Petitioner's Brief For Zivotofsky v Kerry Del Valle High School

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Table of Authorities

CASES

CONSTITUTION AND STATUTES

Peace Treaty with England, Nov. 30, 1782
Neutrality Act of 1794
Joint Resolution of May 28, 1934, 48 Stat. 811, ch. 365
David Gray Adler, The Constitution and Presidential Warmaking: The Enduring Debate, 103 Pol. Sci. Q. 1 (1988)
Louis Fisher, President and Congress (The Free Press, 1972)
Louis Fisher, Congressional Participation in the Treaty Process, 137 U. Pa. L. Rev. 1511(1989) Louis Fisher, The "Sole Organ" Doctrine, Law Library of Congress, Aug. 2006
Louis Fisher, Presidential Inherent Power: The "Sole Organ" Doctrine, 37 Pres. Stud. Q. 139 (2007)
Louis Fisher, Presidential War Power (University Press of Kansas, 3d ed., 2013)
Louis Fisher, The Law of the Executive Branch: Presidential Power (Oxford University Press,
2014)
Louis Fisher, Judicial Errors That Magnify Presidential Power, 61 The Federal Lawyer 66 (Jan-Feb 2014)
Michael J. Glennon, Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright? 13 Yale J. Int'l L. 5 (1988)

Statement of the Argument

Ever since the existence of the state of Israel, the President of the United States, acting through his Secretary of State, has recognized no country as having control over the city of Jerusalem, even though the city resides in the country of Israel (Partly until 1967- Fully from 1967). As part of this policy, the passports of American citizens who are born in Jerusalem list their country of birth as Jerusalem, rather than Israel. This is so even though Jerusalem is not actually a country but a city.

> Congress would then passed The Foreign Relations Authorization Act (2003). It is Section 214(d) of the Foreign Relations Authorization Act (2003) that requires the Secretary of State to record "Israel" as the place of birth on the passport of a United States citizen born in Jerusalem if the citizen or his guardian requests. The Secretary has not enforced this provision, believing that it impermissibly intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations.The parents of Menachem Zivotofsky (a United States citizen born in Jerusalem), filed a lawsuit seeking a permanent injunction ordering the Secretary to issue a passport listing "Israel" as their son's place of birth. Ruling in favor of the Secretary, the Court of Appeals for the District of Columbia Circuit

found that the President held exclusive power to determine whether to recognize a foreign nation. Section 214(d) was not the neutral regulation of the form and content of a passport (as Congress has the power to do under its immigration powers), but rather an attempted legislative articulation of foreign policy, enacted to alter United States foreign policy toward Jerusalem. As a result, Section 214(d) impermissibly intruded on the President's recognition power and was unconstitutional.

The question before the Court is whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

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.

We Will Present Four Core Arguments For The Petitioner

1. The D.C. Appeals Court Relied Heavily on Erroneous Dicta from Curtiss-Wright. This Creates Legal Problems

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. 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.'". 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."

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. Citing Belmont again, the D.C. Circuit referred to the Curtiss-Wright "sole organ" doctrine. 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."

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." Your honor, that passage contains two major qualifiers: carefully and generally. Both words have modified the impact of the materially greatly. As will be explained, the dicta in Curtiss-Wright are 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."] 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. Cross apply the fact that it is the rule of law not the thought on the law which hold precedence.

II. Dicta Does Not Equal Either A Ruling (Holding) or Case Law, Therefore Setting It Up As Such Creates A Horrible Precedent That Will Change The Judicial System

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." A question before a court must be "investigated with care, and considered to its full extent." 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."

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."

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. The 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."

III. There Were False Assertions in Curtiss-Wright Which Have Allowed For A Faulty Conclusion To Be Drawn

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. This would have created an Imperial Presidency and exactly what the Founding Fathers did not want to have. Remember we had just fought a Revolutionary War to free this country from the British, why would we want to go back and turn it over to somebody else and end up with the same thing.

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,

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. 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 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." 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 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. . . ."

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." 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.

Sutherland's article in 1910 connected external matters with the national government, 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.

The same themes appear in Sutherland's book, Constitutional Power and World Affairs, published in 1919. He again distinguishes between internal and external powers 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" 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" 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".

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". Statutes enacted during World War I invested President Wilson "with virtual dictatorship over an exceedingly wide range of subjects and activities". Sutherland spoke of the need to define the powers of external sovereignty as "unimpaired" and "unquestioned".

Conclusion

There are four major logical fallacies which lead me pray that the D.C. Circuit Court of Appeals decision on this case should be overturned.

First, this is clearly a case of making a hasty generalization- relying on dicta from one case (Curtiss- Wright 1936) and from one Judge's viewpoint. Then taking this mistaken concept and trying to judge others by this very small sample. Cross apply the 1918 newspapers that published Woodrow Wilson had lost only find out he won by winning California early that morning. Cross apply the Literary Digest that in 1940 predicted the Landon Knox would defeat President Roosevelt or the 1948 headlines that said Dewey won. All of these cases you had a small sample and you cannot forecast from a small sample to a large group without making errors.

Second, this is a case of speaking for others- actually put words in other peoples' mouth. How can a person or judge in the future look back at notes and understand what you were thinking? They can't but besides this creates another logical fallacy of shifting the bar- you cannot always change the goal line and still expect to score. Unless you are a medium, it would be difficult to understand what it going on in the mind of another. The worst thing about this is that you would create a precedent that would always be changing. A law that constantly changes cannot be consistently enforced and eventually will be totally disregarded.

Third, this entire case today is based upon a false premise situation here. One cannot simply conclude that Presidency was supposed to be an all powerful position. Using a John Marshall quote is equivocation fallacy- using the same words but they have different meanings. How could you conclude that Marshall of all people would believe that the Presidency would be all powerful simply because under his reign as being Chief Justice, the Supreme Court was elevated to an equal branch of the government? Under his predecessor, John Jay, the court was considered the least important branch of the government. If John Marshall had felt the way he did he never would have ruled all of those years on the bench the way he did.

Fourth, the Curtiss- Wright 1936 case itself actually proves that ruling the D.C. Circuit Court based their decision on was based on faulty premise. The fact that this case dealt

with Congressional Power and not Presidential Power, thereby taking out the argument that President may have greater power than the legislative body. This takes out the petitioner's argument that the Presidential power is superior because the Presidential power is based upon Legislative mandates. The argument that Section 214(d) infringes on Presidential power is simply not true and based on faulty logic.

What we have shown here is that there are four points of distinct problems with the basis of the D.C. Circuit Court's opinion. They grossly overstepped their bounds in this decision and this ruling should be overturned right here, right now. The question before the Court is whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him and the answer is clearly that Congress has the power to do so and the passport in question should be stamped Israel instead of Jerusalem.
