D.C. Circuit Court Adopts Old Judicial Error to Inflate Executive Power

Guest Observer
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The D.C. Circuit Court of Appeals on July 23 ruled that a law Congress passed in 2002 "impermissibly infringes" on the president's power to recognize foreign governments. 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.

The D.C. Circuit Court left the impression, in Zivotofsky v. Secretary of State, that members of Congress attempted to exercise the Constitution's recognition power. But to reach that conclusion, the D.C. court four times cited erroneous and blatantly deceitful language from a 1936 Supreme Court decision in United States v. Curtiss-Wright Export Corp.

As the D.C. court noted, 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.'"

In that 1936 opinion, Justice George Sutherland, in a statement that went beyond the issue before the court, argued 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."

In fact, Congress acted under its constitutional authority to decide passport policy. As Judge David Tatel noted in his concurrence in the D.C. Circuit Court: "It is beyond dispute that Congress's immigration, foreign commerce and naturalization powers authorize it to regulate passports."

The court admitted that neither the text of the Constitution nor original intent "provides much help in answering the question of the scope of the President's recognition power." Yet the court decided that an implied executive power should trump an implied legislative power.

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When Sutherland wrote about Marshall's speech, he did not engage merely in extraneous dicta. He presented a blatant misrepresentation. No matter how much in error, his words are regularly cited by the Supreme Court, lower courts and the Justice Department, who clearly don't understand the scope of Sutherland's misinterpretation and his deliberate effort, through deceit, to inflate presidential power in foreign affairs.

Sutherland's repeated use of the word "sole" may suggest that the president has an exclusive power over external affairs, including the recognition power. But what did 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 clear answer: No.

In 1800, Jeffersonians in the House urged that President John Adams be either impeached or censured for turning over to Great Britain an English subject charged with murder. Marshall took the floor to methodically rebut those charges. He explained that the Jay Treaty with England contained an extradition provision that permitted each country to turn over to the other individuals charged with certain crimes, including murder.

Adams was not making foreign policy unilaterally, Marshall argued. He was fulfilling his Article II authority to take care that the laws, including treaties, be faithfully executed. At no point did Marshall suggest that the president possessed some kind of exclusive authority over external affairs.

On completion of his presentation, Jeffersonians found Marshall's argument so tightly reasoned it could not be refuted.

In accepting Sutherland's interpretation of history, the D.C. Circuit Court on July 23, acknowledged it was relying on judicial dicta. It argued that although the Supreme Court has "not held that the President exclusively holds" the recognition power, an inferior court must consider careful language of the Supreme Court as authoritative, "even if technically dictum," especially if the high court has "reiterated the same teaching." (I have written about Sutherland's misrepresentation and scholarly efforts to repudiate his position.)

At no time in Marshall's lengthy public career did he promote exclusive presidential power in foreign affairs. Consider his decision in Little v. Barreme (1804): Congress had passed legislation during the quasi-war against France authorizing the president to seize vessels sailing to French ports. President Adams, meanwhile, issued a proclamation directing American ships to seize ships sailing to or from French ports.

Here the conflict was between a statute and a presidential proclamation. Speaking for a unanimous court, Marshall said the statute was superior to the proclamation.

In Zivotofsky, the D.C. Circuit Court not only deferred to the executive branch (Marshall did not) but held that an agency manual—the State Department's Foreign Affairs Manual—was superior to a statute.

The court was manifestly careless in basing its decision on Sutherland's dicta in Curtiss-Wright. No matter how often the court repeats an error, it remains an error and should not be used to decide constitutional law. An error, with repetition, cannot emerge as truth.

Louis Fisher served four decades at the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library.