No. 13-628

In The Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF LOUIS FISHER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICUS CURIAE*[1]

From 1970 to 2010, *amicus curiae*, Louis Fisher, served for four decades with the Library of Congress as Senior Specialist in Separation of Powers with Congressional Research Service and Specialist in Constitutional Law with the Law Library. Upon his retirement in August 2010, he joined the Constitution Project as Scholar in Residence and the William and Mary Law School as Visiting Professor.[2] He is the author of numerous books and articles on constitutional law and has testified more than 50 times before Congress on a range of issues concerning constitutional disputes and separation of powers. Many of his articles and congressional testimony are available on his personal webpage, http://loufisher.org. Fisher's most recent publication is a treatise on *The Law of the Executive Branch: Presidential Power* (2014). Based upon this expertise, he has an interest in providing the Court with a fuller understanding regarding the scope of presidential authority and the degree to which jurisdiction over external relations is shared

[1] This brief is filed with consent of the parties. No person other than *amicus* authored any part of this brief or made a monetary contribution to the preparation of this brief.

[2] The views expressed in this brief are Dr. Fisher's own, and his institutional affiliations with the Constitution Project and the William and Mary Law School are provided for identification purposes only.

between Congress and the President. Fisher may be contacted at lfisher11@verizon.net.

SUMMARY OF ARGUMENT

In its decision last year in *Zivotofsky v. Secretary of State*, 725 F.3d 197, the D.C. Circuit relied in substantial part on erroneous dicta that appears in *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (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 a speech given by John Marshall in 1800 when he served in the House of Representatives, distorting his remarks to imply that the President may act in external affairs without legislative authority. 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 independent presidential authority, yet Sutherland pressed that doctrine. His error has remained a potent factor ever since 1936 in expanding presidential authority beyond its constitutional boundaries. In *Curtiss-Wright*, Sutherland advanced other misinterpretations, including false assertions about treaty negotiation and the transfer of sovereignty from Great Britain to the United States. Scholars regularly identify these defects in Sutherland's opinion, but the

Supreme Court has yet to correct his errors. It is time to do so. It is 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.

ARGUMENT

I. Relying Heavily on Erroneous Dicta from *Curtiss-Wright*

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. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220. 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." *Id*. at 206. 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 decide passport policy?

On five occasions in its decision, the D.C. Circuit relied on dicta that appears in the Supreme Court's ruling in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Quoting from *Clinton v. City of New York*, 524 U.S. 417, 445 (1998), the D.C. Circuit said the Supreme 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.'" 725 F.3d at 211. 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 foreign nations.'" *Id*. The D.C. Circuit also cited *United States v. Belmont*, 301 U.S. 324, 330 (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. *Id*. Citing *Belmont* again, the D.C. Circuit referred to the *Curtiss-Wright* "sole organ" doctrine. *Id*. at 213. 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." *Id*. at 219.

In citing *Curtiss-Wright*, the D.C. Circuit admitted it was depending on 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." *Id*. at 212. That passage contains two qualifiers: *carefully* and *generally*. As will be explained, the dicta in *Curtiss-Wright* is manifestly careless, 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." *Id*. Without doubt the Supreme Court regularly cites 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. An error, even if frequently repeated, does not emerge as truth.

II. Caveats About Dicta

Courts frequently resort not only to holdings but to 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*, 5 U.S. (1 Cr.) 137 (1803), Chief Justice John Marshall expressed concern about the degree to which litigants read the decision carelessly, failing to separate its core holding from "some dicta of the Court." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). 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." *Id*. A question before a court must be "investigated with care, and considered to its full extent." *Id*. 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." *Id*. at 400. 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." *Id*. at 401.

Writing in 2006, Judge Pierre N. Leval of the Second Circuit underscored the risks of relying on judicial dicta. After saying it is "sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling," he added: "The Supreme Court's dicta are not law." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1274 (2006). He explained why dicta can provide weak and misleading guides to the formation of law. First, courts reach a decision after "confronting conflicting arguments powerfully advanced by both sides." When a court (including the Supreme Court) "asserts rules outside the scope of its judgment, that salutary adversity is often absent." *Id*. at 1261.

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." *Id*. at 1262. Third: "Another weakness of law made through dicta is that there is no available correction mechanism. No

appeal may be taken from the 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." *Id*.

Fourth, Judge Leval noted 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." *Id*.

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." *Brown v. Allen*, 344 U.S. 443, 540 (1953). 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." *Herrera v. Collins*, 506 U.S. 390, 415 (1993). A misrepresentation that appears in *Curtiss-Wright* 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.

III. False Assertions in *Curtiss-Wright*

Writing for the Supreme Court in *Curtiss-Wright*, Justice George Sutherland 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." 299 U.S. at 319, citing 10 *Annals of Cong*. 613. 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. Louis Fisher, *The Law of the Executive Branch: Presidential Power* 261-64 (2014); Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 265-307 (2009). The Constitution plainly vests 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 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.

IV. Placing *Curtiss-Wright* Dicta in Context

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." 10 *Annals of Cong*. 533 (1800). 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 was actually Thomas Nash, a native Irishman. *Id*. at 515. U.S. District Judge Thomas Bee, who was asked to turn the prisoner over to the British, agreed that the individual was Thomas Nash. *Id*.

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. 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, § 3, authority to take care that the laws, including treaties, be faithfully executed. 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. Marshall's full speech is available at http://loufisher.org/docs/pip/444.pdf.

In its February 2014 *Brief for the Respondent in Opposition*, the Justice Department presents contradictory positions on the relative powers of Congress and the President in external affairs. On pages 13 and 23, the Department claims that the President has "plenary and exclusive power * * * as the sole organ of the federal government in the field of international relations," citing *Curtiss-Wright*. Yet on page 13, the Department acknowledges 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." On page 10, the Department states that Congress "also possesses the power to regulate passports pursuant to its enumerated powers." Oddly, it later argues that this "enumerated" power of Congress cannot control the President's *implied* power over recognition policy. Page 22 of the Department's brief offers additional Article I support for the power of Congress in external affairs, such as "its powers to regulate foreign commerce and immigration."

V. *Curtiss-Wright* Involved Legislative – Not Presidential – Power

Although the Supreme Court's decision in *Curtiss-Wright* has become a standard citation for the "sole organ" doctrine and the existence of inherent executive power in the field of foreign affairs, 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 authorized the President to declare an arms embargo in South America. A joint resolution by Congress allowed 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. 48 Stat. 811, ch. 365 (1934).

In imposing the embargo, President Franklin D. Roosevelt relied solely on statutory – not inherent – authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco begins: "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, ..." 48 Stat. 1745 (1934). 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. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935). 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. *United States v. Curtiss-Wright Export Corp*., 14 F. Supp. 230 (S.D. N.Y. 1936). 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." *Id*. at 240. 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. 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." *Statement as to Jurisdiction*, United States v. Curtiss-Wright, No. 98, Supreme Court, Oct. Term, 1936, signed by Martin Conboy, Special Assistant to

the Attorney General of the United States, at 7; reprinted at 32 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Kurland & Casper, eds., 1975), at 898 (hereafter "Landmark Briefs"). The government's brief focused on whether the district court erred in holding that the joint resolution "constitutes an improper delegation of legislative power to the President." *Statement as to Jurisdiction*, at 2; 32 Landmark Briefs 906. 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." *Id*. at 6; 32 Landmark Briefs 910. Past delegations covering the domain of foreign relations represented "a valid exercise of legislative authority." *Id*. at 8; 32 Landmark Briefs 912. 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. *Id*. at 16; 32 Landmark Briefs 920. 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 munitions abroad. *Brief for Appellees*, Curtiss-Wright Export Corp. and Curtiss Aeroplane & Motor Co., Inc., United States v. Curtiss-Wright Export Corp., No. 98, Supreme Court, Oct. Term, 1936, at 3; 32 Landmark Briefs 937. A separate brief, prepared for other private parties, also analyzed the delegation of *legislative* power. *Brief for Appellees*, John S. Allard, Clarence W. Webster & Samuel J. Abelow, United States v. Curtiss-Wright Export Corp., No. 98, Supreme Court, Oct. Term, 1936, at 3-5; 32 Landmark Briefs 979-81.

VI. 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 presidential powers. Nevertheless, in extensive dicta, the decision for the Court by Justice George 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. According to his biographer, 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." Joel Francis Paschal, *Mr. Justice Sutherland: A Man Against the State* 93 (1951).

Justice Sutherland had been a two-term Senator from Utah, from March 4, 1905 to March 3, 1917, and served on the Senate Foreign Relations Committee. His opinion in *Curtiss-Wright* closely tracks his article, "The Internal and External Powers of the National Government," printed as a Senate document in 1910. S. Doc. No. 417, 61st Cong., 2d Sess. (1910). 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. . . ." *Id*. at 1 (emphasis in original).

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." *Id*. (emphasis in original). 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 then to the central government. *Id*. Sutherland's article in 1910 connected external matters with the national government, *id*. at 12, but

in *Curtiss-Wright* he 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 also spoke of "inherent" powers and "extra-constitutional" powers. *Id*. at 8-9.

The same themes appear in Sutherland's book, *Constitutional Power and World Affairs*, published in 1919. He again distinguishes between internal and external powers (*id*. at 26) 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" (*id*. at 111). Earlier in the book he warned against "the danger of centralizing irrevocable and absolute power in the hands of a single ruler" (*id*. at 25), 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" (*id*. at 47).

Later passages of the book, however, 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 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" (*id*. at 74-75). 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" (*id*. at 98). Statutes enacted during World War I invested President Wilson "with virtual dictatorship over an exceedingly wide range of subjects and activities" (*id*. at 115). Sutherland spoke of the need to define the powers of external sovereignty as "unimpaired" and "unquestioned" (*id*. at 171).

VII. Problems with Sutherland's Opinion in *Curtiss-Wright*

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." *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 315 (1936). The principle that the federal government is limited to either enumerated or implied powers "is categorically true only in respect of our internal affairs." *Id*. at 316. 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." *Id*. (emphasis in original). But that doctrine, Sutherland insisted, "applies only to powers which the states had . . . since the states severally never possessed international powers. . . ." *Id*. That is false. As will be explained, 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 America." *Id*. 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. First, 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 Brittanic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia," referring to them as "free, sovereign

and independent States." 8 Stat. 55 (1782). 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. *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 Cr.) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222-24 (1796).

Second, 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. Louis Fisher, *President and Congress* 1-27, 253-70 (1972). 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 between Congress and the President, with ultimate sovereignty vested in the people.

Much of *Curtiss-Wright* is devoted to Sutherland's 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 powerful to invade it." 299 U.S. at 319 (emphasis in original).

In his book, Sutherland took a less doctrinaire and theoretical position on treaty negotiation. He recognized that Senators did in fact participate in the negotiation phase and that Presidents often acceded to this "practical construction." Sutherland, *Constitutional Power and World Affairs*, at 122-24. With regard to treaty-making, the power of the Senate "is co-ordinate, throughout, with that of the President. *Id*. at 123. See also Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. Pa. L. Rev. 1511 (1989), and Louis Fisher, *The Law of the Executive Branch: Presidential Power* 272-76, 286 (2014).

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 external relations, and its sole representative with foreign nations." 299 U.S. at 319.

Justice 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 expressly or by implication by 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 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. *Id*. at 319-20.

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." *Id*. at 333.

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." Letter from Stone to Borchard, Feb. 11, 1942, Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress. In another letter to Borchard, Stone said he "should be glad to be disassociated" with Sutherland's opinion." Letter from Stone to Borchard, May 13, 1937, Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress. 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." Letter from Borchard to Stone, Feb. 9, 1942, Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress.

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 Supreme Court,

lower courts, the Justice Department, and various scholars. They do not read the entire speech to understand the breadth of his misinterpretation and deliberate effort, through deceit, to inflate presidential power in foreign affairs. Louis Fisher, *Judicial Errors That Magnify Presidential Power*, 61 The Federal Lawyer 66 (Jan-Feb 2014). 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.

VIII. Scholarly Evaluations of *Curtiss-Wright*'s Dicta

Scholars who have studied *Curtiss-Wright* have thoroughly repudiated Justice Sutherland for his careless and false mischaracterization of Marshall's speech in 1800 and Sutherland's erroneous understanding of the shift of sovereign authority to the United States after the break with England in 1776. In a 1938 article, Julius Goebel, Jr., took Sutherland to task for ignoring "the theory of control over foreign affairs both before and under the Confederation." Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 Colum. L. Rev. 555, 572 (1938). 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*." *Id*. at 572-73. A footnote to this British case in 1637 explores the king's exclusive control over external affairs, a theory of government that the American Framers considered and rejected. *Id*. at 573, n.50.

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." C. Perry Patterson, *In Re the United States v. The Curtiss-Wright Corporation*, 22 Tex. L. Rev. 286, 297 (1944). 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." David M. Levitan, *The Foreign Relations Powers: An Analysis of Mr. Sutherland's Theory*, 55 Yale L.J. 467, 478 (1946). 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." *Id*. at 493. Sutherland's doctrine "makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol." *Id*. at 497.

In the *Yale Law Journal* in 1973, Charles A. Lofgren analyzed John Marshall's 1800 speech and concluded it would be difficult to extract "an endorsement of unlimited executive discretion in foreign

policy-making." Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 Yale L.J. 1, 25 (1973) (emphasis in original). He said that Sutherland "uncovered no constitutional ground for upholding a broad, inherent, and independent presidential power in foreign relations." *Id*. at 30. 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." *Id*. 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." *Id*. at 32 (emphasis in original).

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 Export Corp*." 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). Sutherland discussed the "sole organ" statement from Marshall "with no reference to its limiting context." *Id*. at 12. Glennon described Sutherland's opinion as "a muddled law review article wedged with considerable difficulty between the pages of United States Reports." *Id*. at 13. Sutherland's interpretation

of the sole-organ speech "mistakes policy communication for policy formulation." *Id*. at 14.

David Gray Adler developed a similar point in dismissing Sutherland's dicta as a "bizarre reading of Anglo-American legal history." David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 Pol. Sci. Q. 1, 30 (1988). 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 affairs somehow passed directly from the crown to the President when in fact it passed to the colonies as sovereign entities." *Id*. By misinterpreting Marshall's speech, Sutherland attempted to infuse "a purely communicative role with a substantive policy-making function." *Id*. at 34.

In a report for the Law Library of Congress in August 2006 and a journal article published the following year, Louis Fisher 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. 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 Pres. Stud. Q. 139 (2007), http://loufisher.org/docs/pip/439.pdf.

Fisher's book on *Presidential War Power* includes a section that identifies the false history and theory promoted by Justice Sutherland's dicta in *Curtiss-Wright*. Louis Fisher, *Presidential War Power* 68-72 (3d ed. 2013). Similarly, Fisher's treatise on *The Law of the Executive Branch: Presidential Power* (2014) devotes several sections to misconceptions about presidential inherent power, treaty negotiation, and the "sole organ" doctrine (*id*. at 68-73, 265-68, 272-76, 286).

IX. John Marshall's Understanding of Congressional Authority as Chief Justice

At no time in John Marshall's lengthy public career did he promote exclusive presidential power over foreign affairs. 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 exclusive authority. Blackstone's theory of external relations, the British royal prerogative, and the concept of plenary 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. 5 U.S. (1 Cr.) 1 (1801). 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 could authorize hostilities either by formal declaration or by statutory authority. 4 U.S. (4 Dall.) 36 (1800).

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." 5 U.S. (1 Cr.) at 28. 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." *Id*.

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. . . ." 2 Cr. (6 U.S.) 170, 177 (emphasis in original). President Adams issued a proclamation directing naval commanders to stop and examine ships sailing "to, or from" French ports. *Id*. at 178. 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." *Id*. at 179. 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: 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." 5 U.S. (1 Cr.) 137, 165 (1803). With regard to political matters that do not affect individual rights, "the decision of the executive is conclusive." *Id*.

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." *Id*. at 165-66. 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." *Id*. at 166. 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.

X. Unsound Stances by the Executive Branch on this Statute

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." *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 *Brief for the Respondent in Opposition*, *Zivotofsky v. Kerry*, No. 13-628, at 6.

First, we treat as law what appears in a statute, not what is said in a signing statement. *DaCosta v. Nixon*, 55 F.R.D. 145 146 (E.D. N.Y. 1972); Fisher, *The Law of the Executive Branch*, at 191-96. 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 acknowledges in its brief cited above. As the Justice Department noted, Congress "also possesses the power to regulate passports pursuant to its enumerated powers." *Brief for the Respondent in Opposition*, at 10. The Justice Department added: that the Constitution "provides that the two Branches exercise some foreign-affairs powers jointly." *Id*. at 13.

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 in Section VIII of this *amicus* brief, the authority to speak and communicate is not the authority to *make* policy over external affairs. Policy 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." Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 862 (2011). Yet according to the Justice Department, 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." *Brief for the Respondent in Opposition*, at 14.

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." Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 424 (2012). Washington issued his Neutrality Proclamation, warning U.S. citizens that they faced prosecution for acting against the law of nations by becoming involved in hostilities against nations at war. *Id*. at 430 n.267.

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. *Id*. at 439. Facing this pattern of acquittals, Washington turned to Congress for statutory authority, supplied by the Neutrality Act of 1794. *Id*. at 440.

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." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 60 (2013).

The Justice Department correctly notes that in a number of cases the Supreme Court has deferred to executive branch determinations over recognition power. *Brief for the Respondent in Opposition*, at 19-20. 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.

CONCLUSION

This case presents two competing 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 is one where Congress and the President concurrently exercise

power over external affairs, with neither branch possessing exclusive, plenary, or inherent authority. This brief has analyzed the sources of the first vision, finding it legally hollow and unsound. For these reasons, this brief suggests that the Court not be misled by the analysis of the D.C. Circuit and that it take steps to correct the erroneous dicta that appear in *Curtiss-Wright*, errors that have misguided federal courts, the Justice Department, Congress, some scholarly studies, and the general public.

Respectfully submitted,

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