

Enumerated Powers and the Delegation Doctrine—The *Curtiss-Wright* and *Youngstown* Cases

Introduction

Perhaps among the most important features embedded in the U.S. Constitution, are the principles of separation of powers and the check and balance system. However, these often result in conflicts pitting the executive branch against the legislative branch.

This problem was discussed before the Constitution was operable. In the ratification debate Antifederalists argued the blending of powers between the executive and legislature, most notably in the Senate, would cause problems. Federalists countered that the enumeration, checking and separation of powers in the Constitution were adequate so as to prevent the encroachment of one branch on another.

Central in many disputes involving any constitution are debates over methods of interpretation. The U.S. Constitution is not immune from these disputes. Among the shortest of constitutional texts, the U.S. Constitution has been framed as either a definitive text that needs minimal clarification or as a set of guidelines that needs continuous interpretation. Central to this debate is the nature of enumerated powers, as well as the dispute over the legitimacy of deriving implied powers from the text. Constitutional textualists submit that the powers enumerated in the text can be simply applied when various branches have contesting claims of authority. On the other hand, proponents of a living Constitution argue there is an inherent vagueness in the wording of the Constitution. Consequently, principles should be employed when deciphering the nature, limits and extent of powers found in the text.

Scholars have noted that the delegation doctrine is among the troublesome issues to emerge in the relationship between the executive and legislative branches. In practice, the delegation doctrine means that one branch of government can delegate its powers to another branch. It is explicitly stated in many constitutions throughout the world and American scholars who support the practice suggest it is implicit within the U.S. Constitution. In *J.W. Hampton, Jr., & Co. v. United States* (1928) the Supreme Court gave judicial sanction to the delegation doctrine stating that so long as there was an “intelligible principle” guiding Congress when it sought the assistance of another branch of government, “the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.”

The theory behind these legislative delegations is can be seen within the activities of administrative agencies. These agencies are created by Congress through legislation that grants the President authority to fill in details of Congressional statutes. Many suggest that officers of these agencies can expertly and objectively enact legislation without facing the pressures of electoral politics. Critics argue that this type of delegation is incompatible with fundamental ideas undergirding the American constitutional system. John Locke, in his *Second Treatise of Government*, noted “The Legislative cannot transfer the Power of Making Laws to any other hands. . . . nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them.” Secondly, critics point to the text of Article I of the Constitution that states “All legislative Powers herein granted shall be vested in a Congress of the United States.” Thus, when critics look at the realities of the day-to-day workings of government, they see the myriad of executive agencies that have been given the authority to write and enforce administrative rules as an example of government running “rough shod” over the plain text of the Constitution.

Another issue that arises in the relationship between the executive and the legislative branches is in the implementation and execution of foreign policy. The president is charged with conducting foreign policy although the approval of two-thirds of the Senate is needed to ratify treaties. Two-thirds of the Senate is needed to confirm appointment of ambassadors and Congress has the power to declare war. Additionally, foreign policy conflicts have arisen when presidents have issued executive orders without congressional approval. Presidents have argued that under the Commander in Chief Clause, they have wide latitude in conducting foreign policy. Those willing to grant the executive these broad powers find their support in Alexander Hamilton's *Federalist 69* and, perhaps, more explicitly in a speech on 7 March 1800 by John Marshall in the U.S. House of Representatives. Marshall noted the president was "the sole organ of the nation in its external relations, and its sole representative with foreign nations." This idea would later be detailed in the seminal case of *U.S. v. Curtiss-Wright*.

Critics, in the Whig tradition, have a wary eye on executive prerogative. They insist the design and text of the Constitution suggests that the President is not singularly responsible in foreign policy. Since the president must coordinate when conducting treaties with the Senate and the House funds war efforts, any suggestion that the executive has sole powers in this regard is without merit. Additionally, those critical of the sole organ theory, point to excessive secrecy that may result when presidents conduct foreign policy based on this model. Consequently, they propose that diplomatic proceedings and military intelligence should be shared with Congress since the legislative process offers greater transparency.

The materials used in this script are taken from three 20th century cases. In *Curtiss-Wright* (1936), Justice George Sutherland's opinion primarily addressed the delegation doctrine and in doing so, articulated the sole organ theory of the presidency. When FDR, through an executive order, stopped the sale of munitions to Paraguay and Bolivia, the Curtiss-Wright Corporation filed suit maintaining congressional authorization of power over commerce to the executive was unconstitutional. Likewise in the *Youngstown* case (1952), the Court again had to decide if President Harry Truman's powers as commander in chief conflicted with Congressional regulatory powers in a takeover of the steel industry during the Korean War.

Supreme Court Cases Used in Script

United States v. Curtiss-Wright Export Corporation et al, 299 U.S. 304 (1936)

Youngstown Sheet and Tube Company et al v. Sawyer, 343 U.S. 579 (1952)

Central Constitutional Issues in Cases Used in Script

United States v. Curtiss-Wright Corporation et al, 1936

Can Congress, through a joint resolution, delegate legislative powers to the President? Can Congress delegate sole responsibility for foreign affairs to the Executive Branch?

Youngstown Sheet and Tube et al v. Sawyer, 1952

Did the President overstep the boundaries separating the legislative and executive functions in the Constitution? Did the Constitution grant the President powers to protect the nation in times of national emergency?

Roles in Script—7 (L—large role; M—medium role; S—small role)

Moderator (L)

Justice Hugo Black (L)

Justice William O. Douglas (M)

Justice Felix Frankfurter (M)

Justice Robert H. Jackson (S)

Justice George Sutherland (L)

Justice Frederick M. Vinson (L)

The Script

Moderator: Hello and welcome. Today we are considering an issue that dates back to the American Revolution. As Americans, we have deep suspicions when executives use power in ways that threaten liberties. The brevity of the Constitution's text complicates our attempts to define and confine the parameters of executive power. We have individuals with us who have offered their views on the matter in the form of Supreme Court decisions. Welcome Justices Sutherland, Black, Jackson, Vinson, Douglas, and Frankfurter.

Justices: It's nice to be here. Hello. It's a pleasure to be here. Etc.

Moderator: Two basic ideas in our Constitution are the separation of powers into three branches of government and the system of checks and balances. Often these concepts come into play when Congress delegates powers to the executive branch.

Frankfurter: President Harding is reported to have said that government . . . is a very simple thing. He must have said that as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale.

Douglas: [Felix, could we . . .]

Frankfurter: The Founders of this Nation . . . acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power if a society is to be at once <consistent>¹ and civilized, but also on the need for limitations on the power of governors over the governed.

Douglas: [You will have to forgive Felix. He perpetually seeks to lecture and he often taxes all of us.]

Frankfurter: [My apologies. I will try to resist the urge to lecture.]

Moderator: But, I do want to focus on some specific instances when the powers of the president and Congress were at loggerheads. Since each of you have written Supreme Court decisions relating to this issue, we want to highlight the basic principles used by justices in a few decisions relating to executive powers.

Jackson: [The central dilemma is this.] While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate depending upon their <disconnection>² or <connection>³ with those of Congress.

Douglas: Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill.

Vinson: The Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress.

Douglas: [But, Justice Brandeis once said that] the doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to <prevent>⁴ the exercise of arbitrary power. The purpose was not to avoid friction, but . . . to save the people from autocracy.

Vinson: [However,] the Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness.

Moderator: But weren't most of the Framers more concerned with the opposite; too much executive power?

Vinson: There is no cause to fear Executive tyranny so long as the laws of Congress are being faithfully executed. Certainly there is no basis for fear of dictatorship when the Executive acts . . . only to save the situation until Congress could act.

Douglas: Legislative power . . . is slower to exercise. There must be delay while the <slow and inefficient>⁵ machinery of committees, hearings, and debates is put into motion. That takes time . . . [and an] emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives.

Vinson: [Precisely. In the past] when the national revenue laws were openly flouted in some sections of Pennsylvania, President Washington, without waiting for a call from the state government, summoned the militia and took decisive steps to secure the faithful execution of the laws.

Douglas: [However.] We pay a price for our system of checks and balances, for the distribution of power among the three branches of government.

Vinson: It is . . . apparent that the Presidency was deliberately fashioned as an office of power and independence. Of course, the Framers created no autocrat capable of <claiming>⁶ any power unto himself at any time. But neither did they create a <robot>⁷ <unable>⁸ to exercise the powers of Government at a time when the survival of the Republic itself may be at stake.

Douglas: Today, a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow, another President might use the same power to prevent a wage increase, to curb trade unionists, [or] to regiment labor.

Moderator: I take it that you are referring to when President Harry Truman ordered the military to take over the steel mills in the midst of the Korean War?

Douglas: [Yes. it's a pretty simple matter.]

Moderator: How so?

Douglas: The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend, and that it is the function of the Congress to legislate.

Moderator: This does seem pretty straightforward.

Frankfurter: [However,] the judiciary may . . . have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But . . . we should be wary and humble. Such is the teaching of this Court's role in the history of the country.

Douglas: [Felix, it's still pretty simple. You always want to complicate things.]

Moderator: Let's focus our attention on a few specific cases from the 20th century. Our first case involves the President's actions in a war in South America in the 1930s between Argentina and Bolivia. If my memory is correct, President Franklin Roosevelt sought to limit and end that conflict?

Sutherland: [Yes. FDR said in an executive order that he was] acting under and by virtue of the authority conferred . . . by [a] resolution of Congress [that he was] prohibiting the sale of arms and munitions of war . . . to those countries engaged in armed conflict in the Chaco.

Moderator: Did FDR have a reason for issuing this executive order?

Sutherland: [FDR thought that this could] contribute to the reestablishment of peace between those countries.

Moderator: In the past, have other presidents acted in a similar fashion when Congress has delegated authority to the executive branch?

Sutherland: [An] Act of June 4, 1794, authorized the President to lay, regulate and revoke embargoes. He was "authorized . . . whenever, in his opinion, the public safety shall so require," to lay the embargo upon all ships and vessels in the ports of the United States, including those of foreign nations "under such regulations as the circumstances of the case may require."

Moderator: That would have been George Washington and if I am not mistaken, our foreign policy was complicated by the events unfolding in the French Revolution.

Jackson: A judge . . . may be surprised at the poverty of really useful and <clear>⁹ authority applicable to concrete problems of executive power as they actually present themselves.

Moderator: Is this true Justice Sutherland?

Sutherland: [Not exactly. Another] Act of March 3, 1795 gave the President authority to permit the exportation of arms . . . the only prescribed guide for his action being that such exports should be in "cases connected with the security of the commercial interest of the United States, and for public purposes only."

Jackson: Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as <puzzling>¹⁰ as the dreams Joseph was called upon to interpret for Pharaoh.

Moderator: So, to get back to Justice Sutherland's point, in essence, Congress granted the president the ability to both prohibit and permit trade with foreign nations?

Sutherland: [Yes. And this practice continued.] The Act of March 3, 1805 made it lawful for the President . . . to forbid, by proclamation, all intercourse with such vessel, and with every armed vessel of the same nation, and . . . to prohibit all supplies and aid from being furnished them.

Moderator: I am assuming this was connected to the Embargo Acts during the Jefferson administration. Is that correct?

Sutherland: [Yes. And furthermore,] Congress passed joint resolutions April 22, 1898, and January 31, to prohibit the export of coal or other war materiel. The resolution of 1898 authorized the President in his discretion, and with such limitations and exceptions as shall seem to him expedient: to prohibit such exportations.

Moderator: Those resolutions would have given Presidents McKinley and Harding discretionary executive authority.

Sutherland: The resolution of March 14, 1912, provides

Jackson: [Look.] A century and a half of <biased>¹¹ debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question.

Moderator: Justice Jackson, I know you want to get into the discussion. We all know your concurring opinion in the Youngstown case is critical, but for now can we let Justice Sutherland finish his thought?

Sutherland: [Thank-you.] A resolution of March 14, 1912, [provided] that whenever the President shall find that, in any American country, conditions of domestic violence exist which are promoted by the use of arms or munitions of war <purchased>¹² from the United States . . . it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe.

Moderator: And this was directed on behalf of Woodrow Wilson as the United States was dealing with a civil war in Mexico.

Sutherland: [Correct.] The uniform, long-continued and undisputed legislative practice rests upon an admissible view of the Constitution which . . . we should not feel at liberty . . . to disturb.

Moderator: So, in the 1930s, what exactly did the Curtiss-Wright Company do that got them into trouble?

Sutherland: [Well, the Curtiss-Wright corporation] conspired to sell in the United States certain arms of war . . . to Bolivia, a country . . . engaged in armed conflict.

Moderator: And, am I right in guessing Congress had given FDR permission to make decisions about trade with nations that were at war?

Sutherland: [Yes. Curtiss-Wright was] in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States.

Moderator: So, I take it FDR had legitimate authority to make his proclamation? What exactly did the congressional resolution say?

Sutherland: [Congress said] that if the President finds that the prohibition of the sale of arms and munitions of war . . . may contribute to the reestablishment of peace between those countries . . . it shall be unlawful to sell . . . any arms or munitions . . . to the countries now engaged in that armed conflict.

Moderator: It sounds like a simple matter of Congress again delegating their responsibilities to the President.

Sutherland: [Yes.]

Moderator: I am perplexed though about the conflict between the enumerated the powers of Congress to regulate commerce in Article I in contrast to the power of the President to conduct foreign policy. How do we reconcile this dilemma in this case?

Sutherland: First [we need to] consider the differences between the powers . . . of government in respect of foreign or external affairs and those in respect of domestic or internal affairs.

Moderator: And in your view, what are the differences?

Sutherland: The federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true **only** in respect of our internal affairs.

Moderator: So when it comes to the executive branch and external affairs, I take it you believe that the President is not limited in the same way as Congress.

Sutherland: The President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. 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 nations."

Moderator: But, this seems to be a granting of power to the Executive branch not warranted by the

text of the Constitution.

Sutherland: If, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved . . . within the international field [we] must often accord to the President a degree of discretion and freedom from . . . restriction which would not be admissible were domestic affairs alone involved.

Moderator: And I suppose there are other practical matters involved here as well?

Sutherland: [The President,] not Congress, has the better opportunity of knowing the conditions . . . in foreign countries, and especially . . . in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic . . . officials.

Moderator: At this point let's return to the case Justice Douglas referenced earlier; the Steel Seizure Case. Justice Black, you wrote the majority opinion in that case, could you fill us in on some of the details surrounding that case?

Black: We [were] asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the nation's steel mills.

Moderator: This seems reasonable that the President as commander in chief would want the military well supplied since they were engaged in the Korean War.

Black: [However.] the mill owners argued that the President's order amount[ed] to lawmaking, a legislative function which the Constitution has expressly <given>¹³ to the Congress, and not to the President.

Moderator: OK. But, aren't there legitimate reasons for the President to take this course of action in time of war?

Vinson: [Yes. The Secretary of Defense said that] a work stoppage in the steel industry will result immediately in serious <reduction>¹⁴ of production of essential weapons and munitions of all kinds.

Moderator: How much of a "serious reduction?"

Vinson: He illustrated by showing that 84% of the national production of certain alloy steel is currently used for production of military-end items and that 35% of total production of another form of steel goes into ammunition, 80% of such ammunition now going to Korea.

Moderator: So why exactly was this an issue for the Court? It seems pretty cut and dry.

Black: [Not exactly.] The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress . . . which

such a power can fairly be implied.

Vinson: Those [were] extraordinary times. A world not yet recovered from the devastation of World War II [was] forced to face the threat of another and more terrifying global conflict. . . . The United States was instrumental in securing adoption of the United Nations Charter and . . . the first purpose of the United Nations is to maintain international peace and security, and . . . to take effective collective measures for the prevention and removal of threats to the peace.

Moderator: Are you suggesting our international obligations automatically expand the powers of the President?

Vinson: In 1950, when the United Nations called upon member nations “to render every assistance” to repel aggression in Korea, the United States furnished its vigorous support. For almost two full years, our armed forces [were] fighting [and] suffering casualties of over 108,000 men. Congressional support of the action in Korea [was] manifested by provisions for increased military manpower and equipment.

Moderator: True, but you still need to constitutionally justify the broad powers granted to Truman in this instance.

Vinson: Further efforts to protect the free world from aggression are found in the congressional enactments of the Truman Plan for assistance to Greece and Turkey and the Marshall Plan for economic aid . . . in Western Europe. Our treaties represent not merely legal obligations, but show congressional recognition that mutual security . . . is the best security against the threat of aggression. . . . Constant international tensions . . . demonstrate how precarious is the peace. Even this brief review of our responsibilities in the world community discloses the enormity of our undertaking.

Moderator: The Constitution, Justice Vinson?

Vinson: Alert to our responsibilities . . . Congress enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program, Congress appropriated \$130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

Black: [As you can see, my colleague has failed to recognize that] the Constitution limits [executive] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor <vague>¹⁵ about who shall make laws which the President is to execute.

Moderator: But isn't it necessary or proper for the President to take this action in time of war?

Black: The first section of the [Constitution] says that “All legislative Powers herein granted shall be vested in a Congress of the United States [and] after granting many powers to the Congress, Article I goes on to provide that Congress may make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.

Moderator: At this point it may be important for us to hear from Justice Jackson. As I recall, in your opinion in the *Youngstown* case, you set up a framework to analyze the extent of executive powers. Can you explain?

Jackson: [Certainly.] When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

Moderator: Is there a situation where the President's power is at a minimum?

Jackson: When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . his power is at its lowest ebb.

Moderator: And is there something in between?

Jackson: [Yes.] 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 <inactivity>¹⁶ may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on events . . . rather than on abstract theories of law.

Moderator: So, let's delve deeper into the circumstances.

Vinson: In the Mutual Security Act of 1951, Congress authorized . . . assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world. . . . In addition to direct shipment of military equipment to nations of the free world, defense production in those countries relies upon shipment of machine tools and allocation of steel tonnage from the United States.

Moderator: So we have congressional support for Truman's action?

Vinson: [Additionally,] Congress directed the President to build up our defenses . . . recognizing the "grim fact . . . that the United States is now engaged in a struggle for survival" and that "it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour."

Jackson: [Not so fast here.] No congressional authorization exists for this seizure.

Moderator: So, in this instance, the seizure of the steel mills does not fit into your first scenario. Can it be defended under flexible tests in your second category?

Jackson: [No.] The President cannot claim [that the seizure was] necessitated or invited by failure of Congress to legislate upon the occasions . . . for seizure of industrial properties.

Moderator: Justice Douglas previously referenced presidential powers and how they might intersect

in labor and management issues. I think this may be relevant here. Am I correct in assuming that the Taft-Hartley Act is an important factor in this case?

Black: [Yes, it is.] When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.

Moderator: For those who may not be familiar, the Taft-Hartley Act set standards regulating the negotiation processes when unions and management were attempting to resolve a dispute?

Black: [Yes.]

Moderator: And specifically, the law provided for a mediation process and the government would be the neutral party in the negotiations.

Black: [Yes.]

Moderator: And, if there was a time of national crisis, unions could not call for a strike that could endanger national security.

Black: [Yes.] Apparently it was thought that the technique of seizure . . . would interfere with the process of collective bargaining. The plan Congress adopted . . . sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports.

Moderator: So, President Truman's order interfered in a labor dispute by seizing the steel mills?

Black: [Exactly.] The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.

Moderator: Wasn't the President enacting the will of Congress?

Black: [Absolutely not.] In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.

Moderator: Some might suggest this is a national emergency?

Douglas: But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. The Congress, as well as the President, is trustee of the national welfare.

Moderator: But didn't Truman notify Congress of his actions?

Vinson: [Yes. Truman said] WHEREAS a controversy has arisen between certain companies . . .

producing and fabricating steel and . . . and certain of their workers . . . regarding terms and conditions of employment . . . WHEREAS the controversy has not been settled through the processes of collective bargaining . . . WHEREAS a work stoppage would immediately jeopardize and imperil our national defense . . . it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies.

Moderator: OK, fine. I understand the rationale, but what exactly was Truman's order?

Vinson: [He said,] By the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces . . . it is hereby ordered [that] the Secretary of Commerce is authorized . . . to take possession of all or such of the plants, facilities . . . as he may deem necessary in the interests of national defense.

Moderator: So, was the President was interfering in domestic commerce policy?

Black: [Precisely.] Congress . . . can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

Moderator: So what conclusions can be drawn from our discussion? Are there any solutions to this dilemma?

Douglas: [Well,] some future generation may . . . deem it so urgent that the President have legislative authority that the Constitution will be amended.

Moderator: So in the absence of an amendment, it was an easy decision in the Steel Seizure case?

Douglas: We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws, but to make some. Such a step would most assuredly alter the pattern of the Constitution.

Moderator: But, in the Curtiss-Wright case the Court reached a different conclusion?

Sutherland: [Yes.] The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Moderator: But isn't this dangerous?

Vinson: [Not necessarily. It is absurd to insist that] the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the

President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon.

Moderator: And the fact there is a trend of Congress delegating its authority, means what?

Sutherland: A legislative practice . . . marked by . . . a steady stream for a century and a half of time, goes a long way in the direction of proving . . . the constitutionality of the practice.

Moderator: So for you, some degree of flexibility is needed when determining the powers of the executive branch?

Vinson: Perfect flexibility is not to be expected in a Government of divided powers . . . it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a <rigid>¹⁷ formalism which can only serve to <paralyze>¹⁸ the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress . . . but this is not to say that all of the subjects concerning which laws might be made are perforce removed from the possibility of Executive influence.

Sutherland: As a government, the United States is invested with all the attributes of sovereignty. . . . It has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

Frankfurter: [And yet,] a scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. It has not been our tradition to envy such governments. . . . Our government was designed to have such restrictions.

Black: The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.

Jackson: [I would put it this way.] The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

Moderator: Well, that brings us to the end of our time. I would like to thank our panelists for sharing with us. It sounds like we will more than likely assemble again at a future date to discuss these issues as we discover new circumstances and yet attempt to live under a written constitution. Good night and good luck.

Endnotes

- ¹ cohesive
- ² disjunction
- ³ conjunction
- ⁴ preclude
- ⁵ ponderous
- ⁶ arrogating
- ⁷ automaton
- ⁸ impotent
- ⁹ unambiguous
- ¹⁰ enigmatic
- ¹¹ partisan
- ¹² procured
- ¹³ confided
- ¹⁴ curtailment
- ¹⁵ equivocal
- ¹⁶ quiescence
- ¹⁷ slavish
- ¹⁸ ossify

Pedagogical Materials

T-Chart for Notes—Enumerated Powers and the Delegation Doctrine

Instructions: As students listen to the scripted conversation, they should take notes using the T-Chart below to organize and summarize the key ideas from the *Curtiss-Wright* and *Youngstown* cases.

	<u>Curtiss-Wright</u>	<u>Youngstown</u>
Background Information		
Central Issue		
Decision		

Review Questions—Enumerated Powers and the Delegation Doctrine

1. In each case, what did FDR and Truman do to trigger the legal proceedings?
2. What role did Congress play in each of these cases?
3. How did war factor into the decisions made by the President in each of these cases?

Discussion Questions—Enumerated Powers and the Delegation Doctrine

1. Do you think that Congress can legitimately delegate its powers to the President? If so, does this mean the separation of powers is an unnecessary feature of our Constitution?
2. To what extent would you agree with Justice Sutherland’s opinion that the President is the “sole organ” of American foreign policy?
3. To what extent would you agree that foreign policy was the backdrop in the *Curtiss-Wright* case and domestic policy was the backdrop in the *Youngstown* case?