ARTICLES

PRESIDENTIAL MILITARY INITIATIVES: CONSTITUTIONAL VIOLATIONS

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The framers of the U.S. Constitution carefully analyzed precedents established in England regarding the scope of executive power over external affairs. In studying such authorities as John Locke and William Blackstone, they understood that among those powers was the capacity of kings to unilaterally place the country in a state of war. The record demonstrates that the framers rejected the British system by vesting in Congress the power to declare war and to make rules to regulate land and naval forces. The framers recognized that Presidents would need authority to repel sudden attacks because Congress was not always in session. Over time, particularly from President Harry Truman forward, the constitutional system created by the framers has been undermined with little effort on the part of Congress or federal courts to check presidential violations. Part of the growth of independent presidential power over external affairs relies on serious misconceptions and errors by the U.S. Supreme Court, particularly the "sole organ doctrine" announced in the 1936 Curtiss-Wright case. All that was needed was for the Court to decide whether Congress could delegate to the President authority to place an arms embargo in an area in South America. In upholding the delegation, however, the Court chose to add entirely erroneous dicta that vested exclusive authority over external affairs with the President. The Court had an opportunity in the 2015 Zivotofsky case to correct those judicial errors but chose to broadly endorse independent presidential power in external affairs.

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I. REJECTING THE BRITISH MODEL

In a work published in 1690, John Locke spoke of three branches of government: legislative, executive, and federative. The latter included "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth." For Locke, the powers of executive and federative "are always almost united."[1] Separating the executive and federative powers, he warned, would invite "disorder and ruin." He placed the federative power with the executive because it "is not necessary" for the legislative branch to "be always in being; but absolutely necessary that the executive branch should, because there is not always need of new laws to be made, but always need of execution of the laws that are made."[2]

In a book published in 1803, the British jurist William Blackstone provided support for Locke's decision to place all external powers with the executive. In a chapter that covered the king's prerogative, Blackstone explained that royal authority and character "are rooted in and spring from the king's political person," including the right to send and receive ambassadors and the power to make war or peace.[3] Through the exercise of Blackstone's prerogative, the king could make "a treaty with a foreign state, which shall irrevocably bind the nation."[4] The king could issue letters of marque and reprisal, authorizing private citizens to undertake military actions. To Blackstone, that prerogative was "nearly related to, and plainly derived from, the other of making war."[5]

These British models of executive power were well known to the framers. They knew that precedents in England had committed to the executive the power to go to war. However, when they declared independence from England, the framers initially vested *all* executive powers in the Continental Congress. The ninth article of America's first constitution, the Articles of Confederation, provided: "The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on war and peace." The single exception lay in the sixth article, which allowed states to engage in war if invaded by enemies or when threatened by Indian tribes.

During debates at the Philadelphia convention the framers offered various reasons for breaking free of Locke's federative powers and Blackstone's royal prerogatives. On June 1, 1787, Charles Pinckney said he was for "a vigorous Executive but was afraid the Executive powers of [the existing] Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one."[6] John Rutledge supported placing the executive power in a single person "tho' he was not for giving him the power of war and

1. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §§ 146-48 (1690).

2. *Id.* § 153.

3. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND § 336 (William Carey Jones ed., 1915) (1803).

4. *Id.* § 352.

5. *Id.* § 362.

6. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 64-65 (Max Farrand ed., 1911).

peace."[7] To Roger Sherman, the "Executive magistracy" was "nothing more than an institution for carrying the will of the Legislature into effect."[8] James Wilson supported a single executive but "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."[9]

Edmund Randolph "strenuously opposed a unity in the Executive," regarding it as "the foetus of monarchy."[10] Delegates at the Philadelphia convention, he said, had "no motive to be governed by the British Government as our prototype." If the United States had no other choice he might adopt the British model but "the fixt genius of the people of America required a different form of Government."[11] Although Alexander Hamilton would later be associated with vigorous and independent presidential power, in a lengthy speech on June 18 he jettisoned the British model of executive prerogatives in foreign affairs and the war power. While offering his private opinion that the "British Govt. was the best in the world,"[12] he nonetheless rejected the Lockean and Blackstonian models. Under his proposal, the President would share with the Senate the power of making treaties but the Senate would have the "sole power of declaring war" and the President would be authorized to have "the direction of war when authorized or begun."[13] The framers would later place the power to declare war in both houses of Congress.

In the *Federalist Papers*, Alexander Hamilton, John Jay, and James Madison offered their views on various constitutional issues, including the scope of presidential power. In Federalist No. 69, Hamilton explained that the President has a "concurrent power with a branch of the legislature in the formation of treaties," whereas the British king "is the *sole possessor* of the power of making treaties."[14] The royal prerogative in foreign affairs was expressly shared with the Senate. Hamilton noted that the power of the king "extends to the *declaring* of war and to the *raising and regulating* of fleets and armies."[15] Article I, Section 8 of the U.S. Constitution vests those powers in Congress.

The Constitution places in Congress the power to regulate foreign commerce, an area that has a direct relationship with the war power. Commercial disputes between nations can often be a direct cause of military conflicts. In *Gibbons v. Ogden* (1824), Chief Justice John Marshall explained that the commerce power "may be, and often is, used as an instrument of war."[16] Guided by history and rejection of the British model, the framers placed that power with Congress.

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7. *Id*. at 65.
8. *Id*.
9. *Id*. at 65-66.
10. *Id*. at 66.
11. *Id*.
12. *Id*. at 288.
13. *Id*. at 292.
14. THE FEDERALIST 450 (Benjamin F. Wright, ed., 2002) (emphasis in original).
15. *Id*. at 446 (emphasis in original).
16. Gibbons v. Ogden, 22 U.S. 1 (9 Wheat.) 192 (1824).

During debates at the Philadelphia convention the framers placed limits on the capacity of the President to initiate war. An early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" to protect the country during an emergency, particularly because he expected Congress to meet but once a year. Madison and Elbridge Gerry offered a motion to insert "declare" for "make," leaving to the President "the power to repel sudden attacks." Their motion carried seven to two. After Rufus King explained that the word "make" would allow the President to conduct war, which was an "Executive function," Connecticut changed its vote, producing a final tally of eight to one.[17]

Debates at Philadelphia reinforce the limited grant of authority to repel sudden attacks. Pierce Butler wanted to empower the President to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it."[18] Roger Sherman objected: "The Executive shd. be able to repel and not to commence war."[19] Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war."[20] George Mason opposed "giving the power of war to the Executive, because not [safely] to be trusted with it; … He was for clogging rather than facilitating war."[21]

The framers vested in Congress the power to initiate war because they believed that Presidents, in their search for fame and glory, would deliberately seek war.[22] John Jay in Federalist No. 4 warned that "absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans." Those and other motivations, "which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of the people."[23]

During the state conventions to ratify the Constitution, delegates underscored the important need to break free from British precedents. In Pennsylvania, James Wilson emphasized that the American system of checks and balances "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large."[24] In North Carolina, James Iredell compared the limited powers of the President with those of the British monarch. He described the king of Great Britain as not only the Commander in Chief but someone who "has power, in time of war, to raise fleets and armies. He has also authority to declare war." Iredell pointed out that the

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17. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1911).

18. *Id*. at 318.

19. *Id*.

20. *Id*.

21. *Id*. at 319.

22. *See generally* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 748 (1997).

23. THE FEDERALIST, *supra* note 14, at 101.

24. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836-1845).

President "has not the power of declaring war by his own authority, nor that of raising fleets of armies. These powers are vested in other hands."[25]

Many of these issues are explored in the writings of Madison. In 1793 he called war "the true nurse of executive aggrandizement …In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which are they are to be enjoyed."[26] Five years later, in a letter to Jefferson, Madison said that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."[27]

Keeping the purse and sword in separate hands was a fundamental principle for the framers. They knew that English kings would rely on extraparliamentary sources of revenue for military actions, with some of the money coming from foreign governments. As a result of those transgressions, England lurched into a civil war and Charles I lost both his office and his head.[28] The growth of democratic government in the United States is directly related to placing in Congress control over all expenditures, including those for foreign and military affairs.

The U.S. Constitution is constructed to avoid the British history of civil war and bloodshed by placing in Congress the power of the purse. Under Article I, section 9, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In Federalist No. 48, Madison said that "the legislative department alone has access to the pockets of the people."[29] Article I, Section 8, empowers Congress to lay and collect taxes, duties, imposts, and excises; borrow money on the credit of the United States; and coin money, regulate its value, and declare war. The power of the purse, Madison said in Federalist No. 58, represents the "most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[30]

To protect democratic government, Madison insisted on keeping the power of Commander in Chief at arm's length from the power to take the country to war. In order to protect constitutional liberties, the power to go to war had to be reserved to Congress:

> Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued*, or *concluded*. They are barred from the latter functions by a great principle in free government, analogous to

25. 15 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot ed., 1836-1845).

26. 6 THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1900-1910).

27. *Id*. at 312.

28. PAUL EINZIG, THE CONTROL OF THE PURSE 57-62, 100-106 (1959).

29. THE FEDERALIST, *supra* note 14, at 345.

30. *Id*. at 391.

> that which separates the sword from the purse, or the power of executing from the power of enacting laws.[31]

Other framers underscored that principle. Thomas Jefferson praised the transfer of the war power "from the executive to the Legislative body, from those who are to spend to those who are to pay."[32] At the Philadelphia convention, George Mason urged that the "purse & the sword ought never to get into the same hands," whether legislative or executive.[33]

II. EARLY PRECEDENTS

To what extent may a President engage in undeclared wars, as with the "Quasi War" against France from 1798 to 1800? President John Adams did not decide that he could, based solely on executive authority, take military action against France. Instead, he asked Congress to pass "effectual measures of defense."[34] Congress debated those bills and enacted several dozen to support military action by the President. Although war was not declared, Congress had clearly authorized war. During legislative debate in 1798, Edward Livingston (D-N.Y.) considered the county "now in a state of war; and let no man flatter himself that the vote which has been given is not a declaration of war."[35] Congress passed legislation on May 28, 1798, authorizing the President to seize armed French vessels.[36]

That law prompted several judicial decisions. In 1800 the Supreme Court recognized that Congress could authorize military action in two ways, either by a formal declaration of war or by statutes that authorize military action, as against France. Justice Samuel Chase noted: "Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time."[37] In a second case a year later Chief Justice John Marshall wrote for the Court: "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 inquiry."[38]

Those decisions did not conclude that once Congress provides authority for military action the President is at liberty to decide the time, place, and scope of carrying out a war. In authorizing war, Congress may place limits on what a President may and may not do. Legislation passed by Congress authorized the President to seize vessels sailing *to* French ports. However, President Adams issued an order directing American ships to capture vessels sailing *to or from* French ports. Captain George Little followed Adams' order by seizing a Danish

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31. 6 THE WRITINGS OF JAMES MADISON, *supra* note 26, at 148 (emphases in original).

32. 6 THE WORKS OF THOMAS JEFFERSON 11 (Paul Leicester Ford ed., 1789-1792).

33. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 6, at 144.

34. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 226 (James D. Richardson ed., 1897-1925) [hereinafter Richardson].

35. 8 ANNALS OF CONG. 1519 (1798).

36. Act of May 28, 1798, ch. 48, 1 Stat. 561.

37. Bas v. Tingy, 4 U.S. 37, 43 (1800).

38. Talbot v. Seeman, 5 U.S. 1, 28 (1801).

ship sailing from a French port. He was sued for damages and the case came to the Supreme Court.

Chief Justice Marshall explained that the case gave him several options. The "first bias" of his mind concluded that although the instructions by Adams "could not give a right, they might yet excuse [a military officer] from damages."[39] The system of military hierarchy appeared to justify the actions of Captain Little, "placed by the laws of his country in a situation which in general requires that he should obey them." On further reflection, however, Marshall decided that Little could be sued for damages:

> I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions [by Adams] cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.[40]

Thus, congressional policy placed in a statute necessarily prevailed over inconsistent presidential orders and military actions. By separate legislation, Congress later decided that Captain Little should not have been liable for following a presidential order. In 1807, Congress passed a private bill reimbursing Little for the damages awarded against him.[41]

From precedents established by George Washington and John Adams, Thomas Jefferson was well aware that in taking office in 1801 the decision to initiate military force against another nation lay with Congress. One of the issues he faced as President was the need to pay annual bribes ("tributes") to four states of North Africa: Morocco, Algiers, Tunis, and Tripoli. The purpose of those payments was to prevent interference with American merchants. The Pasha of Tripoli, insisting on a larger tribute, declared war on the United States on May 14, 1801. Jefferson told Congress that he had sent a small squadron of frigates to the Mediterranean to protect against attack and then asked Congress for further guidance, stating he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." It was up to Congress to authorize "measures of offense also."[42] In 1805 he offered this statement: "Congress alone is constitutionally invested with the power of changing our condition from peace to war."[43]

After military actions against France and the Barbary pirates, Congress declared its first war in 1812. President Madison advised Congress on November 5, 1811 about hostile and discriminatory actions by England that required Congress to prepare for war.[44] His message to Congress on June 1, 1812 identified a number of British initiatives that amounted to "a state of war against the United States," but he left to Congress the issue of declaring war, "a solemn question which the

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39. Little v. Barreme, 6 U.S. 169, 179 (1804).
40. *Id.*
41. Act for the relief of George Little, ch. 4, 6 Stat. 63 (1807).
42. 1 Richardson, *supra* note 34, at 315.
43. 15 ANNALS OF CONG. 19 (1805).
44. 1 Richardson, *supra* note 34, at 479.

Constitution wisely confides to the legislative department of the Government."[45] Congress proceeded to declare war on June 18, 1812, authorizing the President to use "the whole land and naval force of the United States."[46] The war lasted thirty months.

The first presidential abuse over the war power came in 1846 when President James Polk chose to act unilaterally against Mexico by ordering General Zachary Taylor to occupy disputed territory along the Texas-Mexico border. Polk told Congress that Mexico had "invaded our territory and shed American blood upon the American soil," notifying Congress that "war exists."[47] Members of Congress insisted that hostilities did not necessarily mean war. The latter step requires express authority from Congress. Congress declared war on May 13, 1846, recognizing that "a state of war exists."[48] Polk's actions led the House of Representatives to censure him in 1848 on the ground that the war had been "unnecessarily and unconstitutionally begun by the President of the United States."[49]

During the Civil War, with Congress out of session, President Abraham Lincoln took a number of unilateral military actions, issuing proclamations calling forth the state militia, suspending the writ of habeas corpus, and placing a blockade on the rebellious states. Unlike Presidents after World War II, Lincoln never claimed he possessed authority to act as he did. When Congress returned, he explained that his actions, whether "strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."[50] He understood that the superior body on war was Congress, not the President. Congress debated his actions at length, with members supporting the President with the explicit understanding that his actions were illegal.[51] Congress passed legislation approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[52]

Subsequent wars were declared by Congress, first against Spain in 1898, followed by World War I and World War II. Matters then changed fundamentally in constitutional values when Presidents began to seek authority not from Congress but from outside bodies like the U.N. Security Council and NATO allies. That step, contrary to the Constitution, began with President Truman's actions with the Korean War. Before turning to that issue, it is necessary to examine several Supreme Court errors in the 1936 *Curtiss-Wright* case that advanced presidential power in external affairs beyond constitutional limits. In the 2015 *Zivotofsky* case,

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45. *Id*. at 490.

46. Act of June 18, 1812, ch. 102, 2 Stat. 755.

47. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2292 (James D. Richardson ed., 1897-1925).

48. Act of May 13, 1846, ch. 16, 9 Stat. 9 (1846).

49. CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848).

50. 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 24.

51. CONG. GLOBE, 37th Cong., 1st Sess. 393 (1861) (statement of Sen. Timothy O. Howe).

52. An Act to Increase Pay of Troops, ch. 63, 12 Stat. 326 (1861).

discussed later in this article, the Court had an opportunity to correct those errors but chose not to do so.

III. SUPREME COURT ERRORS

Presidential power in external affairs has drawn much support from a badly reasoned decision issued by the Supreme Court in *United States v. Curtiss-Wright Corp*. (1936). The Court was asked whether Congress had delegated too broadly when it empowered President Franklin D. Roosevelt to declare an arms embargo in South America. The statute allowed the President to impose the arms embargo whenever he found it "may contribute to the establishment of peace" between belligerents.[53] The issue before the court: did the statutory language provide the President with too much discretion?

The previous year, in two cases, the Court struck down the delegation of *domestic* power to the President.[54] In *Curtiss-Wright*, the Court could have announced that Congress may delegate more broadly in international affairs than in domestic affairs. The issue was never the existence of some type of independent presidential power. When imposing the embargo, President Roosevelt relied solely on statutory authority, not a claim for inherent executive power. His proclamation prohibiting the sale of arms and munitions did not assert any kind of exclusive, plenary, or extra-constitutional power.[55]

Writing for the Court in *Curtiss-Wright*, Justice George Sutherland relied on several conceptual and historical errors. He 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."[56] In discussing Marshall's 1800 speech, Justice Sutherland did not engage merely in judicial dicta. He committed plain judicial error. At issue in the 1800 debate was an effort to impeach or censure President John Adams for turning over to England a British citizen charged with murder. Because the case was already pending in an American court, some members of Congress wanted to punish President Adams for encroaching on the judiciary and violating the doctrine of separated powers.

Marshall, in his speech, argued that there was no basis for this action against President Adams. In fact, Adams was carrying out an extradition treaty entered into between England and the United States. He was implementing national policy. It was at that point that Marshall said that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[57] President Adams was announcing and carrying out treaty policy, not

53. Sale of War Material in United States, Pub. L. No. 73-28, 48 Stat. 811 (1934).

54. *See generally* Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935); Schechter Corp. v. United States, 295 U.S. 495 (1935).

55. Proclamation No. 2087, 48 Stat. 1745 (May 28, 1934).

56. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (citing 6 ANNALS OF CONG. 613 (1800)).

57. 6 ANNALS OF CONG. 613 (1800).

attempting to act unilaterally. Following Marshall's persuasive speech, the effort to either impeach or censure President Adams was withdrawn.

In *Curtiss-Wright*, Justice Sutherland claimed that the President possessed not only statutory authority to carry out the embargo policy in South America but had access to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[58] With that language, the Court liberated the President from statutory grants of power and extended some type of "plenary and exclusive" power to the President in external affairs. That dicta is fully at odds not only with express language in the Constitution but also with the decision of the Framers to reject the British model in favor of a system of checks and balances in both domestic and foreign affairs.

Sutherland added other erroneous dicta to his opinion. The Constitution allocates the power of external sovereignty to both Congress and the President. The President and the Senate share treaty power. The President receives ambassadors from other countries, but U.S. ambassadors must be approved by the Senate. Congress has the power to declare war, raise and support military forces, make rules for their regulation, provide for calling up the militia to suppress insurrections and repel invasions, and provide for the organization and disciplining of the militia. Sutherland was simplistic and erroneous in drawing a bright line between external and internal affairs and assuming some type of independent presidential power over external affairs.

Sutherland claimed that the President possessed independent power to negotiate agreements with other countries: "He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. In the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[59] In fact, members of the House and Senate are frequently involved in treaty negotiation to build political support for authorizations and appropriations.[60] Sutherland could have sought guidance from a book published in 1919 that described how Senators do in fact participate in treaty negotiation and that Presidents often invite this "practical construction." How would Sutherland know about that book? He was the author.[61]

A third misconception is Sutherland's insistence that 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."[62] By transferring external or foreign affairs directly to a national government and then linking foreign affairs to the executive, Sutherland supplied a powerful but deceptive argument for independent presidential power. His history is false. External sovereignty did not circumvent the colonies and the states and come directly to an independent President. In 1776 there was no President or separate executive branch. Only one branch of government existed at the national

58. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

59. *Id*. at 319 (emphasis in original).

60. Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989); Louis Fisher, *Treaty Negotiation: A Presidential Monopoly?*, 38 PRESIDENTIAL STUD. Q. 44 (2008).

61. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 122-24 (1919).

62. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316.

level: the Continental Congress. During that period, states were allowed to enter into treaties.[63]

Curtiss-Wright became a popular citation for court decisions and academic commentary that promoted unilateral presidential power in external affairs. Different levels of the executive branch, including the White House, the Justice Department, and the State Department, depend heavily on erroneous dicta in *Curtiss-Wright* to expand presidential power at the cost of traditional checks and balances. In 1941, Attorney General Robert Jackson described the opinion, issued on December 21, 1936, as "a Christmas present to the President."[64] Executive branch attorneys turn to the decision with great frequency. As noted by Harold Koh, Justice Sutherland's "lavish description of the president's powers is so often quoted that it has come to be known as the '"*Curtiss-Wright*, so I'm right" cite'–a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief."[65] In 2015, the Supreme Court in *Zivotofsky* had an opportunity to review and correct some of the erroneous dicta in *Curtiss-Wright*. That development is covered later in this article.

IV. THE U.N. CHARTER AND KOREA

In June 1950, President Truman ordered U.S. troops to Korea without seeking congressional authority. He cited resolutions adopted by the U.N. Security Council for legal footing. The United Nations is not a constitutional substitute for congressional authority. If that were possible, the President and the Senate could operate solely by treaty action and shift power to the U.N., stripping from Congress its constitutional role in deciding questions of war.

During consideration of the U.N. in 1945, President Truman was aware that the Senate was debating which branch controlled the war power. Could the Senate through treaty action create a United Nations and transfer the war power to it? From Potsdam, Truman wired a note to Senator Kenneth McKellar (D-Tenn.) on July 27, 1945, expressing his opposition to that position: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."[66] Senators understood that Congress "consists not alone of the Senate but of the two Houses."[67] It was necessary for Congress to pass legislation to implement the U.N. Charter and determine the precise mechanism for the use of force. With that understanding the Senate approved the U.N. Charter by a vote of eighty-nine to two.[68]

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63. Charles Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L. J. 1 (1973); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467 (1946); Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

64. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 201 (1941).

65. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990).

66. 91 CONG. REC. 8185 (July 28, 1945) (statement of Sen. Donnell).

67. *Id*.

68. *Id*. at 8190.

Specific procedures are included in the U.N. Participation Act of 1945. Initially, in case of threats to the peace and any acts of aggression, the U.N. could consider measures not involving the use of military force. If those measures proved inadequate, Article 43 provides that U.N. members shall make available to the Security Council armed forces and other assistance. Those agreements would identify the numbers and types of forces and their degree of readiness. Each nation would ratify those agreements in accordance with their respective constitutional processes.

The meaning of the U.S. constitutional processes is defined in Section 6 of the U.N. Participation Act. Without any ambiguity, this statute requires that agreements "shall be subject to the approval of the Congress by appropriate Act or joint resolution."[69] The statutory language could not be more clear: The President would have to seek approval from both houses in advance. Two qualifications are included in Section 6:

> The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: *Provided*, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.[70]

The first qualification explains that once the President receives approval from Congress for a special agreement, he does not need subsequent approval from Congress to provide military assistance under Article 42 (under which the Security Council determines that peaceful means are inadequate and military action is necessary). However, congressional approval is needed for the special agreement not subsequent implementation of the agreement. The second qualification states that nothing in the U.N. Participation Act is to be construed as congressional approval of other agreements sought by the President.

The legislative history of the U.N. Participation Act reinforces the need for advance approval from Congress. In testimony before the House Committee on Foreign Affairs, Under Secretary of State Dean Acheson explained that only after the President receives the consent of Congress is he "bound to furnish that contingent of troops to the Security Council; and the President is not authorized to furnish any more than you have approved in that agreement."[71] He agreed it was "entirely within the wisdom of Congress to approve or disapprove whatever special agreement the President negotiates."[72] In reporting the U.N. Participation Act, the

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69. Act of Dec. 20, 1945, ch. 583, sec. 6, 59 Stat. 621 (1945).

70. *Id*.

71. *Participation by the United States in the United Nations Organization, Hearings Before the H. Comm. on Foreign Affs.*, 79th Cong. 23 (1945) (statement of Under Sec'y of State Acheson).

72. *Id*.

Senate Foreign Relations Committee anticipated a shared, coequal relationship between the President and Congress.[73]

With those safeguards supposedly in place to protect constitutional principles and congressional authority, President Truman, on June 26, 1950, announced to the American public that he had conferred with the Secretaries of State and Defense, their senior advisers, and the Joint Chiefs of Staff "about the situation in the Far East created by unprovoked aggression [by North Korea] against the Republic of Korea."[74] At that point he made no commitment of U.S. armed forces. On the following day, however, after announcing that North Korea had failed to cease hostilities and withdraw to the 38th parallel, he ordered U.S. air and sea forces "to give the [South] Korean Government troops cover and support."[75] With the Soviet Union absent, the U.N. Security Council voted nine to zero to call upon North Korea to cease hostilities and withdraw their forces. Secretary of State Acheson admitted that "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."[76] After he left the presidency, Truman was asked whether he had been prepared to use military force in Korea without U.N. backing. He replied: "No question about it."[77] Truman did not seek the approval of Congress for his military actions in Korea.

At a news conference on June 29, Truman was asked whether the country was at war. He replied: "We are not at war."[78] Asked whether it would be more correct to call the conflict "a police action under the United Nations," he agreed: "That is exactly when it amounts to."[79] In fact, the United Nations exercised no real authority over the conduct of the war. Truman designated General Douglas MacArthur to serve as commander of U.S. forces in Korea. Measured by troops, money, casualties, and deaths, it remained an American war.

Federal and state courts had no difficulty in regarding hostilities in Korea as war. A federal district court noted in 1953: "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war."[80] During Senate hearings in June 1951, Secretary of State Acheson conceded the obvious when he said "in the usual sense of the word there is a war."[81] Even if it could be argued that the emergency facing Truman in June 1950 required him to act promptly without first seeking and obtaining legislative authority, nothing prevented him from asking Congress for a

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73. S. REP. NO. 79-717, at 5 (1945).

74. Statement by the President on the Violation of the 38th Parallel in Korea, 1 PUB. PAPERS 491 (June 26, 1950).

75. Statement by the President on the Situation in Korea, 1 PUB. PAPERS 492 (June 27, 1950).

76. DEAN ACHESON, PRESENT AT THE CREATION 408 (1969).

77. MERLE MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 276 (1973).

78. The President's News Conference of June 29, 1950, 1 PUB. PAPERS 504 (June 29, 1950).

79. *Id*. On July 13, at a news conference, he again called the Korean War a "police action." The President's News Conference of July 13, 1950, 1 PUB. PAPERS 522 (July 13, 1950).

80. Weissman v. Metro. Life Ins. Co., 112 F. Supp. 420, 425 (S.D. Cal. 1953).

81. *Military Situation in the Far East* (Part 3): *q*, 82d Cong. 2014 (1951) (statement of Sec'y of State Acheson).

statute providing retroactive authority, as President Lincoln did on July 4, 1861. Truman sought no authority from Congress.

Congress's reaction to Truman's usurpation of the war power was largely passive. Some lawmakers offered the weak argument that "history will show that on more than 100 occasions in the life of this Republic the President as Commander in Chief has ordered the fleet or the troops to do certain things which involved the risk of war" without seeking congressional consent.[82] Nothing in that list of precedents for unilateral presidential military actions compares to the magnitude of the Korean War. As Edward S. Corwin noted, the list consists largely of "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like."[83]

About a year into the war, a number of Senators participated in a lengthy debate that thoroughly shredded the administration's legal and constitutional positions. Truman's commitment of troops to Korea violated the U.N. Charter, the U.N. Participation Act, and assurances provided to Congress by Acheson and other executive officials. Truman used military force before the second Security Council resolution. It was a war, not a police action, and it was an American, not a U.N., operation.[84]

V. DWIGHT D. EISENHOWER TO JIMMY CARTER

From Truman forward, Presidents continue to initiate military actions without seeking statutory support or a declaration of war. Given the damage to Truman and the Democratic Party by the Korean War, Dwight D. Eisenhower thought that national commitments would be stronger if entered into jointly by both branches: "I deem it necessary to seek the cooperation of Congress. Only with that cooperation can we give the reassurance needed to deter aggression."[85] In 1954, he was under pressure to intervene in Indochina to assist French troops but refused to act unilaterally. Without obtaining the support of Congress, it "would be completely unconstitutional & indefensible" to provide any assistance to the French.[86]

Eisenhower took an entirely different position on covert operations. He did not seek congressional support or authority in using military force in Iran, Guatemala, and Cuba. Planning for the Bay of Pigs invasion, eventually carried out by President Kennedy, was initiated by the Eisenhower administration. A special study group created by Eisenhower in 1954 provided guidance on covert operations carried out by the CIA. It promoted "an aggressive covert

82. 96 CONG. REC. 9229 (June 27, 1950) (statement of Sen. Lucas).

83. Edward S. Corwin, *The President's Power*, NEW REPUBLIC, Jan. 29, 1951, at 16.

84. 97 CONG. REC. 5078-5103 (May 9, 1951).

85. *Special Message to the Congress on the Situation in the Middle East,* 1 PUB. PAPERS 11 (1957).

86. 13 FOREIGN RELATIONS OF THE UNITED STATES 1952-1954, at 1242 (John P. Glennon & Neal H. Petersen eds., vol. 1, 1982).

psychological, political and paramilitary organization" that would be effective and "more ruthless than that employed by the enemy."[87]

On April 7, 1961, the *New York Times* ran an article entitled "Anti-Castro Units Trained at Florida Bases," describing an effort by the Kennedy administration to train 5,000 to 6,000 Cuban exiles at camps located in Florida, Louisiana, and Guatemala. The purpose: overthrow Premier Fidel Castro. A subhead in the lengthy story read: "Invasion Reported Near."[88] The administration had been using the CIA to train Cuban exiles, supply them with equipment and arms, and direct the planned invasion.

This action by the Kennedy administration led to a quick and humiliating defeat.[89] In response, Cuba sought and obtained from Russia a number of missile sites to provide nuclear strike capability. President Kennedy imposed a quarantine on all offensive military equipment being shipped to Cuba. He announced it would be his policy to regard a nuclear missile launched from Cuba against any nation in the Western Hemisphere "as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union."[90] The Soviet Union eventually removed the missiles but the prospect of nuclear war led one analyst to estimate that never before "had there been such a high probability that so many lives would end suddenly," risking the deaths of 100 million Americans, more than 100 million Russians, and millions of Europeans.[91]

After the French surrendered at Dien Bien Phu in 1954, Vietnam was divided between the northern and southern parts. On August 3, 1964, President Johnson ordered the Navy to take retaliatory actions against the North Vietnamese for their attacks in the Gulf of Tonkin.[92] In a special message two days later, he asked Congress to pass a joint resolution of support, explaining that he sought "no wider war."[93] Congress spent little time debating the resolution. As floor manager, Senator J. William Fulbright (D-Ark.) stated his belief that the resolution "is calculated to prevent the spread of war, rather than to spread it."[94] The resolution received broad support—88 to 2 in the Senate and 416 to 0 in the House—and became law.[95]

Subsequent investigations cast a heavy shadow over explanations offered by President Johnson and administration officials. Secretary of Defense Robert McNamara testified on August 6, 1964, that the American ship *Maddox* was

87. SPECIAL STUDY GROUP ON COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY, at 6-7 (1954), declassified in part in 1976.

88. Tad Szulc, *Anti-Castro Units Trained to Fight at Florida Bases*, N.Y. TIMES, Apr. 7, 1961, at 2.

89. *See* IRVING I. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 14-47 (2d ed. 1982) (providing an analysis of the Bay of Pigs).

90. *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba*, 1 PUB. PAPERS 808, (1962).

91. ELIE ABEL, THE MISSILES OF OCTOBER: THE STORY OF THE CUBAN MISSILE CRISIS 84 (1969).

92. *Statement by the President upon Instruction the Navy to Take Retaliatory Action in the Gulf of Tonkin*, 2 PUB. PAPERS 926 (1964).

93. *Special Message to Congress on U.S. Policy in Southeast Asia*, 2 PUB. PAPERS 931 (1964).

94. 110 CONG. REC. 18462 (1964).

95. Act of Aug. 10, 1964. Pub. L. No. 88-408, 78 Stat. 384.

engaged in a "routine patrol in International waters."[96] In fact, those patrols had helped provide support for South Vietnamese attacks on North Vietnam. A first attack by North Vietnam was too minor to justify asking Congress for a resolution authorizing military action. But questions arose about allegations of a second attack. Initially, McNamara was convinced that the second attack occurred but later, in 1995, said "without a doubt, there was no second attack."[97]

It was on the basis of the supposed second attack that Congress passed the Gulf of Tonkin Resolution in 1964. A "whereas" clause in the resolution stated that North Vietnamese naval units had "deliberately and repeatedly" attacked U.S. naval vessels.[98] In 2005, a study by the National Security Agency released a study of August 1964 that confirmed what had long been suspected: there was no second attack.[99] This would be one of many times that the United States would go to war on the basis of false information provided by the executive branch. President Johnson, aware of the risks of heightened military involvement in Vietnam, was concerned that Republicans would interpret any signs of hesitation on his part as a sign of weakness and being "soft on communism," jeopardizing his reelection chances in 1964.

That concern surfaced during House debate on August 7, 1964, when Rep. Dante Fascell (D-Fla.) spoke about "our confidence in President Johnson's leadership in time of grave crisis." Johnson's prompt military response, he explained,

> should put to rest any erroneous idea that the Communists or others may have that the United States has a 'no win' policy; or that the United States is a 'paper tiger.' President Johnson's action also corrects any Communist idea that this administration or this country 'is soft on communism.'[100]

Despite their concerns and reservations about a major military commitment in Vietnam, both Johnson and Fulbright would do precisely that.

A few weeks before the election, President Johnson told an audience in Ohio that "we are not about to send American boys 9 or 10,000 miles away from home to do what Asian boys ought to be doing for themselves."[101] In that speech he estimated there were about 18,000 American soldiers in Vietnam.[102] After his election, he escalated the war with bombing runs, increased U.S. combat forces from 75,000 to 125,000, and eventually put 500,000 forces in Vietnam.[103] Heavy

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96. *Southeast Asia Resolution, Joint Hearing Before the Sub. Comm. on Foreign Rels. and Armed Servs.*, 88th Cong. 7 (1964) (statement of Sec'y of Def. McNamara).

97. Keith B. Richburg, *Mission to Hanoi*, WASH. POST, Nov. 11, 1995, at A21, A25.

98. Act of Aug. 10, 1964. Pub. L. No. 88-408, 78 Stat. 384.

99. Robert J. Hanyok, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2-4 August 1964,* CRYPTOLOGIC Q. (Feb. 1998) (declassified by the National Security Agency on November 3, 2005).

100. 110 CONG. REC. 18549 (1964).

101. *Remarks in Memorial Hall*, Akron University, 2 PUB. PAPERS 1387, 1391 (Oct. 21, 1964).

102. *Id.*

103. LOUIS FISHER, PRESIDENTIAL WAR POWER 134 (University Press of Kansas, 3d ed. 2013).

casualties spawned a powerful antiwar movement at home, prompting Johnson in 1968 to announce he would not run for reelection.[104]

Richard Nixon, elected in 1968 with a pledge to end the war in Vietnam, actually widened it to include Cambodia and Laos.[105] Congress repealed the Tonkin Gulf Resolution in 1971.[106] Nixon's "incursion" into Cambodia in 1970 triggered nationwide protests and led Congress to enact restrictive amendments in 1971 to forbid the introduction of U.S. ground troops or advisers into Cambodia.[107] Also in 1971, Congress passed legislation making it the policy of the United States to terminate "at the earliest practicable date" all military operations in Southeast Asia and to provide for the "prompt and orderly withdrawal of all United States military forces at a date certain," subject to the release of American prisoners of war.[108] The statute required Nixon to establish a final date for withdrawing all U.S. military forces.[109]

In his signing statement, Nixon said that Section 601 of the statute, providing for the withdrawal of U.S. troops, "does not represent the policies of this Administration" and will be "without binding force or effect."[110] Somehow a signing statement allowed the President to nullify a statute. A federal district judge chided Nixon for his language, advising him that when he signed the bill "it established 'the policy' of the United States' to the exclusion of any different executive or administration policy."[111] The judge described Nixon's signing statement as "very unfortunate."[112] Other court opinions during this period analyzed the binding nature of authorization and appropriation bills.[113]

After many years of debate, Congress passed legislation in an effort to limit presidential war power. Although the War Powers Resolution of 1973 calls for "collective judgment" by the two branches before U.S. troops are sent into combat, the statute allows the President to make war unilaterally for sixty days followed by a thirty day extension.[114] According to Section 2(a), the measure is intended "to fulfill the intent of the framers" but there is nothing in the history of the framers to suggest they would have allowed the President to go to war for ninety days without congressional support. President Nixon vetoed the bill because he thought it encroached on presidential responsibilities as Commander in Chief.[115] Both houses overrode his veto, the House narrowly (284-135) and the Senate by a more comfortable margin (75 to 18).[116]

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104. *Id.*
105. *Id.*
106. Foreign Military Sales Act, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).
107. Special Foreign Assistance Act, Pub. L. No. 91-652, § 7(a), 84 Stat. at 1943 (1971).
108. Pub. L. No. 92-156, § 601, 85 Stat. 430 (1971).
109. *Id.*
110. Public Papers of the Presidents, 1971, at 1114.
111. DaCosta v. Nixon, 555 F.R.D. 145, 146 (E.D.N.Y. 1972).
112. *Id.*
113. FISHER, *supra* note 103, at 140-44.
114. War Powers Resolution, Pub. L. No. 93-148, § 5(a), 87 Stat. 555, 556 (1973).
115. Veto of the War Powers Resolution, 1 PUB. PAPERS 893 (Oct. 24, 1973).
116. FISHER, *supra* note 103, at 146.

Senator Thomas Eagleton (D-Mo.), a principal sponsor of the resolution, denounced the bill that emerged from conference as a "total, complete distortion of the war powers concept."[117] To him, the bill was a sell-out, a surrender. With memories so fresh about presidential war power in Southeast Asia he asked "how can we give unbridled, unlimited total authority to the President to commit us to war?"[118] Section 2(a) of the War Powers Resolution states that its purpose is "to fulfill the intent of the framers of the Constitution of the United States and insure . . . the collective judgment" of both branches when U.S. forces are introduced into hostilities.[119] It does neither.

In May 1975 the U.S. merchant ship *Mayaguez*, traveling from Hong Kong to Sattahip, Thailand, was seized by the Cambodians.[120] Two days later the United States recovered the vessel and its crew after President Gerald Ford ordered air strikes against Cambodia and introduced U.S. Marine ground forces.[121] He reported to Congress in accordance with the War Powers Resolution, triggering the 60-day clock, but only after the operation was over.[122] He stated that the "operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces."[123] However, after leaving the White House Ford said it was the framers' intent that a President "could not initiate a war without the approval of both houses of Congress."[124]

In November 1979, militants in Iran seized the U.S. embassy in Tehran and took more than 50 American citizens as hostage.[125] For the next 444 days they were held captive throughout the remainder of the Carter administration. Unable to use diplomatic efforts to free the hostages, President Jimmy Carter ordered a military raid of eight American helicopters to Iran, landing in a remote area called Desert One.[126] Two of the helicopters malfunctioned. When a third developed a serious hydraulic problem, Carter canceled the operation.[127] He reported to Congress consistent with the War Powers Resolution.[128]

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117. 119 CONG. REC. 36177 (1973).

118. *Id.* at 36178.

119. War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555, 555 (1973).

120. FISHER, *supra* note 103, at 156.

121. *Id.*

122. *Id.*

123. Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Actions in the Recovery of the SS Mayaguez, 1 PUB. PAPERS 670 (May 15, 1975).

124. ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY vii (Potomac Books Inc., 1991).

125. FISHER, *supra* note 103, at 158.

126. *Id*.

127. *Id*. at 159.

128. Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation, 1 PUB. PAPERS 779 (Apr. 26, 1980).

VI. RONALD REAGAN TO JOE BIDEN

Military initiatives by President Reagan in 1982 disclosed severe weaknesses in the War Powers Resolution. He intervened in Lebanon to force the withdrawal of the Palestine Liberation Organization (PLO) and restore the sovereignty of the Lebanese government.[129] He described the deployment of U.S. troops as "carefully limited, noncombatant," expecting to remain in Lebanon no longer than thirty days.[130] He based his actions solely on what he called his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief."[131] A supposedly humanitarian and noncombatant mission, expected to last for thirty days, deteriorated into a violent war of almost two years.[132] Without seeking congressional support, Reagan also engaged in military operations in Grenada, Libya, and the Persian Gulf.[133]

In December 1989, with Congress out of session, President George H. W. Bush ordered 11,000 troops into Panama to join with 13,000 American troops already in the Canal Zone.[134] His report to Congress cited the right of self-defense under Article 51 of the U.N. Charter, fulfilling U.S. responsibilities under the Panama Canal treaties, and his authority with respect to foreign relations and as Commander in Chief.[135] After Saddam Hussein invaded Kuwait on August 2, 1990, President Bush sent several hundred thousand troops to Saudi Arabia and the Middle East, initially for defensive purposes.[136] Instead of receiving authority from Congress he sought support from the U.N. Security Council.[137] It passed Resolution 678 to authorize member states to use "all necessary means" to force Iraqi troops out of Kuwait.[138] When asked whether he needed statutory support from Congress for military action in Kuwait, Bush replied: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions."[139] After Congress passed a bill to authorize offensive action against Iraq, Bush in his signing statement said he could have acted without congressional authority.[140]

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129. FISHER, *supra* note 103, at 159.

130. Remarks to Reporters Announcing the Deployment of United States Forces in Beirut, Lebanon, 2 PUB. PAPERS 1063 (Aug. 20, 1982).

131. Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Beirut, Lebanon, 2 PUB. PAPERS 1079 (Aug. 24, 1982).

132. FISHER, *supra* note 103, at 160-61.

133. *Id*. at 161-65.

134. *Id*. at 165.

135. Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, 2 PUB. PAPERS 1734 (Dec. 21, 1989).

136. FISHER, *supra* note 103, at 165.

137. *Id.* at 169.

138. *Id*. at 169-70.

139. The President's News Conference on the Persian Gulf Crisis, 1 PUB. PAPERS 20 (Jan. 9, 1991).

140. Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 PUB. PAPERS 40 (Jan. 14, 1991).

President Bill Clinton used military force in Iraq, Somalia, Haiti, Bosnia, Afghanistan, Sudan, and Kosovo without once receiving statutory authority for his initiatives.[141] When Congress did pass legislative language, it consisted of legally nonbinding "sense of Congress" resolutions.[142] For his authority, Clinton relied on U.N. Security Council resolutions, the support of NATO allies, and a constitutional interpretation that granted him broad authority over foreign affairs and as Commander in Chief.[143]

On June 26, 1993, Clinton ordered air strikes against Iraq.[144] In justifying his action during an address to the nation, he spoke of an attempted assassination of former President George H. W. Bush during a visit to Kuwait.[145] The CIA referred to "compelling evidence" of a plot to assassinate Bush, relying on a powerful bomb made in Iraq and "directed and pursued by the Iraqi intelligence service."[146] Clinton regarded the attempted assassination as "an attack against our country and against all Americans."[147] In a message to Congress he defended his use of military force as "the exercise of our inherent right of self-defense as recognized in Article 51 of the United Nations Charter and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief."[148] He found no need for statutory support.

In September 1996, Clinton ordered the launching of more cruise missiles against Iraq in response to an attack by Iraqi forces against the Kurdish-controlled city of Irbil in northern Iraq.[149] He defended his action as sending "the following message to Saddam Hussein: When you abuse your own people or threaten your neighbors, you must pay a price."[150] Do Presidents have unilateral authority to unleash military attacks against foreign leaders who abuse their own people? The list of eligible countries would be quite lengthy.

During a visit to Tennessee State University on February 19, 1998, Secretary of State Madeleine Albright was asked how Clinton could order military action against Iraq after opposing American policy in Vietnam.[151] Her response: "We are talking about using military force, but we are not talking about a war. That is an important distinction."[152] By relying on that argument, the framers' effort to keep the war power with Congress could be obliterated simply by referring to

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141. FISHER, *supra* note 103, at 174-200.

142. *Id.* at 180.

143. *Id.* at 175, 177, 182-83.

144. *Id.* at 174.

145. *Id.* at 174-75.

146. *Id.*

147. Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 1 PUB. PAPERS 938 (June 26, 1993).

148. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 PUB. PAPERS 940 (June 28, 1993).

149. FISHER, *supra* note 103, at 191.

150. Remarks Announcing a Missile Strike on Iraq and an Exchange with Reporters, 2 PUB. PAPERS 1469 (Sept. 3, 1996).

151. FISHER, *supra* note 103, at 193.

152. Barton Gellman, *Students Receive Albright Politely*, WASH. POST A19 (Feb. 20, 1998), https://www.washingtonpost.com/wp-srv/politics/govt/admin/stories/albright022098.htm.

presidential action as military force rather than war. The Constitution would be undermined by mere semantics.

President Clinton inherited serious problems with civil war and famine in Somalia, a matter initially dealt with by President George H. W. Bush in 1992.[153] A quarter million people died in the famine and another million or more were at risk of starving to death.[154] When Clinton became President in January 1993, humanitarian matters in Somalia grew more severe. On December 3, 1992, the U.N. Security Council adopted Resolution 794 to authorize the use of peacekeeping troops in order to address the deteriorating crisis.[155] Given conditions in that region, U.S. troops were at risk of becoming engaged in hostilities. With Clinton as President, Congress debated the need to pass authorizing legislation.[156] On February 4, 1993, Senate Majority Leader George Mitchell (D-Maine) supported a Senate joint resolution to authorize the deployment of U.S. troops to Somalia, pointing out that "U.N. Security Council resolutions are no substitute for congressional authorization."[157] Although the joint resolution passed the Senate the two Houses could not agree on compromise language.[158]

Rep. Lee Hamilton (D-Ind.), chairman of the House Foreign Affairs Committee, objected to U.S. military efforts in Somalia: "I do not believe that the United States should be engaged in nation building in Somalia. That is the task of the United Nations."[159] Clinton reached a compromise arrangement with Congress. Legislation provided that no funds for U.S. military operations could be used for expenses after March 31, 1994, although that date could be extended if requested by Clinton and approved by Congress.[160] To assure that American forces would not be under U.N. control, the legislation provided that U.S. combat forces in Somalia "shall be under the command and control of United States commanders under the ultimate direction of the President of the United States."[161]

Another Clinton use of military force involved Haiti. On September 30, 1991, Jean-Bertrand Aristide – the first democratically elected President of Haiti – was ousted in a military coup.[162] On October 12, 1993, Clinton sent about 600 U.S. soldiers to Haiti to assist in restoring Aristide's government.[163] The troops were largely military engineers to work on roads, bridges, and water supplies.[164] Congress considered a number of legislative measures to limit Clinton's power to

153. FISHER, *supra* note 103, at 176-77.
154. *Id.* at 176.
155. *Id.*
156. *Id.* at 177.
157. 139 CONG. REC. 2272 (1993).
158. FISHER, *supra* note 103, at 177.
159. 139 CONG. REC. 22748 (1993).
160. FISHER, *supra* note 103, at 178.
161. Department of Defense Appropriations Act, Pub. L. No. 103-39, § 8151, 107 Stat. 1418, 1475-77 (1993).
162. FISHER, *supra* note 103, at 178.
163. *Id.* at 179.
164. *Id.*

send troops to Haiti.[165] At a news conference on August 3, 1994, Clinton denied the need for congressional authority: "Like my predecessors of both parties, I have not agreed that I was constitutionally mandated" to obtain the support of Congress.[166] Both houses of Congress turned against Clinton, passing legislation stating the "the President should have sought and welcomed Congressional approval before deploying United States Armed Forces to Haiti."[167]

In concert with the U.N. and NATO, Clinton participated in a 1993 humanitarian airlift in Bosnia.[168] At one point he said that for air strikes "Congress would have to agree."[169] Congress debated various restrictions on his military initiatives in Bosnia, but those legislative efforts were not enacted.[170] Agreement was reached on sense-of-Congress language regarding the placement of U.S. troops under foreign commanders.[171]

In 1994 Clinton moved toward authorizing air strikes in Bosnia, relying on U.N. authority and the support of NATO allies.[172] Under that procedure he had to receive the approval of England, Italy, and other NATO countries but not from Congress.[173] In late February 1994, U.S. jets shot down four Serbian bombers over Bosnia.[174] On September 12, 1995, Clinton said the bombing had been "authorized by the United Nations."[175] According to OLC, those actions did not constitute "war."[176] After a peace agreement was reached, Clinton told the nation that "America's role will not be about fighting a war."[177] He then contradicted himself by saying: "Now the war is over."[178]

Unlike previous presidents who sought authority not from Congress for military operations but from the U.N. Security Council and NATO allies, President George W. Bush decided to seek statutory authority for his war against Iraq. The Iraq Resolution of October 2002 granted him authority to use "the Armed Forces

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165. *Id.* at 180-81.

166. The President's News Conference, 2 PUB. PAPERS 1419 (Aug. 3, 1994).

167. Joint Resolution Regarding United States Policy Toward Haiti, Pub. L. No. 103-423, § 1(b), 108 Stat. 4358 (1994).

168. Letter to Congressional Leaders Reporting on the No-Fly Zone Over Bosnia, 1 PUB. PAPERS 429-30 (Apr. 13, 1993).

169. Remarks and an Exchange with Reporters Prior to Discussions with President Alija Izetbegovic of Bosnia, 2 PUB. PAPERS 1455 (Sept. 8, 1993).

170. 139 CONG. REC. 22304-05 (1993).

171. Department of Defense Appropriations Act, Pub. L. No. 013-139, § 9001, 107 Stat. 1418, 1478-80 (1993). *See also*, National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1511, 107 Stat. 1547, 1839-40 (1993).

172. Remarks and an Exchange with Reporters on Bosnia, 1 PUB. PAPERS 186 (Feb. 6, 1994).

173. FISHER, *supra* note 103, at 183-84.

174. Letter to Congressional Leaders Reporting on NATO Action in Bosnia, 1 PUB. PAPERS 354-55 (Mar. 1, 1994).

175. Remarks on the Legislative Agenda and an Exchange with Reporters, 2 PUB. PAPERS 1353 (Sept. 12, 1995).

176. Walter Dellinger, Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. Off. Legal Counsel 327, 329 (1995).

177. Address to the Nation on Implementation of the Peace Agreement in Bosnia-Herzegovina, 2 PUB. PAPERS 1784 (Nov. 27, 1995).

178. *Id*. at 1785.

of the United States as he determines necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."[179] To that extent, Congress shifted the war power not only to Bush but to the Security Council.

Article II, Section 2 of the Constitution designates the president as "Commander in Chief" of the Army, the Navy, and of "the Militia of the several States" when called into actual service. Implied in that language is a trust that presidents will have the competence and integrity to command troops. In the case of the war against Iraq in 2003, the executive branch never presented sufficient and persuasive information to justify military action. Claims by administration officials about the existence of Iraqi WMDs were regularly discredited by press disclosures.[180] The Bush administration justified war against Iraq on the basis of six claims that it possessed WMDs. All six claims turned out to lack any substance.[181]

In part the executive branch relied on claims from an Iraqi emigre who sought asylum in Germany, with the U.S. intelligence community regularly citing him as an authority on chemical and biological weapons, but later his statements were found to be entirely false. The name given to this valued source was "Curveball," a word that ironically captures the consistently unreliable claims he presented. For example, he said that trailers were a source for biological weapons when they were in fact producing hydrogen and helium.[182] The helium was used for weather balloons.[183]

In his address to the U.N. Security Council on February 5, 2003, Secretary of State Colin Powell stated that Iraq possessed WMDs. He spoke with full confidence: "My colleagues, every statement I make today is backed up by sources, solid sources. These are not assertions. What we're giving you are facts and conclusions based on solid intelligence."[184] However, in his subsequent memoir he regarded the errors and misinformation in his speech as "a blot, a failure, [that] will always be attached to me."[185] He asked: "Did analysts decide to tell us what they thought we wanted to hear?"[186] While working on the speech with the assistance of CIA analysts, he now wondered why someone did not stand up and say: "We really don't know that! We can't trust that! You can't say that!"[187] Those professional safeguards were not followed by executive officials

179. H.R.J. Res. 114, 107th Cong. (2002).

180. FISHER, *supra* note 103, at 219-21.

181. *See* LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS 263-72 (University Press of Kansas, 2017).

182. *Id*. at 368-72.

183. *Id*. at 369.

184. President George W. Bush, U.S. Secretary of State Colin Powell, Address at the U.N. Security Council (Feb. 5, 2003) (transcript available at house.archives.gov/news/releases/2003/02/20030205-1.html).

185. COLIN POWELL, IT WORKED FOR ME: IN LIFE AND LEADERSHIP 223 (Reprint ed., Harper Perennial 2014).

186. *Id*. at 222.

187. *Id*. at 117.

when preparing for war against Iraq. As noted by Stephen Knott, the assertion that Iraq possessed weapons of mass destruction represented "one of the most egregious intelligence failures in American history."[188]

During his presidential campaign in 2007, Barack Obama was asked by reporter Charlie Savage under what circumstances a president could assert the constitutional power to bomb Iran without first receiving authority from Congress.[189] At issue was the bombing of suspected nuclear sites in Iran that did not involve an "imminent" threat.[190] Obama replied: "The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."[191] He acknowledged that the president as commander in chief "does have a duty to protect and defend the United States" in cases of actual or imminent threats.[192] Yet he added that history has demonstrated that "military action is most successful when it is authorized and supported by the Legislative branch. It is always preferable to have the informed consent of Congress prior to any military action."[193]

However, in 2011 Obama ordered unilateral military operations against Libya, a country that had not attacked or threatened the United States. In so doing, he abandoned the constitutional principles he had articulated as a presidential candidate, preferring to follow the unconstitutional precedents established by Truman, Clinton, and other presidents. The use of military force against Libya in 2011 left the country broken politically and economically over the years, still struggling today to recover from the use of U.S. force against it.[194]

At a news conference in Santiago, Chile, on March 21, 2011, Obama announced that he would use military force against Libya, predicting that the transition from President Muammar Qaddafi to a successor leader would "take place in a matter of days and not a matter of weeks."[195] The Obama administration decided it would be necessary to use military force in Libya after Qaddafi threatened to kill large numbers of his citizens. Instead of requesting statutory authority from Congress, Obama chose to seek support from the U.N. Security Council and NATO allies. He explained that he took the actions "pursuant to my

188. STEPHEN F. KNOTT, RUSH TO JUDGMENT: GEORGE W. BUSH, THE WAR ON TERROR, AND HIS CRITICS 65 (University Press of Kansas, 2012). For other evaluations, see MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR (Reprint ed., Crown, 2006); THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2003 TO 2005 (Illustrated ed., Penguin Books, 2007).

189. Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE (Dec. 20, 2007), http://boston.com/news/politics/2008/specials/CandidateQA/ObamaQA.

190. *Id*.

191. *Id*.

192. *Id*.

193. *Id*.

194. LOUIS FISHER, PRESIDENT OBAMA: CONSTITUTIONAL ASPIRATIONS AND EXECUTIVE ACTIONS 214-19 (University Press of Kansas, 2018).

195. The President's News Conference with President Sebastian Pinera Echenique of Chile, in Santiago, Chile, 1 PUB. PAPERS 271 (Mar. 21, 2011).

constitutional authority to conduct U.S. foreign relations and as commander in chief and chief executive."[196]

In a report to Congress on March 21, Obama stated that U.S. forces operating under a U.N. resolution had begun a series of strikes against Libyan air defense systems and military airfields for the purpose of preparing what was called a "no-fly zone."[197] He said the strikes "will be limited in their nature, duration, and scope."[198] He would take the actions pursuant to what he considered to be his independent constitutional authority.[199] Members of Congress offered conflicting positions on that issue.[200] In the House, Representative Ron Paul (R-Tex.) issued this warning about going into Libya: "We have to remember, a no-fly zone is an act of war. . . . There's no constitutional authority for a president to willy-nilly go and start placing no-fly zones over countries around the world."[201] The president could not act militarily against Libya "without approval from the Congress."[202] Seeking approval from the U.N. and NATO "is just really a cop-out. What army and air force and technology does the U.N. have, and what does NATO have?"[203]

Regardless of how executive officials sought to downplay or minimize a no-fly zone, the use of military force against another country that has not threatened the United States amounts to, as pointed out by former Secretary of Defense Robert Gates, an "act of war."[204] To maintain a no-fly zone in Libya, it was necessary for the United States and its allies to use military force against all ground targets, including tanks and antiaircraft guns that could threatened U.S. and allied planes. As Obama said on March 28, the United States "hit Qadhafi's air defenses, which paved the way for a no-fly zone. We targeted tanks and military assets that had been choking off towns and cities, and we cut off much of their source of supply."[205]

Obama turned to the Office of Legal Counsel (OLC) in the Justice Department for constitutional support.[206] In a memo released on April 1, OLC concluded that the military actions against Libya did not constitute "war" because of the limited "nature, scope, and duration" of the planned military operations.[207] After military operations exceeded the sixty-day window of the War Powers Resolution, the administration asked OLC to prepare a second memo stating that "hostilities" did not exist in Libya. OLC declined to prepare that memo. It would

196. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, 1 PUB. PAPERS 281 (Mar. 21, 2011).

197. *Id.*

198. *Id.*

199. *Id.*

200. 157 CONG. REC. 3740 (2011).

201. *Id.*

202. *Id.*

203. *Id.*

204. ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY AT WAR 513 (Reprint ed., Vintage, 2015).

205. Address to the Nation on the Situation in Libya, 1 PUB. PAPERS: BARACK OBAMA 30 (Mar. 28, 2011).

206. Authority to Use Military Force in Libya, 15 OP. O.L.C. (2011).

207. *Id.*

have been difficult to do. Its initial memo repeatedly mentioned the use of military "force" and the "destruction of Libyan military assets."

On June 28, 2011, during hearings before the Senate Committee on Foreign Relations, I testified on "Libya and War Powers."[208] With regard to Obama's claim that he received "authorization" from the U.N. Security Council to conduct military operations in Libya, I said it was legally and constitutionally impermissible to transfer the Article I powers of Congress to an international (U.N.) or regional (NATO) body.[209] The president and the Senate through the treaty process may not surrender power vested in the two houses of Congress.[210] Treaties may not amend the Constitution.[211]

During the administrations of Donald Trump and Joe Biden, both presidents took a number of military actions they regarded as defensive in nature without the need to seek congressional authority. In addition, Trump provided substantial military assistance to Saudi Arabia for its military involvement against the Houthi rebels in Yemen. Congress sought to curb this action by blocking billions of dollars of arms sales to the Persian Gulf region. However, Trump vetoed the measure and the Senate lacked the votes needed to override the veto.[212]

On July 20, 2021, Senators Chris Murphy (D-Conn.), Mike Lee (R-Utah), and Bernie Sanders (I-Vt.) introduced legislation designed to restore the constitutional power of Congress over war. Section 104 repeals the War Powers Resolution and Section 108 provides that no appropriated funds may be obligated or expended for any action lacking prior congressional authority under the statute.[213] Further details on that legislation are provided in an article published in the *Washington Post*.[214]

VII. EFFORTS TO CORRECT JUDICIAL ERRORS

As explained in Section III of this article, the sole-organ doctrine in the 1936 *Curtiss-Wright* decision was not only judicial dicta but judicial error, a point underscored by scholars from one decade to the next. Although the case involved legislative authority (the degree to which Congress could delegate its authority to the president), the Court completely misread John Marshall's sole-organ speech to conclude that the president possesses "exclusive and plenary" power over external affairs. As pointed out in Section III, Marshall defended the action by President

208. *Libya and War Powers: S. HRG. 112–89 Before the Subcomm. on Foreign Relations*, 112 Cong. 1 (2011) (statement by Louis Fisher).

209. *Id*. at 44.

210. *Id*.

211. *Id*.

212. Catie Edmondson, *Senate Fails to Override Trump's Veto on Saudi Arms Sales*, N.Y. TIMES (July 29, 2019), https://www.nytimes.com/2019/07/29/us/politics/trump-veto-saudi-arms-sales.html.

213. National Security Powers Act, S.2391, 117th Cong. (2021).

214. *See generally* Karoun Demirjian, *Bipartisan Bill Aims to Reassert Congress's Power Over Arms Sales, Emergencies and Military Operations*, WASH. POST (July 20, 2021), https://www.washingtonpost.com/national-security/senate-war-powers-bill/2021/07/19/7515af7c-e8e1-11eb-8950-d73b3e93ff7f_story.html.

John Adams on the ground that he was carrying out a treaty provision. This was a clear judicial error that remained uncorrected in the courts from one decade to the next.

The sole-organ doctrine resurfaced in a case that reached the Supreme Court in *Zivotofsky v. Kerry* (2015). 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.[215] Yet the Court acknowledged that neither "the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power."[216] Then how did the D.C. Circuit decide that an implied presidential power to recognize foreign governments was superior to an implied power of Congress to formulate passport policy?

As one examines the decision, on five occasions the D.C. Circuit relied on the erroneous sole-organ doctrine. It claimed that the 1936 decision 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.'"[217] Turning again to *Curtiss-Wright*, 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.'"[218]

Citing 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."[219] No doubt the Supreme Court has relied often on the sole-organ doctrine from *Curtiss-Wright*, but no matter how often it repeats an error it remains an error and should not be used to decide the scope of presidential authority. Even with repetition, errors do not somehow emerge as truth.[220] On a regular basis, scholars who studied *Curtiss-Wright* repudiated Justice Sutherland for his careless and false mischaracterization of Marshall's sole-organ speech.[221]

In response to the decision by the D.C. Circuit, I filed an amicus brief with the Supreme Court on July 17, 2014, pointing out the multiple errors by Justice Sutherland and asking the Court to correct them because they pushed presidential power beyond constitutional boundaries and weakened the system of checks and balances.[222] When the Court is in session, the *National Law Journal* each week

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215. Zivotofsky v. Kerry, 725 F.3d 197, 220 (D.C. Cir. 2013).

216. *Id*. at 206.

217. *Id*. at 211 (citing Clinton v. City of New York, 524 U.S. 417, 445 (1998)).

218. *Id*.

219. *Id*. at 212 (citing Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010)).

220. *See* Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 152-59 (2016) (discussing judicial and scholarly warnings about dicta).

221. *Id*. at 186-99.

222. Brief Amicus Curiae of Louis Fisher in Support of Petitioner, Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (No. 13-628), 2014 WL 3611516.

selects a brief that merits attention. On November 3, 2014, it selected mine, offering this heading: "Can the Supreme Court Correct Erroneous Dicta?"[223]

In *Zivotofsky v. Kerry* (2015), the Supreme Court appeared to jettison the sole-organ doctrine but decided to retain other erroneous dicta from *Curtiss-Wright* and present the case for independent presidential power in external affairs.[224] Writing for the Court, Justice Anthony Kennedy reviewed the position of Secretary of State John Kerry, who urged the Court to define executive power over foreign affairs in broad terms, relying on language in *Curtiss-Wright* that described the president as "the sole organ of the federal government in the field of international relations." The Court said it "declines to acknowledge that unbounded power … The *Curtiss-Wright* case does not extend so far as the Secretary suggests."[225]

There are many deficiencies with the Court's opinion in 2015. First, it never clarified how the statutory issue being litigated had anything to do with the president's recognition power. Second, it did not acknowledge that when the D.C. Circuit in *Zivotofsky* upheld presidential power it did so by relying five times on the erroneous sole-organ doctrine. Third, the Court did not explain how Justice Sutherland in *Curtiss-Wright* completely misrepresented John Marshall's speech in 1800. Fourth, the Court left in place Sutherland's erroneous dicta about the president possessing the sole power to negotiate treaties. The record shows that presidents often invite not only senators but representatives to participate in treaty negotiation.[226] Fifth, the Court did not cite scholarly articles that from 1938 to the present time regularly attacked *Curtiss-Wright* for its errors and misconceptions about presidential power.[227]

Sixth, the Court relied on ill-defined stereotypes to define presidential power. For example, it borrowed language from Alexander Hamilton's Federalist No. 70 to broadly define the scope of presidential power: with "unity comes the ability to exercise, to a greater degree, 'decision, activity, secrecy, and dispatch.'"[228] The Court identified those four qualities as though they are inherently positive in nature, meriting support for broad presidential power in external affairs. It failed to understand the damage that can be done to constitutional government by vesting exclusive power in a president who acts unilaterally with "decision, activity, secrecy, and dispatch."[229] Seventh, in relying on Federalist No. 70, the Court ignored Hamilton's warning in Federalist No. 75 about unchecked presidential power.

Eighth, it appeared to recreate a variant of the sole-organ doctrine by describing the president speaking with one voice, offering "unity at all times" when

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223. Jamie Schuman, *Brief of the Week: Can the Supreme Court Correct Erroneous Dicta*?, NAT'L L. J. (Nov. 3, 2014), http://www.loufisher.org/docs/pip/fisherbrief.pdf .

224. Zivotofsky *ex rel*. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089 (2015).

225. *Id.* at 2089.

226. LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION 106 (University Press of Kansas, 2019).

227. LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS 69-78 (University Press of Kansas, 2017).

228. *Zivotofsky*, 135 S. Ct. at 2086.

229. *Id.*

speaking for the nation. [230] Those who study the federal government might be amused by a search for unity in the presidency, even within the same administration. They are more likely to see a confusing pattern of zigs and zags, resulting in costly errors for the nation. Ninth, it created an unrealistic model of presidential unity that the executive branch can invoke in future disputes to elevate the President over Congress. As Jack Goldsmith has noted, there should be little doubt that executive branch officials will exploit the Court's "untidy reasoning" in *Zivotofsky* and interpret its "pro-executive elements for all they're worth."[231]

On efforts to correct judicial errors, it is instructive to examine the Court's decisions in the two Japanese-American cases of *Hirabayashi* and *Korematsu* decided in 1943 and 1944. In the first, the Court upheld the President's authority to place a curfew on all persons of Japanese ancestry.[232] In the second, it upheld the administration's decision to place them in what were euphemistically called "relocation centers."[233] Substantial reliance was placed on General John L. DeWitt, who believed that all Japanese, by race, were disloyal. In his judgment there could be no such thing as "a loyal Japanese."[234] In an article published in 1962, Chief Justice Earl Warren suggested that in times of emergency we should not rely on the judiciary to function as an independent and coequal branch capable of providing protection to individual rights.[235] He said: "the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is."[236] This was a clear warning against judicial finality. The Court held that the government's action in the Japanese-American cases was constitutional when it was not.

On February 20, 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese Americans, "resulting in the uprooting of loyal Americans."[237] Four years later Congress created a commission to gather facts and reach a judgment about Roosevelt's order. The report in 1982 concluded that the order was not justified by military necessity.[238] Moreover, the policies that followed from it (curfew and detention) "were not driven by analysis of military conditions."[239] Instead, the factors that shaped those decisions were "race prejudice, war hysteria and a failure of political leadership."[240] Missing from that list: surrender of judicial independence and willingness to defer to executive policy unsupported by any persuasive evidence.

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230. *Id*.

231. Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 146 (2015).

232. Hirabayashi v. United States, 320 U.S. 81, 113 (1943) (Murphy, J., concurring).

233. Korematsu v. United States, 323 U.S. 214, 246 (1944).

234. Hirabayashi v. United States, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).

235. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192-93 (1962).

236. *Id*.

237. Proclamation 4417, 42 Fed. Reg. 7741 (Feb. 19, 1976).

238. COMM. ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, at 18 (1982).

239. *Id*.

240. *Id*.

In the 1980s, Hirabayashi and Korematsu returned to court with evidence that executive officials had deceived the courts by withholding vital facts. At the time of Korematsu's case in 1944, Justice Department attorneys were aware that a 618-page document called "Final Report," prepared by the War Department for General DeWitt, contained erroneous claims about alleged espionage efforts by Japanese Americans. The FBI and the Federal Communications Commission had rejected War Department assertions that some Japanese Americans had sent signals from shore to assist Japanese submarine attacks along the Pacific coast.[241]

The executive branch had a professional obligation to inform the judiciary about these false allegations. However, a district court in 1984 concluded that the executive branch "knowingly withheld information from the courts when they were considering the critical question of military necessity in this case."[242] The court found "substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court."[243] On that basis the district court vacated Korematsu's conviction.[244] The Justice Department did not appeal that decision.

Hirabayashi also challenged his conviction for violating the curfew order.[245] For General DeWitt there was no "such a thing as a loyal Japanese."[246] The initial draft report from the executive branch contained his remarks.[247] The final report, after War Department editing, did not.[248] The Justice Department received the final report but not the draft version.[249] In 1986 a district court held that the failure of the executive branch to disclose DeWitt's position "was an error of the most fundamental character."[250] The district court vacated that conviction but declined to vacate his conviction for violating the curfew order.[251] On appeal the Ninth Circuit vacated both convictions.[252]

The Supreme Court had sufficient evidence to overrule its decisions in *Hirabayashi* and *Korematsu* but failed to do so. In 1986, Peter Irons discovered a copy of the transcript where Solicitor General Charles Fahy argued *Korematsu* before the Supreme Court.[253] A Justice Department lawyer warned Fahy "not to pass on War Department 'lies' to the Supreme Court."[254] Yet Fahy decided to withhold from the Justices the false claim that Japanese Americans had signaled

241. Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases*, 82 MICH. L. REV. 887, 891 (1984).
242. Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).
243. *Id*. at 1420.
244. *Id.*
245. Hirabayashi v. United States, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id*. at 1457.
251. *Id*. at 1457-58.
252. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).
253. Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 35, 37 (1986).
254. *Id*.

from the coast to Japanese submarines.[255] During oral argument on October 12, 1944, Fahy did disclose that about 2,000 Japanese Americans were released because they posed no danger.[256] Therefore, the administration had the capacity to distinguish between loyal and disloyal Japanese Americans. On May 20, 2011, Acting Solicitor General Neal Katyal publicly acknowledged that Solicitor General Fahy in *Korematsu* failed to inform the Supreme Court of evidence that undermined the rationale for internment.[257]

By 2011 the Supreme Court had sufficient evidence from multiple sources: Chief Justice Warren's law review article in 1962, President Ford's proclamation in 1976 apologizing for the treatment of Japanese Americans, the commission created by Congress and its report released in 1982, the successful appeals by Hirabayashi and Korematsu in the 1980s, and the public statement by Acting Solicitor General Katyal acknowledging the failure of the executive branch to properly inform the Supreme Court. Faced with that mounting evidence, the Supreme Court could have announced that its decisions in 1943 and 1944 were invalid but chose not to do so.

The last step in this story is the *Trump v. Hawaii* decision by the Supreme Court on June 26, 2018.[258] At issue was a proclamation issued by President Trump in September 2017 that placed limits on foreign nationals traveling to the United States.[259] Divided five to four, the Court upheld the proclamation.[260] Writing for the majority, Chief Justice John Roberts toward the end of his opinion pointed out that Justice Sonia Sotomayor in her dissent "invokes *Korematsu v. United States*."[261] He said whatever "rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case."[262] Yet he then said: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."[263] To Roberts, reference to *Korematsu* in Sotomayor's dissent "affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[264] A decision "gravely wrong" in 1944 was not repudiated by the Supreme Court until 2018. What of *Hirabayashi*? Is that still good law? When will the Court disown that decision?

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255. *Id*. at 39.

256. *Id*. at 58.

257. Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUSTICE (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

258. *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

259. *Id* at 2403.

260. *Id* at 2423.

261. *Id.*

262. *Id*.

263. *Id*.

264. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (citing *Korematsu*, 323 U.S. at 248 (Jackson, J. dissenting)).

VIII. CONCLUSIONS

The record is clear from earlier sections of this article that the framers of the U.S. Constitution carefully studied British precedents regarding executive control over external affairs and the war power. They understood that British kings possessed authority to independently take the country to war. That model was expressly rejected by the framers in favor of a system of government that placed the war power with Congress. The framers understood that the President needed authority to repel sudden attacks but reserved to Congress the power to declare war for substantial military commitments. That model of government generally prevailed from 1789 to President Franklin D. Roosevelt. Some exceptions existed, such as President James Polk and his actions along the border with Mexico.

There was a clear shift of the war power from Congress to the President after World War II. Presidents began to claim that the commander-in-chief clause empowered them to send American troops anywhere in the world without seeking congressional approval, either through a declaration of war or statutory authority. A principal substitute for Congress is obtaining support from the U.N. Security Council or NATO allies. It is misleading to argue that independent presidential power is required today because of conditions the framers could not have foreseen. If the current risk to national security is great, so is the risk of presidential miscalculation and aggrandizement. There remains the need for Congress to thoroughly examine and analyze presidential requests for military action. Presidential judgments need more, not less, scrutiny.

In the years following World War II there has been sufficient time for Presidents to seek prior authority from Congress before committing the nation to war. Even if one could argue that President Truman needed to act promptly in response to North Korea's military actions in 1950, he had time to seek and obtain authority from Congress. He chose not to do that and Congress failed to protect its constitutional duties. The specter of nuclear war, unknown to the framers, does not justify shifting the war power to the president. If presidents decide that an emergency requires immediate action without first obtaining approval from Congress, it is far better for them to use military force on suspect and empty authority and then come to Congress to explain what they did and request from Congress retroactive approval. That is the procedure Lincoln used at the start of the Civil War.

Presidents regularly argue that mutual defense treaties (like NATO) and resolutions passed by the U.N. Security Council provide sufficient legal support for military actions. There is no basis for those claims. Treaties entered into with the support of the Senate–whether for NATO or the U.N. Charter–do not strip from the House of Representatives its constitutional authority over military commitments. Nor do they serve as a substitute for appropriations that must be granted by Congress. In going to war, lawmakers must insist that the President deliver reliable evidence, not assumptions and beliefs. On both the Tonkin Gulf Resolution in 1964 and the Iraq Resolution in 2002, Congress allowed itself to be swept along by executive pressures and warnings rather than facts needed to make an informed judgment. The framers valued careful deliberation because it lessens the chance of political mistakes.

There is a tendency in contemporary times to dismiss what the framers said about the war power because contemporary threats exceed eighteenth-century expectations. In the steel seizure case of 1952, Justice Robert H. Jackson urged us to hold fast to essentials: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[265]

265. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).