed at the time of the ruling to influence the Court to render a decision of this kind? To understand more fully this developmental shift and its subsequent impact, we cannot focus solely on the internal doctrinal world—this is only useful to illustrate that a doctrinal shift took place in 1936—or on the external political world. Rather, we must focus on the intersection of legal and political time (two concepts that will be explained below), which will parse out the factors that constrain judicial decisionmaking, and highlight the context in which a case reaches the Court. In so doing, we can determine whether the inclusion of foreign affairs, an area that has been largely understudied in this way, adds to or changes the current developmental narratives of the executive and judicial branches. This brief overview of some of the most significant cases the Court has decided since *Curtiss-Wright* showcases the influential role of the Court on the institutional dynamics of the Executive and shows that the Court has empowered, and legally sanctioned, unilateral presidential action in foreign policymaking.

The Court does not operate independently from the political system and is therefore situated at the juncture of law and politics. Since political and legal time operate differently, it is important to understand how the juncture of these two concepts impacts Supreme Court decisionmaking and how, in turn, the Court impacts the political and constitutional development of the executive branch when the Court decides a foreign affairs case. Doing so will help facilitate an understanding of the dynamic institutional relationship between the Court and the executive branch. On the one hand, political time, as defined by Stephen Skowronek, is the "various relationships incumbents project between previously established commitments of ideolo-

gy and interest," and the President's response to the perceived emergency.[2] Skowronek's explanation of political time helps situate the presidency in American political development. Legal time, on the other hand, is defined by how the "Supreme Court interacts with the world outside the Court,"[3] including external factors or constraints occurring in political time. Legal time is quite different from the political time of the presidency, and it is this difference that has significant implications on the process of judicial decisionmaking. Courts are therefore "positioned at the juncture of law and politics," and the unique quality of the Court is "inherent in the nature of judicial power."[4] To further understand the positioning of the Court, I draw from Ronald Kahn's discussion of the mutual construction process to illustrate how judicial decisionmaking is influenced by external factors.[5] The internal norms of the Court and the external factors that exist in political time are therefore explanatory conditions to understanding the constraints placed on judicial decisionmaking and doctrinal change.

When the Court decides to hear a foreign affairs case, it makes constitutional choices that, at times, may challenge the primary commitments of the majority coalition and the major political institution of the Executive. Alternatively, the Court may choose key moments in which to collaborate with an institution and make legal the construction and stabilization of an asserted political order. Irrespective of the decision rendered, these constitutional choices demonstrate a continuous and constitutive dynamic relationship between both the Court and the executive branch. In the area of foreign affairs, the Court has helped advance legal and political frames since 1936, and these are narrative frames that the Court has appeared all too willing to create.

The Court, as a decisionmaker, is intertwined with the political system. Foreign affairs are no exception to this general paradigm. In 1936, Justice Sutherland's overarching decision in *Curtiss-Wright* illustrates a sharp departure for the Court. The following historical account of some notable epi-

2. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 30 (6th prtg. 2003).

3. Ronald Kahn, *The Constitution May Be Undemocratic, but Not Supreme Court Decisionmaking: The Difference Between Legal and Political Time*, DIGITAL COMMONS@UM CAREY LAW 3 (2006), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1053&context=schmooze_papers.

4. Ronald Kahn & Ken I. Kersch, THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 16 (Ronald Kahn & Ken I. Kersch eds., 2006).

5. *See* Kahn, *supra* note 3, at 4–7.

sodes between the Executive and the judicial branch demonstrates that this change in path trajectory gives the Executive the legal positioning to advance broad claims to unilateral executive decisionmaking. As such, we have borne witness to some outlandish claims by presidents, which have found favor from the Court. In an attempt to understand this rapid growth in power since 1936, I will highlight both the internal legal norms and external social and political constraints to demonstrate the fused process that yields a superior position for the Executive over the legislative branch in the area of foreign affairs.

II. EARLY JUDICIAL RULINGS

Prior to 1936, the Supreme Court decided foreign affairs cases in favor of a strong Legislature and often limited the scope and parameters of the dual partnership between Congress and the Executive. For example, when examining Congress's constitutional authority to declare war, the Court found that it was the sole responsibility of the Legislature to wage a "partial" or "limited" war.[6] And only when Congress authorizes war was the President called in to serve as Commander in Chief.[7] The President, however, was not at liberty to choose the time, location or scope of military activities.[8] The Court reaffirmed these judicial decisions in 1804 in *Little v. Barreme*.[9] In short, as Louis Fisher summarized, "[p]residential orders, even those issued as Commander in Chief in time of war, are subject to restrictions imposed by Congress."[10] Essentially, the Court asserted that the President does not have inherent powers that give him the authority to ignore a law passed by Congress.[11] The one caveat the President had in this

6. Bas v. Tingy, 4 U.S. 37, 43 (1800).

7. *See* Louis Fisher, *Domestic Commander in Chief: Early Checks by Other Branches*, 29 CARDOZO L. REV. 961, 968 (2008) (discussing Congress's power to declare war and the President's power to direct war).

8. *See* Talbot v. Seeman, 5 U.S. 1, 9–16 (1801) (discussing various acts by Congress that designated military details for the war against France).

9. 6 U.S. 170 (1804). For a summary of the issue in *Barreme*, see Fisher, *supra* note 7, at 997 ("Part of the legislation passed by Congress in the 1798–1800 period, to authorize war against France, authorized the President to seize vessels sailing *to* French ports. President Adams exceeded the statute by issuing a proclamation that directed American ships to capture vessels sailing *to or from* French ports." (internal citations omitted)).

10. *See* Fisher, *supra* note 7, at 997.

11. *See Barreme*, 6 U.S. at 177 (noting that President Adams's orders clearly went beyond the congressional statute).

area was in the event that the United States was invaded, it would be lawful for the Executive to oppose such an invasion.[12] This notion was based on defending the nation and the idea that the President would seek out retroactive legislation. As the Circuit Court for the District of New York stated in its 1806 decision in *United States v. Smith*[13]: "Does [the President] possess the power of making war? That power is exclusively vested in Congress . . . ."[14] Thus, if the United States was invaded, the President had only the constitutional authority and obligation to resist with force, but "it is the exclusive province of congress to change a state of peace into a state of war."[15]

Later that century, the Court would address a president's exercise of military power without first procuring congressional approval.[16] Following the attacks on Fort Sumter in April 1861, and with Congress in recess, President Abraham Lincoln issued proclamations calling forth the state militia.[17] He also suspended the writ of habeas corpus and placed a blockade on southern ports (resulting in the capture of several prizes and their cargoes) and rebellious states.[18] Lincoln, acutely aware that his actions were illegal, requested statutory authorization from Congress.[19] While Congress ratified Lincoln's actions,[20] this situation marked the first time the Court would

12. *See* Act of May 2, 1792, 1 Stat. 264–65 ("An Act to Provide for Calling forth the Militia to Execute the Laws of the Union, Suppress Insurrection, and Repel Invasions."); *see also* Fisher, *supra* note 7, at 976 ("As enacted, the militia bill provided that whenever the United States shall be invaded, or be 'in imminent danger of invasion' . . . the president was authorized to call forth such number of the militia as he may judge necessary to repel the invasion." (internal citation omitted)).

13. 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16342).

14. *Id.* at 1230.

15. *Id.*

16. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (holding that the President did not have the authority to order blockade and impound ships, even without formal declaration of war).

17. Thomas H. Lee & Michael D. Ramsey, *The Story of the* Prize Cases*: Executive Action and Judicial Review in Wartime*, *in* PRESIDENTIAL POWER STORIES 56–57 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

18. *Id.* at 57–59.

19. *See id.* at 56–57 (noting that Lincoln called Congress in April 1861 to meet for a special session in July).

20. *See id.* at 59 ("Congress approved in just over a week an array of wartime measures, including funding and authorizing an expanded army and navy.").

hear a case involving the power of the President to respond to sudden attacks.[21]

In *The Prize Cases*,[22] the Court, while sharply divided (five to four), reasoned that the President could not initiate war, as that authority was reserved for Congress, and Congress alone.[23] Lincoln found the secession of several states and the possibility of open hostilities to be enough justification to impose a blockade on the southern ports.[24] While the President is duty bound to rise to the challenge of invasion by a foreign nation to repel sudden attacks,[25] Lincoln subverted this point, by declaring the Confederacy as belligerents. And, the commander-in-chief clause gave the President the authority to proclaim a blockade as a method of waging war.[26] Justice Robert C. Grier, who wrote the majority opinion in *The Prize Cases*, however, placed limits on the President's power to act defensively: "He has no power to initiate or declare a war either against a foreign nation or a domestic State."[27]

These early judicial decisions demonstrate the entrenched path the Court set for the partnership between the legislative and executive branches. Assigning Congress the sole responsibility of initiating hostilities, whether in the form of a general or limited war, left the President, in his capacity as Commander in Chief, with only the power to repel sudden invasions against the United States.[28]

So what changed? How have presidents aggrandized so much power to the point of telling the Supreme Court that they have no power of review? Harold H. Koh suggests that there are three reasons why the Executive always appears to have the leading hand when asserting a strong domi-

21. *See* LOUIS FISHER, PRESIDENTIAL WAR POWERS 47 (2004) (discussing the Court's affirmation of Lincoln's emergency measures). The duty to repel sudden attacks signifies an emergency measure that grants the President the discretion to take actions necessary to resist a sudden invasion that is waged either against the mainland or against American troops abroad. *See id.* at 47–48.

22. The Prize Cases, 67 U.S. (2 Black) 635 (1863).

23. *Id.* at 668.

24. Lee & Ramsey, *supra* note 17, at 56–58.

25. *See supra* note 12 and accompanying text.

26. *See The Prize Cases*, 67 U.S. at 666 ("That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification [of a blockade], has not been, and cannot be disputed.").

27. *Id.* at 668.

28. These early decisions have never been overturned and remain the law of the land today.

nant role in foreign affairs.[29] First, the Executive takes the initiative primarily by "construing laws designed to constrain his actions as authorizations"—as is evident by the use of the War Powers Resolution.[30] Second, Congress has, more often than not, complied with or acquiesced in what actions the President has chosen to take.[31] And lastly, judicial tolerance, which is a point of departure from Koh's argument in terms of the position held in this Article.

III. *CURTISS-WRIGHT*—A DEFINING CONSTITUTIONAL MOMENT

The 1936 case of *Curtiss-Wright* marks the first step for the Court to embark on a new path to (re)define the President's role in foreign affairs and assert itself as the institution to do so. This new role for both branches over time has led to a comprehensive national acceptance "of the systematic legal entrenchment" of an executive acting unilaterally in foreign policymaking. In many ways, *Curtiss-Wright* marked the end of an era. Following this decision, executives have gained significant momentum in this area, and, with successive decisions by the Court, we have seen a distinct judicial conjecture in favor of executive power in the area of foreign policymaking. In the following discussion, I will demonstrate that *Curtiss-Wright* set a new precedent for how the Court (re)defines executive authority and how the Court has come to regard the Legislature as a secondary institution to that of the executive branch. It is not until 2006 when the Court hears the case of *Hamdan v. Rumsfeld*[32] that it admonishes (but not in formal legal terms) the legislative branch to be a more active participant in the area of foreign policymaking, specifically requiring Congress to grant statutory au-

29. Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 158–80 (David Gray Adler & Larry N. George eds., 1996).

30. *Id.* at 158. Primarily drafted to halt creeping wars like Vietnam, the Resolution has come to symbolize, because of drafting flaws, statutory authorization undercutting the effectiveness in restraining the President from initiating hostilities. *Id.* Consequently, when the President decides to "violate[] congressionally imposed procedural constraints in pursuit of substantive policies that they favor," he does so under the guise of the Resolution. *Id.* at 172.

31. Koh argues that this is evident through "legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will." *Id.* at 158.

32. 548 U.S. 557 (2006).

thorization for the use of military commissions, which it did by passing the Military Commissions Act[33] ("MCA") in 2006.

The Court decided *Curtiss-Wright* at the height of President Franklin D. Roosevelt's "personalization and institutionalization of the presidency," which amongst many initiatives included an "extrovert phase in American foreign policy."[34] This marked the nation's arrival as the world's hegemonic power.[35] As such, geopolitical concerns would, in a number of cases, act as external constraints on the Court. Essentially, *Curtiss-Wright* involved the principles of governmental regulation of business and the supremacy of the executive branch in the conduct of foreign affairs.[36] The Court asserted that while the Constitution does not explicitly vest in the President the authority to conduct foreign policy, it is given implicitly through the commander-in-chief clause, thereby empowering the Executive to conduct foreign affairs in a way that Congress can and should not.[37] In fact, the Court stated the President had "plenary" powers in the area of foreign affairs that was not dependent on congressional delegation.[38] The Court, for the first time, significantly changed the course and direction of constitutional and political development for the executive branch in *Curtiss-Wright*.

The Court strategically positioned itself to redefine the scope and direction of the Executive's prerogatives, which sanctions the "extrovert phase" instituted by FDR.[39] It did this, first and foremost, by deciding to hear the case and decide the case on its merits. As scholars have noted, the Court could have invoked the political question doctrine and not hear the case.[40] Second, it did so by redistributing the balance of power between the

33. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948–50).

34. Koh, *supra* note 29, at 160 (noting that this time period began before the attacks on Pearl Harbor and ended with the Vietnam War).

35. *Id.*

36. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 305–06 (1936).

37. *Id.* at 319–20.

38. *Id.* at 320.

39. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 96 (1990) (discussing the activist presidency of FDR, when the "United States assumed unchallenged status as the world's 'hegemon'").

40. *See, e.g.*, David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, *supra* note 29, at 39 ("[The Court's] invocation of the political-question doctrine has been a major means by which the judiciary has strengthened the role of the president in the conduct of foreign policy.").

executive and legislative branches in the area of foreign affairs. But, why did the Court make this move in 1936? What are the dynamics at play when legal and political time intersect that make this case the "perfect storm," permitting the Court to (re)define presidential powers and shift authority away from Congress to the President in this area? Is political time really influencing legal time? And, how does this doctrinal development influence the political development of the executive branch?

Scholars have been highly critical of Justice George Sutherland's theory on the separation of powers and, accordingly, have been quick to point out that Justice Robert H. Jackson in the *Steel Seizure* case of 1952 noted that much of Sutherland's opinion is dictum.[41] Despite this criticism, it is a worthwhile enterprise to (re)evaluate this case not only because of the sweeping language but also because it is the lynchpin of many of the executive branch's subsequent claims of the power to act without congressional authorization in foreign affairs.

During the 1930s, the Court served as a check on New Deal legislation.[42] At every turn in national policy where the cleavage between the old and new regime was distinct, FDR was confronted with a judiciary predominantly held over from the old order. But the Court's eventual support of FDR's New Deal legislation, coupled with an expanded view of executive powers in the area of foreign affairs, helped facilitate the federal government's growth in authority and responsibility.

In response to a potential war breaking out in the Chaco region of South America, Congress authorized President Roosevelt to place an embargo on shipments carrying arms to countries at war in the region, specifically Paraguay and Bolivia since they were engaged, at that time, in a cross-border conflict.[43] Acting pursuant to the authorization of a joint resolution, President Roosevelt issued Proclamation 2087 in May 1934, forbidding the shipment of arms to the combatants in the Chaco region.[44] Curtiss-Wright

41. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring).

42. *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down New Deal legislation on the grounds that they characterized unconstitutionally broad delegations of legislative power to the Executive); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (same).

43. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 311–12 (1936) (detailing Joint Resolution 48 Stat. 811).

44. *See id.* at 312–13 (detailing Presidential Proclamation 2087); *see also* Proclamation No. 2087, 48 Stat. 1744 (1934), a*vailable at*

Export Corporation was charged with plotting to sell fifteen machine guns to Bolivia.[45] This sale violated Presidential Proclamation 2087, and Curtiss-Wright Export Corporation was indicted for violating the embargo.[46] The question before the Supreme Court was whether the congressional resolution was an unlawful delegation of legislative power.[47]

While the Court had already struck down significant pieces of New Deal legislation, it was now faced with a case involving executive prerogatives in foreign policymaking. With the reproaches by the Court in the domestic arena, the Court was now positioned to render yet another decision that might again be in opposition to the commitments of the majority coalition. So, how would the Court read discretionary executive power in this area? Would the external framing of the situation and the administration's asserted authority to act influence the Court's decision?

Justice Sutherland[48] found that the joint resolution was constitutional.[49] Now, why would the leader of the conservative bloc, Justice Sutherland, write an expansive view of presidential authority to conduct foreign policy? Part of the answer comes from his early and developing principles—when he served as Senator and Blumenthal lecturer at Columbia University before joining the Court—of the division between domestic and

http://www.presidency.ucsb.edu/ws/index.php?pid=14888#axzz1lpVgJyPc ("Forbidding the Shipment of Arm to the Combatants in Chaco"). On November 14, 1935, FDR issued a second proclamation that revoked the previous proclamation, finding the prohibition on the sale of arms to Bolivia and Paraguay no longer necessary since the war between the two countries had come to an end. *See Curtiss-Wright*, 299 U.S. at 313; *see also* Proclamation No. 2147, 49 Stat. 3480 (1935), *available at* http://www.presidency.ucsb.edu/

ws/index.php?pid=14978 ("Revoking the Arms Embargo at termination of Hostilities in the Chaco") .

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

46. *Id.*

47. This prerogative is a legislative determination, the lawyers argued on behalf of the Executive, and Congress was leaving this right to the Executive's "unfettered discretion." *Id.* at 314–15. This claim had judicial support, though Congressional Democrats and the White House were severely critical of the Court's decisions. *See supra* note 42 and accompanying text.

48. The only opinion ascribed is that of Justice Sutherland; Chief Justice Hughes; Justices Sutherland, Van Devanter, Brandeis, Butler, Roberts, and Cardozo made up the majority opinion. *Curtiss-Wright*, 299 U.S. at 311. Justice McReynolds dissented, yet there is no recorded dissent, only a note at the end of Justice Sutherland's opinion that Justice McReynolds believed "the court below reached the right conclusion and its judgment ought to be affirmed." *Id.* at 333. Justice Stone took no part in the consideration or decision of the case. *Id.*

49. *Id.* at 329.

foreign affairs powers granted to the government by the Constitution.[50] As demonstrated below, Justice Sutherland's expansive view of presidential authority to conduct foreign policy was, perhaps, an obvious evolution of his visible agenda.

Justice Sutherland was a strict constructionist and tended to align with the Court's conservative side.[51] In fact, Justice Sutherland was regarded as the leader of the conservative[52] bloc when a sharp division on the bench existed. By the time he reached the Court and a new constitutional order was under way, Justice Sutherland's early theories on the Executive's external powers had matured, and a sharp distinction between domestic and foreign affairs now existed. He argued that there was a clear and definitive approach to deciding federal claims of foreign and domestic authority.[53] Broad delegations of power were unconstitutional—the Court's reasoning behind striking down New Deal legislation—even though Justice Sutherland advocated, early on in his career, for a broad reading of the Constitution: the Constitution must have the "capacity for indefinite extension" for those who came after the Constitution was framed and adopted.[54] In his early writings, Justice Sutherland said rather little on the matter of presidential constitutional powers. What he did say in *Curtiss-Wright* was that the President had the sole responsibility to negotiate with foreign powers.[55]

While Justice Sutherland valued the doctrine of *stare decisis*, he argued that precedent was not a fixed pathway, since it is the opinion only of the person who came before and that person stipulated where the pathway should be.[56] Path dependency of precedent in constitutional law, for Justice

50. *See* George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373, 374–75 (1910) (discussing differing levels of government power when the government addresses internal versus external affairs).

51. PETER G. RENSTROM, THE TAFT COURT: JUSTICES, RULINGS, AND LEGACY, 79–80 (2003). Justice Sutherland was part of the conservative "Four Horsemen," which included Justices McReynolds, Devanter, and Butler—the four conservatives, holdovers from the Taft Court, often convinced Justice Roberts to side with them, which gave them the majority. *Id.* These justices were instrumental in striking down Roosevelt's New Deal legislation. *Id.* at 80.

52. With Justice Sutherland's decision in *Curtiss-Wright*, it is evident that conservatism does not map in exactly the same way when we examine foreign affairs cases because Justice Sutherland was also an advocate for woman suffrage and female equality.

53. *See* Sutherland, *supra* note 50.

54. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 50 (1919).

55. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

56. Senator George Sutherland, The Courts and the Constitution, Address Before the American Bar Association 386 (Aug. 28, 1912).

Sutherland, was not a controlling factor; and constitutional decisionmaking on the Court would therefore be based in part on a Justice's personal policy preferences or strategic objectives.[57]

After conveniently narrowing the question before the Court, Justice Sutherland was free to begin the discussion with an account of his theory from *Constitutional Power and World Affairs*.[58] He contended that there are fundamental differences between the powers employed by the federal government in the area of domestic affairs and external or foreign matters.[59] The resolution delegating power to the Executive, he argued, might have been unlawful if it had only applied to our Nation's internal affairs.[60] Foreign affairs are a different issue, Justice Sutherland asserted, because different rules and standards apply.[61] Thus, Congress could delegate powers to the Executive with a general set of standards or could give unrestricted discretion.[62] Going one step further, Justice Sutherland stated that the powers granted to Congress could be exercised or delegated to the President and are not limited to the express and implied powers constitutionally granted.[63] Any limitations were only applicable to internal affairs.[64] What is more, the President exercised "plenary and exclusive power," which is independent of any legislative authority, since he was the sole organ of the federal government in the field of international relations.[65]

Justice Sutherland wove another concept into his conclusion, one that was practically absent from his *Constitutional Power and World Affairs*[66] manuscript. He asserted that there is a significant limitation when exercising power in the area of foreign affairs. This rhetorical caveat was developed in his most famous passage of all. In what some have called "ill-

57. *Id.*; *see* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 974 (2005) ("The point is not just that opinions reflect the differences among the Justices but that the Justices know they may express their differences in their opinions if necessary.").

58. SUTHERLAND, *supra* note 54.

59. *Curtiss-Wright*, 299 U.S. at 315–16.

60. *Id.* at 315.

61. *Id.* at 315–16.

62. *Id.* at 316.

63. *Id.* at 319–20.

64. *Id.* at 316.

65. *Id.* at 320. It is interesting to note that Justice Scalia's decisions regarding sovereignty in international law mirrors, to a large degree, Justice Sutherland's interpretation of sovereignty.

66. SUTHERLAND, *supra* note 54.

considered dicta,"[67] Justice Sutherland contended that the role of foreign affairs rested in the hands of the Executive.[68] His opinion invoked Congressman John Marshall's reference to the President as the "sole organ" of American foreign policy in a speech he delivered to the House of Representatives in 1800.[69] In that speech, Marshall asserted that the President was the "sole organ" of communication.[70] Justice Sutherland's reference to Marshall's remark implies that the President makes foreign policy unilaterally.

It is remarkable that Justice Sutherland would distort Marshall's reference to such a degree in order to ground his own assertions in a historical frame. Justice Sutherland's reference would be powerful evidence given Marshall's elevation a year later to be Chief Justice of the Supreme Court. When read in context, however, Marshall meant only that the President communicates American foreign policy to other nations *after* it has been adopted.[71] Marshall clearly meant that the President was the "sole organ" in *implementing*—that is, merely announcing, not formulating—American foreign policy.[72] Thus, the President would be the "sole organ" of *communication*; the nation would be speaking with a single voice.[73] Marshall's account of the President as the "sole organ" of foreign affairs, however, is commonly distorted. It speaks volumes for Marshall's view that, as Chief Justice, he never invoked the "sole organ" doctrine in defense of unilateral executive power in foreign affairs, though he had many opportunities to do so.[74] In short, articulating the nation's foreign policy to other countries did not carry with it any form of inherent power. Justice Sutherland's reliance

67. Adler, *supra* note 40, at 25.

68. *Curtiss-Wright*, 299 U.S. at 319–20.

69. *Id.* at 319 ("As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign affairs.'" (citing 10 ANNALS OF CONG. 613 (1800))).

70. 10 ANNALS OF CONG. 613–14 (1800). Justice Sutherland infused Marshall's phrase with a substantive policy-making role, a claim not grounded in Marshall's speech.

71. *See* Louis Fisher, The Law*: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRES. STUD. Q. 139, 142 (2007) (clarifying Marshall's "sole organ" speech).

72. *See id.* ("Although it [is] the president's constitutional duty to carry out the law, including treaties, 'Congress, unquestionably, may prescribe the mode.'" (quoting Marshall's speech)). Indeed, first and foremost, Marshall was referring to the President's authority to "communicate," not "make" American foreign policy. 10 ANNALS OF CONG. 613–14 (1800).

73. 10 ANNALS OF CONG. 613–14 (1800).

74. *See* Fisher, *supra* note 71, at 142–43 (discussing Marshall's approach to foreign affairs cases as Chief Justice).

upon Marshall's speech as a foundation of the "sole organ" doctrine is thus indefensible. Yet, it is a measure of Justice Sutherland's mischief that confusion about Marshall's speech has been pervasive ever since.

Justice Sutherland's opinion is evidence of a change of heart from his 1919 defense of Congress's authority and role in foreign affairs against federalism and the "narrow-construction attack to an assertion of the foreign-affairs authority of the president that stresses its independence of Congress."[75] This change of heart[76] might be accredited, as discussed below, to the external factors—the government's argument, historical practice, and the geopolitical impact of the growth of Fascism—that Justice Sutherland's opinion embraces.

On the initial reading of Justice Sutherland's opinion, it is difficult to ascertain what his assertions have to do with the question of delegation. However, if one considers H. Jefferson Powell's reading of Justice Sutherland's opinion[77] and grants Justice Sutherland some latitude, one can consider that, since foreign affairs powers do not originate from the Constitution, they cannot be defined by it and are therefore plenary except when they are limited by "applicable provisions of the Constitution."[78] Continuing with this line of thought, Sutherland can then assert that the distribution of these powers are not created; rather, the Constitution makes the President the "sole organ of the federal government in the field of international relations,"[79] and puts few limitations on his management of those affairs. The President's power in this area is therefore "delicate, plenary and exclusive."[80] If the President is the primary decisionmaker in the realm of foreign policy—in the sense that Justice Sutherland is arguing that this is structural in an extra-constitutional sense—and the President is responsible for formulating that policy, then it naturally follows that a delegation rule constructed to protect Congress's role in defining policy is quite simply and plausibly, according to Justice Sutherland's assertion, inapplicable.[81]

75. H. Jefferson Powell, *The Story of* Curtiss-Wright Export Corporation, *in* PRESIDENTIAL POWER STORIES 195, 222 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

76. Sutherland's early work warns about the growth of presidential powers, but this opinion is clear evidence of him changing his mind.

77. Powell, *supra* note 75, at 195–96.

78. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

79. *Id.*

80. *Id.*

81. *Id.* at 321–22.

Moreover, and this is the point at which Justice Sutherland embraces elements of the government's argument, when Congress legislates in foreign affairs, it appropriately takes into account the President's control, in principle and in practice, of intelligence, secrecy, and negotiation, which are argued to be essential factors to the success of foreign policy.[82]

Justice Sutherland continued to discuss the issue further—relying fundamentally on a structural argument—by pointing out the history of legislation that had been granted to the President, which gave him broad discretionary power over international trade and other interrelated issues.[83]

Given the trajectory of Justice Sutherland's theory and his assertions in his written opinion for the Court, the decision rendered in *Curtiss-Wright* was perhaps an observable evolution of his obvious schema, but not necessarily predetermined. This was a period of modernization for the presidency, but also a time that permanently ended American isolation from European and world affairs. In the 1930s, Congress and the country were determined to remain an isolationist nation and stay out of the war raging in Europe. But President Roosevelt, acutely aware of the impact of Hitler's progression, attempted to ally with France and Great Britain against Hitler's and Mussolini's regimes.

The political timing of this case was not only a determining factor on the severity of the President's response to the situation at hand and the Chaco war more broadly, but also how the Court would weigh the external constraints when reaching its decision, as is evident by the geopolitical context of the case.[84] This constraining external factor may account for Justice Sutherland (re)framing and reformulating an opinion that embraces an expanded role for the Executive. This case highlights the juncture of legal and political time, which created a constitutional moment that presented the

82. *Id.*

83. *Id.* at 322–24.

84. One way in which FDR wanted to counter Fascist advances was in the discretionary control over neutrality. An arms embargo against Italy and Ethiopia, for example, would achieve Roosevelt's agenda. *See* ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 1932–1945, at 107 (1995). It is interesting to note that the press discussed the case in the geopolitical context. The *Washington Post* reported that the opinion in *Curtiss-Wright* vindicated a president's claim to a vast power in foreign affairs and, more specifically, President Roosevelt's quest for "'authority for him to exercise wide discretion in limiting exports to combatants.'" *See* Powell, *supra* note 75, at 225 (quoting Robert C. Albright, *Highest Court Affirms Arms Embargo Act*, WASH. POST, Dec. 22, 1936, at 1). The *Washington Post* emphasized that the case "was generally believed to open the door for a more vigorous neutrality course, providing the approach is discretionary with the President, rather than mandatory." *Id.*

Court with an opportunity to redefine the Executive's powers through the mutual construction process.

As H. Jefferson Powell aptly notes, the *Curtiss-Wright* opinion played no significant role in the tug-of-war between the Executive and Congress "over whether to grant the president discretionary arms-embargo authority or impose on him a mandatory and impartial duty of neutrality in terminating American arms sales to warring states."[85] Those opposing FDR had the upper hand. In fact, Congress blatantly ignored the Court when it insisted that Congress grant the Executive broad discretion.[86]

The case also played a rather narrow role as precedent in the first few years of its decision.[87] What *Curtiss-Wright* did do was set the stage for Justice Sutherland to speak again to the role of the President in foreign affairs. It also established a newly constructed constitutional blueprint for executive supremacy in this area. Although Justice Sutherland's opinion insinuates that the President can make foreign policy unilaterally, the significance of this case is not immediately established. In fact, it did not have any real impact for almost two decades. The result of the case is its evolution as precedent over time and how it became embedded in future presidential claims of broad discretionary power.

Youngstown Sheet and Tube Co. v. Sawyer[88] provides what some would argue is the end point to the impact of *Curtiss-Wright*.[89] This is a compelling assertion, since those who argue this point highlight the fact that, by 1952, the delegation issue had retreated in significance and the specific holding in *Curtiss-Wright* was insignificant.[90] To the contrary, *United States v. Belmont*[91] and *United States v. Pink*[92]—two cases decided in the

85. Powell, *supra* note 75, at 225.

86. *See id.* at 226 ("Sutherland's opinion left *Panama Refining* and *Schechter Poultry* untouched, and it was the Supreme Court's famous recession from its narrow view of federal power beginning in March 1937, not *Curtiss-Wright*, that ultimately proved to have freed Congress and the executive from the constraints that the 1935 delegation decisions appeared to have fashioned.").

87. *Id.*

88. 343 U.S. 579 (1952).

89. *See, e.g.*, Powell, *supra* note 75, at 227 ("The Supreme Court's celebrated decision invalidating President Truman's seizure of the steel industry in *Youngstown Sheet & Tube Co. v. Sawyer*, decided in 1952, marks an appropriate end-point for an examination of *Curtiss-Wright*'s immediate impact.").

90. *Id.*

91. 301 U.S. 324 (1937).

immediate aftermath of *Curtiss-Wright*—along with *Johnson v. Eisentrager*,[93] are all cases that demonstrate the Court's continued adherence to Justice Sutherland's disinclination to be "in haste"[94] to meddle with the Executive's management of foreign affairs.[95]

IV. EXECUTIVE UNILATERAL CLAIMS OF EMERGENCY POWERS DURING WORLD WAR II

The next time the Court heard a challenge to the Executive's claim of unilateral policymaking is with the Japanese Internment Cases.[96] These cases came out of a time when many people in the United States, reeling from the attack on Pearl Harbor on December 7, 1941, believed that Imperial Japan was waging a full-scale attack on the West Coast.[97] Given Japan's swift military defeat of a substantial portion of Asia and the Pacific between 1936 and 1942, some Americans believed not only that Japanese military forces were unstoppable, but they also questioned the loyalty of the ethnic Japanese living in America. This doubt was fueled primarily by the racial prejudices of General John L. DeWitt and the support of some prominent senior military officers.[98]

92. 315 U.S. 203 (1942).

93. 339 U.S. 763 (1950).

94. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936).

95. *Belmont*, 301 U.S. 324 (1937), was decided only four months after *Curtiss-Wright*, and involved the validity of an executive agreement with the Soviet government. *Id.* at 326. Sutherland applied the same reasoning used in *Curtiss-Wright* to *Belmont*: favoring once again his developed distinction between the external and internal powers when he concluded that the national government had the authority to enter into the agreement and invoked the language, while not naming specifically *Curtiss-Wright*, that "in respect of what was done here, the Executive had authority to speak as the sole organ of that [national] government." *Id.* at 330. In *Pink*, 315 U.S. 203 (1942), Justice Douglas expressly quotes from *Curtiss-Wright* the explanation of the Executive's role as "sole organ," and reaffirms that the President has the power to make binding international agreements without Senate ratification. *Id.* at 229. Justice Douglas went a step further and held that Congress had "tacitly" approved of the executive agreement. *Id.* at 227. *Pink* was a case decided when World War II was in full progress and the United States was fully invested. The real impact of *Pink* was seen in the Court's decisionmaking forty years later when it decided *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

96. *See infra* text accompanying notes 100–103.

97. *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 937–38 (2004) (discussing various arrests and evacuations of Japanese Americans on the West Coast post-Pearl Harbor).

98. *Id.* at 938.

On February 19, 1942, President Roosevelt signed Executive Order ("EO") 9066, authorizing military commanders to designate "military areas" at their discretion, "from which any or all persons may be excluded."[99] This authorization sent nearly 120,000 Japanese Nationals and Japanese Americans to internment camps. In a cluster of cases—*Hirabayashi v. United States*,[100] *Yasui v. United States*,[101] *Korematsu v. United States*,[102] and *Ex parte Mitsuye Endo*[103]—the Court considered whether the Executive had exceeded his authority by claiming emergency powers, or whether it was crucial to set in place an exclusion order due to military necessity.

Given public outcry and the political demands surrounding these cases, the external social factors present another opportunity to examine the constraints on the Court when it balanced President Roosevelt's unilateral claim of emergency powers during World War II and the suspension of Japanese-Americans' constitutional right to civil liberties. The Court ultimately sided with the President, asserting that he had statutory and constitutional authority to act during an emergency.[104] It is the dialogue between the Justices and the discourse utilized in these cases that highlights the doctrinal development and the entrenchment of the new path established by the Court in *Curtiss-Wright*.

President Roosevelt did not claim inherent or exclusive constitutional authority, but rather he asserted constitutional authority given to him by way of being the President and statutory authority given to him by Congress. The Internment cases (re)confirm and validate Justice Sutherland's assertion that the President can make foreign policy unilaterally; they also sanction the new path carved out by the Court in *Curtiss-Wright*—a path that the Executive has also subscribed to and, in the present cases, has attempted to broaden.

In *Hirabayashi*, the Court unanimously held that a Japanese-American citizen must obey the curfew regulations ordered by the Western Defense Command.[105] While the nation was at war, the Court found, in both *Hirabayashi* and *Yasui*, that the application of curfews against members of a mi-

99. Exec. Order No. 9066, 3 C.F.R. 1092 (1938–1943).

100. 320 U.S. 81 (1943).

101. 320 U.S. 115 (1943).

102. 323 U.S. 214 (1944).

103. 323 U.S. 283 (1944).

104. *See infra* text accompanying notes 105–110.

105. Hirabayashi v. United States, 320 U.S. 81, 101–02 (1943).

nority group were indeed constitutional. Justice Douglas wrote a concurrence in *Hirabayashi* and noted, "[W]e cannot sit in judgment on the military requirements of that hour."[106]

Executive prerogatives were further called into question in the landmark case of *Korematsu* in 1944. In a sharply divided six to three decision, the Court upheld Korematsu's conviction for violating EO 9066.[107] Justice Hugo Black wrote the majority opinion, which rejected Korematsu's discrimination argument. Siding instead with the government, the Court upheld the constitutionality of EO 9066 and, therefore, the government's policy to relocate citizens in order to protect against espionage, thereby outweighing the rights of Korematsu.[108] The Court reasoned the EO and the actions it authorized were a constitutional exercise of the President's war powers.[109]

While some actions taken by decisionmakers may seem unjustified, given the political climate surrounding the Internment cases—and in this instance, *Korematsu*—the Court reasoned that these decisionmakers are often faced with threats to the nation that call for extraordinary measures. Courts, at times, may "implicitly rely on the good faith of executive officials . . . as the unstated basis for overlooking civil liberties problems with the legal positions that the executive officials have staked out."[110]

Endo was the only Internment case where the Court, unanimously, found in favor of the plaintiff. The Court heard both *Korematsu* and *Endo* at the same time, but delayed announcing the *Endo* decision until December 18, 1944. This was one day after FDR announced Public Proclamation No. 21, which ended the exclusion order on the Western Defense Command.[111] The political timing of this proclamation was a reflection of the President ending incarceration and not a reflection of the Court reaching a decision on the merits. In fact, the Court ruled on statutory grounds that EO 9066 and 9102 cannot be construed to give the War Relocation Authority ("WRA")

106. *Id.* at 106 (Douglas, J., concurring).

107. Korematsu v. United States, 323 U.S. 214, 223 (1944).

108. *Id.* at 219–20.

109. *Id.* at 217–18.

110. Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT, *supra* note 4, at 124.

111. Public Proclamation No. 21, 10 Fed. Reg. 53 (Dec. 17, 1944).

the power "to subject citizens who are concededly loyal" to detention in a relocation center.[112]

V. *STEEL SEIZURE* IS NOT THE END POINT FOR THE REACH OF JUSTICE SUTHERLAND'S OPINION IN *CURTISS-WRIGHT*

A few years later, the *Steel Seizure* case of 1952 marked an extraordinary moment wherein the Supreme Court, during a time of war, used judicial review to check executive power. On April 8, 1952, President Harry S. Truman announced that, to avoid a labor strike, the federal government was to seize the steel mills of all major companies involved in a labor dispute with the United Steelworkers of America.[113] This announcement was met with uniform shock. While presidents in the past had seized plants, never before had the government, during what was, by all intents and purposes, a time of peace, apprehended a major portion of an industry as central to the American economy as steel. Nor had a president laid claim to inherent executive powers under Article II of the Constitution to defend a seizure when a statute—in this instance, the Taft-Hartley Act[114]—provided an alternate and legal method for thwarting the strike.[115]

Truman's actions created a political and constitutional crisis that solicited fundamental questions about the role of the President and the nature of presidential power. *Steel Seizure* afforded the Court an opportunity to reexamine the balance of authority among the branches. More importantly, this was an occasion for the Court to reassess and potentially (re)define the scope of presidential power in light of almost twenty years of unparalleled exploitation of executive authority. In this moment, Truman's unprecedented action sparked the traditional constitutional and institutional debate: Did the President act with legal authority? If he did not, what role, if any, did Congress play in passing judgment? And finally, did that judgment fall to the Court?

Justice Jackson's concurring opinion in *Steel Seizure* has become the leading authority—dividing the President's authority into three categories—for how the Court defines the relationship between Congress and the executive branch and how the Court determines whether the actions taken by the

112. *Ex parte* Mitsuye Endo, 323 U.S. 283, 297 (1944).

113. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 583 (1952).

114. Act of June 23, 1947, Pub. L. No. 80-101, 61 Stat. 135 (codified as amended at 29 U.S.C. §§ 141–187 (2006)).

115. *Id.* at 586.

President are legitimate.[116] It is an opinion that is often cited by the Court and invoked by presidents. While *Steel Seizure* demonstrates the limit of the executive branch's reach and scope of power when acting as Commander in Chief, it also illustrates how external forces—the Korean Conflict—did not constrain the Court.

Additionally, *Steel Seizure* illustrates why the Court did not find that the President's military power extended to labor disputes. The case took place against a backdrop of two decades in which presidents had steadily expanded their power and the judiciary had all but sanctioned its continued growth. As such, this development of power led Truman to assert that he had the authority to seize the mills. Truman believed that taking over the mills was necessary to safeguard the continued need of supplies to American troops in Korea and to support the healthy economy the nation was enjoying.[117] Truman envisioned a quick end to the hostilities and therefore attempted to downplay the seriousness of the course of action taken. During a press conference, Truman definitively stated, "We are not at war."[118] After being questioned by a reporter, Truman acceded that the United Nations operation could be characterized as a "police action."[119] The Korean Conflict soon became a war in every practical sense, however. As such, the Court's decision in *Steel Seizure* is what some would call an unexpected decision. Given the sizeable reasoning for Truman's action, why would the New Deal-Fair Deal Court that had previously been so receptive to the exercise of presidential authority use this case to restrain the use of inherent executive power?

From a historical standpoint, the decision in *Steel Seizure* is a sharp rebuke to President Truman's seizure and an attempt by the judicial branch to immobilize the accumulation of power by the executive branch. Justice Jackson criticized and rejected Justice Sutherland's opinion in *Curtiss-Wright* when he wrote his concurring opinion in *Steel Seizure*, observing that the language used by Justice Sutherland merely insinuates that "the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."[120] Justice Jackson

116. *Id.* at 634–35 (Jackson, J., concurring).

117. *Id.* at 582–83 (majority opinion).

118. The President's News Conference, 179 PUB. PAPERS 502 (June 29, 1950).

119. *Id.*

120. *Steel Seizure*, 343 U.S. at 636 n.2 (Jackson, J., concurring).

asserted that much of Justice Sutherland's opinion was dicta and bore no relevance to the issues presented in the *Steel Seizure* case.[121]

An examination of the *Steel Seizure* opinions demonstrates that the Court's holding was not a simple case of rebuke and not as sweeping as the broad language may initially suggest. Justice Black, FDR's first nominee to the Court and an ardent supporter,[122] quickly earned a reputation for "decisiveness, forthright thinking, strong attitudes, and impatience with legalism . . . ."[123] In most instances, Justice Black favored government intrusion to regulate business and labor's right to assist itself with the backing of auspicious legislation.[124] In general, Justice Black interpreted the words of the Bill of Rights literally to thwart government intrusion with personal liberties; during wartime, however, civil liberty claims had to give way before the needs of the government. This was the case when Justice Black authored the majority opinion in *Korematsu*; when the war powers of the government conflicted with individual rights, the safety of the nation necessitated the sacrifice of the latter.[125] With this reasoning, it was not unthinkable to expect Justice Black to sustain Truman's seizure of the steel mills, given the hostilities in Korea, international concerns, and the administration's assertions that steel was indispensable to the United States and its allies. In this instance, however, the Court sided with Congress against the President's assertion of unilateral power and found no congressional statute authorizing the President's actions.[126]

There is a tacit understanding that decisions by the Court are profoundly impacted by the political climate surrounding a case at hand. Seldom, however, do Justices acknowledge this realization. Then-Justice William H. Rehnquist's book,[127] written in 1987, recalls an exception that occurred when he served as a law clerk for Justice Jackson at the time the

121. *Id.*

122. For a detailed account of Justice Black's career before joining the Court, see VIRGINIA VAN DER VEER HAMILTON, HUGO BLACK: THE ALABAMA YEARS, 3–108 (1972). For Justice Black's appointment to the Court, see William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U. CHI. L. REV. 1 (1973).

123. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947, at 258 (1948); *see also* Leuchtenburg, *supra* note 122, at 22–23 (discussing Justice Black's early days on the Court).

124. PRITCHETT, *supra* note 123, at 208, 258.

125. *See supra* text accompanying notes 107–109.

126. *See supra* text accompanying note 109.

127. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987).

Steel Seizure case was argued and decided. During his time as a law clerk, he believed the Truman Administration was on solid ground with respect to legal precedent in *Steel Seizure*.[128] So why did Truman lose by a vote of six to three? Evidently, Truman's delineation of executive power was too sweeping for the nation, and strong public opinion[129] opposing his policies constrained the Court's decision. As then-Justice Rehnquist pointed out: "I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence on the Court."[130]

Justice Jackson's concurring opinion has had the greatest impact on contemporary constitutional analysis and "[n]o other statement by a Justice has so concisely and insightfully defined the limits and scope of presidential power."[131] Given this impact, Justice Jackson's concurrence is discussed at length. He split from the purely textual approach advocated by Justice Black, deducing that:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[132]

128. *Id.* at 94–95.

129. This check on presidential power is contingent on the general public expressing its trepidations and articulating that sentiment to the courts as well as to Congress. This prerequisite places a heavy burden on the individual citizen: it expects them to be cognizant of the use of executive power, to evaluate its use, to ask the Legislature or judicial branch to rein in that power, and to give its full support to the constraints imposed by either of the two branches.

130. REHNQUIST, *supra* note 127, at 95; *see also* MAEVA MARCUS, TRUMAN AND THE *STEEL SEIZURE* CASE: THE LIMITS OF PRESIDENTIAL POWER (Duke Univ. Press 1994) (1941). Marcus makes a similar observation. District Judge David A. Pine's decision, which held against Truman, "apparently influenced public opinion, for the Gallup Poll taken after the announcement of the ruling showed less support for the seizure than had been evidenced in previous polls. This popular reaction, which theoretically should not have had any effect on the outcome of the [*Steel Seizure*] case as it traveled through the higher courts, as a practical matter became an important element in the legal decision-making process." *Id.* at 130.

131. Louis Fisher, *Foreward* to MARCUS, *supra* note 130, at xii.

132. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Given this position, Justice Jackson sets out a three-tier framework, which not only addresses the relationship between Congress and the executive branch, but also stipulates how the Court will determine whether the actions taken by the President are legitimate.[133] As many before have noted, Justice Jackson divided the President's authority into three distinct categories. Tier one asserted that presidential power is at its zenith "[w]hen the President acts pursuant to an express or implied authorization of Congress" because "it includes all that he possesses in his own right plus all that Congress can delegate."[134] In such a situation, the President is dependent on his own powers as well as those delegated to him by the legislative branch.

It is tier two, known as the "Twilight Zone," that is of particular interest. Justice Jackson maintained:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.[135]

In this instance, if the President's power were in doubt, the legality of his act was "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[136] It is this point—and to some degree, the two aforementioned tiers—that demonstrate the Court's acceptance and willingness to take into consideration external forces and to be constrained by them when rendering a decision.

Tier three provided that presidential power is at its lowest ebb when it is "incompatible with the expressed or implied will of Congress," as the

133. *Id.* at 635–38.

134. *Id.* at 635.

135. *Id.* at 637. This could either be an indication of an expanded view of legislative deferrals, or it is simply politically unpopular for Congress to be seen as a war hawk. For an expanded discussion of legislative deferrals, see GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003); *see also* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

136. *Steel Seizure*, 343 U.S. at 637.

President may only rely upon his own constitutional authority.[137] In this circumstance, the President depends on his own constitutional powers, excluding whatever constitutional authority Congress could have over the issue. In this instance, the Court could uphold an executive's action only by finding that Congress could not act in the situation.[138]

The Court has embraced Justice Jackson's three-tier analysis to resolve continued issues of presidential power in the area of military and foreign affairs.[139] Justice Jackson counseled, "[l]oose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings."[140] Advocates of granting the President immense power can shift their claim to one of implied constitutional power.

For President Truman, the Court's decision came out of left field. He clearly expected an auspicious ruling and therefore took the decision as a personal censure.[141] Events occurring in the two decades prior to the decision suggested that the Court would not restrain presidential power. The Court's majority, however, was not swayed by the President's assertion that the crisis confronting the nation was grave enough to justify a claim of inherent executive power to seize private property. Despite the Court's rul-

137. *Id.* at 637.

138. *Id.* at 637–38. The extent to which the third category is applied is exemplified by President Reagan's role in the Iran-Contra affair. To justify their actions, the Reagan Administration used the theory of extra-constitutional powers. At the time, aides to the President utilized the teachings of *Curtiss-Wright* and extended the notion of executive power beyond the counsel given by Justice Sutherland. During the Iran-Contra hearings, Oliver North stated that the President had the power to authorize and conduct covert actions with non-appropriated funds—funds acquired from private parties from foreign governments. *See Iran-Contra Investigation: J. Hearings Before the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the H. Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong. (1987) (testimony of Oliver L. North). The issues at hand in *Curtiss-Wright* did not deal with this kind of dispute, and the dicta used to support the necessity of secrecy and confidentiality in foreign affairs in that case did not offer any support for North's assertions. But this incident does reflect the executive branch's continued use of *Curtiss-Wright*.

139. *See infra* Part VI.

140. *Steel Seizure*, 343 U.S. at 646–47.

141. *See* MARCUS, *supra* note 130, at 214–15.

ing, presidents have—with large success[142]—advanced Justice Jackson's three-tier analysis as the legal authority to act unilaterally.

VI. THE IMPACT OF *STEEL SEIZURE*

To identify the extent to which a president claims broad unilateral authority in foreign affairs following Justice Jackson's three-tier analysis, *Dames & Moore v. Regan*[143] and *Regan v. Wald*[144] provide another opportunity to examine the Court's role in re-defining executive power in this area. In *Dames & Moore*, the Court found the President's claim to an executive agreement, which declared a national emergency and froze Iranian assets, was grounded in statutory authorization because Congress had tacitly endorsed the President's agreement.[145] According to the Court, the "general tenor of Congress' legislation in this area" allocated broad discretionary authority to the President.[146] Justice Rehnquist, writing for the majority, asserted that "[p]ast practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.'"[147]

142. The "zone of twilight" helps explain the successful use of power by many presidents subsequent to this case and its ruling. When President Jimmy Carter declared his intention to unilaterally terminate a defense treaty with Taiwan, his legal authority to terminate a treaty without the advice and consent of the Senate was called into question. When this case reached the Supreme Court, Justice Powell echoed Justice Jackson's concurrence in *Steel Seizure*, stating, "If the Congress chooses not to confront the President, it is not our task to do so." Goldwater v. Carter, 444 U.S. 996, 998 (1979). Similar decisions were handed down in the cases involving the Reagan Administration and its use of the war power in El Salvador, Nicaragua, Grenada, and in the Persian Gulf. For example, in a war powers case involving President Reagan and Nicaragua, Judge Ruth Bader Ginsburg, who later became a member of the Supreme Court, noted "Congress has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. . . . Congress expressly allowed the President to spend federal funds to support paramilitary operations in Nicaragua." Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsberg, J., concurring); *see also* Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985) (declining to exercise jurisdiction in a case challenging U.S. actions in Grenada); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (declining to exercise jurisdiction in a case challenging U.S. actions in the Persian Gulf); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (finding a lawsuit challenging U.S. actions in El Salvador not justiciable).

143. 453 U.S. 654 (1981).

144. 468 U.S. 222 (1984).

145. *Dames & Moore*, 453 U.S. at 669–74.

146. *Id.* at 678.

147. *Id.* at 686 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).

As a final point, the Court argued from a public policy standpoint that the President needed the freedom to act; in this case, the need to use frozen assets as "bargaining chips" in delicate negotiations.[148] The Court declared that if such a power was not granted to the Executive, "the Federal Government as a whole [would] lack[] the power exercised by the President . . . ."[149] Relying explicitly on Justice Jackson's concurrence in *Steel Seizure*, the *Dames* Court did conclude, however, that the legislative branch's failure to pass a statute articulating disapproval was tantamount to an invitation to the President to act unilaterally.[150] For the *Dames* Court, congressional silence was indistinguishable to the sanctioning of presidential initiatives.

The *Dames* decision demonstrates a marked—albeit engineered—shift in authority from Congress to the President. And, because the opinion rests on statutes that do not directly speak to the issue, the decision illustrates the Court's recognition of broad presidential power in foreign relations. While the *Steel Seizure* Court did not speak explicitly to the issue of inherent powers, the *Dames* Court confirmed the relevance of Justice Jackson's concurrence to finding that the President may possess inherent powers when responding to international emergencies. The Court, therefore, emphasized the constraining external factors when considering cases in this area.

In *Regan v. Wald*, the Court found exceptions to justify and sanction broad discretionary authority to the President when President Ronald Reagan restricted travel to Cuba because of national security needs—the ever-pervasive Cold War.[151] The Court reasoned that the legislative branch authorized the President's actions,[152] and sanctioned them with, as *Steel Seizure* phrased it, the "widest latitude of judicial interpretation."[153] Even though Congress asserted a dominant role by enacting provisions to "tie the hands" of the President and fence in the far-reaching scope of presidential authority, the *Regan* Court found in favor of the Executive.[154] This decision demonstrated that even though Congress attempted to rein in the Presi-

148. *Id.* at 673–74.

149. *Id.* at 674.

150. *Id.* at 678–79.

151. 468 U.S. 222, 230–244 (1984).

152. *Id.* at 232.

153. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

154. Regan v. Wald, 468 U.S. 222, 244 (1984).

dent, it was up to the Court to determine what power and authority the President had. Given the Court's determination in this matter, it granted more power to the Executive, essentially stripping the authority of the legislative branch to statutorily determine what checks and limits would be placed on executive powers. Furthermore, despite Congress's post-Vietnam legislative assertiveness to rein in the powers of the Executive in foreign policy, the Court determined that this kind of opposition had essentially run its course. The Court's position on presidential control of foreign policy would therefore win out.

VII. UNPRECEDENTED UNILATERAL CLAIMS IN THE WAR ON TERROR

Two decades later, the Supreme Court would have another chance to (re)evaluate Congress's role in the area of foreign affairs. Following the terrorist attacks of September 11, 2001, the Bush Administration mounted an offensive war against, what it would deem, a nontraditional enemy; it was, therefore, a new kind of war—a "War on Terror." This contention suggests the necessity of a more robust review by the courts of the administration's detention policies when balancing concerns of national security and the protection of individual liberty. The set of cases challenging the Bush Administration's detention policies are labeled, quite apropos, the Detainee Cases. The Detainee Cases appraise the controversial treatment of the executive power used during the War on Terror by the Bush Administration—policies vis-à-vis the capture, detention, and legal processing of suspected terrorists since 2004.

This cluster of cases includes *Rumsfeld v. Padilla*,[155] *Rasul v. Bush*,[156] *Hamdi v. Rumsfeld*,[157] *Hamdan v. Rumsfeld*,[158] and *Boumediene v. Bush*.[159] In the end, the Court sided with the Bush Administration on fundamental constitutional grounds, but constrained it statutorily.

Even though this juncture, or constitutional moment, provided the Court with an opportunity to change the course taken by the executive branch and require a more dominant role by Congress, the Court ultimately took into account external constraints that sanctioned the President's asser-

155. 542 U.S. 426 (2004).
156. 542 U.S. 466 (2004).
157. 542 U.S. 507 (2004).
158. 548 U.S. 557 (2006).
159. 553 U.S. 723 (2008).

tions and assisted in developing a new baseline, one that established the necessity for taking into account the executive's framing and assertion of an alternative understanding on how to handle a unique war. The War on Terror was a nontraditional war, and, as such, necessitated actions contrary to traditional standards.

Since 1936 when *Curtiss-Wright* was decided, granting implicit executive power, the clear trend of case law was to support the President's use of emergency and war powers.[160] The discretionary latitude afforded to the President is particularly evident given the response of the federal courts to President Bush's assault on the War on Terror. Even though the President sought and received congressional support for many of the actions taken to combat this war, the White House did not suggest, at any point, that it needed congressional approval for the policies it implemented.[161] In fact, President Bush, on numerous occasions, emphasized his unilateral authority to conduct a unique war how he saw fit.

In June 2004, the Supreme Court ruled in three related cases: *Rasul v. Bush*,[162] *Hamdi v. Rumsfeld*,[163] and *Rumsfeld v Padilla*.[164] These three cases address the President's anti-terror initiatives and executive claims of unilateral power. The Administration also claimed the President's authority was unreviewable by the judiciary and could not be checked by a coordinate branch of government. In two of the three cases, however, it appears the Court placed some statutory limits upon executive authority.

The Bush Administration claimed that the President is granted broad war-making powers when acting in the constitutional capacity of Commander in Chief to conduct a successful campaign.[165] Moreover, the Au-

160. *See, e.g.*, HAROLD HONGJU KOH, *supra* note 39, at 138 ("The Burger Court had several opportunities to read *Curtiss-Wright* strictly and thereby to rein in this executive practice. On each occasion, however, it ruled in the president's favor, approving rather than rejecting his self-serving construction of the statute in question.").

161. *See* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 506 (2002) (noting that in the past, "when Congress has actually authorized troop deployments in hostilities, Presidents have taken the position that such legislation, although welcome, was not constitutionally necessary.").

162. 542 U.S. 466 (2004).

163. 542 U.S. 507 (2004).

164. 542 U.S. 426 (2004).

165. Delahunty & Yoo, *supra* note 161.

thorization for Use of Military Force ("AUMF") Act,[166] a joint resolution passed by Congress immediately following the September 11 attacks, granted the President considerable latitude in the conduct of hostilities. This Act also gave the President the authority to use all necessary and appropriate force against those who aided or abetted in the terrorist attacks.[167]

Rasul v. Bush was the first habeas corpus case to reach the Court. The question before the Court was whether it had jurisdiction to hear legal appeals filed on behalf of the foreign citizens who were being held at Guantanamo Bay's naval base.[168] Justice John Paul Stevens wrote the six to three opinion, holding that Guantanamo Bay was territory under American jurisdiction, thus entitling the prisoners to habeas corpus hearings.[169] More importantly, the petitioners' rights to habeas corpus were not dependent on their citizenship status.[170]

In its 2002 decision in *Hamdi v. Rumsfeld*,[171] ("*Hamdi II*"), the United States Court of Appeals for the Fourth Circuit quoted *Curtiss-Wright*, asserting that when assessing national security concerns, the President wields "plenary and exclusive power."[172] Citing *Steel Seizure*, the Fourth Circuit also said this power is superior when the President acts "with statutory authority from Congress."[173] While the court did not indicate which statutes might have authorized the President's actions, it went on to affirm the President's constitutional power—as supported by the *Prize Cases* and *Dames & Moore*—to conduct military operations, determine who would be considered an enemy combatant, and decide the rules governing the treatment of such individuals.[174] In *Hamdi v. Rumsfeld*[175] ("*Hamdi III*") in 2003, the same court concluded the President had near unfettered discretion when faced with an emergency, and it was inappropriate for the Judiciary to

166. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note (2006)).

167. *Id.*

168. Rasul v. Bush, 542 U.S. 466, 470 (2004).

169. *Id.* at 480–81.

170. *Id.* at 484–85.

171. 296 F.3d 278 (4th Cir. 2002).

172. *Id.* at 281 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

173. *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–37 n.2 (1952) (Jackson, J., concurring)).

174. *Id.* at 281–82.

175. 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

weigh down presidential decisions with what the court called the "'panoply of encumbrances associated with civil litigation.'"[176]

When *Hamdi III* reached the Supreme Court, the Court was unable to agree on a unanimous line of reasoning, resulting in the six to three vote that the AUMF granted the President authority to detain a United States citizen as an enemy combatant because the President's action was pursuant to an act of Congress.[177] Specifically, Justice Sandra Day O'Connor wrote that because "the AUMF is explicit congressional authorization for the detention of individuals," it gives the President the authority to use all necessary and appropriate force against "nations, organizations, or persons."[178] Justice O'Connor, however, reminded the Administration that the Rehnquist Court would not become a rubber stamp for an administration that was attempting to "*condense* power into a single branch of government."[179]

In *Rumsfeld v. Padilla*, the Court made clear that presidential actions were, indeed, subject to judicial scrutiny, placing some constraints on the President's unfettered power.[180] Ultimately, however, the Court declined on procedural grounds to rule in this case.[181] Justice Stevens's dissenting opinion is interesting, however, for a couple of reasons. He asserted that the arguments stated by the Court could not justify avoiding its duty to respond to the question the case raised: Did the President have the authority to detain Padilla by claiming a broad inherent or emergency power?[182] Justice Stevens argued, "[t]his is an *exceptional* case that we clearly have jurisdiction to decide."[183] He further maintained that the case before the Court gave the Justices an opportunity to review the actions taken by the Administration and the constitutional claims made by the President when he

176. *Id.* at 465 (quoting *Hamdi II*, 296 F.3d at 283–84).

177. Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

178. *Id.* at 517–18 (internal quotations omitted).

179. *Id.* at 536.

180. 542 U.S. 426, 430 (2004) (explaining that the Court granted certiorari to review, in part, the legality of Padilla's military detainment pursuant to the President's determination that he is an "enemy combatant").

181. *Id.* at 451.

182. *Id.* at 455 (Stevens, J., dissenting).

183. *Id.* (emphasis added).

invoked inherent power—terms echoing *Curtiss-Wright*—to deny Padilla his civil liberties in the name of national security.[184]

Ultimately, the amalgamation of *Rasul*, *Hamdi*, and *Padilla* provide the most definitive statement yet of what powers are afforded to the President when detaining so-called enemy combatants. The Court, weighing the legal norms and external factors (the mutual construction process), was constrained by extenuating circumstances and found, in large part, in favor of the Executive.

The composition of the Court had not changed in almost ten years, not since Justice Breyer replaced Justice Blackmun. It had been its longest period of stability. President Bush, however, would have the opportunity to appoint not one, but two nominees to the Court in 2005. This would yield a new Court dynamic, one that the Administration hoped would continue to vote in their favor. Since Justice O'Connor—known as having immense power as a swing voter—was no longer on the bench, Justice Kennedy's vote became the one to watch.[185] Justice Antonin Scalia, Justice Clarence Thomas, and the newly confirmed Justice Samuel Alito were likely to align themselves with the Bush Administration, leaving Justices Souter, Breyer, Stevens, and Ginsburg to side with plaintiffs.

The Court under Chief Justice Roberts would now be left to answer the important questions left unanswered by the Rehnquist Court when it ruled in *Rasul*, *Hamdi*, and *Padilla*. For example, no five Justices could settle on the exact kind of legal process Hamdi or other enemy combatants should be given. Of course, this lack of consensus was not necessarily met with disapproval by the Bush Administration.

Hamdan v. Rumsfeld and *Boumediene v. Bush* were the two final cases for the Court to review. The Court was split five to three in *Hamdan*. Writing for the majority, Justice Stevens concluded that special military tribu-

184. *See id.* at 461 ("[T]his case is singular not only because it calls into question decisions made by the Secretary himself [under the President's order], but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen."); *see also id*. at 465 ("Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law.").

185. Justice Kennedy wrote a concurring opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006), in which he concluded the petitioners had the privilege of habeas corpus, but noted the Court would not address whether the President has the authority to detain these petitioners nor would it hold that the writ must be issued. Justice Kennedy also delivered the majority opinion in *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

nals[186] must either be established by statute or, if created by presidential order, must follow rules and procedures consistent with the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions.[187] Moreover, the mere assertion of inherent powers did not grant the President the authority to establish military commissions.[188] The upshot of Jusitce Stevens's opinion amounted to a more systematic reproach to the Administration than the Court had issued two years earlier. Procedures could not be written for the military commissions unilaterally—Congress had to approve them—nor could the procedures ignore Geneva Conventions; in fact, they had to comply with the treaty.[189] The courts also had an important role to play and had to be involved from the start and not just when the detainees were convicted and sentenced.[190] Even though the Court ultimately invalidated these particular tribunals, it did accept the principle that the President has the authority to order that those he believes to be unlawful combatants be tried by military tribunals so long as, the Court asserted, the tribunals were lawfully constituted.[191]

Acting pursuant to the Court's counsel, the President asked Congress for the authorization to create special tribunals operating under basically the same rules and procedures as those declared unconstitutional by the Supreme Court. Congress acted forthwith and acceded to President George W. Bush's request by passing the Military Commissions Act ("MCA"),[192] which the President promptly signed into law in October 2006.

Even though in *Boumediene* the commissions were ultimately challenged and subsequently found by the Court to be an unconstitutional suspension of a prisoner's right to habeas corpus, the decision in *Hamdan* demonstrates the Court acting as a mediator between the two branches. Insisting that Congress play a more prominent role identifies the Court's prowess to force another institution to act in order for it to sanction, statutorily, the actions taken by the executive branch. Consequently, since the

186. A Combatant Status Review Tribunal was established for Hamdan's case by the U.S. Department of Defense on July 7, 2004. *Hamdan*, 548 U.S. at 570 (majority opinion).

187. *Id.* at 567.

188. *Id.* at 593.

189. *Id.* at 620–25. Justice Stevens, however, did not have a majority for all parts of the Geneva Conventions analysis. *Id.* at 564.

190. *Id.* at 633–35.

191. *Id.* at 594–95.

192. Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified at 10 U.S.C. § 948a–950w and other sections of Titles 10, 18, 28, and 42).

President sought, and Congress approved, statutory authorization, the *Hamdan* decision does not appear to posture a demonstrable challenge to presidential power during a time of war.

Boumediene involved a more direct confrontation to the Bush Administration's authority because it challenged the constitutionality of the MCA. In a five to four split, Justice Kennedy, writing for the majority, held that the habeas statute extended to non-citizens at Guantanamo as a guarantee under the Constitution, and that the MCA was an unconstitutional suspension of the federal courts' jurisdiction to hear habeas applications from detainees who had been labeled "enemy combatants" by the Bush Administration.[193]

The Court's assertions were a sharp reproach to the Administration's contention that it could offer an alternative constitutional understanding.[194] In fact, the Court stated, it is not the "regime" that has the authority to say "what the law is," but the Court's authority.[195] What this illustrates is an institution not willing to back down in the face of the Executive's attempt to commandeer the Court's role in defining the President's powers and scope in foreign policymaking. When challenged on the supremacy over constitutional interpretation, the Court will confront the primary commitments of the majority coalition and (re)establish its institutional legitimacy. While the courts have upheld certain due process rights of individuals classified by the Administration as enemy combatants, what these decisions have not adequately addressed is the core war-making powers of the President. As such, the Court's (re)definition of those powers remain largely intact.

The initiation of the War on Terror by the Bush Administration saw national security powers unavoidably encroaching on domestic issues with the U.S.A. Patriot Act (2001)[196] and the newly formed Homeland Security Department—a multi-faceted agency that responds to tornadoes, floods, and terrorists. The War on Terror has been a long drawn out effort that has become almost a permanent fixture of our political reality, as the Cold War

193. Boumediene v. Bush, 553 U.S. 723, 733 (2008).

194. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 15 (2007) (noting that, at times, various political actors, in this instance the Executive, seek to supplant other potential constitutional interpreters (the Court in this case) and assert their own authority to define the powers or "content of contested constitutional principles").

195. *Boumediene*, 553 U.S. at 765 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

196. United and Strengthening America—Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

was for many years. When the line between foreign and domestic policy becomes blurred, the President's expanding pool of foreign policy powers will take on greater domestic prominence, which is sure to yield protests and political inconveniences that dare to confront a president's monopoly over foreign policymaking—as was possibly the situation in the *Steel Seizure* case.

Recently, we have witnessed President Barack Obama utilizing the unbridled unilateral power that so many presidents[197] before him have claimed—a power the Court has legally sanctioned. The President is making full and unprecedented use of drone warfare, which is quickly becoming the cornerstone of his national policy. A secret memorandum released to the Senate by the Justice Department in February 2013 goes beyond what was said publicly about the legal justifications for targeting Americans who are suspected as operational leaders of al Qaeda.[198] These broad interpretations by the Obama Administration may usher in new questions for the Court and we will see, perhaps, if the Court will find in favor of the great elasticity with which this Administration is exercising the commander-in-chief clause, and whether the President can broadly interpret his power to defend the nation to include the use of drones. As should be evident, even when the Court has appeared to hand a president a loss, Justices proceed with caution when evaluating the potential ramifications of their decisions.

VIII. CONCLUSION

At the onset of military exigencies, Congress and the public at large give presidents enormous freedom of action in the realm of foreign and security policy. But how the federal courts define the appropriate balance between security and liberty, which has the potential effect of constraining the Executive, is relevant to understanding how U.S. foreign policy and the relationship between Congress, the President, and the courts has evolved. Adjudicating competing concerns over the security of the nation and the liberty of the individual presents a more significant challenge for the Court

197. *See* Lori Fisler Damrosch, *Covert Operations*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 87–97 (LOUIS HENKIN, MICHAEL J. GLENNON, & WILLIAM D. ROGERS eds., 1990) (discussing the ways in which Congress allowed the executive branch to circumvent its policies regarding covert actions).

198. UNITED STATES DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE , *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

than simply resolving domestic policy disputes. As such, to understand judicial decisionmaking requires a better grasp of the factors affecting each Justice's decision, including their alliance to bedfellows on the Court and political leanings. In short, the Supreme Court tends to support a president's Hamiltonian view of his role in foreign policy. This is evident with Justice Sutherland's 1936 opinion in *Curtiss-Wright*—that the President is the "sole organ of the federal government in the field of international relations."[199]

While the *Steel Seizure* case all but relegated *Curtiss-Wright* to a footnote—describing Justice Sutherland's opinion as dicta in Justice Jackson's concurrence—this has not curbed presidents from asserting a dominant role in foreign affairs. In fact, Justice Sutherland's opinion in *Curtiss-Wright* is oft-cited by the Court to support claims of "broad delegations of legislative power to the President" and also "the existence of independent, implied, and inherent powers for the President."[200] Moreover, many politicians and the public at large generally have accepted this assertion. This trend has exalted presidential power far beyond the constitutional blueprint advocated by the Court prior to 1936 and enters into the realm of unilateral executive dominance. While the decisions rendered by the Court have not always invoked *Curtiss-Wright*, the essence of Justice Sutherland's opinion has infused other techniques invoked by the Court, such as the "political-question doctrine, grounds of nonjusticiability, and the silence and inaction of Congress."[201] This overview of the past seventy-five plus years demonstrates a trend that perpetuates the usurpation of powers by the President and the overarching claim that the President is granted superior authority in foreign affairs. Given this trend, extra-constitutional arguments as presented by those supporting a powerful executive have a sturdy foundation.

Curtiss-Wright has never been overruled and, when viewed narrowly to only the decision rendered, no one has ever really questioned the Court's ruling. It has been an "authority" on which those rallying for support of plenary presidential powers independent of congressional delegation rely. For those intent on championing unilateral presidential action in the area of foreign affairs, or in challenging congressional attempts to limit the Executive's discretion in this realm, Justice Sutherland's profuse language has shown to be alluring:

199. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

200. FISHER, *supra* note 21, at 73.

201. Adler, *supra* note 40, at 27.

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen . . . Congress itself is powerless to invade. . . . [T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .[202]

Executive branch lawyers, therefore, understandably have not refrained. As Harold H. Koh noted, "[a]mong government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the "'*Curtiss-Wright*, so I'm right' cite"—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief."[203]

While it is evident that no post-*Steel Seizure* decision by the Supreme Court visibly rested on the *Curtiss-Wright* decision as controlling precedent, what this analysis has identified is a discernible change in trajectory by the Court in the area of foreign affairs. Furthermore, the Court asserts its authority to define presidential power at the juncture of political and legal time. It is apparent from the analysis that Justice Sutherland's opinion—drawing largely from his early writings—also embraced some of the arguments presented by the government, and the political timing of the case placed the Court in the prominent position of changing the path trajectory of the executive branch, altering not only the subsequent path taken by presidents, but also how an executive can frame arguments in the future when claiming a broad prerogative. The Court's dynamic institutional role influenced the development of constitutional law and the political development of the executive branch.

Curtiss-Wright is also a story of how a Court decision, at the juncture of legal and political time, can escape almost all of its contemporary context, and how both lawyers and the Executive can utilize and reinvent the decision so that what it stands for has virtually nothing to do with the original case. As H. Jefferson Powell noted, "*Marbury v. Madison* rested the power of the Court to determine constitutional meaning on the duty of the

202. *Curtiss-Wright*, 299 U.S. at 319–20.

203. KOH, *supra* note 39, at 94 (quoting Brief for Respondents, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), at 30, 40, 44, 52, 53; Brief for Appellees, *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989), at 18–19, 22, 24–25, 44).

judicial branch to decide cases[, but] *Curtiss-Wright* suggests that the Court's constitutional role may be, at times anyway, very different."[204]

The Court's judicial tilt toward the executive branch caught the attention of such scholars as Edward Corwin, who argues that courts often defer to the executive branch because presidential exercises of power frequently generate changes in the world that the U.S. judiciary feels powerless to invalidate.[205] This analysis, however, demonstrates the sophistication of the Court and its dynamic role in (re)defining executive powers in the area of foreign affairs.

The Court serves as an architect in (re)defining executive unilateral powers in foreign policymaking. It is the continuous and constitutive relationship between the Court and the Executive that has elevated the President's authority far beyond the Court's early judicial rulings. As Keith Whittington noted, "[t]he creation or recognition of a new power by one president necessarily empowers his successors . . . ."[206] I would assert that as the Court (re)defines the Executive's power in the area of foreign affairs, it not only empowers that president, but also grants to succeeding presidents the empowerment to act forthwith. As such, we have witnessed the Court's direct hand in shaping the growth of the President's unilateral powers and institutionalized this prerogative in the area of foreign affairs.

204. Powell, *supra* note 75, at 196.

205. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 16 (4th ed. 1957).

206. WHITTINGTON, *supra* note 194, at 17.