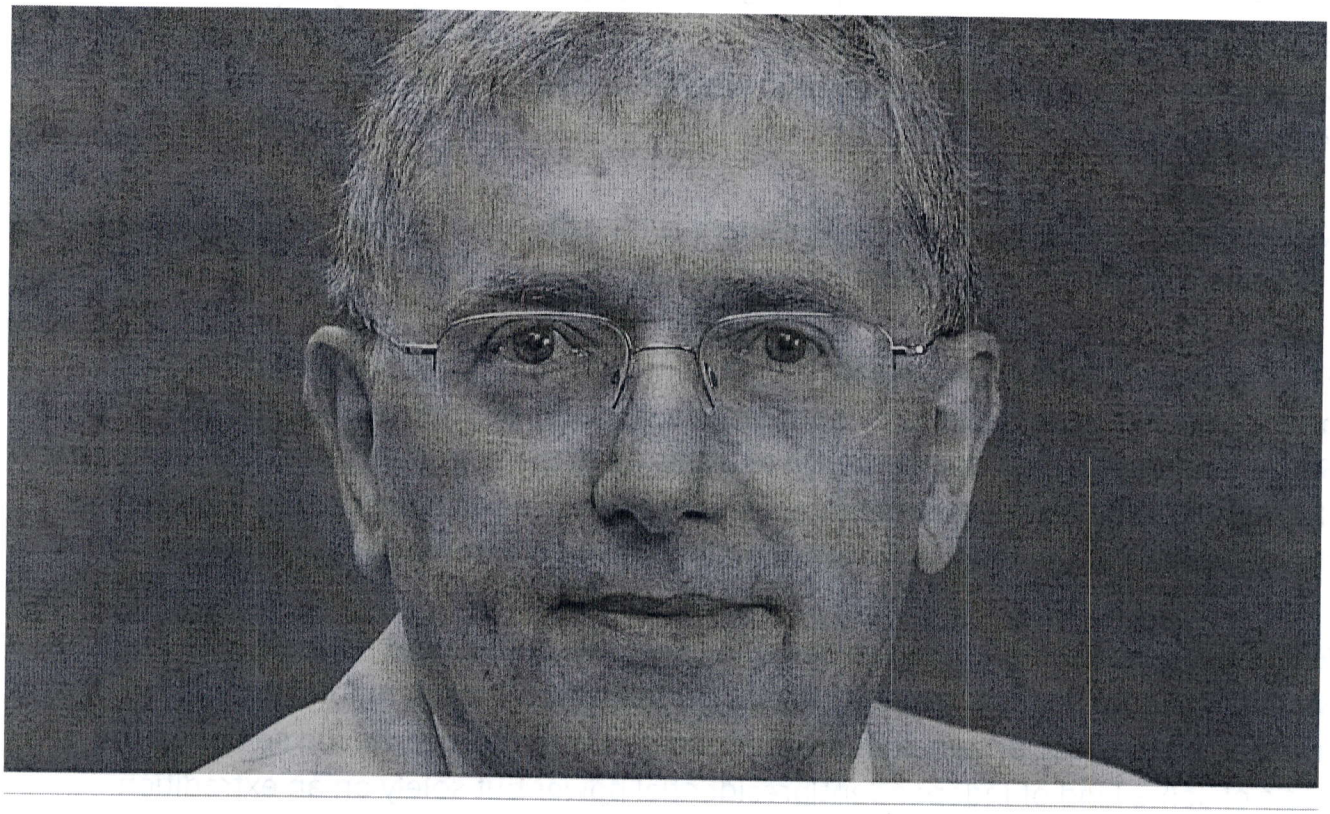
How courts expand presidential power beyond constitutional limits



By Dr. Louis Fisher - - *Monday, September 12, 2016*

From 1936 to the present time, U.S. presidents have claimed extensive and often exclusive authority over external affairs.

Initially, the Supreme Court rejected such claims as contrary to express language in the Constitution, the principle of self-government and the system of checks and balances — and that analysis persisted until United States v. Curtiss-Wright Export Corporation (1936).

But in that year, based on multiple errors of history, the high court promoted a conception of presidential power in external affairs that was plenary and exclusive.

The 1936 case itself had nothing to do with independent presidential power. It arose when Congress in 1934 authorized the president to place an arms embargo in a region in South America. President Franklin D. Roosevelt relied entirely on statutory authority. No one in the lower courts or the Justice Department argued for inherent, independent, plenary, exclusive or extra-constitutional presidential power.

Writing for the Supreme Court, Justice George Sutherland upheld the delegation of legislative power, but in dicta committed numerous errors to greatly expand presidential authority in external affairs. Among his many errors, he misrepresented a speech that John Marshall gave in 1800 when he served as a member of the House of Representatives.

Marshall said during debate: "The President is the sole organ of the nation in external relations, and its sole representative with foreign nations."

The expression "sole organ" meant a president who communicates with other nations after policy has been decided by both branches, either by statute or treaty. Yet Sutherland interpreted that sentence to attribute to the president authority granted by the legislature "plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."

Evidently Sutherland and the justices who joined his opinion did not bother to read Marshall's entire speech. It merely explained that when President John Adams transferred to Great Britain an individual charged with murder, he did so not on the basis of some kind of independent presidential power but solely on an extradition provision in the Jay Treaty. Thus, Adams did not single-handedly make foreign policy. He carried it out.

Although Sutherland committed plain error, the sole-organ doctrine expanded presidential power beyond constitutional limits from one decade to the next, until partially corrected last year by the Supreme Court in Zivotofsky v. Kerry.

In its 6-3 decision in Zivotofsky, the high court manufactured a new model that is close cousin to the sole-organ doctrine. In upholding for the first time an exclusive power of the president to recognize foreign governments, the high court said that only the president can speak with "one voice," offer "unity" at all times, and speak "for the Nation."

Relying on an essay by Alexander Hamilton, it argued that with "unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'" The six justices in the majority did not understand that those same four qualities can greatly harm the nation, including these presidential actions: Lyndon Johnson's escalation of the Vietnam War, Richard Nixon's Watergate, Ronald Reagan's Iran-Contra, and the decision by George W. Bush to go to war against Iraq based on six false claims that Iraqi President Saddam Hussein possessed weapons of mass destruction.

Presidential power also extended beyond constitutional boundaries when President Harry Truman went to war against North Korea without first obtaining congressional authority. During Senate debate on the U.N. Charter, Truman wired a note to Sen. Kenneth McKellar on July 27, 1945, pledging that if any agreements were negotiated to require U.S. troops in a U.N. military action, "it will be my purpose to ask Congress for appropriate legislation to approve them." That precise requirement was included in the U.N. Participation Act of 1945, which Truman signed without expressing any constitutional or policy objections.

Yet five years later, he committed U.S. troops to Korea solely on the basis of Security Council resolutions without ever seeking or obtaining congressional approval. That unconstitutional precedent was followed by President Bill Clinton in Haiti and Bosnia, and by President Obama in Libya. When Clinton could not obtain U.N. authority for military action in Kosovo, he reached out to NATO allies for support.

Treaties may not shift the Article I authority of Congress to outside bodies, whether the U.N. or NATO. Thus, from 1950 forward, presidents have engaged in unconstitutional wars.

• *Louis Fisher, Ph.D., is scholar-in-residence at The Constitution Project, a think tank founded in 1997 to foster consensus-based solutions to difficult constitutional challenges. From 1970 to 2010, Dr. Fisher handled issues of separation of powers and constitutional law at the Library of Congress. His books include "The Law of the Executive Branch: Presidential Power" (paper ed., 2015).*

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