



As with any human institution, federal courts (including the Supreme Court) make errors. What happens if they are not corrected? Why should they continue to guide courts, the elected branches, and scholars? No matter how often repeated, an error remains an error and should not serve as a legitimate precedent.

BY LOUIS FISHER

Judicial Errors That Magnify Presidential Power

We treat judicial rulings, particularly those by the Supreme Court, as legitimate sources of authority. But what if a decision rests on a plain misconception about presidential power, often because the Court failed to properly understand a historical precedent? No matter how frequently courts and scholars later cite that decision, a misrepresentation is not a valid source of authority. Courts and scholars should not continue to cite an erroneous secondary source, even if it appears regularly in Supreme Court dicta. Instead, they should revisit a judicial mistake and correct it.

The Jerusalem Passport Case

This general issue takes concrete form by examining the July 23, 2013, decision by the D.C. Circuit in *Zivotofsky v. Secretary of State*. The court ruled that congressional legislation in 2002 “impermissibly intrudes” on the President’s power to recognize foreign governments.¹ The statute required the Secretary of State to record Israel as the place of birth on the passport of a U.S. citizen born in Jerusalem if the parent or guardian so requests. In deciding the case, the D.C. Circuit left the impression that lawmakers attempted to exercise the recognition power, but Congress acted under its authority to decide passport policy. Judge David Tatel noted in his concurrence: “It is beyond dispute that Congress’s immigration, foreign commerce, and naturalization powers authorize it to regulate passports.”²

Why did the court highlight the recognition power and conclude that it is vested exclusively in the President? It acknowledged that neither the text of the Constitution nor “originalist evidence provides much help in answering the question of the scope of the

President’s recognition power.”³ Article II states that the President “shall receive Ambassadors and other public Ministers,” but the court said that fact, “by itself, does not resolve whether he has the exclusive authority to recognize foreign nations.”⁴ Nonetheless, it concluded that “longstanding post-ratification practice supports the Secretary’s position that the President exclusively holds the recognition power.”⁵ Certainly it can be argued that Congress has a “longstanding practice” of deciding passport policy. By what reasoning did the D.C. Circuit decide that an implied executive power is superior to an implied legislative power?

Relying on *Curtiss-Wright*

Midway through its decision, the court begins to cite dicta in the Supreme Court’s decision in *United States v. Curtiss-Wright Export Corp.*⁶ Quoting from *Clinton v. City of New York*, the Supreme Court said it 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.’”⁷ Citing *Curtiss-Wright* a second time on the same page, 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 foreign nations.’”⁸ Marshall made that speech in 1800, but Justice George Sutherland writing for the Court in *Curtiss-Wright* entirely misrepresented it, as will be explained.

The next paragraph of the D.C. Circuit opinion cites a Supreme Court opinion in *United States v. Belmont* that relied on *Curtiss-Wright*, claiming that the President has authority to speak as the “sole organ” of the government in matters of recognition.⁹ Toward the end of the decision, the D.C. Circuit returned a fourth time to *Curtiss-Wright* to describe the President as the “sole organ of the nation in its external relations.”¹⁰

Repeated use of the word “sole” may suggest that the President has an exclusive power over external affairs, including the recognition power. However, clearly the framers did not adopt William Blackstone’s model that placed all of external affairs with the executive. Articles I and II of the Constitution vest many of Blackstone’s executive powers expressly in Congress or

assigns them jointly to the President and the Senate, as with treaties and appointing ambassadors. What did John Marshall mean when he spoke before the House of Representatives in 1800? Did he believe that in the field of foreign affairs the President possessed exclusive, plenary, independent, and inherent power? The answer is clearly no.

John Marshall's "Sole-Organ" Speech

In 1800, Thomas Jefferson campaigned for President against John Adams. Jeffersonians in the House urged that 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."¹¹ Although critics of Adams claimed that the individual, Jonathan Robbins, was "a citizen of the United States," Secretary of State Timothy Pickering determined that Robbins was using an assumed name and that he was Thomas Nash, a native Irishman.¹² U.S. District Judge Thomas Bee, who was asked to turn the prisoner over to the British, agreed that the individual was Thomas Nash.¹³

Marshall took the floor and began 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. 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 authority to take care that the laws, including treaties, be faithfully executed. National policy for external affairs would be made by the two elected 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.¹⁴

In discussing Marshall's speech in *Curtiss-Wright*, Justice Sutherland did not engage merely in *dicta*. He committed judicial error. No matter how mistaken, his language is routinely cited by the

of Marshall's speech. In a 1938 article for *Columbia Law Review*, Julius Goebel, Jr., took Sutherland to task for ignoring "the theory of control over foreign affairs both before and under the Confederation."¹⁵ 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*."¹⁶ A footnote to this British case of *Rex v. Hampden* (1637) explores the king's exclusive control over external affairs.¹⁷

Writing in 1944, C. Perry Patterson described Sutherland's belief in the existence of inherent presidential power as "(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous."¹⁸ Two years later, David M. Levitan noted that "the 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."¹⁹ Levitan regarded Sutherland's theory as "the 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."²⁰ Sutherland's doctrine "makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol."²¹

In the *Yale Law Journal* in 1973, Charles A. Lofgren analyzed John Marshall's 1800 speech and concluded it would be difficult to extract from his comments "an endorsement of unlimited executive discretion in foreign *policy*-making."²² He said that Sutherland "uncovered no constitutional ground for upholding a broad, inherent, and independent presidential power in foreign relations."²³ 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."²⁴ Sutherland's opinion in *Curtiss-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."²⁵

Michael Glennon 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*

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Supreme Court, lower courts, and the Justice Department. They do not read the speech to understand the scope of his 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 on a permanent basis to be repeatedly cited as an authoritative source without any step to correct the error.

Scholarly Evaluations

Scholars who have studied *Curtiss-Wright* have thoroughly repudiated Justice Sutherland for his careless and false mischaracterization

Export Corp."²⁶ Sutherland discussed the "sole organ" statement from Marshall "with no reference to its limiting context."²⁷ Glennon described Sutherland's opinion as "a muddled law review article wedged with considerable difficulty between the pages of the United States Reports."²⁸ Sutherland's interpretation of the sole-organ speech "mistakes policy communication for policy formulation."²⁹

David Gray Adler developed a similar point in dismissing Sutherland's *dicta* as a "bizarre reading of Anglo-American legal history."³⁰ He 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 foreign affair somehow passed directly from

the crown to the President when in fact it passed to the colonies as sovereign entities.³¹ By misinterpreting Marshall's speech, Sutherland attempted to infuse "a purely communicative role with a substantive policy-making function."³²

In a report for the Law Library of Congress in August 2006 and a journal article 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.³³ My book, *Presidential War Power*, has a section that identifies the false history and theory promoted in Justice Sutherland's *dicta*.³⁴

The Weight of Dicta

In citing *Curtiss-Wright* and other rulings, the D.C. Circuit in *Zivotofsky* acknowledged it was relying on judicial *dicta*. 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. But, for us—an inferior court—'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'"³⁵ That passage contains two qualifiers: carefully and generally. Justice Sutherland's *dicta* was manifestly careless, as is every subsequent citation to his 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."³⁶

No doubt the Supreme Court regularly cites the sole-organ doctrine in *Curtiss-Wright*. But no matter how often the Court repeats an error, it remains an error and should not be used to decide the President's constitutional authority. An error, even if frequently repeated, does not somehow emerge as truth. The Court does not practice alchemy, converting base metals into gold.

John Marshall as Chief Justice

At no time in John Marshall's lengthy public career did he promote exclusive presidential power in foreign affairs. In his capacity as Chief Justice of the Supreme Court, starting in 1801, 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 exclusive authority. Blackstone's theory of external relations, the British royal prerogative, and the concept of exclusive executive power in foreign affairs do 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.

He wrote for the Court in *Talbot v. Seeman*, a case involving salvage of the ship *Amelia* during the Quasi-War with France.³⁷ Part of the decision turned on the war's undeclared nature. A series of statutes authorized President John Adams to use military force against France, but there had been no formal declaration of war. The Court the previous year, in *Bas v. Tingy*, decided that Congress could authorize hostilities either by formal declaration or by statutory authority.³⁸

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 in regard to France, the acts of congress

are to be inspected."³⁹ He had no difficulty in identifying the branch that possessed the war power: "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."⁴⁰

When Statutes and Presidential Policy Collide

In *Little v. Barreme*, 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. ..." ⁴¹ President Adams issued a proclamation directing naval commanders to stop and examine ships sailing "to, or from" French ports.⁴² Marshall agreed with other justices that presidential "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."⁴³ Speaking for a unanimous Court, Marshall said the statute was 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: one that is independent of judicial control and another that is controlled 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."⁴⁴ With regard to political matters that do not affect individual rights, "the decision of the executive is conclusive."⁴⁵

However, when Congress proceeds 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."⁴⁶ 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."⁴⁷ 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* would prevail over the conflicting policies contained in a State Department manual. ☉



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Conclusion

Indigent plaintiffs in the federal courts face special barriers litigating their claims. After *Burnside* and *LaFountain*, plaintiffs proceeding *in forma pauperis* in the Sixth Circuit no longer face one of those barriers and may be permitted to amend their complaints. But as *Burnside*'s journey from the district court to the U.S. Supreme Court shows, it may still take extraordinary efforts to persuade the courts simply to give their claims a fair review. ☉

Endnotes

- ¹28 U.S.C. § 1915(e)(2).
²See *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc); *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997).
³See *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983).
⁴*McGore*, 114 F.3d at 612.
⁵*Burnside v. Walters*, No. 09-2727 (W.D. Tenn. June 1, 2010).
⁶See *Moniz v. Hines*, 92 F. App'x 208, 212 (6th Cir. 2004).
⁷*Jones v. Bock*, 549 U.S. 199 (2007).
⁸*Id.* at 214.
⁹See, e.g., *Brown v. Johnson*, 387 F.3d 1344, 1349 (11th Cir. 2004) (collecting cases).
¹⁰See Posting of Pierre Bergeron to Sixth Circuit Appellate Blog, Interview with Sixth Circuit Clerk Leonard Green, www.sixthcircuitappellateblog.com/interviews/we-sat-down-recently-with/ (July 1,

2011); see also Posting of Colter Paulson to Sixth Circuit Appellate Blog, Case Management at the Sixth Circuit: Comparisons Between Circuits on the Role of Staff Attorneys, www.sixthcircuitappellateblog.com/news-and-analysis/case-management-at-the-sixth-circuit-comparisons-between-circuits-on-the-role-of-staff-attorneys/ (August 17, 2011); Posting of Colter Paulson to Sixth Circuit Appellate Blog, Case Management at the Sixth Circuit: The Role of Staff Attorneys, www.sixthcircuitappellateblog.com/news-and-analysis/case-management-at-the-sixth-circuit-the-role-of-staff-attorneys/ (August 12, 2011).

- ¹¹See 28 U.S.C. § 1915(a); *Coppedge v. United States*, 369 U.S. 438, 445 (1962).
¹²See Fed. R. Civ. P. 62.1(a)(2).
¹³*Burnside v. Walters*, No. 10-5790/6368, slip op. at 3 (6th Cir. Apr. 27, 2012).
¹⁴www.ca6.uscourts.gov/opinions/opinion.php.
¹⁵Wendy L. Watson, *The U.S. Supreme Court's In Forma Pauperis Docket: A Descriptive Analysis*, 27 JUST. SYS. J. 47, 47 (2006).
¹⁶David C. Thompson and Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 254-55 (2009).
¹⁷See *Burnside v. Walters*, 133 S. Ct. 2337 (2013).
¹⁸*LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013).
¹⁹See *Burnside v. Walters*, 133 S. Ct. 2789 (2013).

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Endnotes

- ¹*Zivotofsky v. Secretary of State*, No. 07-5347 (D.C. Cir., July 23, 2013), memo op., at 2.
²*Id.* at 1 (Tatel, J., concurring).
³*Zivotofsky*, majority op., at 14.
⁴*Id.*
⁵*Id.* at 17.
⁶299 U.S. 304 (1936).
⁷*Clinton v. City of New York*, 524 U.S. 417, 445 (1998), cited by majority op., at 23-24.
⁸Majority op., at 24.
⁹*United States v. Belmont*, 301 U.S. 324, 330 (1937), cited by majority op., at 24-25.
¹⁰Majority op., at 40.
¹¹10 ANNALS OF CONG. 533 (1800).
¹²*Id.* at 515.
¹³*Id.*
¹⁴The full speech can be read at www.loufisher.org/docs/pip/444.pdf.
¹⁵Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 572 (1938).
¹⁶*Id.* at 572-73.
¹⁷*Id.* at 573, n.50.
¹⁸C. Perry Paterson, *In Re the United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286, 297 (1944).
¹⁹David M. Levitan, *The Foreign Relations Powers: An Analysis of Mr. Sutherland's Theory*, 55 YALE L.J. 467, 478 (1946).
²⁰*Id.* at 493.
²¹*Id.* at 497.
²²Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 25 (1973) (emphasis in original).

- ²³*Id.* at 30.
²⁴*Id.*
²⁵*Id.* at 32 (emphasis in original).
²⁶Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barre or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 11 (1988).
²⁷*Id.* at 12.
²⁸*Id.* at 13.
²⁹*Id.* at 14.
³⁰David Gray Adler, *The Constitution and Presidential War-making: The Enduring Debate*, 103 POL. SCI. Q. 1, 30 (1988).
³¹*Id.*
³²*Id.* at 34.
³³Louis Fisher, *The "Sole Organ" Doctrine*, Law Library of Congress, August 2006, loufisher.org/docs/pip/441.pdf; Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRES. STUD. Q. 139 (2007), loufisher.org/docs/pip/439.pdf.
³⁴LOUIS FISHER, *PRESIDENTIAL WAR POWER* 68-72 (3d ed. 2013).
³⁵Majority op., at 25 (emphasis in original).
³⁶*Id.*
³⁷*Talbot v. Seeman*, 5 U.S. (1 Cr.) 1 (1801).
³⁸*Bas v. Tingy*, 4 U.S. (4 Dall.) 36 (1800).
³⁹*Talbot*, 5 U.S. (1 Cr.) at 28.
⁴⁰*Id.*
⁴¹*Little v. Barre*, 2 Cr. (6 U.S.) 170, 177 (emphasis in original).
⁴²*Id.* at 178.
⁴³*Id.* at 179.
⁴⁴*Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 165 (1803).
⁴⁵*Id.*
⁴⁶*Id.* at 165-66.
⁴⁷*Id.* at 166.