

## **Analysis by Louis Fisher of the Justice Department’s “Brief for the Respondent,” *Zivotofsky v. Kerry*, U.S. Supreme Court, No. 13-628 (September 2014)**

The Justice Department, attributing to the President an “exclusive” power to recognize foreign states, regards as unconstitutional Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, which permits a U.S. citizen to request the State Department to record Israel on a birth certificate or passport for a child born in Jerusalem. In developing its argument, the Department relies on misconceptions about core constitutional principles and offers as supporting evidence a number of misleading and false citations.

**Constitutional Principles.** In its brief, the Justice Department states: “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” (9).

This reference to *Curtiss-Wright* is the first of nine citations to the Supreme Court’s decision. The other eight appear at 10, 18, 23, 24, 24, 24, 53, 54. Even when not citing *Curtiss-Wright*, the Justice Department makes repeated arguments that the President has “sole power” to conduct foreign relations (9-10), act as “sole organ” in foreign relations (25), and the requirement that the United States speak with “one voice” in foreign affairs (10, 13, 26), with that voice being the President’s.

The Department’s reading of the Constitution lacks credibility and persuasive force for several reasons: (1) it is contradicted by other statements in the DOJ brief that recognize that the U.S. Constitution provides for shared power between the two elected branches in making foreign policy; (2) references to the “sole organ” doctrine in *Curtiss-Wright* rest not on the Court’s ruling (upholding the delegation of legislative authority) but rather on plainly erroneous dicta; and (3) citations that initially appear to support the Department’s position are found, after closer examination, to provide no evidence for an exclusive presidential power over recognition.

**External Relations as Shared Power.** After more than a dozen claims that the President exercises exclusive power in foreign affairs, acting as “sole organ” and supplying the Nation with “one voice,” the Department acknowledges what is obvious by 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 exclusive power, the Department’s brief explains that the President has instead “broad authority to conduct the Nation’s foreign relations” (9). Congress “may enact passport legislation in furtherance of its enumerated powers” (11). Congress “may regulate foreign

commerce and the value of foreign currency,” declare war, and define and punish offenses “against the Law of Nations” (22, n.5). Congress “has the authority to regulate passports in furtherance of its enumerated powers over immigration and foreign commerce” (45). Congress “has unquestioned authority to legislate on certain matters affecting foreign affairs” (58). 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 will often adopt conflicting policies for foreign affairs, with no branch superior over the other. History supports this pattern of shared power.

The Department states: “While the Constitution expressly confers recognition authority on the President through the power to receive ambassadors and other foreign-relations powers, the Constitution contains no provision for Congress to make, or even participate in, recognition decisions” (22). The Constitution does *not* “expressly confer recognition authority on the President. That power is implied, not enumerated. Granted the text of the Constitution contains no provision for Congress to make recognition decisions, but that is true as well of the President. Also on page 22 of the Department’s brief: “Nor do any of Congress’s enumerated powers encompass the recognition power.” None of the President’s enumerated powers encompass authority over recognitions. It is an implied power.

**Breaking with the British Model.** By repeatedly describing the President’s role in external relations as the “sole power,” the “sole organ,” and providing the Nation’s “one voice,” the Department appears to embrace what the Framers repudiated: the British model of an Executive who possesses exclusive control over foreign affairs. The Framers, after closely studying the British political system that centered foreign policy and war-making in the Executive, broke decisively with that model. They transferred many powers of external affairs to the legislative branch to secure the principle of self-government and popular sovereignty. Unlike England, with its long history of monarchy over which Parliament gradually gained some powers, America as a national government began in 1776 with a legislative branch and no other. Louis Fisher, *The Law of the Executive Branch: Presidential Power* 5, 261-68 (2014).

The Department’s brief notes that Congress “lacks any enumerated power that would permit it to make recognition decisions” (10). The President also lacks any enumerated power to make recognition decisions. The brief states: “The political Branches’ relative institutional capabilities confirm that recognition decisions must be made by the President alone” (10). That assertion lacks any supporting evidence other than vague claims that the President is able to make “nuanced” decisions (10, 13, 24), gather information needed to make those judgments “in a timely and decisive manner” (10), act with “dispatch” (24), keep “its deliberations secret” (24), and make decisions “with the necessary speed and clarity” (25).

According to the Department, the Petitioner “is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition” (27). Congress has never asserted primacy in this field. Instead, it has at times asserted a right to form independent decisions about national policy, including passports. Another claim in the DOJ brief: Petitioner’s position “in fact appears to be one of congressional supremacy . . . .” (25). No one argues that Congress is supreme in matters of recognition.

**Implied and Inherent Powers.** The Department appears to equate “implied” and “inherent” presidential powers. As it notes, President Monroe in 1824 determined that the power of recognizing foreign government “was necessarily implied in that of receiving Ambassadors and public Ministers” (28). Yes. Implied powers are those that can be reasonably drawn from enumerated powers, just as Congress draws from some of its enumerated powers the implied authority to make passport policy. The Constitution is protected when the three branches operate on the basis of enumerated and implied powers.

The Constitution is at risk when the President claims “inherent” power to act. Government officials and scholars often treat “implied” and “inherent” as synonymous, but the two terms are fundamentally different. Implied powers must be reasonably drawn from express powers. Inherent powers are those that *inhere* in an office or a person and can therefore not be controlled by the other branches through the system of checks and balances. Three Presidents (Truman, Nixon, and Bush II) invoked inherent powers on four occasions. All lost either in court, in Congress, or in both: Truman with his steel seizure in 1952, Nixon by impounding appropriated funds, Nixon ordering warrantless domestic surveillance, and Bush II by attempting to use independent power instead of statutory authority to create military tribunals. Louis Fisher, *The Law of the Executive Branch* 68-73, 237-240, 334-341, 394-401 (2014).

Despite this clear record of Presidents being rebuffed when they assert inherent authority, three places in the Department’s brief relies on inherent presidential power. It claims that the President “has long used its inherent constitutional over the content of passports to ensure that their birthplace designations conform to the President’s recognition decisions” (42). The authority to issue passports “historically has been understood to flow directly from his inherent constitutional power regarding ‘the national security and foreign policy of the United States,’” (44, citing *Haig v. Agee*, 453 U.S. 280, 293 (1981)). The Department discovers support “that the Executive exercises inherent constitutional authority to use passports as instruments of foreign policy,” but then acknowledges that the Supreme Court in *Agee* decided the case on statutory authority and found no need to reach constitutional questions (45). Any claim of inherent presidential power deserves to be repudiated by Congress and the courts.

**Misreading *Curtiss-Wright*.** As explained in my amicus brief to the Supreme Court on July 17, 2014, *Curtiss-Wright* involved legislative—not presidential—power (amicus brief, 11-14). The

brief is available at <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>. At issue was whether Congress in 1934 had delegated *legislative* authority too broadly when it authorized the President to declare an arms embargo in South America. In imposing the embargo, President Franklin D. Roosevelt relied solely on statutory—not independent executive—authority. At no time in the litigation did any party, including the Justice Department, discuss the availability of any independent, plenary, exclusive, or inherent power of the President (amicus brief, 12-14).

All references to “one voice,” “sole organ,” and “sole power” come from dicta written by Justice George Sutherland. Not only are the references dicta, they are demonstrably *erroneous* dicta. Sutherland cited this language by John Marshall in 1800 when he served in the House of Representatives: “The President is the sole organ of the nation in external relations, and its sole representative with foreign nations” (amicus brief, 8). When read in context, it is clearly evident that Marshall never suggested that the President possesses some kind of exclusive or plenary authority over foreign affairs. Instead, once the two elected branches have established national policy by statute or by treaty, it is the President’s responsibility to *implement* that policy. The full speech is available at <http://loufisher.org/docs/pip/444.pdf>.

**Misleading, Empty, and False Citations.** In a section 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” (13). The recognition power is 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. In citing constitutional language directing 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 that became Pub. L. No. 107-228. Shall Section 214(d) be executed or not? Through a signing statement the Department refers to on page 7, President Bush raised constitutional objections to Section 214(d). Such statements do not give the President an item veto, free to carry out some provisions but not others. That interpretation would give the President an absolute veto instead of the qualified veto he has under the Constitution, which permits Congress to override vetoes.

In claiming that Section 214(d) “unconstitutionally encroaches on the President’s core recognition authority,” the Department’s brief on page 48 relies on four decisions by the Supreme Court: *Chadha*, 462 U.S. at 946-948; *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *United States v. Klein*, 80 U.S. (13 Wall) 128, 148 (1871). A reader might wonder why cases involving the legislative veto, campaign finance, the Gramm-Rudman-Hollings deficit control act, and the President’s pardon power have any bearing on recognitions. In fact, none of them have anything to do with the recognition power. The

citation to *Chadha* applies solely to the Presentment Clause and the President's veto. The citation to *Buckley* concerns only a proposal at the Constitutional Convention that the Senate be vested with authority to appoint Ambassadors. The citation to *Bowsher* discusses only the power to remove executive officials. The citation to *Klein* applies entirely to the President's pardon power. True, these citations involve cases where statutory policy was limited by the Court, but—for balance—the Justice Department might as well provide a string cite to identify cases that placed limits on presidential power.

Another passage in the Department's brief promotes presidential power by citing the Court's 2012 decision on the Affordable Care Act: "The question in this case is whether that mandate [in Section 214(d)] impermissibly interferes with the President's exclusive recognition power. Cf. *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012)" (56). Page 2598 focuses entirely on the taxing power and the individual mandate. With the Department's approach, any case involving a statutory requirement (a "mandate") could be cited for support of exclusive presidential authority over recognition.

In a section called "Article II of the Constitution assigns the recognition power to the President," the Department states: "Because establishing diplomatic relations with a foreign entity entails determining that the entity should be treated as a state, the recognition power is vested solely in the President. See 3 Joseph Story, *Commentaries on the Constitutional of the United States* § 1560, at 415-416 (1833)" (14). The Department does not explain on page 14 what Story says in Section 1560, which actually appears at 415-417. He discusses the power to receive ambassadors and ministers and treats as "an executive function" the reception of new ministers, but then adds: "If such recognition is made, it is conclusive upon the nation, unless indeed it can be reversed by an act of congress repudiating it." If the executive refuses recognition, "it is said, that congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation, or party." Story calls these propositions "abstract statements" and therefore "not as absolutely true, but as still open to discussion." Much later in the brief, the Department mentions some of these points (40, n.8).

On pages 15-16, the Department's brief cites three treatises on the law of nations for the view that receiving a minister "entailed recognizing his state and government": Hugo Grotius, *The Rights of War and Peace* (1625), Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (1737), and Emmerich de Vattel, *The Law of Nations* (1758). As discussed in the brief, none of those treatises identify the recognition power as exclusively executive. Moreover, treatises published in 1625, 1737, and 1758 accepted the King or Executive as the exclusive actor in external affairs. They could not possibly understand the unique system of separation of powers and checks and balances to be accepted by the Framers at the Constitutional Convention in 1787 and the ratification debates in 1788.

According to the Department, the President “has the sole responsibility for negotiating treaties before presenting them to the Senate. See *Curtiss-Wright*, 299 U.S. at 319 (‘Into the field of [treaty] negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.’)” (19). Here is another citation that lacks any factual basis. First, the language by Justice Sutherland in *Curtiss-Wright* had nothing to do with the issue before the Court in 1936: whether Congress could delegate to the President authority to impose an arms embargo. Sutherland’s language is thus pure dicta. Second, it is erroneous dicta. Presidents have often invited Senators and Representatives to participate in treaty negotiation in order to build political support for subsequent Senate action on a treaty and congressional action on authorization and appropriation bills needed to implement the treaty. Louis Fisher, *The Law of the Executive Branch: Presidential Power* 272-76, 286 (2014); Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. Pa. L. Rev. 1511 (1989). In a book published by Sutherland in 1919, he admitted that Senators did indeed participate in the negotiation phase and Presidents often acceded to this “practical construction.” George Sutherland, *Constitutional Power and World Affairs* 122-24 (1919).

A section in the Department’s brief that focuses on historical practice regarding the recognition power begins with this passage: “More than two hundred years of historical practice confirms what the Constitution’s text and structure make clear: The recognition power belongs exclusively to the Executive. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (‘long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President’) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))” (26-27). Yes, historical practice is helpful in deciding the constitutional powers of Congress and the President, but a “consideration of great weight” falls far short of finding “exclusive” power, as is evident in the history of the recess appointment power in *Noel Canning*, exercise of the pocket veto, and many other executive-legislative disputes. Louis Fisher, *The Law of the Executive Branch: Presidential Power* 132-41, 177-85 (2014).

Page 55 of the Department’s brief: “But ‘where the Constitution by explicit text commits the power at issue to the exclusive control of the President,’ the Court has ‘refused to tolerate any intrusion by the Legislative Branch.’ *Public Citizen v. DOJ*, 491 U.S. 440, 485, 486-487 (1989) (Kennedy, J., concurring in the judgment); see also *Chadha*, 462 U.S. at 945; *Morrison v. Olson*, 487 U.S. 654, 711-712 (1988 (Scalia, J., dissenting)).” This passage provides no analytical value because no explicit text in the Constitution commits the recognition power to the exclusive control of the President.