

## Sec. 1—The President

## Clause 1—Powers and Term of the President

“The broad statement that 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. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. . . .”

“As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . .”

“It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the Federal Government as necessary concomitants of nationality. . . .”

“Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”<sup>29</sup>

Scholarly criticism of Justice Sutherland’s reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as a collective unit, is in error.<sup>30</sup> Dicta in later cases controvert the conclusions drawn in *Curtiss-Wright* about the foreign relations power being inherent rather than subject to the limitations of the del-

<sup>29</sup> 299 U.S. at 315–16, 318, 319.

<sup>30</sup> Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L. J. 467 (1946); Patterson, *In re United States v. Curtiss-Wright Corp.*, 22 TEXAS L. REV. 286, 445 (1944); Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L. J. 1 (1973), reprinted in C. LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 167 (1986).