

# THE STAYING POWER OF ERRONEOUS DICTA: FROM *CURTISS-WRIGHT* TO *ZIVOTOFSKY*

*Louis Fisher\**

## ABSTRACT

*We treat judicial rulings, particularly those of the Supreme Court, as legitimate sources of constitutional authority. But what if a decision rests on a plain misconception, expressed not in the holding of the case but in influential dicta, because the Court failed to properly understand a historical precedent? No matter how frequently courts, the Justice Department, and scholars later cite the dicta, a misrepresentation is not a valid source of authority. The responsible step for the Supreme Court is to revisit the mistake and correct it. This article focuses on the “sole organ” doctrine that appeared in *United States v. Curtiss-Wright* (1936). For nearly eight decades the Court allowed the error to persist as a source of presidential authority in external affairs. As a result of the author’s amicus brief filed with the Court on July 17, 2014, concerning the case of *Zivotofsky v. Kerry*, the Court was formally put on notice about the error. On June 8, 2015, the Court corrected the error while allowing other *Curtiss-Wright* errors to survive. The continuation of a judicial error for nearly eight decades demonstrates that the Court lacks a satisfactory system for removing erroneous dicta that improperly magnified presidential power and damaged the constitutional system of checks and balances.*

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\* Visiting Scholar, William & Mary Law School. From 1970 to 2010, Dr. Fisher served as Senior Specialist in Separation of Powers with Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress. He thanks Dave Adler, Reb Brownell, Felicia Burton, Henry Cohen, Neal Devins, Chris Edelson, Jenny Elsea, Herb Fenster, Mike Glennon, Jerry Goldman, Paul Hellyer, Nancy Kassop, Charles Lofgren, Derek Mathis, Bob Mutch, Jeff Powell, Dave Pozen, Dick Pious, Bob Reinstein, Mort Rosenberg, Rob Sloane, Mitch Sollenberger, Bob Spitzer, and Charles Tiefer for their comments, assistance, and advice on this article.

## INTRODUCTION

In its 2013 decision in *Zivotofsky v. Secretary of State*, the D.C. Circuit relied in substantial part on erroneous dicta included in the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.* (1936). Although *Curtiss-Wright* concerned legislative—not presidential—authority, Justice George Sutherland added pages of extraneous material to concoct an array of independent, plenary, exclusive, and inherent powers for the President in external affairs. Sutherland wholly mischaracterized the “sole organ” speech given by John Marshall in 1800 when he served in the House of Representatives, distorting his remarks to imply expansive presidential powers in external affairs.

In fact, the purpose of Marshall's speech was to defend President John Adams for *carrying out a treaty provision*. Nothing in Marshall's sole-organ speech promoted or advocated independent presidential authority, yet Sutherland pressed that false doctrine. His error remained a potent factor after 1936 in expanding presidential authority beyond its constitutional boundaries and weakening the system of checks and balances. As explained in this article, Sutherland advanced other misinterpretations in *Curtiss-Wright*, including the claim that treaty negotiation is assigned exclusively to the President and that sovereignty passed directly from the Crown to the United States. Scholars regularly called attention to defects in Sutherland's opinion, but the Supreme Court for 79 years failed to correct his errors.

This article highlights four broad issues about the judicial process: (1) the ease with which erroneous dicta appear in court decisions because they are added without guidance from briefs, oral argument, and the adversary process, (2) the pattern of dicta over time becoming accepted as the holding, (3) the distortions that can occur in presidential power because of erroneous dicta, and (4) the apparent inability of the Supreme Court to correct in timely manner erroneous dicta. The litigation process concentrates on misconceptions and errors in holdings, not dicta.

With *Zivotofsky v. Kerry* in 2015, the Court finally jettisoned the sole-organ doctrine.<sup>1</sup> It was always in the interest of the Court and the Nation to adhere to a judicial process that is thoughtful, informed, grounded, and principled, giving proper guidance to lower courts and the elected branches.<sup>2</sup> As explained in Section XII of this article, in making a correction in *Zivotofsky* the Court left in place other erroneous dicta in *Curtiss-Wright* and created a new model of presidential power that seems close cousin to the sole-organ doctrine.

### I. THE JERUSALEM PASSPORT CASE

On July 23, 2013, the D.C. Circuit held that congressional legislation in 2002 “impermissibly infringes” on the President’s power to recognize foreign governments.<sup>3</sup> The court acknowledged that “[n]either the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President’s recognition power.”<sup>4</sup> By what reasoning did the D.C. Circuit decide that an implied executive power to recognize foreign governments is superior to an implied power of Congress to formulate passport policy?

On five occasions in its decision, the D.C. Circuit relied on erroneous dicta that appeared in the Supreme Court’s 1936 ruling in *Curtiss-Wright*.<sup>5</sup> Quoting from the Court’s 1998 decision in *Clinton v. City of New York*,<sup>6</sup> the D.C. Circuit said the Court recognized that “in the foreign affairs arena, the President has ‘a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.’”<sup>7</sup> Citing *Curtiss-Wright* a second time, the D.C. Circuit claimed that the Supreme Court, “echoing the words of then-Congressman John Marshall, has described the President as the ‘sole organ of the nation in its external relations, and its sole representative with

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1. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

2. This article draws on the author’s amicus brief submitted to the Supreme Court on July 17, 2014, in *Zivotofsky v. Kerry*, <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>.

3. *Zivotofsky v. Kerry*, 725 F.3d 197, 220 (D.C. Cir. 2013).

4. *Id.* at 206.

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

6. 524 U.S. 417, 445 (1998).

7. *Zivotofsky*, 725 F.3d at 211.

foreign nations.”<sup>8</sup> The D.C. Circuit also cited *United States v. Belmont* (1937), relying on *Curtiss-Wright* to claim that the President has authority to speak as the “sole organ” of the government in matters of recognition.<sup>9</sup> Citing *Belmont* again, the D.C. Circuit referred to the *Curtiss-Wright* “sole organ” doctrine.<sup>10</sup> Toward the end of its decision, the D.C. Circuit returned a fifth time to *Curtiss-Wright* to describe the President as the “sole organ of the nation in its external relations.”<sup>11</sup>

With its dependence on *Curtiss-Wright*, the D.C. Circuit admitted it was placing confidence in judicial dicta rather than a judicial holding. Citing language from one of its decisions in 2006, it stated: “To be sure, the Court has not *held* that the President exclusively holds the power [of recognition]. But, for us—an inferior court—carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”<sup>12</sup> That passage contains three qualifiers: *carefully*, *considered*, and *generally*. As will be explained, the dicta in *Curtiss-Wright* lacked care and consideration, as is every subsequent citation to the sole-organ argument.

Referring to one of its decisions in 2010, the D.C. Circuit said that dictum is “especially” authoritative if the Supreme Court “has reiterated the same teaching.”<sup>13</sup> Without doubt the Supreme Court has regularly cited the sole-organ doctrine from *Curtiss-Wright*, but no matter how often the Court repeats an error it remains an error and should not be used to decide the scope of presidential constitutional authority. Errors, even with repetition, do not emerge as truth.

## II. CAVEATS ABOUT DICTA

A holding by the Supreme Court is subject to subsequent challenges, at times leading the Court to abandon an earlier holding as no longer valid. What of erroneous dicta? Are they

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8. *Id.*

9. *Id.* (citing *United States v. Belmont*, 301 U.S. 324, 330 (1937)).

10. *Id.* at 213.

11. *Id.* at 219.

12. *Id.* at 212 (emphasis in original), citing *United States v. Dorecly*, 454 F.3d 366, 375 (D.C. Cir. 2006).

13. *Id.*, citing *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010).

relatively easy to tuck into an opinion? If later discovered to be in error, is there a procedure to correct them? Do litigants ever pay attention to erroneous dicta? Is there a clear distinction between holdings and dicta? Those questions guide this section.

Courts frequently resort to both holdings and dicta. No one expects that custom to end, even if the results can damage the development and reputation of law. After authoring *Marbury v. Madison*,<sup>14</sup> Chief Justice John Marshall expressed concern in 1821 about the degree to which litigants read the decision carelessly, failing to separate its core holding from “some dicta of the Court.”<sup>15</sup> When it became evident that attorneys were rummaging around *Marbury* to find nuggets favorable to their cause, he insisted that general expressions in a case “are to be taken in connection with the case in which those expressions are used,” and if those expressions “go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”<sup>16</sup> A question before a court, he said, must be “investigated with care, and considered to its full extent.”<sup>17</sup> In *Marbury*, the “single question” before the Court was “whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it.”<sup>18</sup> That was the core holding. Everything else, including possible claims of judicial supremacy, amounted to dicta. Some of the language in *Marbury* was not only too broad, Marshall said, “but in some instances contradictory to its principle.”<sup>19</sup>

Various efforts have been made to distinguish between acceptable and unacceptable dicta. In his book, *The Nature of the Judicial Process* (1921), Benjamin Cardozo noted that judges must decide cases “swathed in obscuring dicta, which must be stripped off and cast aside.”<sup>20</sup> It was a “mystery” to him how judges, “of all persons in the world, should put their faith in

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14. 5 U.S. (1 Cranch) 137 (1803).

15. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

16. *Id.*

17. *Id.*

18. *Id.* at 400.

19. *Id.* at 401.

20. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 29 (1921).

dicta.”<sup>21</sup> There was a constant need to separate “the accidental and the non-essential from the essential and inherent.”<sup>22</sup>

Writing for the Supreme Court in 1933, Justice Cardozo analyzed state court rulings in an effort to interpret a statute in Oklahoma. He remarked: “An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum.”<sup>23</sup> The meaning of the latter term is developed in this statement: “At least it is considered dictum, and not comment merely obiter.”<sup>24</sup> To Cardozo, a considered dictum is entitled to respect. In contrast, the erroneous dicta included by Justice Sutherland in *Curtiss-Wright* cannot be described as considered, reasoned, studied, or a reliable source of law. It is not entitled to respect.

A 1994 article by Michael Dorf defines dicta as “statements in a judicial opinion that are not necessary to support the decision reached by the court. A dictum is usually contrasted with a *holding*, a term used to refer to a rule or principle that decides the case.”<sup>25</sup> He added: “It is a commonplace that holdings carry greater precedential weight than dicta, ‘which may be followed if sufficiently persuasive but which are not controlling.’”<sup>26</sup> In the case of Sutherland’s dicta in *Curtiss-Wright*, scholars have demonstrated for more than seven decades that his statements about presidential power in the field of external affairs are not persuasive. Nevertheless, the greater precedential weight in *Curtiss-Wright* has not been the holding but rather the dicta.

A study by Michael Abramowicz and Maxwell Stearns in 2005 relies on *Black’s Law Dictionary* to define dictum “as a statement in a judicial opinion that is ‘unnecessary’ to the case resolution.”<sup>27</sup> They define holding to consist of propositions and paths of reasoning that “(1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a

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21. *Id.*

22. *Id.* at 30.

23. *Hawks v. Hamill*, 288 U.S. 52, 58–59 (1933).

24. *Id.* at 59.

25. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1197, 2000 (1994).

26. *Id.* (citing *Humphrey’s Executor*, 295 U.S. 602, 627 (1935)).

27. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1056 (2005).

holding, a proposition stated in a case counts as dicta.”<sup>28</sup> Their purpose is to develop clear distinctions between holdings and dicta to be applied to judicial rulings, with the former given dominant status. In *Curtiss-Wright*, Justice Sutherland’s declarations about the sole-organ doctrine and other misconceptions should be considered not merely dicta but erroneous dicta. Yet federal courts, the elected branches, and some scholars regularly treated them as the holding.

The overlap between dicta and holding is analyzed by Judith Stinson in an article in 2010. Despite much guidance from the legal profession, “lawyers and judges continue to confuse dicta for holding and holding for dicta.”<sup>29</sup> To the extent that courts treat dicta as holding, “they are more likely to reach incorrect decisions, to exceed their judicial authority, and to generate illegitimate results.”<sup>30</sup> That accurately summarizes the influence of *Curtiss-Wright*. Stinson observes that Supreme Court opinions “tend to be lengthy, allowing more space for extraneous commentary.”<sup>31</sup> No doubt about that.

In defense of dicta, Foster Calhoun Johnson in 2012 looked to dicta as “a unique tool for addressing injustice, without *doing* injustice,” especially in cases involving equitable relief.<sup>32</sup> With regard to *Curtiss-Wright*, Justice Sutherland’s profound misconceptions and errors about plenary and exclusive presidential power have created a serious imbalance between the two elected branches in the field of foreign affairs. A concentration of power in one branch, the result not of constitutional grants but of judicial error, poses great risk of injustice. To Johnson, by employing dicta “to announce a prospective new rule, the court advances the interests of justice while reconciling tensions in legal doctrine.”<sup>33</sup> Justice did not come from Sutherland’s dicta in *Curtiss-Wright*. Johnson says that the virtue of dicta “is that it can correct the law without betraying

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28. *Id.* at 1065.

29. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 *BROOK. L. REV.* 219, 220 (2010).

30. *Id.* at 221.

31. *Id.* at 222.

32. Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 *U.S.F. L. REV.* 883, 889 (2012), emphasis in original.

33. *Id.* at 900.

the law.”<sup>34</sup> That may occur in cases of equitable remedy. With regard to artificially inflated theories of presidential power, Sutherland’s dicta betrayed the law and the Constitution. According to Johnson, dicta’s virtue “is precisely this: It corrects the law without betraying the law.”<sup>35</sup> With *Curtiss-Wright* the law was not corrected. It was systematically undermined.

Writing in 2006, Judge Pierre N. Leval of the Second Circuit expressed concern that dicta “no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law.” The distinction between dictum and holding, he said, “is more and more frequently disregarded.”<sup>36</sup> Although many agree that dictum does not establish binding law, “this rule is now honored in the breach with alarming frequency.”<sup>37</sup> The acceptance of prior dicta as binding law “results in some part from time pressures on an overworked judiciary.”<sup>38</sup>

As to Supreme Court dicta, Judge Leval said it is “sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling,” even though the Court’s dicta “are not law.”<sup>39</sup> He explained why dicta can provide weak and misleading guides to the formation of law. First, courts are supposed to reach a decision after “confronting conflicting arguments powerfully advanced by both sides. When, however, the court asserts rules outside the scope of its judgment, that salutary adversity is often absent.”<sup>40</sup>

As a second point, Judge Leval cautioned that when a court asserts a rule of law in dictum, it “will often not have before it any facts affected by that rule. In addition, the lack of concrete facts increases the likelihood that readers will misunderstand the scope of the rule the court had in mind.”<sup>41</sup> Third, another weakness of law made through dicta is that “there is no available correction mechanism. No appeal may be taken from the

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34. *Id.* at 930.

35. *Id.* at 949.

36. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

37. *Id.*

38. *Id.* at 1256.

39. *Id.* at 1274.

40. *Id.* at 1261.

41. *Id.* at 1262

assertion of an erroneous legal rule in dictum. Frequently, what's more, no party has a motive to try to get the bad proposition corrected. No party will even ask the court to reconsider its unfortunate dicta."<sup>42</sup> That has been the history of the sole-organ doctrine in *Curtiss-Wright*. Finally, Judge Leval recalled that his experience as a judge "has shown me that assertions made in dictum are less likely to receive careful scrutiny, both in the writing chambers and in the concurring chambers. When a panel of judges confers on a case, the judges generally focus on the outcome and on the reasoning upon which the outcome depends. . . . There is a high likelihood that peripheral observations, alternative explanations, and dicta will receive scant attention."<sup>43</sup>

Justice Robert Jackson once described the Supreme Court as having the final word: "We are not final because we are infallible, but we are infallible only because we are final."<sup>44</sup> Chief Justice Rehnquist later described the Court's record with greater clarity and accuracy: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible."<sup>45</sup> A misrepresentation that appears in *Curtiss-Wright* is not a valid source of authority. Courts should not continue to cite an erroneous secondary source, even if it appears regularly in Supreme Court and lower court dicta. Instead, the Court should revisit a judicial mistake and correct it.

The Supreme Court has a capacity to correct its errors, often within the space of three years, as it did with the compulsory flag-salute cases in 1940 and 1943.<sup>46</sup> Interestingly, the Justice who wrote for the Court in the second case was Robert Jackson, clearly demonstrating that the Court is neither infallible nor final. The executive branch has a capacity to correct its errors. Solicitors General have confessed error in the Supreme Court approximately 250 times over the past century, with most of the

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42. *Id.*

43. *Id.*

44. *Brown v. Allen*, 344 U.S. 443, 540 (1953).

45. *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

46. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

confessions involving criminal cases.<sup>47</sup> A recent example is Acting Solicitor General Neal Katyal stating in 2011 that Solicitor General Charles Fahy in the Japanese-American cases during World War II failed to inform the Supreme Court about matters directly relevant to the cases of Gordon Hirabayashi and Fred Korematsu.<sup>48</sup>

The Supreme Court has available to it a procedure to revise its opinions to catch spelling errors, duplicate words, punctuation and spacing problems, citation form, and allow for word additions, deletions, and substitutions.<sup>49</sup> In one case, the Supreme Court released an opinion that misstated who was President of the United States in 1799.<sup>50</sup> With regard to erroneous dicta, the Supreme Court appears to have little process that enables it to publicly admit error and remove serious misconceptions from prior cases that distort the constitutional powers available to the President and weaken the system of checks and balances.<sup>51</sup>

In an article in 2014, Judge Andrew D. Hurwitz of the Ninth Circuit could recall few judicial rulings “acknowledging common human error.”<sup>52</sup> With regard to such errors, he wondered whether the authority of the Supreme Court in a recent case “would have suffered a whit had it just acknowledged its collective humanity. If one views the Supreme Court as Olympian, of course, failure to know everything is unthinkable.”<sup>53</sup> Whenever judges learn of significant mistakes that affect the outcome of a case, “there is value to correcting them transparently.” Correcting errors, Judge Hurwitz points out, “is not only required to do justice, but reemphasizes a sad but important truth—that although almost all judges try very hard to do their best, we

47. David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080–81 (1994).

48. Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027 (2013).

49. Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 562–73 (2014).

50. *Id.* at 567.

51. Louis Fisher, *Judicial Errors That Magnify Presidential Power*, 61 FED. LAW. 66 (Jan/Feb 2014).

52. Andrew D. Hurwitz, *When Judges Err: Is Confession Good for the Soul?* 56 ARIZ. L. REV. 343, 344 (2014).

53. *Id.* at 348. See also Charles Rothfeld, *Should the Supreme Court Correct Its Mistakes?*, 128 HARV. L. REV. FORUM 56 (2014).

sometimes fall short. More frequent admissions of human fallibility will increase the public appreciation of the role of the courts and their capacity for human error.”<sup>54</sup>

### III. ERRONEOUS DICTA IN *CURTISS-WRIGHT*

Writing for the Supreme Court in *Curtiss-Wright*, Justice George Sutherland introduced three conceptual and historical errors. First, he said that John Marshall during debate in the House of Representatives in 1800 described the President as the “sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>55</sup> The word “sole” seems to suggest that the President has exclusive control over external affairs, including the recognition power, but clearly the Framers did not adopt William Blackstone’s model that placed all of external affairs with the executive.<sup>56</sup> Among other prerogatives, Blackstone recognized in the King the power to appoint ambassadors, make war, make treaties, issue letters of marque and reprisal, power to raise and regulate the military, and the power over domestic commerce.<sup>57</sup>

The Constitution plainly vests those powers either expressly in Congress (declaring war, issuing letters of marque and reprisal, raising and regulating the military, and commerce) or assigns them jointly to the President and the Senate, as with treaties and appointing ambassadors. What did Marshall mean when he spoke during House debate in 1800? Did he believe that in the field of foreign affairs the President possessed exclusive, plenary, independent, and inherent power? By understanding Marshall’s purpose in giving his speech, the answer is clearly no, a point underscored in Section IV.

As a second error, Justice Sutherland claimed that the Constitution commits treaty negotiation exclusively to the President. That is incorrect, as the record plainly shows. Much of

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54. *Id.* at 351.

55. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 (citing ANNALS, 6th Cong., 613 (1800)).

56. LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCHE: PRESIDENTIAL POWER* 261–64 (2014); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 265–307 (2009).

57. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 233, 243, 249, 250, 254, 266 (1765).

*Curtiss-Wright* is devoted to his discussion about independent and inherent presidential powers in foreign affairs. Having made the distinction between external and internal affairs, he wrote: “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. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>58</sup> In his book published in 1919, Sutherland acknowledged that Senators do in fact participate in the negotiation phase and that Presidents often accede to this “practical construction.”<sup>59</sup> With regard to treaty-making, he said the power of the Senate “is co-ordinate, throughout, with that of the President.”<sup>60</sup>

Many Presidents have invited not only Senators but members of the House of Representatives to participate in treaty negotiation. The purpose is to build political support in the Senate for the treaty and support in the House for authorization and appropriation bills needed to implement the treaty. In 1830, President Andrew Jackson submitted to the Senate “propositions” for a treaty with the Choctaw Indians, seeking advice from Senators on a series of questions. He reached out to the Senate because “measures in this respect emanating from the united counsel of the treaty-making power would be more satisfactory to the American people and to the Indians.”<sup>61</sup>

Similarly, President James K. Polk invited the Senate’s advice on negotiating a treaty. He concluded that consulting with Senators in advance “upon important measures of foreign policy which may ultimately come before them for their consideration the President secures harmony of action between that body and himself.”<sup>62</sup> The negotiation of treaties is often shared with the Senate in order to build legislative understanding and support.<sup>63</sup>

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58. 299 U.S. at 319 (emphasis in original).

59. GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 122–24 (1919).

60. *Id.* at 123.

61. 4 J. EXEC. PROCEEDINGS OF THE SENATE OF THE U.S.A. 99 (1887).

62. 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2299 (James D. Richardson ed. 1897).

63. 2 GEORGE HENRY HAYNES, *THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE* 576–602 (1938).

No doubt a President may decide to exclude the Senate from the negotiating phase, as President Woodrow Wilson did with the Versailles Treaty, but his insistence on exclusive presidential control over negotiation ultimately failed when the Senate rejected the treaty.<sup>64</sup>

A constructive model of joint executive-legislative action appears in the legislative history of the United Nations Charter. Half of the eight members of the U.S. delegation that met in San Francisco in 1945 came from Congress: Senators Tom Connally (D-Tex.) and Arthur H. Vanderberg (R-Mich.) and Representatives Sol Bloom (D-N.Y.) and Charles A. Eaton (R-N.J.).<sup>65</sup> Despite this ample record, the Office of Legal Counsel in 2009 cited Justice Sutherland's "clear dicta" in *Curtiss-Wright* that "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."<sup>66</sup> These statements, no matter how frequently and confidently expressed, have no relationship to the regular practice of treaty negotiation by both branches.<sup>67</sup>

The third error that Sutherland included as dicta in *Curtiss-Wright* concerns his belief that when the United States separated from Great Britain the field of external sovereignty flowed directly from the Crown to the United States. That is false. States did possess and exercise sovereign powers. To reach his conclusion, Sutherland said that after the Declaration of Independence "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

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64. Wilson's belief in presidential monopoly of treaty negotiation has been decisively refuted by scholars. See Forrest R. Black, *The United States Senate and the Treaty Power*, 4 ROCKY MTN. L. REV. 1 (1931); William Whitwell Dewhurst, *Does the Constitution Make the President Sole Negotiator of Treaties?*, 30 YALE L.J. 478 (1921); Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989); Richard E. Webb, *Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L.J. 490 (1970).

65. *The Charter of the United Nations: Hearings Before the S. Comm. on Foreign Relations*, 79th Cong., 1st Sess. 644 (1945).

66. Office of Legal Counsel, *Memorandum Opinion for the Acting Legal Adviser, Department of State*, June 1, 2009, at 9, <http://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054.pdf>.

67. FISHER, *supra* note 56, at 210, 272-76, 286.

America.”<sup>68</sup> By transferring external or foreign affairs directly to the national government and associating foreign affairs with the executive, Sutherland positioned himself to advance a broad definition of inherent presidential power.

There are multiple problems with Sutherland’s analysis. External sovereignty did not circumvent the colonies and the independent states and pass directly to the national government. When Great Britain entered into a peace treaty with America, the provisional articles of November 30, 1782 were not with a national government because a national government did not yet exist. Instead, “His Britannic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pensylvania [sic], Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia,” referring to them as “free, sovereign and independent States.”<sup>69</sup> The colonies formed a Continental Congress in 1774. It provided a form of national government until passage of the Articles of Confederation, ratified in 1781, and adoption of the U.S. Constitution.

Until that time, the states operated as sovereign entities in making treaties and exercising other powers that would pass to the new national government in 1789. The Supreme Court has frequently recognized that the American colonies, upon their separation from England, exercised the powers of sovereign and independent governments.<sup>70</sup> Sovereignty and external affairs did not pass from Great Britain to the U.S. President. In 1776, at the time of America’s break with England, there was no President and no separate executive branch. Only one branch of government—the Continental Congress—functioned at the national level. It carried out all governmental powers, including legislative, executive, and judicial.<sup>71</sup> When the new national government under the U.S. Constitution began in 1789, sovereign powers were not placed solely in the President. They were divided

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68. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. at 316.

69. U.S.-U.K., art. I, Nov. 30, 1782, 8 Stat. 55.

70. *United States v. California*, 332 U.S. 19, 31 (1947); *Texas v. White*, 74 U.S. 700, 725 (1869); *M’Ilvaine v. Coxe’s Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222–24 (1796).

71. LOUIS FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 1–27, 253–70 (1972).

between Congress and the President, with ultimate sovereignty vested in the people. As explained in Section IX, many scholars have rejected Sutherland's theory about external sovereignty.

#### IV. PLACING DICTA IN PROPER CONTEXT

John Marshall's speech about the President as "sole organ" can only be understood by reading it in full and appreciating the political circumstances. In 1800, Thomas Jefferson campaigned for President against John Adams. Jeffersonians in the House urged that President Adams be either impeached or censured for turning over to Great Britain an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to sanction Adams for encroaching upon the judiciary and violating the doctrine of separation of powers. A House resolution described the decision to turn the accused over to the British as "a dangerous interference of the Executive with Judicial decisions."<sup>72</sup> According to the resolution, the decision to release the individual to the British "exposes the administration thereof to suspicion and reproach."<sup>73</sup> Some lawmakers "had no doubt of the competency of the House either to impeach, to censure, or to approbate the conduct of the Executive . . ."<sup>74</sup>

There was disagreement about the nationality of the person released to the British. The House resolution began with these words: "it appears to this House that a person, calling himself Jonathan Robbins, and claiming to be a citizen of the United States," was held on a British ship and committed to trial in the United States "for the alleged crime of piracy and murder, committed on the high seas, on board the British frigate *Hermione*."<sup>75</sup> Notice the language: *it appears*. What were the facts? Robbins said he was from Danbury, Connecticut, but citizens living there certified they had never known an inhabitant of the town "by the name of Jonathan or Nathan Robbins, and that there has not been nor now is any family known by the name

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72. 10 ANNALS OF CONG. 533 (1800).

73. *Id.*

74. *Id.* at 553 (Rep. Bayard).

75. *Id.* at 532.

of Robbins within the limits of said town.”<sup>76</sup> Secretary of State Timothy Pickering concluded that Robbins was using an assumed name and was actually Thomas Nash, a native Irishman.<sup>77</sup> U.S. District Judge Thomas Bee, who was asked to turn the prisoner over to the British, agreed that the individual was Thomas Nash.<sup>78</sup>

Marshall took the floor to methodically shred the call for impeachment or censure. The Jay Treaty with England contained an extradition provision in Article 27, providing that each country deliver up to each other “all persons” charged with murder or forgery.<sup>79</sup> President Adams was not making foreign policy unilaterally. He was not the “sole organ” in formulating the treaty. He was the sole organ in *implementing* it. Adams was fulfilling his Article II, Section 3, authority to take care that the laws, including treaties, be faithfully executed. Under Article VI of the Constitution, all treaties “shall be the supreme Law of the Land.”

Marshall explained that the President “is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.”<sup>80</sup> As to executive-judicial relationships, Marshall said if President Adams had “directed the Judge at Charleston to decide for or against his own jurisdiction, to condemn or acquit the prisoner, this would have been a dangerous interference with judicial decisions, and ought to have been resisted.”<sup>81</sup> There was no such interference. National policy for external affairs would be made by the two branches jointly, in this case by treaty and in other cases by statute. At no point did Marshall suggest that the President possessed some kind of exclusive authority over foreign affairs. After Marshall completed his presentation, Jeffersonians considered his argument so tightly reasoned it could not be refuted.<sup>82</sup>

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76. *Id.* at 517.

77. *Id.* at 515.

78. *Id.* See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *YALE L.J.* 229 (1990). On page 310, Wedgwood states that the defendant was not “Jonathan Robbins,” an American, but rather Thomas Nash, an Irishman.

79. Treaty on Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 129.

80. 10 *ANNALS OF CONG.* 613 (1800).

81. *Id.* at 615–16.

82. Marshall’s speech is available at <http://loufisher.org/docs/pip/444.pdf>.

In its February 2014 brief to the Supreme Court in *Zivotofsky*, the Justice Department presented incoherent arguments on the relative powers of Congress and the President in external affairs. In some places the Department claimed the President has “plenary and exclusive power \* \* \* as the sole organ of the federal government in the field of international relations,” citing *Curtiss-Wright*.<sup>83</sup> Yet the Department also acknowledged that “the two Branches exercise some foreign-affairs powers jointly,” including the power to make and execute treaties and the Article I, § 8, cl. 3 power of Congress “to regulate foreign commerce and the value of foreign currency.”<sup>84</sup> Elsewhere the Department stated that Congress “also possesses the power to regulate passports pursuant to its enumerated powers.”<sup>85</sup> Oddly, it then concluded that an *enumerated* power of Congress cannot control the President’s *implied* power over recognition policy. The Department’s brief offered additional Article I support for the power of Congress in external affairs, such as its powers to regulate immigration.<sup>86</sup> Section XI examines the Justice Department’s position in greater detail.

#### V. *CURTISS-WRIGHT* INVOLVED LEGISLATIVE, NOT PRESIDENTIAL, POWER

The Supreme Court’s decision in *Curtiss-Wright* became a standard citation for the “sole organ” doctrine and the existence of inherent, exclusive executive power in the field of foreign affairs. The word “sole” appears to be synonymous with plenary and exclusive, but what is meant by “organ”? An independent executive policy-maker or simply the medium used by Presidents in communicating with other countries? To answer that question, one has to read John Marshall’s speech in full to put “sole organ” in proper context.

The case itself did not concern independent or plenary presidential power. The issue before the judiciary was whether Congress had delegated *legislative* authority too broadly when it

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83. Brief for the Respondent in Opposition, at 13, 23, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13–628), 2014 WL 718600.

84. *Id.* at 13.

85. *Id.* at 10.

86. *Id.* at 22.

authorized the President to declare an arms embargo in South America. A joint resolution by Congress authorized the President to prohibit the sale of arms in the Chaco region whenever he found that it “may contribute to the reestablishment of peace” between belligerents.<sup>87</sup>

In imposing the embargo, President Franklin D. Roosevelt relied solely on statutory—not inherent executive—authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco began: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, . . .”<sup>88</sup> The proclamation did not assert the existence of any inherent, independent, plenary, exclusive, or extra-constitutional presidential power.

Litigation on the proclamation focused on legislative power because, during the previous year, the Supreme Court in two cases had struck down the delegation by Congress of domestic power to the President.<sup>89</sup> The issue in *Curtiss-Wright* was therefore whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court, holding that the joint resolution represented an unconstitutional delegation of legislative authority, said nothing about any reservoir of inherent presidential power.<sup>90</sup> It acknowledged the “traditional practice of Congress in reposing the widest discretion in the Executive Department of the government in the conduct of the delicate and nicely posed issues of international relations.”<sup>91</sup> Recognizing that need, however, did not justify for the district court the delegation, nor did it recognize any broad capacity of the President as “sole organ” in external affairs.

The district court decision was taken directly to the Supreme Court. None of the briefs on either side discussed the availability of independent or inherent powers for the President.

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87. Joint Resolution, Pub. L. No. 73–28, ch. 365, 48 Stat. 811 (1934).

88. 48 Stat. 1745.

89. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

90. *United States v. Curtiss-Wright Exp. Corp.*, 14 F. Supp. 230 (S.D.N.Y. 1936).

91. *Id.* at 240.

To the Justice Department, regarding the issue of jurisdiction, the question for the Court went to “the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose.”<sup>92</sup> Its brief focused on whether the district court erred in holding that the joint resolution “constitutes an improper delegation of legislative power to the President.”<sup>93</sup> The government argued that previous decisions by the Supreme Court, including those in the field of foreign relations, supported the delegation of this “legislative power to the President.”<sup>94</sup> Past delegations covering the domain of foreign relations represented “a valid exercise of legislative authority.”<sup>95</sup> The joint resolution, said the government, contained adequate standards to guide the President and did not fall prey to the “unfettered discretion” found by the Court in the 1935 *Panama Refining* and *Schechter* decisions.<sup>96</sup> The government’s brief consistently regarded the source of authority as legislative, not executive.

The brief for the private company, Curtiss-Wright, also concentrated on the issue of delegated legislative power and did not explore the existence of independent or inherent presidential power. The brief charged that the joint resolution (1) represented an unlawful delegation of legislative power, (2) did not go into operation because the President’s proclamation failed to contain all the findings required by the joint resolution, (3) the President could not have consulted other governments as contemplated by the joint resolution, and (4) the effect of the President’s second proclamation of November 14, 1935, extinguished the alleged liability of private companies involved in selling arms and

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92. Statement as to Jurisdiction at 7, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (No. 98), signed by Martin Conboy, Special Assistant to the Attorney General of the United States, *reprinted in* 32 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 898 (Philip B. Kurland & Gerhard Casper, eds., 1975) [hereinafter LANDMARK BRIEFS].

93. Brief for the United States at 2, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (No. 98), *reprinted in* 32 LANDMARK BRIEFS 906.

94. *Id.* at 6, *reprinted in* 32 LANDMARK BRIEFS 910.

95. *Id.* at 8, *reprinted in* 32 LANDMARK BRIEFS 912.

96. *Id.* at 16, *reprinted in* 32 LANDMARK BRIEFS 920.

munitions abroad.<sup>97</sup> A separate brief, prepared for other private parties, also analyzed the delegation of *legislative* power.<sup>98</sup>

Writing for the Court in *Curtiss-Wright*, Justice Sutherland reversed the district court and upheld the delegation of legislative power to the President to place an embargo on arms or munitions to the Chaco. To Sutherland, the two categories of external and internal affairs are different “both in respect of their origin and their nature.”<sup>99</sup> The principle that the federal government is limited to either enumerated or implied powers “is categorically true only in respect of our internal affairs.”<sup>100</sup> The purpose, he said, 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.”<sup>101</sup> But that doctrine, Sutherland insisted, “applies only to powers which the states had . . . since the states severally never possessed international powers . . . .”<sup>102</sup>

In *Curtiss-Wright*, Sutherland quotes John Marshall out of context, implying a scope of presidential power that Marshall never embraced. Marshall said during House debate: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>103</sup> Sutherland developed for the President a source of power in foreign affairs that was not grounded in authority delegated by Congress or extended to the President either expressly or by implication in the Constitution:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of

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97. Brief for Appellees, *Curtiss-Wright Exp. Corp. and Curtiss Aeroplane & Motor Co., Inc.* at 3, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (No. 98), reprinted in 32 LANDMARK BRIEFS 937.

98. Brief for Appellees John S. Allard, Clarence W. Webster & Samuel J. Abelow at 3–5, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (No. 98), reprinted in 32 LANDMARK BRIEFS 979–81.

99. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936).

100. *Id.* at 316.

101. *Id.* (emphasis in original).

102. *Id.*

103. *Id.* at 319.

international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>104</sup>

In liberating the President from statutory grants of power and legislative restrictions, Justice Sutherland did not explain how the exercise of presidential power would be constrained by requiring that it “be exercised in subordination to the applicable provisions of the Constitution.” Which provisions in the Constitution could check or override presidential decisions? On that fundamental issue he was silent. Justice McReynolds’ dissent was brief: “He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.”<sup>105</sup>

Justice Stone did not participate. He later wrote to Edwin M. Borchard, a prominent law professor: “I have always regarded it as something of a misfortune that I was foreclosed from expressing my views in . . . *Curtiss-Wright* . . . because I was ill and away from the Court when it was decided.”<sup>106</sup> In another letter to Borchard, Stone said he “should be glad to be disassociated” with Sutherland’s opinion.<sup>107</sup> Borchard advised Stone that the Court, in such cases as *Curtiss-Wright*, “has attributed to the Executive far more power than he had ever undertaken to claim.”<sup>108</sup>

In discussing Marshall’s 1800 speech in *Curtiss-Wright*, Justice Sutherland did not engage merely in dicta. He committed plain judicial error, yet his language is routinely cited by the

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104. *Id.* at 319–20.

105. *Id.* at 333.

106. Letter from Harlan F. Stone J., to Edwin M. Borchard, Professor at Yale Univ. School of Law (Feb. 11, 1942) (on file at Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress).

107. Letter from Stone J., to Borchard (May 13, 1937) (on file at Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress).

108. Letter from Borchard, to Stone J. (Feb. 9, 1942) (on file at Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress).

Supreme Court, lower courts, the Justice Department, and various scholars. They do not read the entire speech to understand the breadth of Sutherland’s misinterpretation and deliberate effort, through deceit, to inflate presidential power in foreign affairs. One of the weaknesses of the judicial process is that once a historical misconception enters a decision, including one by the Supreme Court, it can remain there for decades and be cited repeatedly as an authoritative source without any steps to correct the error. Any institution, including the federal judiciary, is damaged publicly and internally when it lacks the capacity to identify and rectify mistakes.

## VI. JUDICIAL MISCONCEPTIONS ABOUT HISTORY

How could Justice Sutherland err on so many occasions in *Curtiss-Wright* about Marshall’s sole-organ speech, the treaty negotiation process, and how external sovereignty came to the United States? His misrepresentations about history have quite a bit of judicial company. An article by Justice Robert Jackson in 1945 observed: “Judges often are not thorough or objective historians.”<sup>109</sup> When Justices fall short in understanding history, how can they rely on the school of originalism in deciding constitutional cases? Seeking principles from the nation’s founding has broad appeal, but this type of analysis can offer evidence on both sides of an issue, inviting Justices to arbitrarily pick one side over another. Judge J. Harvie Wilkinson III notes that federal judges “are neither trained nor equipped to conduct this type of inquiry.”<sup>110</sup> Judges “lifted high by the lofty promises of originalism are laid bare to the insidious temptations of personal preference.”<sup>111</sup>

Charles A. Miller, in his study of judicial dependence on history, offered this judgment: “[T]he Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for

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109. Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

110. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNMENT* 50 (2012).

111. *Id.* at 57.

communication in public affairs.”<sup>112</sup> When the Court errs in judging history, “this is seldom due to a simple misstatement of verifiable fact. Rather, the Court’s history is misleading in its interpretation.”<sup>113</sup> When Senator Claude Pepper participated in oral argument at the Supreme Court, he appealed to the historical record “because when this great tribunal declares the law we all bow to it; but history remains history, in spite of judicial utterances upon the subject.”<sup>114</sup>

Writing in 1965, Alfred H. Kelly described the Court’s role as constitutional historian as “if not a naked king, no better than a very ragged one. From a professional point of view, most, if not all, of its recent historical essays are very poor indeed.”<sup>115</sup> Too often Justices “reach conclusions that are plainly erroneous.”<sup>116</sup> The Court is not likely to receive reliable guidance from briefs submitted to it. Attorneys who prepare briefs “do not attempt to present a court with balanced and impartial statements of truth. . . . The object of this process is not objective truth, historical or otherwise, but advocacy—*i.e.*, the assertion of a client’s interests”<sup>117</sup>

In an article on originalism in 1989, Justice Antonin Scalia remarked that the judicial system “does not present the ideal environment for entirely accurate historical inquiry.”<sup>118</sup> Referring to the experience and scholarly background of his own staff, he said courts do not “employ the ideal personnel.”<sup>119</sup> Moreover, Scalia noted, the “inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values . . . .”<sup>120</sup> Justice John Paul Stevens, in a book published in 2011, wrote that “judges are merely amateur historians” whose interpretations of

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112. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 195 (1969).

113. *Id.*

114. *Id.* at 196.

115. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155.

116. *Id.*

117. *Id.* at 155–56.

118. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

119. *Id.*

120. *Id.* at 864.

past events, “like their interpretations of legislative history, are often debatable and sometimes simply wrong.”<sup>121</sup>

Judge Wilkinson underscores judicial limitations in understanding matters of history. He explains that historians spend years studying a period of time “and investigating its nuances,” while judges have only months to decide each case “and even that time has to be divided among all the cases on the docket.”<sup>122</sup> History professors, he points out, have the benefit of research assistants trained in the tools of historical research. Judges have their law clerks, “and although these newly minted lawyers are intelligent and capable, they are typically unversed in the historian’s methods.”<sup>123</sup>

Granted these limitations, if federal judges decide to characterize the speech by John Marshall in 1800, it is unacceptable to mechanically repeat what other courts have said about the sole-organ doctrine. There is an obligation on the part of a judge, assisted by a law clerk, to actually read the speech and reach an informed understanding. Students in undergraduate schools are required to do that. Students in my classes at the William and Mary Law School read Marshall’s speech and fully understand that Justice Sutherland in *Curtiss-Wright* fundamentally misrepresented it.<sup>124</sup> No one reading Marshall’s speech could possibly conclude that he promoted unilateral, inherent, plenary, and exclusive powers of the President in external affairs. Judicial misconceptions and errors about history are serious because, once uttered, they are likely to be cited on a regular basis as reliable precedents. Section VIII illustrates the extent to which the errors in *Curtiss-Wright* have become embedded in American law.

#### VII. SUTHERLAND’S POLITICAL VIEWS AS U.S. SENATOR

There was no need for the Supreme Court in 1936 to explore the existence of independent, inherent, or exclusive

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121. JUSTICE JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 225–26 (2011).

122. WILKINSON, *supra* note 110, at 50–51.

123. *Id.* at 51.

124. Jamie Schuman, *Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?*, NAT’L L. J., Nov. 3, 2014, <http://www.loufisher.org/docs/pip/fisherbrief.pdf>.

presidential powers in foreign affairs. Nevertheless, in extensive dicta, the decision for the Court by Justice Sutherland went far beyond the specific issue before the Court and discussed extra-constitutional powers of the President. Many of the themes in the decision were drawn from Sutherland's writings as a U.S. Senator from Utah (1905-17) and his book, *Constitutional Power and World Affairs*, published two years after he left the Senate. According to Joel Francis Paschal, Sutherland "had long been the advocate of a vigorous diplomacy which strongly, even belligerently, called always for an assertion of American rights. It was therefore to be expected that [Woodrow] Wilson's cautious, sometimes pacifistic, approach excited in him only contempt and disgust."<sup>125</sup>

Sutherland served in the Senate from March 4, 1905, to March 3, 1917, gaining experience as a member of the Senate Foreign Relations Committee. His opinion in *Curtiss-Wright* draws from his article, "The Internal and External Powers of the National Government," printed as a Senate document in 1910.<sup>126</sup> The article began with this fundamental principle: "That this Government is one of *limited* powers, and that absolute power resides nowhere except in the people, no one whose judgment is of any value has ever seriously denied . . . ."<sup>127</sup>

Yet subsequent analysis in the article moved in the direction of independent presidential power that could not be checked or limited by other branches, even by the people's representatives in Congress. He first faulted other studies for failing "to distinguish between our *internal* and our *external* relations."<sup>128</sup> With regard to external relations, Sutherland argued that after the Declaration of Independence, the American colonies lost their character as free and independent states and that national sovereignty passed directly to the central government.<sup>129</sup> Sutherland's article in 1910 connected external matters with the national government,<sup>130</sup> but in *Curtiss-Wright* he

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125. JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 93 (1951).

126. S. DOC. NO. 61-417, 61st Cong., 2d Sess. (1910).

127. *Id.* at 1 (emphasis in original).

128. *Id.* (emphases in original).

129. *Id.*

130. *Id.* at 12.

associated national sovereignty and external affairs with the presidency, greatly expanding executive power. In addition to identifying express and implied constitutional powers in his article, Sutherland spoke of “inherent” powers and “extra-constitutional” powers.<sup>131</sup>

The same themes appear in Sutherland’s book, *Constitutional Power and World Affairs*, published in 1919. He again distinguishes between internal and external powers<sup>132</sup> and insists that in carrying out military operations the President “must be given a free, as well as a strong hand. The contingencies of war are limitless—beyond the wit of man to foresee. . . . To rely upon the slow and deliberate processes of legislation, after the situation and dangers and problems have arisen, may be to court danger—perhaps overwhelming disaster.”<sup>133</sup> Earlier in the book he warned against “the danger of centralizing irrevocable and absolute power in the hands of a single ruler”<sup>134</sup> and said that in “all matters of external sovereignty” with regard to the general government the “result does not flow from a claim of inherent power.”<sup>135</sup>

He expressed concern that the office of the President “has grown in potency and influence to an extent never dreamed of by those who framed and adopted the Constitution,” leading to subsequent thoughts of the President “as a superior officer rather than as a co-equal member of a tripartite organization.”<sup>136</sup> Under these pressures, Congress would be “driven from its traditional and constitutional place in public thought, as a co-ordinate branch of the government.”<sup>137</sup> After spending twelve years in the U.S. Senate and penning these thoughts in his book, why would he later, in *Curtiss-Wright*, promote presidential power in external affairs as “plenary and exclusive”?

Later passages of the book vested in the President as Commander-in-Chief a power that is supreme: “Whatever any Commander-in-Chief may do under the laws and practices of war as recognized and followed by civilized nations, may be done by

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131. *Id.* at 8–9.

132. SUTHERLAND, *supra* note 59, at 26.

133. *Id.* at 111.

134. *Id.* at 25.

135. *Id.* at 47.

136. *Id.* at 75.

137. *Id.* at 76.

the President as Commander-in-Chief. In carrying on hostilities he possesses sole authority, and is charged with sole responsibility, and Congress is excluded from any direct interference.”<sup>138</sup> In time of war, Sutherland concluded that traditional rights and liberties had to be relinquished: “individual privilege and individual right, however dear or sacred, or however potent in normal times, must be surrendered by the citizen to strengthen the hand of the government lifted in the supreme gesture of war. Everything that he has, or is, or hopes to be—property, liberty, life—may be required.”<sup>139</sup> Statutes enacted during World War I, Sutherland said, invested President Wilson “with virtual dictatorship over an exceedingly wide range of subjects and activities.”<sup>140</sup> Sutherland spoke of the need to define the powers of external sovereignty as “unimpaired” and “unquestioned.”<sup>141</sup>

#### VIII. HOW COURTS COMPOUND JUDICIAL ERRORS

Anthony Simones, after reviewing the academic literature and judicial decisions following Justice Sutherland’s opinion, concluded that “for every scholar who hates *Curtiss-Wright*, there seems to exist a judge who loves it.”<sup>142</sup> The litigation record fully supports that observation. Courts and executive officials repeatedly cite *Curtiss-Wright* favorably, not only to sustain delegations of legislative power but to support the existence of inherent and exclusive presidential power in foreign affairs.

Robert Jackson, as Attorney General, relied on *Curtiss-Wright* to defend the destroyers-bases agreement entered into by President Franklin D. Roosevelt in 1940.<sup>143</sup> In doing so, he drew some boundaries to cabin executive power: “The President’s power over foreign relations while ‘delicate, plenary, and exclusive’ is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to

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138. *Id.* at 74–75.

139. *Id.* at 98.

140. *Id.* at 115.

141. *Id.* at 171.

142. Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 415 (1996).

143. 39 OPS. ATT’Y GEN. 484, 486–87 (1941).

exercise powers vested in the Congress.”<sup>144</sup> Two years later, in a case involving an executive agreement between President Roosevelt and Russia, the Supreme Court cited *Curtiss-Wright* and the “sole organ” doctrine, but described the President as acting under “a modest implied power,” not an inherent power.<sup>145</sup>

In the Nazi Saboteur Case of 1942, the Court spoke of the need to treat statutory grants of authority to the President as being “entitled to the greatest respect.”<sup>146</sup> For that proposition it referred to three cases, including *Curtiss-Wright*.<sup>147</sup> At issue, however, was authority granted by Congress, not some type of plenary or exclusive presidential power. In one of the Japanese-American cases, the Court looked to *Curtiss-Wright* to support the granting of broad powers to the President during time of war.<sup>148</sup> The Court relied on Sutherland’s opinion to sustain the delegation of legislative power, not the existence of independent, exclusive, or inherent presidential power.

In 1948, the Court decided that presidential actions in authorizing applications by carriers engaged in overseas air transportation were beyond the competence of courts to review.<sup>149</sup> The President acted under a provision of the Civil Aeronautics Act. The Court’s opinion, written by Justice Jackson, cited *Curtiss-Wright* and adopted much of its language, but the thrust of the decision was to remove the judiciary — not Congress — from such questions:

The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government,

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144. *Id.* at 487.

145. *United States v. Pink*, 315 U.S. 203, 229 (1942). *Curtiss-Wright* was also cited in *United States v. Belmont*, 301 U.S. 324, 331–32 (1937).

146. *Ex parte Quirin*, 317 U.S. 1, 41–42 (1942).

147. *Id.* at 42.

148. *Ex parte Endo*, 323 U.S. 283, 298 n.21 (1944).

149. *Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103 (1948).

Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman v. Miller*, 307 U.S. 433, 454; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-321; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302.<sup>150</sup>

When Justice Jackson wrote those words, courts had in fact been hearing executive confidences in camera as part of a judge's duty to determine what evidence could be admitted at trial.<sup>151</sup> Moreover, in subsequent years Congress specifically authorized federal courts to receive confidential documents from the executive branch and examine them in camera.<sup>152</sup>

In a military tribunal case decided in 1948, Justice Douglas wrote in a concurrence: "The President is the sole organ of the United States in the field of foreign relations. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318-321. Agreements which he has made with our Allies in furtherance of our war efforts have been legion. Whether they are wise or unwise, necessary or improvident, are political questions, not justiciable ones."<sup>153</sup> As with Justice Jackson, this passage appears to exclude the judiciary, not Congress, and does not seem to endorse unlimited, unchecked presidential actions taken pursuant to inherent powers.

In 1950, the Court used *Curtiss-Wright* to support an inherent presidential power to exclude Ellen Knauff, a German citizen married to an American soldier. The case involved questions of statutory authority and agency regulations adopted

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150. *Id.* at 111.

151. *Haugen v. United States*, 153 F.2d 850, 851 (9th Cir. 1946).

152. E.g., Act of Oct. 15, 1980, 94 Stat. 2025 (1980) (the Classified Information Act of 1980 authorizes trial judges to rule on classified information in camera before the defendant attempts to introduce evidence in open court); Act of Nov. 21, 1974, 88 Stat. 1562 (1974) (to amend section 552 of title 5, United States Code, known as the Freedom of Information Act) (a district court has jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court . . . may examine the contents of such agency records in camera. . ."); Ronald M. Levin, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557 (1974).

153. *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring, announced on June 27, 1949).

to enforce congressional policy, but the Court also relied on inherent presidential power: “[T]here is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304; *Fong Yue Ting v. United States*, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.”<sup>154</sup> That is a strange passage. If executive power were truly inherent, on what ground could Congress pass legislation?

In this case, a dissent by Justice Jackson pushed back against the assertion of inherent presidential power. He found no evidence that Congress had authorized “an abrupt and brutal exclusion of the wife of an American citizen without a hearing.”<sup>155</sup> He said the administration told the judiciary “that not even a court can find out why the girl is excluded.”<sup>156</sup> To Jackson, the claim that evidence of guilt “must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.”<sup>157</sup> He added: “Security is like liberty in that many are the crimes committed in its name.”<sup>158</sup> He would have directed the Attorney General “either to produce his evidence justifying exclusion or to admit Mrs. Knauff to the country.”<sup>159</sup>

In a military tribunal case decided in 1950, the Supreme Court discussed legal challenges being brought against the “conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 . . . .”<sup>160</sup> A deportation case in 1952 cited *Curtiss-Wright* but nevertheless recognized the role of the

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154. U.S. ex rel. *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

155. *Id.* at 550 (Jackson, J., dissenting).

156. *Id.* at 551.

157. *Id.*

158. *Id.*

159. *Id.* at 552.

160. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

legislative branch in deciding policy in this area. Aliens “remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.”<sup>161</sup>

In the Steel Seizure Case of 1952, a concurrence by Justice Jackson observed that the most that can be drawn from *Curtiss-Wright* is the intimation that the President “might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.”<sup>162</sup> Here he found support not on broad inherent or plenary presidential power in external affairs but on limited implied power and shared power by Congress and the President in external affairs. He noted that “much of the [Justice Sutherland] opinion is *dictum*.”<sup>163</sup> In 1981, a federal appellate court also cautioned against placing undue reliance on “certain dicta” in Justice Sutherland’s opinion: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.”<sup>164</sup> This case represents a rare example of a lower federal court attempting to place limits on Supreme Court dicta about presidential power.

A right to travel case in 1965 cited *Curtiss-Wright* to uphold the authority of the Secretary of State to restrict travel to Cuba.<sup>165</sup> Inherent presidential power was not at issue. The case turned on the Court’s recognition that Congress, when it delegates legislative power to the President, “must of necessity paint with a brush broader than that it customarily wields in domestic areas.”<sup>166</sup> Several Justices in the Pentagon Papers Case in 1971 referred to *Curtiss-Wright*. A concurrence by Justice Potter Stewart, joined by Justice Byron White, described the President’s power in national defense and international affairs as

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161. *Carlson v. Landon*, 342 U.S. 524, 534 (1952).

162. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring).

163. *Id.*

164. *Am. Int’l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

165. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

166. *Id.*

“largely unchecked by the Legislative and Judicial branches,” citing four cases, one of them *Curtiss-Wright*.<sup>167</sup> Nothing in John Marshall’s sole-organ speech in 1800 provides support for that understanding. Another concurrence by Justice Thurgood Marshall claimed that *Curtiss-Wright* gives the President “broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief.”<sup>168</sup> Of course that relies not on the decision in *Curtiss-Wright*, upholding the delegation of *legislative* power, but on erroneous dicta by Justice Sutherland. A dissent by Justice John Harlan quoted John Marshall’s speech in 1800 (“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”) and remarked: “From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power.”<sup>169</sup> Had Harlan taken time to read Marshall’s speech, he would have seen a powerful and substantial challenge to that description of presidential power.

A year after the Pentagon Papers Case, Justice Rehnquist announced the judgment of the Court in a case involving the expropriation of property in Cuba. He first cited a case from 1918 that recognized that the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—’the political’—Departments . . .”<sup>170</sup> Certainly that is the plain textual meaning of Articles I and II of the Constitution. Having discussed *concurrent* power, Rehnquist then proceeded down the opposite path by citing *Curtiss-Wright* and quoting from Marshall’s sole-organ speech to buttress the point that the executive branch has “exclusive competence” in the field of foreign affairs.<sup>171</sup> Of course Marshall said precisely the opposite: that President John Adams was using extradition authority granted him by treaty.

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167. *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring).

168. *Id.* at 741 (Marshall, J., concurring).

169. *Id.* at 756 (Harlan, J., dissenting).

170. *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

171. *Id.* (citing *United States v. Belmont*, 301 U.S. 324 (1937)).

In 1975, Rehnquist relied on *Curtiss-Wright* to argue that the limits on the authority of Congress to delegate its legislative power are “less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.”<sup>172</sup> Why confuse the need for delegating legislative authority if the President already has “exclusive competence” in foreign affairs? In a dissenting opinion in 1977, again relying on *Curtiss-Wright*, Rehnquist maintained the President occupies a “pre-eminent position . . . with respect to our Republic,” particularly “in the area of foreign affairs and international relations.”<sup>173</sup> A footnote borrows extensively from Justice Sutherland’s dicta in *Curtiss-Wright*, including this sentence: “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.’”<sup>174</sup> As explained in Section X, John Marshall rejected preeminent power for the President in foreign affairs not only as a Member of Congress in 1800 but as Chief Justice of the Supreme Court.

In a treaty termination case decided in 1979, Justice Powell relied on *Curtiss-Wright* to argue that Congress may grant the President wider discretion in foreign policy than in domestic affairs.<sup>175</sup> In that same case, Justice Rehnquist (joined by Chief Justice Burger and Justices Stewart and Stevens) cited *Curtiss-Wright* for the more sweeping proposition that the judiciary should decline to decide political questions involving “foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked.”<sup>176</sup> Here the argument is not for the President’s exclusive competence in foreign affairs but for judicial deference to national policy decided by both elected branches. A year later, in a concurrence, Rehnquist cited *Curtiss-Wright* to observe that delegations of legislative authority are upheld “because of the delegatee’s residual authority over particular subjects of regulation,” and that

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172. *United States v. Mazuric*, 419 U.S. 544, 556–57 (1975).

173. *Nixon v. Adm’r of Gen. Serv.*, 433 U.S. 425, 550–51 n.6 (1977) (Rehnquist, J., dissenting).

174. *Id.* at 551 n. 6.

175. *Goldwater v. Carter*, 444 U.S. 996, 1001 n.1 (1980).

176. *Id.* at 1003–04; *see also* 1004–05.

in the area of foreign affairs Congress (quoting from Justice Sutherland in *Curtiss-Wright*) “must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”<sup>177</sup>

In 1981, in a case involving the revocation of an American citizen’s passport, Chief Justice Burger relied in part on dicta from *Curtiss-Wright* that the President “has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”<sup>178</sup> Burger next cited *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.* (1948),<sup>179</sup> which argued not for exclusive presidential power in foreign affairs but for judicial deference to policy developed by Congress and the executive branch.

Also in 1981, Justice Rehnquist wrote for the Court in *Dames and Moore* to sustain President Carter’s decision to freeze Iranian assets. The decision turned in large part on statutory authority under the International Emergency Economic Powers Act (IEEPA), but Rehnquist referred to language in *Curtiss-Wright* about the existence of presidential power resulting from a statutory grant of authority but with “the 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, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”<sup>180</sup> The Court took note of the fact that “Congress has not disapproved of the action taken here. . . . We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential

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177. *Indus. Union Dep’t. v. Am. Petroleum Inst.*, 448 U.S. 607, 684 (1980) (Rehnquist, J., concurring).

178. *Haig v. Agee*, 453 U.S. 280, 307–08 (1981) (citing *Curtiss-Wright*, 299 U.S. at 320).

179. *Haig*, 453 U.S. at 308.

180. *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (citing *Curtiss-Wright*, 299 U.S. at 319–20).

authority.”<sup>181</sup> This passage seems to accept a legislative check on presidential power in the field of external affairs.

In 1984, the Court upheld presidential authority under the Trading With the Enemy Act (TWEA) to limit travel-related transactions with Cuba, referring to language in *Curtiss-Wright* about the “traditional deference to executive judgment ‘[i]n this vast external realm.’”<sup>182</sup> A 1988 decision by the Court concerned the authority of the Central Intelligence Agency (CIA) to terminate an employee on grounds of homosexuality. The Court ruled that a provision of the Administrative Procedure Act precluded judicial review of the agency’s decision, and reversed the D.C. Circuit on that ground.<sup>183</sup> Again, the issued involved statutory policy, not independent presidential power. Concurring in part and dissenting in part, Justice O’Connor stated that the functions performed by the CIA “lie at the core of ‘the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.’ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).”<sup>184</sup> In a dissent, Justice Scalia repeated the same language, adding the rest of the sentence from *Curtiss-Wright*: “a power which does not require as a basis for its exercise an act of Congress.”<sup>185</sup>

In 1993, the Supreme Court held that neither a statutory provision nor Article 33 of the United Nations Convention Relating to the Status of Refugees limited the President’s power to order the Coast Guard to return undocumented aliens, intercepted on the high seas, to Haiti.<sup>186</sup> The Court interpreted congressional legislation as granting to the President “ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores.”<sup>187</sup> Whether the President’s method of returning Haitians posed a greater risk of harm to them was considered by the Court as “irrelevant to the scope of his authority to take action that neither

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181. *Dames*, 453 U.S. at 687–88.

182. *Regan v. Wald*, 468 U.S. 222, 243 (1984) (citing *Curtiss-Wright*, 299 U.S. at 319).

183. *Webster v. Doe*, 486 U.S. 592 (1988).

184. *Id.* at 605–06.

185. *Id.* at 614–15.

186. *Salc v. Haitian Ctr. Council, Inc.*, 509 U.S. 155 (1993).

187. *Id.* at 187.

the Convention nor the statute clearly prohibits.”<sup>188</sup> The presumption that a congressional statute does not have extraterritorial application unless the intent is clear “has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).”<sup>189</sup> By citing the case as a whole instead of particular pages, it was left unclear how much the Court depended on erroneous dicta and a misreading of John Marshall’s sole-organ speech.

In 2005, writing for the Court, Justice Thomas decided that a plot to defraud a foreign government of tax revenue violated the federal wire fraud statute. He said: “In our system of government, the Executive is ‘the sole organ of the federal government in the field of international relations,’ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).”<sup>190</sup> In making that statement, he did not conclude that the President possessed exclusive or plenary authority over foreign affairs. Instead, Congress had authority to pass the legislation and the President could elect to bring the prosecution.

A year later, the Court held that President George W. Bush lacked authority to create military tribunals to try individuals who gave assistance to the terrorist attacks on 9/11. To the Court, the tribunals violated both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.<sup>191</sup> In a dissent, Justice Thomas said the Court “openly flouts our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs.”<sup>192</sup> It was the Court’s “duty to defer to the President’s understanding of the provision at issue here,” a duty “only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and

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188. *Id.* at 188.

189. *Id.*

190. *Pasquantino v. United States*, 544 U.S. 349, 369 (2005).

191. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

192. *Id.* at 678 (Thomas, J., dissenting).

character of an armed conflict. See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).<sup>193</sup>

In 2009, a unanimous Court held that the Republic of Iraq under applicable law was no longer subject to suit in American courts.<sup>194</sup> Part of congressional policy authorized the President to suspend certain provisions of the Iraq Sanctions Act of 1990. Writing for the Court, Justice Scalia said: “To a layperson, the notion of the President’s suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322–324 (1936) (canvassing precedents from as early as the ‘inception of the national government’).”<sup>195</sup> Justice Scalia also noted: “in the ‘vast external realm, with its important, complicated, delicate and manifold problems,’ *Curtiss-Wright Export Corp.*, 299 U.S., at 319, courts ought to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law’s true purpose.”<sup>196</sup> Here the focus is on joint action by the legislative and executive branches.

In 2011, the Supreme Court denied the request of the executive branch to stay the execution of a Mexican national in expectation that Congress would pass remedial legislation. To the Court: “we are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation.”<sup>197</sup> Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, objected that the Court should have deferred to the executive branch, claiming the Court “has long recognized the President’s special constitutionally based authority in matters of foreign relations. See e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936).”<sup>198</sup>

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193. *Id.* at 718–19. For a brief reference to *Curtiss-Wright*, see *Boumediene v. Bush*, 553 U.S. 723, 796–97 (2008).

194. *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

195. *Id.* at 856–57.

196. *Id.* at 860.

197. *Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

198. *Id.* at 2870 (Breyer, J., dissenting).

IX. SCHOLARLY EVALUATIONS OF  
*CURTISS-WRIGHT* DICTA

Scholars who have studied *Curtiss-Wright* have thoroughly repudiated Justice Sutherland for his careless and false mischaracterization of the sole-organ speech in 1800, an erroneous understanding of the process of treaty negotiation, and misunderstanding the shift of sovereign authority to the United States after the break with Great Britain in 1776. In a 1938 article, Julius Goebel, Jr., of the Columbia Law School evaluated some of the principal tenets of Sutherland's opinion. Before turning to *Curtiss-Wright*, he observed that a "certain amount of history is implicit in the study of constitutional law," but that the teaching of the subject in law schools "has tended toward the abandonment of the historical element" in order to provide room for what he called "the dialectic urge" to analyze cases, including "balance sheets, valuation charts and the profundities of economic theory."<sup>199</sup>

In the classroom, a law professor "can, as usually he must, assume that the student comes armed with at least a citizen's knowledge of American government and history." This supposition, Goebel said, is "quite unsupported in fact, but it has acquired the force of an irrebuttable presumption of law."<sup>200</sup> Whether justified or not, the assumption "enables the teacher to maintain his propositions of doctrine in appropriate aloofness and detachment from political history." Constitutional cases, "drained of historical significance," may then be more easily "manipulated as so many capsules of legal essence."<sup>201</sup>

Goebel reviewed what Justice Sutherland in *Curtiss-Wright* said about America's war of independence after 1776: "As a result of the separation from Great Britain by the colonies acting as a unit the power of external sovereignty passed from the crown not to the colonies severally but to the colonies in their collective and corporate character as the United States of America."<sup>202</sup> In a footnote, Goebel pointed out that although Sutherland cited *Penhallow v. Doane's Adm.*, 3 Dall. 54, 80-81 (1795), nothing in

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199. Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 555 (1938).

200. *Id.* at 556.

201. *Id.*

202. *Id.* at 571 (citing *Curtiss-Wright*, 299 U.S. 304, 316 (1936)).

that opinion supported Sutherland's position. In fact, the Court in 1795 agreed that states did exercise what Justice Iredell called "high powers of what I may perhaps with propriety for distinction call external sovereignty."<sup>203</sup> Furthermore, the treaty with Great Britain on September 3, 1783, acknowledged the "said United States viz. New Hampshire, Massachusetts Bay, Rhode Island etc. to be free sovereign and independent States."<sup>204</sup> To Goebel, Sutherland's view of sovereignty "passing from the British crown to the union appears to be a perversion of the dictum of Jay, C.J. in *Chisholm's Executors v. Georgia*, 3 Dall. 419, 470 (U.S. 1799) to the effect that sovereignty passed from the crown to the people."<sup>205</sup>

As to Sutherland's statement in *Curtiss-Wright* that the President "alone negotiates" treaties and that into this field "of negotiation the Senate cannot intrude," Goebel regarded that position as a misleading description of presidential authority in foreign affairs, pointing to early examples of Presidents consulting the Senate before negotiation.<sup>206</sup> Goebel took Sutherland to task for ignoring "the theory of control over foreign affairs both before and under the Confederation."<sup>207</sup> Instead, Sutherland chose "to frame an opinion in language closely parallel to the description of royal prerogative in foreign affairs in the *Ship Money Case*."<sup>208</sup> Goebel's footnote to this British case from 1637 explores the king's exclusive control over external affairs, a theory of government that the American Framers considered and rejected.<sup>209</sup> Goebel did not analyze Sutherland's understanding of John Marshall's sole-organ speech in 1800.

A law review article in 1944 by James Quarles expressed surprise that, up to that point, *Curtiss-Wright* "seems not to have attracted especial notice" in professional journals.<sup>210</sup> Quarles did note, however, that Justice Sutherland raised questions that were not considered "by counsel for either side, either in the District

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203. *Id.* at 571 n.46.

204. *Id.*

205. *Id.* at 572 n.46.

206. *Id.* at 572 n.47.

207. *Id.* at 572.

208. *Id.* at 572–73.

209. *Id.* at 573, n.50. See also FISHER, *supra* note 56, at 5, 73–74, 261–65.

210. James Quarles, *The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?*, 32 GEO. L.J. 375, 375 (1944).

Court or in the Supreme Court; nor is there any allusion to any issue of that sort in the opinion of the District Judge. Indeed, the pages of Mr. Justice Sutherland's opinion devoted to a discussion of that question appear to the present writer as being little, if any, more than so much interesting yet discursive *obiter*."<sup>211</sup>

Another analysis of *Curtiss-Wright* published in 1944 is by C. Perry Patterson, professor of government at the University of Texas. After describing Sutherland's position that external sovereignty passed from the British Crown not to the states but directly to the Union, and that the Union existed before the Constitution, Patterson stated that Sutherland's doctrine of "inherent powers whether in internal or external affairs is (1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous."<sup>212</sup> In Patterson's view, states were sovereign and independent before ratification of the Constitution.<sup>213</sup> The colonies, not the Continental Congress, voted for independence from Great Britain.<sup>214</sup> In that sense, Patterson concluded that Sutherland's doctrine in *Curtiss-Wright* that Congress "acquired power over the entire field of foreign affairs as a result of the issue of the Declaration is contrary to the facts of American history."<sup>215</sup> Patterson did not analyze Sutherland's understanding of treaty negotiation or the sole-organ speech by John Marshall.

Two years later, in an article for *Yale Law Journal*, David M. Levitan wrote more broadly about the implications of *Curtiss-Wright* for constitutional government, explaining how Sutherland borrowed some of the positions he advanced while a U.S. Senator from Utah.<sup>216</sup> In an article he wrote called "The Internal and External Powers of the National Government," printed as a Senate document, Sutherland argued that the power over external affairs was never possessed by the states but came directly to the

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211. *Id.* at 378.

212. C. Perry Patterson, *In Re the United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286, 297 (1944).

213. *Id.*

214. *Id.* at 304-05.

215. *Id.* at 308.

216. David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 472-78 (1946).

national government.<sup>217</sup> Of course that position has been rejected by many scholars, as noted above in this section. After leaving the Senate, Sutherland was invited to deliver a series of lectures at Columbia University, where he reiterated the same theme about external sovereignty.<sup>218</sup>

After reviewing this material from Sutherland's Senate career and immediately after, Levitan explained that he provided extensive detail to demonstrate the pattern between those positions and his authorship of *Curtiss-Wright*: "Not only is there a consistency as to ideas, but in fact quotation of language. Few men indeed are in the happy position of being able to give their writings and speeches the status of the law."<sup>219</sup> Comparing Sutherland's career before he joined the Court and his decision on presidential power in 1936 led Levitan to say: "[T]he whole theory and a great amount of its phraseology had become engraved on Mr. Sutherland's mind before he joined the Court, waiting for the opportunity to be made the law of the land."<sup>220</sup>

Levitan did not reject Sutherland's theory in *Curtiss-Wright* simply because it dovetailed with earlier positions: "It is only to be expected, and even to be hoped, that justices should give expression to carefully thought out ideas."<sup>221</sup> Yet when analyzing the validity of Sutherland's theory of external relations and presidential power, Levitan concluded that the facts did not support Sutherland. For example, the "record of events leaves no doubt that treaty-making power was exercised by the States."<sup>222</sup> Sutherland's theory that the power of external sovereignty passing from the Crown not to individual colonies but to the colonies in their "collective and corporate capacity as the United States of America" did not, to Levitan, "harmonize with the facts. It simply was not so."<sup>223</sup> Sutherland's theory "of the nature of the foreign relations power represents the most extreme interpretation of the powers of the national government. It is the

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217. *Id.* at 473–75, 473 n.17 (citing S. Doc. No. 417, 61st Cong., 2d Sess. (1909)). The date of the Senate document is actually 1910.

218. *Id.* at 475.

219. *Id.* at 476.

220. *Id.* at 478.

221. *Id.*

222. *Id.* at 485.

223. *Id.* at 489.

furthest departure from the theory that [the] United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power.”<sup>224</sup> Sutherland’s doctrine of external affairs “makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol.”<sup>225</sup>

In the *Yale Law Journal* in 1973, Charles A. Lofgren analyzed Sutherland’s understanding in *Curtiss-Wright* when he spoke of “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”<sup>226</sup> Lofgren read John Marshall’s words “to put them in context.”<sup>227</sup> Marshall explained to his colleagues in the House of Representatives that the President “is charged to execute the laws,” a treaty “is declared to be law,” and it was therefore the duty of President Adams to carry out the extradition provision in the Jay Treaty.<sup>228</sup> Under Lofgren’s reading, it was “difficult to extract from Marshall’s comments an endorsement of unlimited executive discretion in foreign *policy*-making.”<sup>229</sup> National policy had been established by the President and the Senate acting jointly through the treaty-making process, not by the President alone.

Moreover, Lofgren concluded that Sutherland had “uncovered no constitutional ground for upholding a broad, inherent, and independent presidential power in foreign relations.”<sup>230</sup> Americans in 1936 “probably accorded Congress a coordinate, if not a dominant, role in the initiation of war, whether declared or not,” and control of commercial policy “was largely assigned to Congress.”<sup>231</sup> To Lofgren, Marshall “evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker.”<sup>232</sup> Sutherland’s opinion in *Curtiss-*

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224. *Id.* at 493.

225. *Id.* at 497.

226. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 24 (1973).

227. *Id.*

228. *Id.* at 25.

229. *Id.* (emphasis in original).

230. *Id.* at 30.

231. *Id.*

232. *Id.*

*Wright* “does not support the existence of an extra-constitutional base for federal authority, broad independent executive authority, or laxness in standards governing delegation. It certainly invests the President with no sweeping and independent *policy* role.”<sup>233</sup>

During the Iran-Contra hearings in 1987, the sole-organ doctrine of *Curtiss-Wright* was alluded to at times. For example, Rep. Henry Hyde asked an administration witness, Bretton G. Sciaroni, whether Congress could use its power of the purse “to cut off, restrict or amend the President’s constitutional powers to be the supreme spokesman for America in foreign policy, the sole operator? Can the power of the purse amend the constitutional powers of the President?” Sciaroni replied: “I don’t believe so.”<sup>234</sup> Shortly after that, Senator George Mitchell said to Sciaroni: “Now, Representative Hyde read to you a section from the Supreme Court case known as *Curtiss Wright*.” Mitchell asked Sciaroni if the language about the President being “sole organ” was dictum. Sciaroni answered that he would have to look at the opinion to make that determination. Mitchell stated: “When you do so, I believe you will find it was dictum, it was not relevant to the decision and it has no binding effect, as all dictum does not.”<sup>235</sup>

The Iran-Contra report contains a section that raises numerous objections to Justice Sutherland’s analysis in *Curtiss-Wright*. The report denied that anything in John Marshall’s speech supported inherent and exclusive presidential power. Instead, he regarded the President as simply carrying out the law on the basis of authority granted by statute or treaty.<sup>236</sup> The minority views in the report interpreted *Curtiss-Wright* to empower the President to exercise inherent and independent powers in the field of foreign affairs.<sup>237</sup>

The explanation by Senator Mitchell may have wide acceptance in the legal community, but the record is quite clear

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233. *Id.* at 32 (emphasis in original).

234. *Iran-Contra Investigation; Part 100-5, Joint 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., 1st Sess. 421 (1987).

235. *Id.* at 426.

236. H. R. REP. NO. 100—433, S. REP. NO. 100—216, 100th Cong., 1st Sess. 388–90 (1987).

237. *Id.* at 472–74.

that various administrations have resorted to the sole-organ doctrine to justify expansive definitions of presidential power. That has been the pattern in litigation on *Zivotofsky*. Section XI of this article analyzes the extent to which the Justice Department depends on *Curtiss-Wright* dicta to advocate an exclusive and plenary role for the President in the field of international affairs.

Michael Glennon, writing in the *Yale Journal of International Law* in 1988, referred to the “extravagant scheme concocted by Justice George Sutherland, first unveiled in his earlier writings and later, in 1936, transposed into a Supreme Court opinion, and unleashed upon the nation in *United States v. Curtiss-Wright Export Corp.*”<sup>238</sup> Sutherland discussed the “sole organ” statement by John Marshall “with no reference to its limiting context.”<sup>239</sup> After quoting Sutherland’s language in *Curtiss-Wright* that the President possesses not only authority delegated to him by Congress but also “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,” Glennon remarks: “The first thing to be said about this breathtaking exegesis concerning ‘plenary powers’ is that it is the sheerest of *dicta*.”<sup>240</sup> To Glennon, *Curtiss-Wright* “is demonstrably not a plenary powers case” because such power “is one that is not susceptible to congressional limitation.” Plenary power refers to the “exclusive presidential power to act without regard to congressional action.”<sup>241</sup> But, as Glennon notes, President Roosevelt in *Curtiss-Wright* acted on the basis of statutory authority conferred by Congress. Sutherland’s opinion is described as “a muddled law review article wedged with considerable difficulty between the pages of United States Reports.”<sup>242</sup> Moreover, his interpretation of the sole-organ speech “mistakes policy communication for policy formulation.”<sup>243</sup>

David Gray Adler, in a 1988 article, states that it is “quite likely that *Curtiss-Wright* is the most frequently cited case

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238. Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 *YALE J. INT’L L.* 5, 11 (1988).

239. *Id.* at 12.

240. *Id.*

241. *Id.*

242. *Id.* at 13.

243. *Id.* at 14.

involving the allocation of foreign affairs powers.”<sup>244</sup> After deciding that the delegation by Congress of authority to the President was not unduly broad, Justice Sutherland “strayed from the delegation question and in some ill-considered dicta imparted an unhappy legacy, the chimerical idea that the external sovereignty of the nation is vested in the presidency and is neither derived from nor restrained by the Constitution.” His theory of inherent presidential power “stems from his bizarre reading of Anglo-American legal history.”<sup>245</sup> Adler found no factual foundation for Sutherland’s assertion that domestic and foreign affairs are different, “both in respect of their origin and nature,” and that external sovereignty somehow passed directly from the Crown to the President when in fact it passed to the colonies as sovereign entities.<sup>246</sup>

As for the sole-organ speech, Adler explains that John Marshall was merely defending the decision of President John Adams to surrender to Great Britain a British deserter, acting under the Jay Treaty. At no point in the speech did Marshall “argue that the president’s exclusive authority to communicate with a foreign nation included a power to formulate or develop policy.”<sup>247</sup> By misinterpreting Marshall’s speech, Sutherland attempted to infuse “a purely communicative role with a substantive policy-making function.”<sup>248</sup> It appeared to Adler that “the sole organ doctrine is simply so much fanciful rhetoric.”<sup>249</sup>

A biography of Justice Sutherland in 1994 by Hadley Arkes concentrates on Sutherland’s jurisprudence anchored in his understanding of natural rights. Part of that discussion is devoted to Sutherland’s position on presidential power in the field of foreign policy. As to the embargo policy at issue in *Curtiss-Wright*, Arkes states: “In the strictest sense, Congress did not choose to legislate in this case.”<sup>250</sup> In fact, as Arkes notes, Congress in 1934 “passed a joint resolution that authorized the president to bar the

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244. David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 POL. SCI. O. 1, 30 (1988).

245. *Id.*

246. *Id.*

247. *Id.* at 33.

248. *Id.* at 34.

249. *Id.*

250. HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 198 (1994).

sale of arms and munitions” to Bolivia and Paraguay.<sup>251</sup> Yet he said the action of Congress “did not have the solemnity and the properties of a statute,” even though it passed both houses, was presented to the President, and signed into law.<sup>252</sup>

As to Justice Sutherland’s decision in *Curtiss-Wright*, Arkes claims that the separate states after 1776 “never enjoyed the attributes of sovereignty in international relations” and the power of external sovereignty passed from the Crown directly to the United States.<sup>253</sup> As indicated in this section, a number of scholars have produced evidence to refute that position. Arkes cites language that the President “alone negotiates” treaties and into that field the “Senate cannot intrude,” without recognizing that Presidents in the past had invited Senators to join in the negotiation of treaties and that Sutherland in his 1919 book admitted that Senators had done precisely that.<sup>254</sup> Arkes refers to Marshall’s “sole organ” speech in 1800, but does not analyze the speech to understand that Marshall was not arguing for exclusive and plenary power of the President in foreign affairs.<sup>255</sup>

Despite numerous scholarly critiques that have highlighted Justice Sutherland’s errors and misconceptions, an article in 1996 by Anthony Simones correctly observes that “judges have utilized *Curtiss-Wright* to sanction a broad range of presidential powers.”<sup>256</sup> After reading the repudiations of Sutherland’s work, Simones expected the decision to be “tossed into the dust bin of constitutional jurisprudence” along with *Dred Scott v. Sandford* and *Plessy v. Ferguson*. Instead, *Curtiss-Wright* remains a source of authority in deciding cases. “Most judges don’t seem to care about the historical basis of Justice Sutherland’s theory and don’t recall the specific facts of the case.”<sup>257</sup>

Writing in 2000 in the *William and Mary Law Review*, Michael D. Ramsey described *Curtiss-Wright* as “demonstrably

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251. *Id.*

252. *Id.* at 204.

253. *Id.* at 201.

254. *Id.* at 204.

255. *Id.*

256. Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411 (1996).

257. *Id.* at 415.

wrong as a historical matter, and it is wrong for reasons that have escaped the central focus of many attacks upon it.”<sup>258</sup> He concentrated not on the issue of states exercising sovereign power, the sole-organ doctrine, or the treaty negotiation process, but instead on Justice Sutherland’s decision to wrongly describe the understanding of those who drafted and ratified the Constitution. At that time, there was “no theory of extraconstitutional power in foreign affairs” and it was understood that the Constitution provided “the means to give the national government foreign relations power it would otherwise lack.”<sup>259</sup> The “truly radical part of *Curtiss-Wright* is not its emphasis on presidential power, but rather its claim that that power arose outside the Constitution.”<sup>260</sup> To that extent, *Curtiss-Wright* “is historically indefensible.”<sup>261</sup> Ramsey rejected Sutherland’s position that the field of foreign affairs relies on “inherent powers.”<sup>262</sup>

Also writing in 2000, Roy E. Brownell II analyzed the relative strengths and weaknesses of *Curtiss-Wright*.<sup>263</sup> He did not question the accuracy of Glennon’s description of Justice Sutherland’s decision as “a muddled law review article wedged with considerable difficulty between the pages of the United States Reports.”<sup>264</sup> With regard to Sutherland’s language regarding “the 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,” Brownell offered this appraisal: “Anyone making even the most cursory glance at constitutional text will conclude that it is difficult to fashion a theory under which *Curtiss-Wright*’s ‘plenary’ powers statement could be justified.”<sup>265</sup> The notion that Congress may be excluded

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258. Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 381 (2000).

259. *Id.*

260. *Id.* at 382.

261. *Id.* at 437.

262. *Id.* at 444.

263. Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL’Y. 1, 21–42 (2000).

264. *Id.* at 17.

265. *Id.* at 20 n. 55.

from national security affairs, “as implied by *Curtiss-Wright’s* ‘plenary/sole organ’ passage, clearly does violence to the text of the Constitution.”<sup>266</sup> Although Brownell refers to John Marshall’s speech in 1800 describing the President as “sole organ” of the nation in external affairs,<sup>267</sup> he does not offer a judgment whether Sutherland misrepresented what Marshall said.

In a report for the Law Library of Congress in August 2006 and a journal article published the following year, I explained that Marshall’s speech did not support an independent, extra-constitutional or exclusive power of the President in foreign relations. The concept of an executive having sole power over foreign relations borrows from other sources, including the British model of a royal prerogative that gave the king plenary power over external affairs.<sup>268</sup> The Framers rejected that model.<sup>269</sup> My book on *Presidential War Power* includes a section that identifies the false history and theory promoted by Justice Sutherland’s dicta in *Curtiss-Wright*.<sup>270</sup> Similarly, my 2014 legal treatise on the executive branch devotes several sections to misconceptions about presidential inherent power, treaty negotiation, and the “sole organ” doctrine.<sup>271</sup> On July 17, 2014, I submitted an amicus brief to the Supreme Court in *Zivotofsky v. Kerry*, pointing to errors and misconceptions in *Curtiss-Wright* and requesting the Court to issue corrections.<sup>272</sup>

In 2009, H. Jefferson Powell published a detailed analysis of *Curtiss-Wright*.<sup>273</sup> He provided important background on the Gran Chaco War in South America, the political context of President Roosevelt’s involvement in the arms embargo, the

266. *Id.* at 41.

267. *Id.* at 19.

268. Louis Fisher, *The “Sole Organ” Doctrine*, Law Library of Congress, Aug. 2006, <http://loufisher.org/docs/pip/441.pdf>; Louis Fisher, *Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 *PRESIDENTIAL STUD. Q.* 139 (2007), <http://loufisher.org/docs/pip/439.pdf>.

269. FISHER, *supra* note 56, at 5, 73–74, 261–65.

270. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 68–72 (3d ed. 2013).

271. FISHER, *supra* note 56, at 68–73, 265–68, 272–76, 286.

272. Brief of Louis Fisher as Amicus Curiae Supporting Petitioner, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628), <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>.

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

legislation passed by Congress, the ensuing criminal prosecution, positions taken by opposing parties in the litigation, and Sutherland's political and legal background before joining the Supreme Court.<sup>274</sup> As to the decision in *Curtiss-Wright*, Powell explains that part of it was “a direct reprise” of Sutherland's work, *Constitutional Power and World Affairs*, and summarized “chapters two and three” of the book.<sup>275</sup> The famous passages about the President as “sole organ” in international relations, with exclusive control over treaty negotiation and possessing “plenary and exclusive power,” Powell says, were “unparalleled” in Sutherland's earlier writings and lectures.<sup>276</sup> He further notes: “no one embraces Sutherland's cherished theory about the twofold nature of federal power and the opinion probably doesn't make sense without the theory.”<sup>277</sup>

Although Powell cites some critics of *Curtiss-Wright*,<sup>278</sup> he does not indicate whether he agrees with their evaluations. He says that critics describe Sutherland's quotation of John Marshall about the President as “sole organ” as “a cheat—all Marshall meant was that foreign governments communicate with the United States through the president, not that the president decides what to say or do in response.”<sup>279</sup> A footnote has this parenthetical to an article by Powell: “the critics are right about the meaning of the ‘sole organ’ passage in Marshall's speech but that Marshall nevertheless thought the president enjoys independent policymaking authority over foreign affairs.”<sup>280</sup> The purpose of Marshall's speech was to reject calls for the impeachment or censure of President Adams, pointing out that Adams acted on the basis of authority granted him in the Jay Treaty. Section X explains Marshall's position about presidential power when he served as Chief Justice.

In 2013, Edward A. Purcell, Jr. published an article that analyzed *Curtiss-Wright* not so much for historical misconceptions in its dicta but the possible influence of Chief Justice Hughes in

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274. *Id.* at 196–220.

275. *Id.* at 221.

276. *Id.* at 222.

277. *Id.* at 231.

278. *Id.* at 229–30.

279. *Id.* at 230.

280. *Id.* at 230 n. 86.

promoting “plenary and exclusive” power for the President in foreign affairs. Justice Sutherland authored the opinion, but Purcell maintains it went far beyond what Sutherland had written as a U.S. Senator or in the book he wrote in 1919, where he emphasized that the roles of Congress and the President in foreign affairs were “co-ordinate.”<sup>281</sup> In his book, Sutherland highlighted the Senate’s authority “to participate in the making of treaties at any stage of the process,” including the negotiation phase.<sup>282</sup> Purcell asks: “Why was Sutherland willing to change his own long-held views on foreign affairs powers in order to assert the ‘plenary and exclusive’ nature of the executive’s power?”<sup>283</sup>

To Purcell, the “plenary and exclusive” language “most likely came not from Sutherland but from Chief Justice Charles Evans Hughes, and that Hughes was the architect of both the Court’s 7-1 majority and the opinion’s executive power language.”<sup>284</sup> He further argues that the majority Justices “likely accepted” Hughes’ views to provide “practical support for President Franklin Roosevelt in his contemporaneous struggle with Congress over the nation’s foreign policy, especially his efforts to implement an anti-Nazi foreign policy and to secure discretionary authority over arms embargoes.”<sup>285</sup> Because Hughes had been U.S. Secretary of State from 1921 to 1925 and author of many books on law and international affairs, as well as a judge on the Permanent Court of International Justice,<sup>286</sup> in foreign affairs “he readily understood the need for executive independence and discretion.”<sup>287</sup> If Hughes “had urged the ‘plenary and exclusive’ executive power language on the justices, his exhortation would have carried great weight.”<sup>288</sup> Although this expansive language “differed substantially” from anything Sutherland “had

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281. Edward A. Purcell, Jr., *Understanding Curtiss-Wright*, 31 *LAW & HIST. REV.* 653, 661 (2013) (citing Sutherland’s book, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* at 50–69, 76–78, 91, 99, 110, 122–280). The word “co-ordinate” appears in Sutherland’s book, at 76.

282. Purcell, *supra* note 281, at 661. The language about the treaty process appears in Sutherland’s book, at 123.

283. *Id.* at 663–64.

284. *Id.* at 654–55.

285. *Id.* at 655–56.

286. *Id.* at 667.

287. *Id.* at 668.

288. *Id.* at 676.

previously articulated,” Purcell concludes that Sutherland deferred to Hughes on this point.<sup>289</sup>

Purcell does not say this, but if Sutherland was willing to accept the language from Hughes, that may have led Hughes to tolerate the abundant dicta that Sutherland added to his opinion, including Sutherland’s account of John Marshall’s sole-organ speech in 1800. Purcell does not analyze whether Sutherland misinterpreted what Marshall actually said once the entire speech is read. When Marshall became Chief Justice a year later, he used several opportunities to make it abundantly clear that presidential powers in external affairs are limited by congressional constitutional and statutory authority.

#### X. MARSHALL’S CONSTITUTIONAL POSITION AS CHIEF JUSTICE

At no time in John Marshall’s lengthy public career did he promote plenary and exclusive presidential power over foreign affairs. No one who read the text of Articles I and II of the Constitution could possibly advance such a doctrine. In his capacity as Chief Justice of the Supreme Court from 1801 to 1835, he insisted that the making of foreign policy is a joint exercise by the executive and legislative branches, acting through treaties and statutes. The President did not possess inherent authority. Blackstone’s theory of external relations, the British royal prerogative, and the concept of independent executive power in foreign affairs did not appear in Marshall’s decisions. With the war power, for example, Marshall looked solely to Congress—not the President—for the authority to take the country to war against another power and to place constraints on the President’s actions as Commander-in-Chief.

Chief Justice Marshall wrote for the Court in *Talbot v. Seeman*, a case involving salvage of the ship *Amelia* during the Quasi-War with France.<sup>290</sup> Part of the decision turned on the war’s undeclared nature. A series of statutes passed by Congress authorized President John Adams to use military force against France, but there had been no formal declaration of war. The previous year the Court in *Bas v. Tingy* decided that Congress

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289. *Id.* at 710.

290. 5 U.S. (1 Cranch) 1 (1801).

could authorize hostilities either by formal declaration or by statutory authority.<sup>291</sup>

In *Talbot*, the captain of a U.S. ship of war captured a merchant ship that the French had earlier seized. The owner of the ship sued the captain. Chief Justice Marshall ruled in favor of the captain. To decide the case, it was necessary to examine the relationship between the United States and France at the time. To do that, Marshall looked for constitutional guidance to statutory policy: “To determine the real situation of America in regard to France, the acts of congress are to be inspected.”<sup>292</sup> He had no difficulty in identifying the branch of government authorized to settle this issue of external affairs: “The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”<sup>293</sup>

In *Little v. Barreme* (1804), Chief Justice Marshall ruled that when a presidential proclamation issued in time of war is contrary to a statute passed by Congress, the statute prevails. As part of legislation involving the Quasi-War, Congress authorized the President to instruct naval commanders to stop, examine, and seize suspected U.S. ships “sailing to any port or place within the territory of the *French* republic or her dependencies . . . .”<sup>294</sup> President Adams issued a proclamation directing naval commanders to stop and examine ships sailing “to, or from” French ports.<sup>295</sup> Marshall ruled that presidential “instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”<sup>296</sup> Speaking for a unanimous Court, Marshall regarded the statute as superior to the proclamation. In *Zivotofsky*, the D.C. Circuit not only deferred to the executive branch (which Marshall did not) but held that an agency manual—the State Department’s *Foreign Affairs Manual*—was superior to a statute.

In one section of *Marbury v. Madison*, Chief Justice Marshall distinguished between two types of presidential action:

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291. 4 U.S. (4 Dall.) 37 (1800).

292. 5 U.S. (1 Cranch) at 29.

293. *Id.* at 28.

294. 6 U.S. (2 Cranch) 170, 177 (1804) (emphasis in original).

295. *Id.* at 178.

296. *Id.* at 179.

one that is independent of judicial control and another that is governed by statute. Under the Constitution, the President “is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.”<sup>297</sup> With regard to political matters that do not affect individual rights, “the decision of the executive is conclusive.”<sup>298</sup>

However, when Congress proceeds by statute to impose on an executive officer “other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion sport away the vested rights of others.”<sup>299</sup> In cases where a “specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”<sup>300</sup> Under these conditions, the executive officer’s duty is to the law, not to the President. Following Marshall’s reasoning, the statutory rights of private parties in *Zivotofsky* should prevail over the conflicting policies contained in a State Department manual.

#### XI. EXECUTIVE BRANCH RELIANCE ON *CURTISS-WRIGHT*

Different levels of the executive branch, including the Justice Department, the State Department, and the White House, depend heavily on dicta in *Curtiss-Wright* to expand presidential power at the cost of traditional checks and balances. In 1941, Attorney General Robert Jackson described the opinion, issued on December 21, 1936, as “a Christmas present to the President.”<sup>301</sup> Executive branch attorneys turn to the decision with great frequency. As noted by Harold Koh, Justice Sutherland’s “lavish description of the president’s powers is so

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297. 5 U.S. (1 Cranch) 137, 165–66 (1803).

298. *Id.* at 166.

299. *Id.*

300. *Id.*

301. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 201 (1941).

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.”<sup>302</sup>

In signing a bill in 2002 that contained language on Jerusalem passports, President George W. Bush stated that if Section 214 were construed to impose a legislative requirement, it would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”<sup>303</sup> The language implicitly, if not explicitly, borrows from *Curtiss-Wright* dicta.

First, we treat as law what appears in a statute, not what is said in a signing statement.<sup>304</sup> Second, the remarks by President Bush highlight a number of widespread misconceptions. He said that Section 214 would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States.” Formulation of public policy in external affairs is a constitutional duty assigned to both elected branches, as the Justice Department acknowledged in its brief to the Supreme Court in February 2014: Congress “also possesses the power to regulate passports pursuant to its enumerated powers.”<sup>305</sup> The Justice Department added that the Constitution “provides that the two Branches exercise some foreign-affairs powers jointly.”<sup>306</sup>

Third, President Bush said that Section 214 interferes with the President’s authority to “speak for the Nation in international affairs,” an apparent allusion to John Marshall’s “sole organ” speech in 1800. But as pointed out by scholars discussed in Section IX of this article, the authority to speak and communicate is not the authority to *make* policy over external affairs. Policy

302. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990).

303. *Statement on Signing the Foreign Relations Authorization Act*, Fiscal Year 2003, 2002 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH 1697, 1698 (Sept. 30, 2002), cited by the Justice Department in its Brief for the Respondent in Opposition at 6, *supra* note 83.

304. *DaCosta v. Nixon*, 55 F.R.D. 145, 146 (E.D. N.Y. 1972); FISHER, *supra* note 56, at 191–96.

305. Brief for the Respondent in Opposition, *supra* note 83, at 10.

306. *Id.* at 13.

communication is separate from policy formulation. The two elected branches share in the *formulation* of policy. The President communicates it.

Fourth, the signing statement by President Bush claimed that Section 214 interferes with the President's authority to "determine the terms on which recognition is given to foreign states," suggesting that the recognition power is vested solely in the President under Article II of the Constitution. There is no evidence that the Framers vested the recognition power in the President, "and certainly not a power that is plenary in nature."<sup>307</sup> Yet according to the Justice Department in its February 2014 brief, from "the Washington Administration to the present, the Executive Branch has asserted sole authority to determine whether to recognize foreign states and governments, as well as their territorial boundaries, and Congress has acquiesced in that understanding."<sup>308</sup>

The Justice Department appropriately selects the verb "asserted," but assertions are merely that. They fall short of evidence. They represent only a claim by one party. In this case, the assertion by the Justice Department is itself incorrect. The historical record amply demonstrates that Presidents have not consistently claimed exclusive recognition power and Congress has not acquiesced in that assertion.

Contrary to the Justice Department claim, President George Washington was more modest and circumspect about his power over foreign affairs, including the recognition power. When Washington recognized the new French revolutionary government, he did not rely on broad theories of Article II power or the existence of plenary, inherent, and exclusive presidential control over external affairs. Instead, he followed the law of nations and Vattel's doctrine of *de facto* recognition. If a government was in "actual possession" of the instruments of national power, it was "entitled to be recognized by other states."<sup>309</sup> Washington issued his Neutrality Proclamation, warning U.S. citizens that they faced prosecution for acting

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307. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 862 (2011).

308. Brief for the Respondent in Opposition, *supra* note 83, at 14.

309. Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 424 (2012).

against the law of nations by becoming involved in hostilities against nations at war.<sup>310</sup>

Washington then discovered the limits of independent executive power. Although individuals were prosecuted by the administration, indicted by grand juries, and all with the support of federal judges, jurors objected to finding someone guilty of a crime that lacked a statutory basis. Washington's initiative smacked too much of monarchical powers rejected by the Framers. On a regular basis, jurors returned a verdict of not guilty.<sup>311</sup> Facing this pattern of acquittals, Washington turned to Congress for statutory authority, supplied by the Neutrality Act of 1794.<sup>312</sup>

In place of the Justice Department narrative, it is more accurate to say that Congress has also exercised the recognition power and that Presidents have acquiesced in that legislative judgment. The historical evidence in the post-ratification period from Washington to the present time does not support a plenary recognition power in the President. Executive recognition decisions "are not exclusive but are subject to laws enacted by Congress."<sup>313</sup> The Justice Department correctly notes that in a number of cases the Supreme Court has deferred to executive branch determinations over recognition power.<sup>314</sup> Unlike Congress, the federal judiciary is not assigned an array of constitutional powers over external affairs and foreign policy. Acquiescence by the Supreme Court does not require acquiescence by Congress.

In September 2014, the Justice Department filed with the Supreme Court its "Brief for the Respondent" in *Zivotofsky*.<sup>315</sup> It stated: "The principle that the Nation must speak with one voice in foreign affairs, see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936), therefore applies with particular force to recognition decisions."<sup>316</sup> The reference to *Curtiss-Wright*

310. *Id.* at 430 n.267.

311. *Id.* at 439.

312. *Id.* at 440.

313. Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 *TEMP. L. REV.* 1, 60 (2013).

314. Brief for the Respondent in Opposition, *supra* note 83, at 19-20.

315. U.S. Justice Department, "Brief for the Respondent," *Zivotofsky v. Kerry*, U.S. Supreme Court, No. 13-628, Sept. 2014.

316. *Id.* at 9.

is the first of nine citations by the Justice Department to this decision.<sup>317</sup> Even when not citing *Curtiss-Wright*, the Department makes repeated arguments that the President has “sole power” to conduct foreign relations,<sup>318</sup> act as “sole organ” in foreign relations,<sup>319</sup> and the requirement that the United States speak with “one voice” in foreign affairs,<sup>320</sup> with that voice being the President’s. The Department does not explain why the voice to state public policy is the same voice that makes public policy.

The Department’s reading of the Constitution lacks credibility and persuasive force for several reasons. First, it is contradicted by other statements in the Department’s brief that recognize that the Constitution provides for shared power between the two elected branches in making foreign policy. The Department acknowledges what is obvious by simply reading the text of the Constitution and the operation of government over more than two centuries: the field of external relations is shared between the legislative and executive branches. Instead of the President possessing plenary and exclusive power, the Department’s brief explains that the President has instead “broad authority to conduct the Nation’s foreign relations.”<sup>321</sup> Conducting policy is not the same as making it. The Department recognizes that Congress “may enact passport legislation in furtherance of its enumerated powers.”<sup>322</sup> Congress, states the Department, “may regulate foreign commerce and the value of foreign currency,” declare war, and define and punish offenses “against the Law of Nations.”<sup>323</sup> Those powers are expressly granted to Congress, undermining any possible argument that the President has plenary and exclusive power over external affairs.

The Department recognizes other legislative powers in foreign affairs. Congress “has the authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce.”<sup>324</sup> It “has unquestioned

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317. The eight other references to *Curtiss-Wright* appear at 10, 18, 23, 24 (three times), 53, and 54.

318. *Id.* at 9–10.

319. *Id.* at 25.

320. *Id.* at 10, 13, 26.

321. *Id.* at 9.

322. *Id.* at 11.

323. *Id.* at 22 n.5.

324. *Id.* at 45.

authority to legislate on certain matters affecting foreign affairs.”<sup>325</sup> The Department’s insistence that the President provide the “sole organ” and “one voice” in external affairs would subordinate Congress to executive power. The Constitution anticipates that the two elected branches shall often adopt conflicting policies for foreign affairs, with no branch superior to the other. History supports this pattern of shared power.

In a subsection called “The Reception Clause confers recognition powers on the President,” the Department offers this argument: “The primary source of the President’s recognition power is Article II’s grant of authority to the President alone to ‘receive Ambassadors and other public Ministers.’ U.S. Const. Art. II, § 3.”<sup>326</sup> The recognition power is thus implied, not expressly stated. Congress has an implied power to make passport policy. The issue is therefore the need to resolve two competing implied powers, not discover plenary and exclusive power of the President.

In citing constitutional language that directs the President to receive Ambassadors and other public ministers, the Department does not cite constitutional language in Article II, Section 3, that immediately follows: “he shall take Care that the Laws be faithfully executed . . . .” President Bush signed the bill containing the Jerusalem passport provision and the bill became Pub. L. No. 107-228. He had a duty to carry out Section 214(d). His signing statement, raising constitutional objections, does not operate as an item veto, enabling the President to carry out some provisions but not others. That interpretation would give the President an absolute veto instead of the qualified veto granted by the Constitution.

## XII. A PARTIAL CORRECTION IN *ZIVOTOFSKY*

In *Zivotofsky v. Kerry*, the Supreme Court corrected the sole-organ erroneous dicta that had magnified presidential power in external affairs for 79 years. Writing for the Court, Justice Anthony Kennedy reviewed the position of Secretary of State John Kerry, who urged the Court to define executive power over

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325. *Id.* at 58.

326. *Id.* at 13.

foreign affairs in broad terms, relying on language in *Curtiss-Wright* that described the President as “the sole organ of the federal government in the field of international relations.”<sup>327</sup> In its response, the Court said it “declines to acknowledge the unbounded power. . . . The *Curtiss-Wright* case does not extend so far as the Secretary suggests.”<sup>328</sup>

As explained in this section, the Court decided not to address a number of related issues and created a new model that could expand presidential power. There are numerous deficiencies in the Court’s opinion. First, it never clarified how the statutory issue at question had anything to do with the President’s recognition power. Second, it did not acknowledge that when the D.C. Circuit in *Zivotofsky* upheld presidential power it relied five times on erroneous dicta in *Curtiss-Wright*. Therefore, readers would not understand the legal significance of the sole-organ doctrine in this case. Third, the Court did not explain how Justice Sutherland flagrantly misrepresented the speech by John Marshall in 1800 when he served in the House of Representatives. Fourth, the Court left in place Sutherland’s erroneous dicta about the President possessing the sole power to negotiate treaties. Fifth, the Court did not cite scholarly articles that from 1938 to the present time regularly attacked *Curtiss-Wright* for its errors about presidential power. Sixth, the Court relied on stereotypes to define the power of the President. Seventh, it appeared to recreate a variant of the sole-organ doctrine with the President speaking with “one voice,” offering “unity at all times,” and speaking “for the Nation.” Eighth, it created an unrealistic model of presidential unity that the executive branch can invoke in future disputes to elevate the President over Congress. These eight points shall now be elaborated.

#### WHAT DID §214(D) HAVE TO DO WITH RECOGNITION POWER?

The basic holding in *Zivotofsky* is that the President “has the exclusive power to grant formal recognition to a foreign sovereign.”<sup>329</sup> It ruled in favor of an exclusive presidential power

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327. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015).

328. *Id.*

329. *Id.* at 2078.

over recognition and held invalid §214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, which authorized parents of children born in Jerusalem to ask American Embassy officials to list the place of birth as “Israel” on passports. As the Court explains in Section I.A of its decision, when President Harry Truman in 1948 recognized the State of Israel he explained that his statement did not recognize Israeli sovereignty over Jerusalem.<sup>330</sup> No President after Truman “issued an official statement or declaration acknowledging any country’s sovereignty over Jerusalem.”<sup>331</sup>

The Court acknowledged that the statement required by Section 214(d) “would not itself constitute a formal act of recognition.”<sup>332</sup> A page later, however, the Court stated that the purpose of Section 214(d) “was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President.”<sup>333</sup> To the Court, the statutory provision represented “a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State.”<sup>334</sup> Following that reason, the Secretary of State would permit the placement of “Jerusalem” on a passport’s place-of-birth section, but not “Israel.”<sup>335</sup> The administration could have avoided litigation simply by having the State Department record Israel on passports while explaining that the U.S. position has not changed in leaving the issue of sovereignty over Jerusalem to the Israelis and the Palestinians.

Four Justices concluded that Section 214(d) had nothing to do with the recognition issue. In an opinion concurring in part and dissenting in part, Justice Clarence Thomas said “no act of recognition is implicated here.”<sup>336</sup> A dissent by Chief Justice John Roberts, joined by Justice Samuel Alito, stated that “the statute at issue *does not implicate recognition*.”<sup>337</sup> A dissent by Justice Antonin Scalia, joined by Roberts and Alito, said: “To know all

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330. *Id.* at 2081.

331. *Id.*

332. *Id.* at 2095.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 2111 (Thomas, J., concurring in part and dissenting in part).

337. *Id.* at 2114 (Roberts, C.J., joined by Alito, J. dissenting) (emphasis in original).

this is to realize at once that §214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem."<sup>338</sup>

#### OVERLOOKING ERRONEOUS DICTA IN *CURTISS-WRIGHT*

In deciding the case, the Court in *Zivotofsky* provided little context for analyzing the sole-organ doctrine. It did not acknowledge that when the D.C. Circuit in *Zivotofsky* upheld presidential power it relied five times on *Curtiss-Wright* dicta. Referring to that legal history would have helped readers appreciate why the Court found it necessary to confront, and jettison, the sole-organ doctrine. Those details are set forth in Section I of this article.

In his dissent in *Zivotofsky*, Chief Justice Roberts highlights the degree to which the executive branch depended on *Curtiss-Wright* dicta: "The Solicitor General invokes the case no fewer than ten times in his brief."<sup>339</sup> To provide necessary background for analyzing the constitutional issue in *Zivotofsky* and how it was resolved, references to those essential documentary materials deserved being included in the opinion issued by the majority.

#### IGNORING THE SOLE-ORGAN SPEECH

In deciding to reject the sole-organ doctrine, the Court would have done that more credibly by explaining how Justice Sutherland wholly misrepresented what Marshall said in his speech in 1800. A speech needs context, as explained in Section IV of this article. Why did the Court decide to omit that basic and relevant analysis? Was it considered inappropriate to point an accusing finger at a particular Justice and underscore the failure of his colleagues to double-check Marshall's language to make sure it was being properly cited? Would such an explanation discredit the Supreme Court as an institution capable of constitutional interpretation? Surely it is of interest that the Court in 1936 chose to mischaracterize the speech of someone who a year later would be Chief Justice of the Supreme Court. As

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338. *Id.* at 2118 (Scalia, J., joined by Roberts, C.J., Alito, J. dissenting).

339. *Id.* at 2115 (Roberts, C.J., joined by Alito, J. dissenting).

explained in this article, the record is clear that at no time in his service in Congress or on the Supreme Court did Marshall endorse a theory that gave the President “plenary and exclusive” authority over external affairs, as Sutherland claimed in *Curtiss-Wright*. The record is clearly otherwise and Section X makes that clear.

#### RETAINING ERRONEOUS DICTA

Although the Court in *Zivotofsky* rejected the claim in *Curtiss-Wright* that the President possessed “unbounded power” in external affairs,<sup>340</sup> it left in place other erroneous dicta from Justice Sutherland. For example, the Court in *Zivotofsky* stated that the President has “the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) . . . .”<sup>341</sup> Sutherland was entirely wrong that the President “makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>342</sup> As explained in Section III, Sutherland knew from his twelve years in Congress that Senators are involved in treaty negotiation. Moreover, members of the House are often invited by President to participate in treaty negotiation to build political support for authorization and appropriation bills needed to implement treaties.

No matter how often the facts about the treaty negotiation process are set forth in scholarly works,<sup>343</sup> explaining the close involvement of Senators and Representatives, the erroneous dicta in *Curtiss-Wright* about treaty negotiation—given new life by the Court’s decision in *Zivotofsky*—will heavily influence legal and public debate about constitutional issues. The apparent rule: if something appears in a Supreme Court decision, no matter how egregiously in error, it provides fully adequate authority. The executive branch exploits these judicial errors to promote presidential power. In 2009, the Office of Legal Counsel cited

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340. *Id.* at 2089.

341. *Id.* at 2086.

342. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 (emphasis in original).

343. For example, *supra* note 64.

“clear dicta” in *Curtiss-Wright* that “[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>344</sup> Clear dicta? No doubt about that. Also clearly erroneous dicta? True as well, but those who assume that what the Court says is always correct and reliable would not know one issue from the other.

The extent to which Supreme Court errors mislead public discussion of constitutional issues is reflected in an article by Steve Coll in *The New Yorker*, published on April 27, 2015. He criticized 47 Senate Republicans for sending an open letter to Iranian leaders about negotiations to cap Iran’s nuclear program in exchange for lifting economic sanctions. Coll sought support from *Curtiss-Wright*, which he described as “a thumping endorsement of a President’s prerogative to lead foreign policy.”<sup>345</sup> He proceeded to add this language from *Curtiss-Wright*: “In this vast external realm, with its important, complicated, delicate and manifold problems,” giving only the President “the power to speak or listen as a representative of the nation. . . . He alone negotiates” and in this field Congress is “powerless” to intrude.<sup>346</sup>

Not only can OLC, reporters, and others continue to cite this erroneous dicta in *Curtiss-Wright*, but they can refer to the Court’s fresh endorsement in *Zivotofsky* that this error remains a valid and binding source of constitutional authority. How many other professions, such as medicine and engineering, make an error 79 years ago and continue to rely on it, no matter how often studies highlight the error and point to needless deaths and bridges falling down?

In *Zivotofsky*, the Court chose to pay no attention to another error in *Curtiss-Wright* that has received extensive attention by scholars from 1938 to the present time. It concerns Sutherland’s claim that the two categories of external and internal affairs are different “both in respect of their origin and nature.”<sup>347</sup> The principle that the federal government is limited to either enumerated or implied powers “is categorically true only in

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344. Office of Legal Counsel, *supra* note 66, at 9.

345. Steve Coll, *Dangerous Gamesmanship*, THE NEW YORKER, April 27, 2015, at 19.

346. *Id.*

347. 299 U.S. at 315.

respect of our internal affairs.”<sup>348</sup> By arguing that external and foreign affairs were transferred directly to the national government and then associating foreign affairs with the executive, Sutherland advanced a broad definition of inherent presidential power in external affairs. Section III explains why Sutherland’s theory is false, even though it provides a breeding-ground for unchecked presidential power over foreign policy. The Court in *Zivotofsky* should have analyzed and corrected *all* of the erroneous dicta in *Curtiss-Wright*, examining the decision root and branch, not simply correcting one error and ignoring others. They are all intertwined.

The inability of the Court to understand the scope and interrelationship of erroneous dicta in *Curtiss-Wright* is reflected elsewhere in *Zivotofsky*. In discussing why it was necessary to reject the sole-organ doctrine, it discussed earlier decisions in *United States v. Belmont* and *United States v. Pink*, regarding the decision by President Franklin D. Roosevelt to recognize the Soviet government of Russia. Without the slightest misgiving or awareness, the Court writes: “In these matters, ‘the Executive ha[s] authority to speak as the sole organ of th[e] government.’”<sup>349</sup> Of course that is the very dicta the Court was supposedly rejecting in *Zivotofsky*.

#### IGNORING SCHOLARLY CRITIQUES OF *CURTISS-WRIGHT*

Nowhere in *Zivotofsky* does the Court refer to scholarly articles that regularly punctured, from 1938 to 2014, the erroneous dicta in *Curtiss-Wright* about presidential power. At times the Court cites work by Robert Reinstein, Louis Henkin, Julius Goebel, Saikrishna Prakash, and Michael Ramsey, but only on the recognition power.<sup>350</sup> At one point the Court includes a reference to an article by Michael Glennon to support this constitutional principle: “It is not for the President alone to determine the whole content of the Nation’s foreign policy.”<sup>351</sup> Readers of *Zivotofsky* would not know that Glennon was highly critical of the erroneous dicta in *Curtiss-Wright*. As explained in Section IX, regarding

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348. *Id.* at 316.

349. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. at 2089.

350. *Id.* at 2085, 2087, 2090, 2092, 2093, 2097, 2098, 2099, 2010, 2114, 2016–17.

351. *Id.* at 2090.

scholarly evaluations of *Curtiss-Wright* dicta, Glennon regarded Sutherland's opinion as an "extravagant scheme concocted" to promote presidential power and resembled a "muddled law review article."

#### CREATING PRESIDENTIAL STEREOTYPES

The Court in *Zivotofsky* borrowed language from Alexander Hamilton's Federalist No. 70 to broadly define the scope of presidential power: with "unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'"<sup>352</sup> The Court cites those four qualities as though they are inherently positive in nature, meriting support for broad presidential power in foreign affairs. It failed to understand the damage that can come to constitutional government by vesting exclusive power in a President who acts unilaterally with "decision, activity, secrecy, and dispatch."

One need only recall these presidential initiatives from 1950 to the present time: President Truman ordering U.S. troops in Korea to travel northward, prompting the Chinese to introduce their forces and resulting in a costly stalemate; President Johnson's decision to escalate the war in Vietnam; President Reagan's involvement in Iran-Contra, leading to prosecution of those involved and nearly in his impeachment; President Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction—six claims found to be entirely empty; and President Obama ordering military action against Libya in 2011, leaving behind a country broken legally, economically, and politically, providing a breeding-ground for terrorism.<sup>353</sup>

In relying on Federalist No. 70, the Court ignored Hamilton's warning in Federalist No. 75 about unchecked presidential power. He noted that several writers had placed the power to make treaties "in the class of executive authorities," but to Hamilton "it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."<sup>354</sup> Speaking more

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352. *Id.* at 2086.

353. LOUIS FISHER, *supra* note 270, at 100–03, 132–37, 209–32, 238–47, 280–88.

354. BENJAMIN F. WRIGHT, ed., *THE FEDERALIST* 476 (2002 ed.).

broadly about the realm of foreign affairs, he cautioned: “The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.”<sup>355</sup>

In his dissent in *Zivotofsky*, Justice Scalia objected that the Court’s decision “does not rest on text or history or precedent.” Instead, it relies on “functional considerations,” such as the Court’s assertion that the Nation must speak “with one voice” about the status of Jerusalem. To Scalia, the “vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs.”<sup>356</sup> That leads to the next question: did the Court in *Zivotofsky* endorse a model of presidential power that bears close similarities to Sutherland’s sole-organ doctrine?

#### FASHIONING A NEW PRESIDENTIAL MODEL

In dismissing the administration’s plea for a President who acts as “sole organ” in the field of foreign affairs, the Court in *Zivotofsky* created a variant that seem close cousin, without grounding it in any constitutional text. It states that recognition is a topic on which the Nation must “speak . . . with one voice,” and that voice “must be the President’s.”<sup>357</sup> The citation here is to the Court’s decisions in *Garamendi* (2003), quoting *Crosby* (2000).<sup>358</sup> Neither decision had anything to do with independent presidential power in foreign affairs, cut free from congressional control. Instead, both cases concerned efforts by *states* to interfere with national policy. *Crosby* involved a Massachusetts law that barred state entities from buying goods or services from companies doing business with Burma. Congress later imposed

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355. *Id.* at 477.

356. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. at 2123 (Scalia J., dissenting) (emphasis in original).

357. *Id.* at 2086.

358. *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 424 (2003) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

mandatory and conditional sanctions on Burma. A unanimous Court held that the state act was preempted by congressional statutory policy.<sup>359</sup> The decision did not elevate the President over Congress in external affairs. Instead, the Court declared: “A fundamental principle of the Constitution is that Congress has the power to preempt state law.”<sup>360</sup> The President was operating on statutory authority, not on independent executive power.

The Massachusetts law on Burma represented “an obstacle to the accomplishment of Congress’s full objectives under the federal Act.”<sup>361</sup> The Court explained that the legislation passed by Congress “intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma.”<sup>362</sup> The President was therefore operating on the basis of statutory authority, not independent executive power. In that sense, the President was acting under Justice Jackson’s first category in his *Youngstown* concurrence: “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.”<sup>363</sup>

*Crosby* then adds: “See also *id.*, at 635-36, n. 2 (noting that the President’s power in the area of foreign relations is least restricted by Congress and citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).” The Court in *Crosby* did not pursue what Jackson said in Note 2, but it is illuminating to do so here. He correctly explained that *Curtiss-Wright* “involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress.”<sup>364</sup> The Court in *Zivotofsky* makes the same point that *Curtiss-Wright* “dealt with congressionally authorized action, not a unilateral Presidential determination.”<sup>365</sup>

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359. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

360. *Id.* at 372.

361. *Id.* at 373.

362. *Id.* at 374.

363. *Id.* at 375 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

364. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952).

365. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. at 2090.

Jackson's Note 2 probed further. He said that dicta in *Curtiss-Wright* "recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs." He said that in *Curtiss-Wright* it was "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."<sup>366</sup> That is the precise result reached by the Court in *Zivotofsky*, holding that the President possessed exclusive control over the recognition power and could therefore act contrary to §214(d).

#### ASSERTING PRESIDENTIAL UNITY

Having cited *Crosby* for the proposition that the Nation must "speak . . . with one voice" and that voice "must be the President," the Court in *Zivotofsky* made this claim: "Between the two political branches, only the Executive has the characteristic of unity at all times."<sup>367</sup> The Court cited no authority to support that assertion. Those who follow the operations of the federal government might be amused—or bemused—in their search for unity in the presidency, even within the same administration. They are more likely to see a confusing pattern of zigs and zags.

The Court in *Zivotofsky* appears to be influenced by such presidential scholars as Clinton Rossiter, Arthur M. Schlesinger, Jr., Henry Steele Commager, and Richard Neustadt, who built their professional careers by arguing that it was politically necessary and constitutionally permissible to transfer ever greater power to the President. The unpopularity of the Vietnam War caused some scholars, including Schlesinger, to rethink the wisdom of vesting unchecked power in the executive branch. However, this period marked only a momentary pause in the general pattern of scholars and the media to lionize the American President and manufacture heroic properties, including the capacity to act instinctively for the "national interest," surrounded by advisers with unrivaled expertise and unerring

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366. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 n.2.

367. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. at 2086.

political judgment, and possessing the competence and unity necessary to protect the Nation from domestic and foreign threats.<sup>368</sup> Those properties are highly imaginary and romantic, as witnessed by anyone who reviews the full record of Presidents from Truman to Obama.

Consider the immigration policy of the Obama Administration. From 2010 to November 2014, President Obama publicly stated that he lacked personal authority to resolve the problem of undocumented aliens. On October 25, 2010, he said he was President, “not a king,” adding that the system of government requires that the two elected branches work together: “I can’t just make the laws up by myself.”<sup>369</sup> In subsequent statements over the next three years, he continued to make similar announcements, explaining that he could not suspend deportations simply by issuing an executive order.<sup>370</sup>

In June 2012, the Obama Administration unilaterally granted deferred action for undocumented aliens who arrived in the United States as children (childhood arrivals, or DACA). Having extended protection to the “Dreamers,” President Obama stated on February 14, 2013, that he was not “the emperor” and had “kind of stretched our administrative flexibility as much as we can.”<sup>371</sup> Nevertheless, following the November 2014 elections, he issued a major address to the Nation on November 20, setting forth a comprehensive immigration policy to cover about four to five million undocumented aliens.<sup>372</sup> The matter is now in the courts, with the administration losing thus far in district court and the Fifth Circuit. The brief by the Justice Department to the Fifth Circuit describes the immigration initiative in markedly narrower terms than announced by President Obama in his November 20,

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368. Louis Fisher, *Teaching the Presidency: Idealizing a Constitutional Office*, 45 PS: POL. SCI. & POL. 17 (2012), <http://loufisher.org/docs/ci/teach.pdf>.

369. 161 CONG. REC. H962, H967 (daily ed., Feb. 11, 2015, placed in the record by Rep. Hill of Arkansas).

370. *Id.*

371. *Id.* at H968.

372. Remarks by the President in Address to the Nation on Immigration, Nov. 20, 2014, <http://www.whitehouse.gov/issues/immigration/immigration-action>, 3.

2014 public address. The contradictions between the brief and the presidential statement are quite pronounced.<sup>373</sup>

As a final argument in favor of an exclusive recognition policy for the President, the Court in *Zivotofsky* insists that the “formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.”<sup>374</sup> There should be little doubt that the executive branch and advocates for independent presidential power will use these vague judicial arguments to advance presidential interests over those of Congress in the field of external affairs. As noted by Jack Goldsmith, the Court’s “untidy reasoning” will invite executive branch lawyers to “interpret its pro-executive elements for all they are worth.”<sup>375</sup>

### CONCLUSION

It was important, even if long overdue, for the Supreme Court to discard the sole-organ doctrine fabricated in *Curtiss-Wright* dicta. At the same time, the Court allowed other erroneous dicta in that case to continue. In holding that the President has the exclusive power to grant formal recognition to a foreign sovereign, the Court noted that “Congress has an important role in other aspects of foreign policy.”<sup>376</sup> That is an obvious point for anyone who reads Articles I and II of the Constitution and understands events abroad from 1789 to the present time.

*Zivotofsky v. Kerry* presented two rival jurisprudential visions. One promotes the President as the sole authority to decide national policy regarding U.S. relations with foreign nations. That is the theory advanced by the D.C. Circuit, rooted in *Curtiss-Wright* dicta. The competing vision recognizes that Congress and the President concurrently exercise power over

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373. Louis Fisher, *DOJ's Argument in Immigration Case At Odds with the Law—and Obama*, NAT'L L. J., April 20, 2015, at 35, <http://www.loufisher.org/docs/pip/immigration5th.pdf>.

374. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. at 2087.

375. Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 146 (2015).

376. *Zivotofsky*, 135 S. Ct. at 2088.

external affairs, with neither branch possessing exclusive, plenary, or inherent authority. This article has analyzed the sources of the first vision, finding them legally hollow and unsound. Because the majority opinion in *Zivotofsky* is in many areas carelessly drafted and analyzed, it will add unnecessary and unwanted confusion about the role of the two elected branches in foreign affairs, most likely advancing presidential power over that of Congress.