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Unilateral Executive Power ENSHRINED in Law: The *Zivotofsky* Court Stays the Course

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Zivotofsky v. Kerry (2015) is the most recent challenge to presidential prerogatives, and while the Supreme Court addresses the erroneous mistake espoused by Justice Sutherland in 1936, the Court ultimately fails to harness the unbridled powers of the Executive in the area of foreign affairs. The Court establishes a new standard for presidential ascendancy, which leaves the imperial president largely intact. This Article shows that a dynamic and fluid institutional relationship exists between the executive branch and the Court; the Court affects constitutional and political development by taking a leading role in interpreting presidential decision-making in the area of foreign affairs since 1936. Examining key cases and controversies in foreign policymaking, this Article exposes patterns of regime building by the Court, highlights feedback loops, and examines the long-term effect on presidential politics. Presidents are not bound by their position in the regime. In the area of foreign affairs, presidents, because of the dynamic nature of the Court, are unconstrained by the institutional context of their leadership efforts based on their predecessors.

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I. INTRODUCTION

The Supreme Court of the United States instituted a new constitutional[1] order when it decided *United States v. Curtiss-Wright Export Corporation*[2] ("*Curtiss-Wright*") in 1936. The *Curtiss-Wright* Court established a new role for the Executive vis-à-vis the legislative branch. Prior to 1936, the Court settled cases in favor of a strong legislature to formulate our nation's foreign policy, which undermined a President's claim to executive unilateralism. This switch placed the Court as the vanguard of redefining the scope and path of international relations.

Scholars that track doctrinal development in the area of foreign affairs simply note that a shift occurred and illustrate how this reallocation of power has resulted in executives claiming broad unilateral powers with little oversight.[3] However, the doctrinal shift of 1936 is best explained as the intersection of legal and political time[4] and evaluated over developmental time. A brief overview of some of the most significant cases the Court has decided since *Curtiss-Wright* showcases the influential role of the Court on the institutional dynamics of the Executive and demonstrates that the Court has empowered, and legally sanctioned, unilateral presidential action in foreign policymaking. *Zivotofsky*[5] falls within this narrative.

The Court is not autonomous from the political system and is consequently positioned at the juncture of law and politics.[6] Political and legal time operate differently, but the juncture of these two concepts can constrain the courts and simultaneously provide the space for the courts to make decisions that reconfigure the political and constitutional developmental paths of the executive and legislative branches. Ultimately, even if a decision by the Court does not appear to clearly make a new law, the decision rendered can still be noteworthy if it signals a major change in the Court's jurisprudence.

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1. *See* Kimberley L. Fletcher, *The Court's Decisive Hand Shapes the Executive's Foreign Affairs Policymaking Power*, 73 MD. L. REV. 247 (2013).

2. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

3. *See* Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 142 (2007) (clarifying Marshall's "sole organ" speech); *see also* David G. Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 39 (David G. Adler & Larry N. George eds., 1996) ("[The Court's] invocation of the political-question doctrine has been a major means by which the judiciary has strengthened the role of the president in the conduct of foreign policy.").

4. *See* Fletcher, *supra* note 1; *see also* RONALD KAHN & KEN I. KERSCH, THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 1, 4-7 (Ronald Kahn & Ken I. Kersch eds., 2006).

5. Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

6. *See* KAHN & KERSCH, *supra* note 4, at 16.

Political time, as Skowronek notes, is the "various relationships incumbents project between previously established commitments of ideology and interest," and the Executive's response, in this analysis, to the perceived emergency.[7] Skowronek adds that the executive branch experiences institutional thickening—an institution having "shorter time periods for successful innovation."[8] Legal time is quite different from the political time of the presidency, and it is this disparity that has important implications on the developmental narratives of both the judicial and executive branches. Legal time is defined by how the "Supreme Court interacts with the world outside the Court,"[9] including external factors or constraints occurring in political time. The judicial branch is therefore "positioned at the juncture of law and politics," and the unique quality of the Court is "inherent in the nature of judicial power."[10] So, while institutional barriers might constrain the executive branch, they do not bind the Court.[11] As such, the path of the Court and the President is not a fixed pathway[12] in foreign affairs.[13]

When the Court decides a case involving international relations and foreign policy making, the Court makes constitutional choices that, at times, may confront the primary commitments of the majority coalition and the major political institutions, in this case, the executive branch. On the other hand, the Court may select decisive moments in which to collaborate with an institution and make legal the construction and stabilization of an asserted political order. These constitutional choices reveal a continuous and constitutive dynamic relationship between both the Court and the Executive. And in the area of international relations, the Court has shaped and reconfigured the developmental narrative of unilateral discretionary powers since 1936.

The Court, as a decision-maker, is intertwined with the political system. International relations are no exception to this general paradigm. Justice George Sutherland's majority opinion in *Curtiss-Wright* (1936) was a sharp departure for the Court. The Court asserted that while the Constitution does not explicitly vest in the Executive the authority to conduct foreign policy, it

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7. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 30 (6th prtg. 2003).

8. Ronald Kahn, *The Constitution May Be Undemocratic, but Not Supreme Court Decision-Making: The Difference Between Legal and Political Time*, DIG. COMMONS 2 (2006), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1053&context=schmooze_papers.

9. *Id.* at 3.

10. KAHN & KERSCH, *supra* note 4, at 16.

11. *See* KAHN & KERSCH, *supra* note 4.

12. Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251-67 (2000).

13. *See* Fletcher, *supra* note 1.

is given implicitly through the commander-in-chief clause, thereby empowering the President the sole authority to conduct foreign affairs in a way that Congress cannot and should not.[14]

The following sections include a historical overview of some notable cases and controversies between Presidents and the Court over developmental time. This summary illustrates that this change in path trajectory provides the executive branch with the legal positioning to make broad claims of unilateral decision-making. As such, we have borne witness to some outlandish claims by executives, which have repeatedly found favor from the judicial branch. This rapid growth in power since 1936 not only exemplifies the superior positioning of the Executive over the legislative branch in the area of foreign affairs, but also calls into question how we understand the evolution of the imperial president.[15]

II. FIRST CONSTITUTIONAL ORDER—EARLY JUDICIAL RULINGS

The early judicial record shows the Supreme Court, in the area of international relations, favored a strong legislative branch while limiting the role of the Executive. For example, when assessing which branch had the constitutional authority to declare war, the Court asserted it was the sole responsibility of the legislature to wage a "partial" or "limited" war.[16] And only when Congress authorizes war was the Executive called in to serve as commander-in-chief.[17] And, when the President serves as commander-in-chief, he does not have the freedom to choose the time, location, or scope of military activities.[18] As Louis Fisher summarized, "[p]residential orders, even those issued as Commander in Chief in time of war, are subject to restrictions imposed by Congress."[19] *Little v. Barreme* (1804)[20] is an early decision by the Court confirming this allocation of powers. At no point did the Court announce that the

14. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 302, 319-20 (1936).

15. *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1973 (Houghton Mifflin Co. ed., Mariner Books 2004).

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

17. *See* Louis Fisher, *Domestic Commander in Chief: Early Checks by Other Branches*, 29 CARDOZO L. REV. 961, 968 (2008) [hereinafter Fisher, *Domestic Commander in Chief*] (discussing Congress's power to declare war and the President's power to direct war).

18. *See* Talbot v. Seeman, 5 U.S. 1, 9-16 (1801) (discussing various acts by Congress that designated military details for the war against France).

19. *See* Fisher, *Domestic Commander in Chief*, *supra* note 17, at 997.

20. Little v. Barreme, 6 U.S. 170 (1804). For a summary of the issue in *Barreme*, see Fisher, *Domestic Commander in Chief*, *supra* note 17, at 997 ("Part of the legislation passed by Congress in the 1798–1800 period, to authorize war against France, authorized the President to seize vessels sailing *to* French ports. President Adams exceeded the statute by issuing a proclamation that directed American ships to capture vessels sailing *to or from* French ports.") (internal citations omitted) (emphasis added)).

Executive has inherent powers allowing him the authority to ignore or to extend beyond a law passed by Congress.[21] The one caveat the Executive had in this area was that in the event the United States was invaded, it would be lawful for the President to oppose such an invasion.[22] As the Circuit Court for the District of New York noted in its 1806 decision in *United States v. Smith*:[23] "Does [the President] possess the power of making war? That power is exclusively vested in congress . . . ."[24] And Justice William Paterson of the U.S. Supreme Court reasoned,

> [P]lain reason, that a state of complete and absolute war actually exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration.[25]

Thus, if the United States was invaded, the President had only the constitutional authority and obligation to resist with force, but "it is the exclusive province of congress to change a state of peace into a state of war."[26] However, the Executive's authority of self-defense (repelling sudden invasions) did not extend beyond the water's edge to foreign lands.

Later that century, the Court heard *The Prize Cases*, which called into question a President's exercise of military power without first procuring congressional approval.[27] Following the attacks on Fort Sumter in April 1861, and with the legislative branch in recess, President Abraham Lincoln issued

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21. *See Barreme*, 6 U.S. at 177 (noting that President Adams's orders clearly went beyond the congressional statute).

22. *See* Act of May 2, 1792, 1 Stat. 264-65 ("An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions."); *see also* Fisher, *Domestic Commander in Chief*, *supra* note 17, at 976 ("As enacted, the militia bill provided that whenever the United States shall be invaded, or be 'in imminent danger of invasion' . . . the president was authorized to call forth such number of the militia as he may judge necessary to repel the invasion.") (internal citation omitted)); *see* U.S. CONST. art. I, § 8 para. 11.

23. United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806).

24. *Id.* at 1230.

25. *Id.* Justice William Paterson was also a delegate from New Jersey to the Constitutional Convention.

26. *Id.*

27. *See* The Brig Amy Warwick, 67 U.S. 635 (1862) (holding that the President did not have the authority to order blockade and impound ships, even without formal declaration of war) (commonly identified as "The Prize Cases.").

a set of proclamations calling forth the state militia.[28] In addition, Lincoln suspended the writ of habeas corpus and placed a blockade on southern ports (resulting in the capture of several prizes and their cargoes) and rebellious states.[29] President Lincoln, acutely aware that his actions were illegal, requested statutory authorization from the legislature.[30] While Congress ratified Lincoln's actions,[31] this situation marked the first time the Court heard a case concerning the power of the Executive to respond to sudden attacks.[32]

In *The Prize Cases* (known formally as "The Brig Amy Warwick" case, consisting of a set of cases, "were . . . captured and brought in as prizes by public ships of the United States"),[33] the Court reasoned the President could not initiate war, as that authority was reserved for Congress, and Congress alone.[34] Lincoln found the secession of several states and the prospect of open hostilities to be sufficient justification to impose a blockade on the southern ports.[35] While the President is constitutionally bound to repel a sudden invasion by a foreign nation,[36] it was a reach to extend this reasoning to the Confederacy. However, Lincoln went around this point, by declaring the Confederacy as belligerents. The commander-in-chief clause gave the President the authority to proclaim a blockade as a method of waging war.[37] Justice Robert C. Grier, majority opinion writer in *The Prize Cases*, however, placed limits on the Executive's power to act defensively: "He has no power to initiate or declare a war either against a foreign nation or a domestic State."[38]

These early decisions illustrate the Court's continued adherence to establish a partnership between the legislative and executive branches. Assigning the legislature the sole duty of initiating hostilities, whether in the form

28. Thomas H. Lee & Michael D. Ramsey, *The Story of the* Prize Cases*: Executive Action and Judicial Review in Wartime*, *in* PRESIDENTIAL POWER STORIES 56-57 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

29. *Id.* at 57-59.

30. *See id.* at 56-57 (noting that Lincoln called Congress in April 1861 to meet for a special session in July).

31. *See id.* at 59 ("Congress approved, in just over a week, an array of wartime measures, including funding and authorizing an expanded army and navy.").

32. *See* LOUIS FISHER, PRESIDENTIAL WAR POWERS 47 (2004) (discussing the Court's affirmation of Lincoln's emergency measures). The duty to repel sudden attacks signifies an emergency measure that grants the President the discretion to take actions necessary to resist a sudden invasion that is waged either against the mainland or against American troops abroad. *See id.* at 47-48.

33. The Brig Amy Warwick, 67 U.S. 635, 636 (1863).

34. *Id.* at 668.

35. Lee & Ramsey, *supra* note 28, at 56-58.

36. *See* Act of May 2, 1792, 1 Stat. 264-65; *see also supra* text accompanying note 22.

37. *See The Brig Amy Warwick*, 67 U.S. at 666 ("That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification [of a blockade], has not been, and cannot be disputed.").

38. *Id.* at 668.

of a general or limited war, left the Executive, in his capacity as commander-in-chief, with only the power to repel sudden invasions against the nation.[39] The Court's jurisprudence vested in Congress all offensive powers of the nation.

We have come a long way from these early decisions. Prior to 1936, the Court established a constitutional blueprint, which embraced the principle of collective decision-making, or a system of shared powers.[40] Presidents today, however, have the lion's share of foreign policy making, which has rendered Congress to the sidelines with little say in the decision-making process. We have also seen more contemporary executives assert that the Supreme Court has no power of review when a case involves national security concerns. Harold H. Koh suggests there are three reasons why Presidents always appear to have the leading hand when asserting a strong dominant role in foreign affairs.[41] First, the President takes the initiative primarily by "construing laws designed to constrain his actions as authorizations"—as is evident by the use of the War Powers Resolution.[42] Second, the legislative branch has, more often than not, complied with or acquiesced in the actions taken or policies implemented by the Executive.[43] And lastly, judicial tolerance; however, as this Article illustrates, is not tolerance, but instead it is the constitutive role of the judicial branch.[44]

III. *CURTISS-WRIGHT*—A NEW PATH BECOMES ENSHRINED IN LAW

Curtiss-Wright (1936) marks a sharp departure for the Court, and reveals the Court embarking on a new path to redefine the President's role in foreign affairs vis-à-vis the legislative branch. The Court also establishes itself as the institution to reconfigure, and, if necessary, to redefine the scope

39. These early decisions have never been overturned and remain the law of the land today. *See generally* Fisher, *Domestic Commander in Chief*, *supra* note 17; Adler, *supra* note 3.

40. *See generally* The Brig Amy Warwick, 67 U.S. 635, 668 (1863); Little v. Barrame, 6 U.S. 170 (1804); Talbot v. Seeman, 5 U.S. 1 (1801); Bas v. Tingy, 4 U.S. 37, 43 (1800); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806).

41. Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 158-80 (David Gray Adler & Larry N. George eds., 1996).

42. *Id.* at 158. Primarily drafted to halt creeping wars like Vietnam, the Resolution has come to symbolize, because of drafting flaws, statutory authorization undercutting the effectiveness in restraining the President from initiating hostilities. *Id.* Consequently, when the President decides to "violate[] congressionally imposed procedural constraints in pursuit of substantive policies that they favor," he does so under the guise of the Resolution. *Id.* at 172.

43. Koh argues that this is evident through "legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will." *Id.* at 158.

44. Fletcher, *supra* note 1.

and prerogatives of the President in this area. This new role for both branches over time has led to a comprehensive national acceptance "of the systematic legal entrenchment" of an executive acting unilaterally in foreign policymaking. Essentially, *Curtiss-Wright* involved the principles of governmental regulation of business and the supremacy of the executive branch in the conduct of foreign affairs.[45] The case held the President's foreign affairs powers are not only open-ended, but also inherent in his position as the executive of a sovereign nation. Following this decision, executives have gained significant momentum in this area, and, with successive decisions by the judicial branch we have seen a distinct conjecture in favor of executive power in international relations. In fact, the *Curtiss-Wright* decision uses sweeping language that the executive branch regularly cites to support its claim of the power to act without congressional authorization in foreign policy. The *Zivotofsky* Court essentially reverts to the established path of presidential ascendency.

The Court decided *Curtiss-Wright* at the height of President Franklin D. Roosevelt's "personalization and institutionalization of the presidency," which amongst many initiatives included an "extrovert phase in American foreign policy."[46] This marked the nation's arrival as the world's hegemonic power.[47]

Yet, how does *Curtiss-Wright*—a singular decision—influence both the doctrinal development of the judicial branch and the political development of the executive branch? Scholars have been decidedly critical of Justice George Sutherland's theory on the separation of powers, and thus have been quick to point out that Justice Robert H. Jackson in *Youngstown* (1952) asserted that much of Sutherland's opinion is dictum.[48] Despite this criticism and the relegated opinion, Sutherland's sweeping language is often cited as the lynchpin of many of the executive branch's subsequent claims of the power to act without congressional authorization in foreign affairs (from Truman to Obama).

During the 1930s, the Court served as a check on New Deal legislation.[49] At every turn in national policy where the cleavage between the old and new regime was distinct, FDR was confronted with a judiciary predominantly held over from the old order. The Court was now faced with a case

45. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 305-06 (1936).

46. Koh, *supra* note 41, at 160 (noting that this time period began before the attacks on Pearl Harbor and ended with the Vietnam War).

47. Koh, *supra* note 41, at 160; *see* Fletcher, *supra* note 1. Geopolitical concerns have been shown to act as an external constraint on judicial decision-making.

48. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring).

49. *See, e.g.*, Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935) (striking down New Deal legislation on the grounds that they characterized unconstitutionally broad delegations of legislative power to the Executive); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

involving executive prerogatives in foreign policymaking. With the reproaches by the Court in the domestic arena, the Court was now positioned to render yet another decision that might again be in opposition to the commitments of the majority coalition. But the Court's eventual support of FDR's New Deal legislation, coupled with an expanded view of executive powers in the area of foreign affairs, helped facilitate the federal government's growth in authority and responsibility.

In response to a potential war breaking out in the Chaco region of South America, and acting pursuant to the authorization of a joint resolution, President Roosevelt issued Proclamation 2087[50] in May 1934, forbidding the shipment of arms to the combatants in the Chaco region.[51] Curtiss-Wright Export Corporation was charged with plotting to sell fifteen machine guns to Bolivia.[52] This sale violated the Proclamation and Curtiss-Wright Export Corporation was indicted for violating the embargo.[53]

The question before the Supreme Court was whether the congressional resolution was an unlawful delegation of legislative power,[54] a right Congress was leaving to the Executive's "unfettered discretion."[55] According to precedent, broad delegations of power were unconstitutional—the Court's reasoning behind striking down New Deal legislation. Early on in his career, Justice Sutherland encouraged a broad reading of the Constitution; the Constitution must have the "capacity for indefinite extension" for those who came after the Constitution was framed and adopted.[56] And it is this position that underscores the majority opinion for the Court in *Curtiss-Wright*.

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50. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 311-12 (1936) (detailing Joint Resolution 48 Stat. 811).

51. *See id.* at 312-13 (detailing Presidential Proclamation 2087); *see also* Proclamation No. 2087, 48 Stat. 1744 (1934), http://www.presidency.ucsb.edu/ws/index.php?pid=14888#axzz1lpVgJyPc (last visited Nov. 11, 2016) ("Forbidding the Shipment of Arms to the Combatants in the Chaco"). On November 14, 1935, FDR issued a second proclamation that revoked the previous proclamation, finding the prohibition on the sale of arms to Bolivia and Paraguay no longer necessary since the war between the two countries had come to an end. *See Curtiss-Wright*, 299 U.S. at 313; *see also* Proclamation No. 2147, 49 Stat. 3480 (1935), http://www.presidency.ucsb.edu/ws/index.php?pid=14978 (last visited Nov. 11, 2016) ("Revoking the Arms Embargo at the Termination of Hostilities in the Chaco").

52. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 311.

53. *Id.*

54. This prerogative is a legislative determination, the lawyers argued on behalf of the Executive, and Congress was leaving this right to the Executive. *Id.* at 314–15. This claim had judicial support, though Congressional Democrats and the White House were severely critical of the Court's decisions. *See* Pan. Ref. Co. v. Ryan, 299 U.S. 388 (1935).

55. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 314-15.

56. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 50 (1919).

This case caused much concern for the administration. The administration was primarily concerned about the subsequent impact on the role between congressional flexibility and executive discretion. Although some administration lawyers argued internally that the Executive should assert a stronger claim to executive independent authority in the area of foreign affairs, it was left out of the briefs, favoring instead executive discretion.[57] According to the government, Congress had the authority to grant the President the ability to go to war if he believed that in doing so it would reestablish peace between nations that were at war. If this was the case, "it [would be] the President and not Congress who decided whether this country should go to war."[58] But nothing in any of the briefs suggested that *Curtiss-Wright* would become a foundation on which to show judicial support for the Executive's control over foreign policy. In fact, administration lawyers drafting the brief asserted the President's "conduct…of the foreign relations of the Government"—a phrase quoted in the Court's opinion in *Panama Refining*—was more restrained, and circumscribed an area of legislation, whether due to settled principle, access to facts, or even the Court's own language, where the delegation principle was confined to this situation.[59]

Justice Sutherland was a strict constructionist, aligned with the Court's conservative side, and was often viewed as the leader of the conservative bloc when a clear divide existed on the bench.[60] With a new constitutional order under way, Sutherland's early theories on the President's external powers had matured, and a sharp distinction between domestic and foreign affairs now existed. In Sutherland's early writings, he did not say much on the matter of presidential constitutional powers. But in *Curtiss-Wright*, Sutherland asserted that the Executive had the sole authority to conduct the nation's foreign affairs.[61]

Interestingly, while Justice Sutherland valued the doctrine of *stare decisis*, he asserted that precedent was not a fixed pathway, since it is the opinion only of the person who came before and that person stipulated where the pathway should be.[62] Path dependency of precedent in constitutional law, for

57. R. Walton Moore, *Memorandum on Neutrality*, *in* DEBATING FRANKLIN D. ROOSEVELT'S FOREIGN POLICIES 1933-1945, at 95, 97-99 (2005).

58. Brief for Appellees at 20, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 416-26 (1936) (No. 98) (The parties included in this brief are John S. Allard, Clarence W. Webster, and Samuel J. Abelow).

59. Brief for United States at 8, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 422-25 (1936) (No. 98) (quoting Pan. Ref. Co. v. Ryan*,* 293 U.S. 388, 422-25 (1935)).

60. PETER G. RENSTROM, THE TAFT COURT: JUSTICES, RULINGS, AND LEGACY 79-80 (2003). Justices McReynolds, Devanter, Butler, and Sutherland were instrumental in striking down Roosevelt's New Deal legislation. *Id.* at 80.

61. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319.

62. Senator George Sutherland, The Courts and the Constitution, Address Before the American Bar Association (Aug. 28, 1912).

Sutherland, was not a controlling factor; and constitutional decision-making on the Court would therefore be based in part on a justice's personal policy preferences or strategic objectives.[63] Sutherland, assigned majority opinion writer,[64] instituted a new constitutional order when he argued the President had the sole responsibility to negotiate with foreign powers.[65]

Sutherland contended that there are fundamental differences between the powers employed by the federal government in the area of domestic affairs and external or foreign matters.[66] Foreign affairs, Justice Sutherland asserted, necessitate a different set of rules and standards, so, the powers granted to Congress could be exercised or delegated to the President and are not limited to the express and implied powers constitutionally granted.[67] Sutherland added that any limitations were only applicable to internal affairs. Furthermore, Sutherland noted, the President exercised "plenary and exclusive power," which is independent of any legislative authority, since he was the sole organ of the federal government in the field of international relations.[68]

Justice Sutherland wove another concept into his conclusion, one that was practically absent from his *Constitutional Power and World Affairs*[69] manuscript. He maintained that there is a significant limitation when exercising power in the international arena. This rhetorical caveat was developed in his most famous passage of all. In what some have called "ill-considered dicta,"[70] Justice Sutherland invoked Congressman John Marshall's reference to the President as the sole organ of American foreign policy in a speech Marshall delivered to the House of Representatives in 1800.[71] In that speech, Marshall asserted the President was the sole organ of communication,[72] but Sutherland's reference to Marshall's remark implies that the President makes foreign policy unilaterally.

It is quite surprising that Sutherland would misrepresent Marshall's reference to such a degree in order to ground his own assertions in a historical

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63. *Id.*; *see* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 974 (2005) (the point here is not just that judicial opinions reveal the differences among the Justices but rather that the Justices know they may assert their differences in their respective opinions if they chose to do so).

64. *See* Edward A. Purcell, Jr., *Understanding Curtiss-Wright*, 31 L. & HIST. REV. 653 (2013). Purcell's article evaluates Chief Justice Hughes's reasons for assigning the majority opinion to Sutherland in *Curtiss-Wright*.

65. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319; *see also* Fletcher, *supra* note 1.

66. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 315-16.

67. *Id.* at 319-20.

68. *Id.*

69. Sutherland, *supra* note 62.

70. Adler, *supra* note 3, at 40.

71. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 (quoting 6 ANNALS OF CONG. (1800)).

72. 6 ANNALS OF CONG. 613-14 (1800).

frame. When read in context, Marshall meant only that the President communicates American foreign policy to other nations *after* it has been adopted.[73] Marshall clearly meant that the Executive was the sole organ in *implementing*—that is, merely announcing, not formulating—American foreign policy.[74] Thus, the Executive would be the sole organ of *communication*; the nation would be speaking with a single voice.[75]

Sutherland's distortion speaks volumes for Marshall's theory because, as Chief Justice, he never once invoked the sole organ doctrine in defense of unilateral executive power in foreign affairs, though he had many opportunities to do so.[76] In short, articulating the nation's foreign policy to other countries did not carry with it any form of inherent power according to Marshall. Justice Sutherland's reliance upon Marshall's speech as a foundation of the sole organ doctrine is thus untenable. Yet, it is a measure of Sutherland's mischief that confusion about Marshall's speech has been pervasive ever since. As such Marshall's account of the President as the sole organ of foreign affairs is commonly distorted.

Given the trajectory of Justice Sutherland's theory and his assertions in his written opinion for the Court, the decision rendered in *Curtiss-Wright* was perhaps an observable evolution of his obvious schema, but not necessarily predetermined. Justice Sutherland's majority opinion is evidence of a change of heart from his 1919 defense of Congress's authority and role in foreign affairs against federalism and the "narrow-construction attack to an assertion of the foreign-affairs authority of the President that stresses its independence of Congress."[77] This change of heart[78] might be attributed, as discussed below, to the exogenous factors—the government's argument, historical practice, and the geopolitical impact of the growth of Fascism—that Sutherland's opinion embraces.

On the initial reading of Justice Sutherland's opinion, it is difficult to ascertain what his assertions have to do with the question of delegation. How-

73. *See* Fisher, supra note 3.

74. *See id.* ("Although it [is] the president's constitutional duty to carry out the law, including treaties, 'Congress, unquestionably, may prescribe the mode.'") (quoting Marshall's speech)). Indeed, first and foremost, Marshall was referring to the President's authority to "communicate," not "make" American foreign policy. 6 ANNALS OF CONG. 613-14 (1800).

75. 6 ANNALS OF CONG. 613-14 (1800).

76. *See* Fisher, *supra* note 3, at 142-43 (discussing Marshall's approach to foreign affairs cases as Chief Justice).

77. H. Jefferson Powell, *The Story of* Curtiss-*Wright Export Corporation*, *in* PRESIDENTIAL POWER STORIES 195, 222 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

78. *See* Fletcher, *supra* note 1 (Sutherland's early work warns about the growth of presidential powers, but this opinion is clear evidence of him changing his mind).

ever, if one takes note of H. Jefferson Powell's reading of Justice Sutherland's opinion[79] and grant Justice Sutherland some latitude, one can conclude, since foreign affairs powers do not originate from the Constitution, they cannot be defined by it and are therefore plenary except when they are limited by "applicable provisions of the Constitution."[80] Continuing with this line of thought, Sutherland can then assert that the distribution of foreign affairs powers are not created; rather, the Constitution renders the Executive "the sole organ of the federal government in the field of international relations,"[81] and places few limitations on the management of foreign affairs. The President's power in this area is therefore "delicate, plenary and exclusive."[82] If the Executive is the primary decision-maker in the realm of foreign policymaking—in the sense that Justice Sutherland is arguing that this is structural in an extra-constitutional sense—and the Executive is responsible for formulating that policy, then it naturally follows that a delegation rule constructed to protect Congress's role in delineating policy is quite simply and plausibly, according to Sutherland's assertion, inapplicable.[83] Moreover, and this is the point at which Justice Sutherland embraces elements of the government's argument, when Congress legislates in foreign affairs, it appropriately takes into account the President's supremacy, in principle and in practice, of intelligence, secrecy, and negotiation, which are argued to be essential constraints to the success of foreign policy.[84]

Curtiss-Wright was a case decided during a period of modernization for the presidency, but it was also a time that permanently ended American isolation from European and world affairs. In the 1930s, Congress and the country were determined to remain an isolationist nation and stay out of the war raging in Europe. But President Roosevelt, acutely aware of the impact of Hitler's progression, attempted to ally with France and Great Britain against Hitler's and Mussolini's regimes. So the political timing of *Curtiss-Wright* was not only a determining factor on the autonomy of the President's power to respond to the situation at hand and the Chaco war more broadly, but also how the Court would weigh the exogenous constraints when reaching its decision, as is evident by the geopolitical context of the case.[85] This constrain-

79. Powell, *supra* note 77, at 195-96.
80. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).
81. *Id.*
82. *Id.*
83. *Id.* at 321-22.
84. *Id.*
85. One way in which FDR wanted to counter Fascist advances was in the discretionary control over neutrality. An arms embargo against Italy and Ethiopia, for example, would achieve Roosevelt's agenda. *See* ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 1932–1945, at 107 (1995). Interestingly the press discussed the case in its

ing external factor also accounts for Justice Sutherland reframing and reformulating an opinion that both embraces an expanded role for the Executive and united the judicial bench.[86] This case demonstrates that the juncture of legal and political time created a constitutional moment that presents the Court with an opportunity to redefine the Executive's powers through the mutual construction process.[87]

Advocates of executive power have long advanced notions of drawing power from outside of the Constitution, notably Theodore Roosevelt—with his stewardship theory of the presidency—and Alexander Hamilton in Pacificus No. 1.[88] The *Curtiss-Wright* Court, however, offers a nuanced interpretation to the original constitutional order. In effect, the constitutional order adhered to in early judicial cases is supplemented by a new order, one in favor of the practical reality of a strong executive in the area of foreign affairs.[89]

Scholars have been highly critical of Sutherland's theory on the separation of powers and, accordingly, have been quick to point out that Justice Robert H. Jackson in the *Steel Seizure* case (1952) relegated much of Sutherland's opinion as dictum.[90] Despite this criticism, Sutherland's misappropriation of Marshall's speech is so entrenched that it is the basis of many of the executive branch's subsequent claims to unilateral discretion in foreign affairs.

Even though Congress intentionally ignored the *Curtiss-Wright* decision when it insisted that it alone may grant the Executive broad discretionary power,[91] and while the case also played a rather limited role as precedent in the first few years of its decision,[92] *Curtiss-Wright* did enable Sutherland to speak again to the role of the Executive vis-à-vis the legislative branch in the

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geopolitical context. The *Washington Post* reported that the opinion in *Curtiss-Wright* vindicated a President's claim to a vast power in foreign affairs and, more specifically, Roosevelt's quest for "authority for him to exercise wide discretion in limiting exports to combatants." *See* Powell, *supra* note 77, at 225 (quoting Robert C. Albright, *Highest Court Affirms Arms Embargo Act*, WASH. POST, Dec. 22, 1936, at 1). The *Washington Post* emphasized that the case "was generally believed to open the door for a more vigorous neutrality course, providing the approach is discretionary with the President, rather than mandatory." *Id.*

86. *See* Purcell, *supra* note 64.

87. KAHN & KERSCH, *supra* note 4.

88. THE FEDERALIST No. 1 (Alexander Hamilton) (Modern Library, 1937). Hamilton famously asserted executive energy and dispatch.

89. Fletcher, *supra* note 1.

90. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring).

91. *See* Powell, *supra* note 77, at 226 ("Sutherland's opinion left *Panama Refining* and *Schechter Poultry* untouched, and it was the Supreme Court's famous recession from its narrow view of federal power beginning in March 1937, not *Curtiss-Wright*, that ultimately proved to have freed Congress and the executive from the constraints that the 1935 delegation decisions appeared to have fashioned.").

92. Powell, *supra* note 77, at 226.

area of foreign affairs. The decision also established a newly constructed constitutional order for executive supremacy in this area. Although Sutherland's opinion insinuates the President can make foreign policy unilaterally, the impact of this case is not immediate. In fact, the effect of the holding is its evolution as precedent over time,[93] and how the sole organ doctrine become embedded in future unilateral claims of broad discretionary power by Presidents.

Youngstown Sheet and Tube Co. v. Sawyer[94] provides what some would contend is the end point to the influential role of *Curtiss-Wright*.[95] This is quite a compelling statement, since those who argue this point emphasize that, by 1952, the delegation issue had retreated in significance and the specific holding in *Curtiss-Wright* was irrelevant.[96] However, the judicial record suggests something quite different. *United States v. Belmont*[97] and *United States v. Pink*[98]—two cases decided immediately following *Curtiss-Wright*—in conjunction with *Johnson v. Eisentrager*,[99] are cases that illustrate the Court's continued devotion to Sutherland's reluctance to be "in haste"[100] to interfere with the President's handling of international relations.[101]

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93. Mark Graber Legal, *Strategic or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction*, *in* THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 41-42.

94. *Youngstown*, 343 U.S. at 579.

95. *See, e.g.*, Powell, *supra* note 77, at 227. "The Supreme Court's celebrated decision invalidating President [sic] Truman's seizure of the steel industry in *Youngstown Sheet & Tube Co. v. Sawyer*, decided in 1952, marks an appropriate end-point for an examination of *Curtiss-Wright*'s immediate impact."

96. Powell, *supra* note 77, at 227.

97. United States v. Belmont, 301 U.S. 324 (1937).

98. United States v. Pink, 315 U.S. 203 (1942).

99. Johnson v. Eisentrager, 339 U.S. 763 (1950).

100. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 322 (1936).

101. *Belmont*, 301 U.S. at 324, was decided only four months after *Curtiss-Wright*, and involved the validity of an executive agreement with the Soviet government. *Id.* at 326. Sutherland applied the same reasoning used in *Curtiss-Wright* to *Belmont*: favoring once again his developed distinction between the external and internal powers when he concluded that the national government had the authority to enter into the agreement and invoked the language, while not naming specifically *Curtiss-Wright*, that "in respect of what was done here, the Executive had authority to speak as the sole organ of that [national] government." *Id.* at 330. In *Pink*, 315 U.S. at 203, Justice Douglas expressly quotes from *Curtiss-Wright* the explanation of the Executive's role as sole organ, and reaffirms that the President has the power to make binding international agreements without Senate ratification. *Id.* at 229. Justice Douglas went a step further and held that Congress had "tacitly" approved of the executive agreement. *Id.* at 227. *Pink* was a case decided when World War II was in full progress and the United States was fully invested. The real impact of *Pink* was seen in the Court's decision-making forty years later when it decided Dames & Moore v. Regan, 453 U.S. 654 (1981).

IV. UNILATERAL CLAIMS OF EMERGENCY POWERS DURING WORLD WAR II

The next time the Court heard a challenge to presidential claims of unilateral foreign policymaking was with the Japanese Internment Cases.[102] It was with this set of cases the Court entrenches the new constitutional order established with the *Curtiss-Wright* case. These cases came out of a time when many people in America, reeling from the attack on Pearl Harbor on December 7, 1941, believed that Imperial Japan was waging a full-scale attack on the West Coast, and the attack was imminent.[103] Questioning the loyalty of ethnic Japanese living in the United States, fueled primarily by the racial prejudices of General John L. DeWitt, there was growing support by Americans to intern the Japanese.[104]

As a result, President Roosevelt signed Executive Order (EO) 9066 in early 1942, sanctioning military commanders to designate "military areas" at their discretion, "from which any or all persons may be excluded."[105] This authorization sent nearly 120,000 Japanese Nationals and Japanese Americans to internment camps. In a cluster of cases—*Hirabayashi v. United States*,[106] *Yasui v. United States*,[107] *Korematsu v. United States*,[108] and *Ex parte Mitsuye Endo*[109]—the Court considered whether President Roosevelt had exceeded his authority by claiming emergency powers, or whether it was crucial to set in place an exclusion order due to military necessity. Essentially the Court was tasked with balancing President Roosevelt's unilateral claim of emergency powers during a war vis-à-vis the suspension of Japanese-Americans' constitutional right to civil liberties. The Court found in Roosevelt's favor, asserting the President had statutory and constitutional authority to act during exigent circumstances.[110] With the nation at war, the Court reasoned, in both the *Hirabayashi* and *Yasui* cases, that the application of curfews against members of a minority group were constitutional: "[W]e cannot sit in judgment on the military requirements of that hour."[111]

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102. *See infra* text accompanying notes 104-07.

103. *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 937-38 (2004) (discussing various arrests and evacuations of Japanese Americans on the West Coast post-Pearl Harbor).

104. *Id.* at 938.

105. Exec. Order No. 9066, (Feb. 19, 1942), 3 C.F.R. 1092 (1938-1943).

106. Hirabayashi v. United States, 320 U.S. 81 (1943).

107. Yasui v. United States, 320 U.S. 115 (1943).

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

109. *Ex parte* Mitsuye Endo, 323 U.S. 283 (1944).

110. *See infra* text accompanying notes 111-15.

111. *Hirabayashi*, 320 U.S. at 106 (Douglas, J., concurring).

Justice Hugo Black wrote the majority opinion in *Korematsu*,[112] which rejected the plaintiff's claim of discrimination. Siding with the government, the Court upheld the constitutionality of the relocation order because it protected the nation against espionage, and this was sufficient justification to outweigh the rights of Korematsu.[113] The Court reasoned that the EO and the actions it authorized were a constitutional exercise of the Executive's war powers.[114]

While the actions taken by key decision-makers at the time have been justly criticized and shown to be discriminatory, the Court reasoned that these decision-makers are often faced with threats to the nation that call for extraordinary measures. Courts, at times, may "implicitly rely on the good faith of executive officials . . . as the unstated basis for overlooking civil liberties problems with the legal positions that the executive officials have staked out," which is what we find with the Internment cases.[115]

Endo is the only internment case that the Court, unanimously, finds in favor of the plaintiff. But, the Court ruled only on statutory grounds that EO 9066 and 9102 cannot be construed to give the War Relocation Authority ("WRA") the power "to subject citizens who are concededly loyal" to detention in a relocation center.[116] One day after the *Endo* decision FDR announced Public Proclamation No. 21 on December 19, 1944, which ended the exclusion order on the Western Defense Command.[117]

V. *YOUNGSTOWN*—A BOOK END TO THE SOLE ORGAN DOCTRINE?

A few years later, the *Youngstown* case of 1952 marked an exceptional moment wherein the Court, during a time of war, used judicial review to check broad unilateral assertions of power. On April 8, 1952, President Truman announced that, to avoid a labor strike, the federal government would seize all steel mills involved in a labor dispute that were planning to strike.[118] While Presidents in the past had seized plants, never before had the government, during a time of peace, apprehended a major portion of an industry. Nor had an executive laid claim to inherent presidential powers under Article

112. *Korematsu*, 323 U.S. at 223.

113. *Id.* at 219-20.

114. *Id.* at 217-18.

115. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, WIS. L. REV. 273, 294 (2003).

116. *Ex parte* Mitsuye Endo, 323 U.S. 283, 297 (1944).

117. Proclamation No. 21, 10 Fed. Reg. 53 (Dec. 17, 1944).

118. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 583 (1952).

II of the Constitution to defend a seizure when a statute—the Taft-Hartley Act[119]—provided an alternate and legal method for preventing the strike.[120]

Truman's actions created a political and constitutional crisis that solicited fundamental questions about the role of the Executive and the nature of presidential power: Did the President act with legal authority? If he did not, what role, if any, did Congress play in passing judgment? And finally, did that judgment fall to the Court? *Youngstown* presented the Court with an opportunity to reexamine the balance of authority among the branches. And, more importantly, this was an occasion for the Court to reconsider and potentially redefine the scope of unilateral power in light of almost twenty years of unparalleled exploitation of executive authority.

Justice Robert H. Jackson's concurring opinion in *Youngstown* has become the leading authority—dividing the Executive's authority into three categories—for how the Court delineates the relationship between Congress and the President and how the Court determines whether the actions taken by the Executive are legitimate.[121] *Youngstown* outlined the limit of the executive branch's reach and extent of power when acting as commander-in-chief. Ultimately, the Court found that the President's military power did not extend to labor disputes.

Youngstown took place against a backdrop of two decades in which Presidents had steadily expanded their power, and the judiciary had all but sanctioned its continued growth. This development of expanded power led Truman to assert he had the authority to seize the mills. Truman believed that the seizure was necessary to safeguard the continued need of supplies to American troops in Korea and to support the healthy economy the nation was enjoying.[122] However, the Korean Conflict soon became a war in every practical sense. The *Youngstown* decision was, by all accounts, an unexpected decision: Why would the New Deal-Fair Deal Court that had previously been so receptive to the exercise of broad presidential authority reverse course and restrain inherent executive power?

The *Youngstown* decision is a sharp rebuke to Truman's seizure and an attempt by the judicial branch to immobilize the accumulation of power by the Executive. Justice Jackson's concurring opinion both criticized and rejected Justice Sutherland's *Curtiss-Wright* opinion. Jackson observed that the language used by Sutherland merely insinuates, "the President might act in external affairs without congressional authority, but not that he might act

119. Act of June 23, 1947, Pub. L. No. 80-101, 61 Stat. 135 (codified as amended at 29 U.S.C. §§ 141-187 (2006)).

120. *Youngstown*, 343 U.S. at 586.

121. *Id.* at 634-35 (Jackson, J., concurring).

122. *Id.* at 582-83 (majority opinion).

contrary to an Act of Congress."[123] Jackson asserted that much of Sutherland's opinion was dicta and was not relevant to the issues presented in the present case.[124]

Upon reexamination, the *Youngstown* case was not a simple case of rebuke and was not as sweeping as the broad language may initially suggest. In general, Justice Black[125] interpreted the words of the Bill of Rights literally to thwart government intrusion with personal liberties; during wartime, however, civil liberty claims had to give way before the needs of the government. This was the reasoning in Justice Black's majority opinion in *Korematsu*; when the war powers of the government conflicted with individual rights, the safety of the nation necessitated the sacrifice of the latter.[126] It was therefore not unthinkable to expect Justice Black to sustain Truman's seizure of the steel mills, given the hostilities in Korea, international concerns, and the administration's declarations that steel was indispensable to the nation and its allies.[127] Truman's delineation of executive power, however, was too sweeping for the nation, and strong public opinion[128] opposing his policies constrained the Court's decision. Ultimately, the *Youngstown* Court sided with Congress against the President's assertion of unilateral powers and found no congressional statute authorizing Truman's actions.[129]

Justice Jackson split from the purely textual approach advocated by Justice Black, deducing that: "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[130] This logic led Justice Jackson to set out a three-tier framework, which not only addresses the relationship between Congress and the presidency, but also stipulates how the Court will determine whether the actions taken by the Executive are legitimate.[131] As many before have noted, Jackson divided the

123. *Id.* at 636 n.2 (Jackson, J., concurring).

124. *Id.*

125. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947, at 208, 258 (1948); *see* VIRGINIA VAN DER VEER HAMILTON, HUGO BLACK: THE ALABAMA YEARS 3-108 (1972). For Justice Black's appointment to the Court, see William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U. CHI. L. REV. 1 (1973).

126. *See supra* notes 112-14.

127. *See generally* THE AM. PRESIDENCY PROJECT, PAPERS OF HARRY S. TRUMAN 1949-1953, presidency.ucsb.edu/harry_s_truman.php (last visited Sept. 20, 2016).

128. This check on presidential power is contingent on the general public expressing its trepidations and articulating that sentiment to the courts as well as to Congress. This prerequisite places a heavy burden on the individual citizen: it expects them to be cognizant of the use of executive power, to evaluate its use, to ask the legislature or judicial branch to rein in that power, and to give its full support to the constraints imposed by either of the two branches.

129. *Youngstown*, 343 U.S. at 635.

130. *Id.* (Jackson, J., concurring).

131. *Id.* at 635-38.

President's authority into three distinct categories. Tier one asserts that presidential power is at its zenith "[w]hen the President acts pursuant to an express or implied authorization of Congress" because "it includes all that he possesses in his own right plus all that Congress can delegate."[132] In such a situation, the President is dependent on his own powers as well as those delegated to him by Congress.

Tier two, known as the "Twilight Zone," is of particular interest to scholars. When the Executive "acts in the absence of either a congressional grant or denial of authority" then he has only his independent powers. But when there is "concurrent authority" between the legislative and executive branches or there is uncertainty in the distribution of powers, then a zone of twilight exists. And "congressional inertia, indifference or quiescence" may at times "enable, if not invite" unilateral decision-making.[133] If the President's authority was in doubt, the legality of his act was "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[134] It is this point—and to some degree, the two other tiers—that shows the Court's acceptance and willingness to consider external forces. Moreover, this decision also demonstrates how the Court might be constrained by exogenous forces.

Tier three stipulates that presidential power is at its lowest ebb when it is "incompatible with the expressed or implied will of Congress," as the Executive may only rely upon his own constitutional authority.[135] In this case, the President depends on his own constitutional powers, which excludes whatever constitutional authority the legislative branch could have over the issue. In this instance, the Court can then uphold an executive's action only by finding that Congress could not act in the situation.[136]

Given the Court's use of *Curtiss-Wright* as controlling precedent over developmental time, Truman clearly expected an auspicious ruling and therefore took the decision as a personal censure.[137] However, the Court's majority was not swayed by Truman's claim that the crisis confronting the nation was

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132. *Id.* at 635.

133. *Id.* at 637.

134. *Youngstown*, 343 U.S. at 637. This could either be an indication of an expanded view of legislative deferrals, or it is simply politically unpopular for Congress to be seen as a war hawk. For an expanded discussion of legislative deferrals, see GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003); *see also* Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

135. *Youngstown*, 343 U.S. at 637.

136. *Id.* at 637–38. The extent to which the third category is applied is exemplified by President Reagan's role in the Iran-Contra affair.

137. *See* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 214-15 (Duke Univ. Press 1994) (1941).

grave enough to justify an assertion of inherent executive power to seize private property. The *Youngstown* Court was therefore willing to scrutinize unilateral claims and find in favor of collective decision-making when those assertions directly cross over into the domestic sphere. Despite the *Youngstown* ruling, Presidents have—with large success[138]—advanced Justice Jackson's three-tier analysis as the legal authority to act unilaterally.

For almost fifty years following the *Curtiss-Wright* decision, the Court decided countless cases that offered a definition of the scope of executive power in the area of foreign affairs. The Court signaled that the President as the sole organ enjoyed inherent, as well as, implied powers, largely unimpeded, to control the challenging terrain of international affairs, as he deemed most effective.[139] And the next set of cases illustrates the Court's role in reengineering presidential prerogatives in foreign affairs.

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138. For example, when President Jimmy Carter declared his intention to unilaterally terminate a defense treaty with Taiwan, his legal authority to terminate a treaty without the advice and consent of the Senate was called into question. When this case reached the Supreme Court, Justice Powell echoed Justice Jackson's concurrence in *Youngstown*, stating, "[i]f the Congress chooses not to confront the President, it is not our task to do so." Goldwater v. Carter, 444 U.S. 996, 998 (1979). Similar decisions were handed down in the cases involving the Reagan administration and its use of the war power in El Salvador, Nicaragua, Grenada, and in the Persian Gulf. For example, in a war powers case involving President Reagan and Nicaragua, Judge Ruth Bader Ginsburg noted "Congress has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch . . . . Congress expressly allowed the President to spend federal funds to support paramilitary operations in Nicaragua." Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsberg, J., concurring); *see also* Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

139. *Curtiss-Wright* has been cited and extended far beyond the traditional claims of unfettered discretion in foreign policymaking. *E.g.*, Justice Scalia, dissenting argued in favor of the constitutionality of the firing of a CIA technician who publicly acknowledged his homosexuality. In justifying his position Scalia referred to "the very delicate, plenary and exclusive power of the [executive] as the sole organ of the federal government in the field of international relations." Webster v. Doe, 486 U.S. 592, 614-15 (1988) (quoting United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936)). Similarly, Justice O'Connor, dissenting, relied on *Curtiss-Wright* when she argued in favor of the discharge of the homosexual CIA employee: "The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President . . ." which in turn "lie at the core of 'the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations.'" *Id.* at 605-06.

VI. FREEDOM TO ACT—EXALTING PRESIDENTIAL CONTROL OVER FOREIGN AFFAIRS

Dames & Moore v. Regan[140] and *Regan v. Wald*[141] provide us with another occasion in which to evaluate the Court's role in reconstituting the authority of the Executive's prerogative to act unilaterally. In *Dames & Moore*, the Court argued the Executive's claim to an executive agreement, which declared a national emergency and froze Iranian assets, was grounded in statutory authorization since the legislature tacitly endorsed the Executive's agreement.[142] The Court reasoned, the "general tenor of Congress' legislation in this area" allocated broad discretionary authority to the Executive.[143] Justice William H. Rehnquist, writing for the majority, asserted that "[p]ast practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'"[144]

The Court also maintained that from the perspective of public policy, the Executive must have the autonomy to act; in this case, the need to use frozen assets as "bargaining chips" in delicate negotiations.[145] The Court declared that if such a power was not granted to the President, "the Federal Government as a whole [would] lack[] the power exercised by the President."[146] Relying explicitly on Justice Jackson's concurrence in *Youngtown*, the *Dames & Moore* Court concluded Congress' failure to pass a statute articulating disapproval was tantamount to an invitation to the Executive to act unilaterally.[147] For the *Dames & Moore* Court, congressional silence was indistinguishable to the sanctioning of presidential initiatives.

The *Dames & Moore* decision was an engineered shift in authority from Congress to the Executive by the Court. And, since the opinion rested on statutes that did not directly speak to the issue, the decision illustrated the Court's recognition of broad presidential power in international relations. While the *Youngstown* Court did not speak explicitly to the issue of inherent powers, the *Dames & Moore* Court confirmed the relevance of Justice Jackson's concurrence when it asserted that the Executive possesses inherent powers when responding to international emergencies.

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140. Dames & Moore v. Regan, 453 U.S. 654 (1981).
141. Regan v. Wald, 468 U.S. 222 (1984).
142. *Dames & Moore*, 453 U.S. at 669-74.
143. *Id.* at 678.
144. *Id.* at 688 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).
145. *Id.* at 673-74.
146. *Id.* at 674.
147. *Dames & Moore*, 453 U.S. at 678-79.

In *Haig* v. *Agee*,[148] the Court asserted the Carter administration interpreted the Passport Act, which granted to the Secretary of State the power to issue and revoke passports. *Haig* involved the administration revoking the passport of Philip Agee, an ex-CIA agent who was releasing classified information, with serious implications for our national security.[149]

The *Haig* Court relied on *Curtiss-Wright* when it sanctioned presidential "[m]easures to protect the secrecy of our Government's foreign intelligence operations."[150] The Court simply upheld the Executive's interpretation of the Passport Act.[151] While the Court avoided demarcating the precise scope of the Executive's power as sole organ, the Court did work into the opinion the sole organ doctrine language from *Curtiss-Wright* to uphold the President's asserted interpretation of the law, which thus enabled the Executive to achieve an objective not permitted by the law.[152] In fact, the administration cited *Curtiss-Wright* as the authority for which to interpret the Passport Act given "the volatile nature of problems confronting the Executive in foreign policy and national defense."[153] By permitting the Executive the discretion to renegotiate and define the bounds of those laws, which were enacted to impose limits on the President's objectives based on the unpredictability of the problems he would encounter, the Court was exploiting *Curtiss-Wright* to further a precedent that would permit the Executive to remain the governing authority in determining the scope and direction of national security affairs in spite of legislative resurgence.[154]

The Court's decision in *Haig* and the precedent set is further strengthened in *Regan* v. *Wald*. The *Regan* Court found exceptions to justify and sanction broad discretionary authority to the Executive when President Ronald Reagan restricted travel to Cuba because of national security needs—the ever-pervasive Cold War.[155] The Court reasoned that Congress authorized

148. Haig v. Agee, 453 U.S. 280, 286 (1981).

149. *Id.* at 280.

150. *Id.* at 307-08. Interestingly this is not the first time that *Curtiss-Wright* is utilized to sanction presidential secrecy. *See also* Nixon v. Adm'r of Gen. Services, 433 U.S. 425, 551 (1977) (Rehnquist, J., dissenting); N.Y. Times Co. v. United States, 403 U.S. 713, 728-29 (1971); Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (asserting the Executive, "both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world." *Id*. *See also* Webster v. Doe, 486 U.S. 592, 605-06 (1988).

151. *Haig*, 453 U.S. at 306.

152. *Id.* at 291.

153. *Id. See also* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). In a concurring opinion Justice Kennedy singled out *Curtiss-Wright*, and argued the previous decisions of the Court "stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Id.* at 277.

154. *See, e.g.*, War Powers Act of 1970, 50 U.S.C. §§1541-1548 (2016).

155. Regan v. Wald, 468 U.S. 222, 230-44 (1984).

the President's actions,[156] and sanctioned them with, as *Steel Seizure* phrased it, the "widest latitude of judicial interpretation."[157] Even though the legislature proclaimed a dominant role by enacting provisions to "tie the hands" of the President and fence in the far-reaching scope of presidential authority, the *Regan* Court found in favor of the Executive.[158] Ultimately it was up to the Court to determine the scope and parameters of the Executive. As such, by granting more power to the Executive the Court stripped the authority of the legislative branch to statutorily determine what checks and limits would be placed on executive powers.

Curtiss-Wright was utilized by the *Regan* Court to establish a new line of precedent of executive branch interpretation and enforcement of the law that is not always consistent with legislative intent, but is favorable to the Executive's policy initiatives. And, despite Congress's post-Vietnam legislative (War Powers Resolution of 1973) assertiveness to rein in the powers of the President in foreign affairs, the Court's recent decisions in *Dames & Moore* and *Regan* decided that this kind of opposition had essentially run its course.

VII. WAR ON TERROR—A ROBUST REVIEW OF NATIONAL SECURITY CONCERNS AND THE PROTECTION OF INDIVIDUAL LIBERTY

Following the Court's decisions in the 1980s and the two decades that followed, the Court refined its use of *Curtiss-Wright* as a case from which to draw authority. The Court would employ *Curtiss-Wright* not as a means to assert that executives were free to roam at large, but rather as a way to declare Presidents were using implied powers to appropriately deal with mounting national security concerns. And the detainee cases show just this.

The Court continues to adhere to the constitutional order established in 1936, but worked with the "repackaged version" of *Curtiss-Wright* as it handed down its initial rulings in the detainee cases. However, as President George W. Bush asserted unreviewable unilateral power and became more marginalized from the regime, the Court was politically strengthened to render a more robust review of the administration's detention policies when it heard *Boumediene* in 2008.

The detainee cases appraise the controversial assertion of unilateral power exerted during the War on Terror by the Bush administration—policies vis-à-vis the capture, detention, and legal processing of suspected terrorists since 2004. In the end, the Court sided with the Bush administration on fundamental constitutional grounds, but constrained it statutorily.

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156. *Id.* at 232.

157. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

158. *Wald*, 468 U.S. at 244.

The juncture of legal and political time provided the Court with an opportunity to change the course taken by the executive branch and require a more dominant role by the legislative branch, but the Court, taking into account the external constraints, ultimately sanctioned the President's assertions, but only statutorily. However, the Court did reconstitute a new baseline: judicial evaluation of executive branch framing and management of a unique war may necessitate actions contrary to the standards established by the Court post-1936. This baseline would become a cautionary tale for the incoming Obama administration, which remained guarded in relying on *Curtiss-Wright* as a standard.

Post-1936 the court's jurisprudence was to support the President's use of emergency and war powers.[159] The discretionary latitude afforded to the President is particularly evident in light of the federal court's response to President Bush's assault on the War on Terror. Even though the President sought and received congressional support for many of the actions taken to combat this war, the White House did not suggest, at any point, that it needed congressional approval for the policies it implemented.[160] In fact, President Bush, on numerous occasions, emphasized his unilateral authority to conduct a unique war how he saw fit.

In June 2004, the Supreme Court ruled in three related cases: *Rasul v. Bush*,[161] *Hamdi v. Rumsfeld*,[162] and *Rumsfeld v. Padilla*.[163] These three cases addressed the President's anti-terror initiatives and executive claims of unilateral power. The administration also claimed that the President's authority was unreviewable by the judiciary and could not be checked by a co-ordinate branch of government.

The Bush administration claimed that the President is granted broad war-making powers when acting in the constitutional capacity of commander-in-chief to conduct a successful campaign.[164] Moreover, the administration claimed that the Authorization for Use of Military Force ("AUMF")

159. *See, e.g.*, HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 138 (1990) ("The Burger Court had several opportunities to read *Curtiss-Wright* strictly and thereby to rein in this executive practice. On each occasion, however, it ruled in the president's favor, approving rather than rejecting his self-serving construction of the statute in question.").

160. *See* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 506 (2002) (noting that in the past, "when Congress has actually authorized troop deployments in hostilities, Presidents have taken the position that such legislation, although welcome, was not constitutionally necessary").

161. Rasul v. Bush, 542 U.S. 466 (2004).

162. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

163. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

164. Delahunty & Yoo, *supra* note 160.

Act,[165] a joint resolution passed by Congress immediately following the attacks of September 11, granted the Executive considerable latitude in the conduct of hostilities. The Act also granted to the Executive the authority to use all necessary and appropriate force against those who aided or abetted in the terrorist attacks.[166]

Rasul v. Bush was the first habeas corpus case to reach the Court. The question before the Court in *Rasul* was whether it had jurisdiction to hear legal appeals filed on behalf of the foreign citizens who were being held at Guantanamo Bay's naval base.[167] Justice John Paul Stevens wrote the majority opinion and held that because Guantanamo Bay was territory under American jurisdiction, it thus entitled the prisoners to habeas corpus hearings.[168] More importantly, Stevens reasoned, the petitioners' rights to habeas corpus were not dependent on their citizenship status.[169]

In *Hamdi v. Rumsfeld*[170] ("*Hamdi II*") the U.S. Court of Appeals for the Fourth Circuit relied on *Curtiss-Wright*, asserting that when weighing national security concerns against individual civil rights, the President wields "plenary and exclusive power."[171] Citing *Youngstown*, the Fourth Circuit also said this power is superior when the President acts "with statutory authorization from Congress."[172] While the court did not specify which statutes might have authorized the President's actions, it went on to affirm the Executive's constitutional power—as supported by the *Prize Cases* and *Dames & Moore*—to not only conduct military operations, but also to determine who would be considered an enemy combatant, and settle the rules governing the treatment of such individuals.[173] And, in *Hamdi v. Rumsfeld*[174] ("*Hamdi III*") in 2003, the same court concluded that the President had near unfettered discretion when faced with a national emergency, and it was inappropriate for the Judiciary to weigh down presidential decisions with what the court called the "'panoply of encumbrances associated with civil litigation.'"[175]

When *Hamdi III* reached the Supreme Court, the Court was unable to agree on a unanimous line of reasoning, which resulted in a six to three vote.

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165. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2006)).

166. *Id.*

167. Rasul v. Bush, 542 U.S. 466, 470 (2004).

168. *Id.* at 480-81.

169. *Id.* at 484-85.

170. Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).

171. *Id.* at 281 (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

172. *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635-37 n.2 (1952) (Jackson, J., concurring)).

173. *Id.* at 281-82.

174. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

175. *Id.* at 465 (quoting *Hamdi II*, 296 F.3d at 283-84).

However, the majority opinion noted that the AUMF granted the President the authority to detain an American citizen as an enemy combatant because the Executive's actions were pursuant to an act of Congress.[176] Specifically, Justice Sandra Day O'Connor wrote that because "the AUMF is explicit congressional authorization for the detention of individuals," it gives the Executive the authority to use all necessary and appropriate force against "nations, organizations, or persons."[177] O'Connor, however, reminded the Bush administration that the Rehnquist Court would not become a "rubber stamp" for an administration that was attempting to "*condense* power into a single branch of government."[178]

In *Rumsfeld v. Padilla*, the Court made clear that presidential actions were, indeed, subject to judicial scrutiny, placing some constraints on the President's claim to unfettered power.[179] Ultimately, however, the Court declined, on procedural grounds, to rule in this case.[180] Justice Stevens's dissent in this case noted that the arguments stated by the Court could not justify avoiding its duty to respond to the question the case raised: Did the President have the authority to detain Padilla by claiming a broad inherent or emergency power?[181] Justice Stevens maintained, "[t]his is an *exceptional* case that we clearly have jurisdiction to decide."[182] He further argued that the case before the Court gave the Justices an opportunity to review the actions taken by the administration and the constitutional claims made by the President when he invoked inherent power—terms echoing *Curtiss-Wright*—to deny Padilla his civil liberties in the name of national security.[183]

Ultimately, the amalgamation of *Rasul*, *Hamdi*, and *Padilla* offer the most definitive statement yet of what powers are afforded to the President when detaining enemy combatants. The Court, constrained by extenuating circumstances, found in favor of Bush.

The Roberts Court was left to answer the important questions left unanswered by the Rehnquist Court when it ruled in *Rasul*, *Hamdi*, and *Padilla*.

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176. Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

177. *Id.* at 517-18 (internal quotations omitted).

178. *Id.* at 536.

179. Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004) (explaining that the Court granted certiorari to review, in part, the legality of Padilla's military detainment pursuant to the President's determination that he is an "enemy combatant").

180. *Id.* at 451.

181. *Id.* at 455 (Stevens, J., dissenting).

182. *Id.* (emphasis added).

183. *See id.* at 461 ("[T]his case is singular not only because it calls into question decisions made by the Secretary himself [under the President's order], but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen."); *see also Rumsfeld*, 542 U.S. at 465 ("Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law.").

For example, no five Justices could settle on the exact kind of legal process Hamdi or other enemy combatants should be given.

Hamdan v. Rumsfeld[184] and *Boumediene v. Bush*[185] round out the detainee cases. Writing for the majority in *Hamdan*, Justice Stevens concluded that special military tribunals[186] must either be established by statute or, if created by presidential order, must follow rules and procedures consistent with the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions.[187] Moreover, the mere assertion of inherent powers did not grant the Executive the authority to establish military commissions.[188] The upshot of Justice Stevens's opinion amounted to a more systematic reproach to the administration than the Court had issued two years earlier. Procedures could not be written for the military commissions unilaterally—Congress had to approve them—nor could the procedures ignore Geneva Conventions; in fact, the administration had to comply with the treaty.[189] Even though the Court ultimately invalidated these particular tribunals, it did accept the principle that the Executive has the power to order those individuals he believes to be unlawful combatants to be tried by military tribunals so long as, the Court asserted, the tribunals were lawfully constituted.[190]

Acting pursuant to the Court's counsel, President Bush asked Congress for the authorization to create special tribunals operating under basically the same rules and procedures as those already declared unconstitutional by the *Hamdan* Court. Congress acted forthwith and acceded to President Bush's request by passing the Military Commissions Act ("MCA"),[191] which Bush promptly signed into law in October 2006. Consequently, since the President sought, and Congress approved, statutory authorization, the *Hamdan* decision does not appear to posture a demonstrable challenge to presidential power during a time of war. However, the commissions were ultimately challenged and subsequently found by the *Boumediene* Court to be an unconstitutional suspension of a prisoner's right to habeas corpus.

Boumediene involved a direct confrontation to the Bush administration's authority because it challenged the constitutionality of the MCA. Justice Kennedy's majority opinion held that the habeas statute extended to noncitizens at Guantanamo as a guarantee under the Constitution. In addition,

184. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

185. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

186. A Combatant Status Review Tribunal was established for Hamdan's case by the U.S. Department of Defense on July 7, 2004. *Hamdan*, 548 U.S. at 570 (majority opinion).

187. *Id.* at 567.

188. *Id.* at 593.

189. *Id.* at 620-25. Justice Stevens, however, did not have a majority for all parts of the Geneva Conventions analysis. *Id.* at 564.

190. Hamdan v. Rumsfeld, 548 U.S. 557, 594-95 (2006).

191. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and other sections of Titles 10, 18, 28, and 42).

the *Boumediene* Court found that the MCA was an unconstitutional suspension of the federal courts' jurisdiction to hear habeas applications from detainees who had been labeled "enemy combatants" by the Bush administration.[192]

The Court's assertions in the detainee cases in general were a sharp reproach to the administration's contention that it alone could offer an alternative constitutional understanding of how to conduct the War on Terror.[193] In fact, the Court stated, it is not the "regime" that has the authority to say "what the law is," but the Court's authority.[194] When the Court is challenged on the supremacy over constitutional interpretation, the Court will confront the primary commitments of the majority coalition and reestablish its institutional legitimacy as it did in this set of cases. While the courts have upheld certain due process rights of individuals classified by the administration as enemy combatants, what these decisions have not adequately addressed is the core war-making powers of the executive branch. As such, the Court's redefinition of those powers remains largely intact.

VIII. *ZIVOTOFSKY*—ESTABLISHING A NEW STANDARD

To date we have witnessed President Barack H. Obama exploiting the unbridled, unilateral power that so many Presidents[195] before him have claimed—a power the judicial branch has legally sanctioned since 1936. Broad interpretations by the Obama administration have ushered in new questions about the great elasticity with which this administration is exercising the commander-in-chief clause. And *Zivotofsky*[196] is the most recent challenge. Initially, it appears the Court handed the presidency a loss when it renounced the sole organ doctrine. However, upon closer examination the Court continues to endorse presidential prerogatives with respect to the recognition and treaty making powers of the Executive.

At issue in the case was whether a federal statute could direct the Secretary of State to record the birthplace of a U.S. citizen born in Jerusalem as

192. Boumediene v. Bush, 553 U.S. 723, 733 (2008).

193. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 15 (2007) (noting that, at times, various political actors, in this instance the Executive, seek to supplant other potential constitutional interpreters (the Court in this case) and assert their own authority to define the powers or "content of contested constitutional principles").

194. *Boumediene*, 553 U.S. at 765 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

195. *See* Lori Fisler Damrosch, *Covert Operations*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 87 (Louis Henkin, Michael J. Glennon & William D. Rogers eds., 1990) (discussing the ways in which Congress allowed the executive branch to circumvent its policies regarding covert actions).

196. Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

Israel, and if so, would this directive impermissibly infringe on the Executive's authority to recognize foreign states?[197]

As with so many briefs before, the Justice Department relied on *Curtiss-Wright* as precedent to claim broad, exclusive, and plenary powers for the Obama administration in *Zivotofsky*.[198] The case involved the President's exclusive recognition powers, which the Court essentially upheld. Although the Court seemed to abandon the sole organ doctrine, it fashioned a new standard. One that still allows future Courts the opportunity to exalt executive power above Congress in this area.

In a 6-3 majority decision Justice Kennedy noted while the Court "declines to acknowledge that unbounded power" that the *Curtiss-Wright* case asserts, Kennedy left "the sole power to negotiate treaties"[199] still in the hands of the Executive, which draws on *Curtiss-Wright*'s holding that "the Senate cannot intrude; and Congress is powerless to invade."[200] Moreover, the *Zivotofsky* Court asserted, "the Executive ha[s] authority to speak as the sole organ of th[e] government"[201] which is the dicta of *Curtiss-Wright* that the current Court was purportedly denouncing. Ultimately, the Court found that the federal statute in question was unconstitutional because it usurped the Executive's sole authority to recognize foreign nations as it relates to passports. The Court noted that its reasoning was supported by precedent and history. In the specific instance, because the administration had expressed an impartial position by not recognizing any nation's sovereignty over Jerusalem, the statute was unconstitutional. And, in general terms, the Court found that the recognition power belongs exclusively with the executive branch.

Interestingly, the Court relied on two cases, both of which present conflicting precedents, and yield from the constitutional orders I argue present two very different paths for presidential ascendancy. As noted, the Court retreats from the President's "perennial favorite" (*Curtiss-Wright*) and "resurrects an all-but-forgotten opinion of Chief Justice John Marshall that tightly circumscribed presidential power, *Little v. Barreme* (1804)."[202] *Barreme* directly involved the commander-in-chief clause during an undeclared war and

197. *Id.* at 2081.

198. Brief for the Respondent, Zivotofsky v. Kerry, No. 13-628 (U.S. Sept. 22, 2014) at 17-18 (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936)).

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

200. *Curtiss-Wright*, 299 U.S. at 319.

201. *Zivotofsky*, 135 S. Ct. at 2088.

202. Michael J. Glennon, *Recognizable Power the Supreme Court Deals a Blow to Executive Authority*, FOREIGN AFFAIRS (2015), https://www.foreignaffairs.com/articles/united-states/2015-06-23/recognizable-power. This is interesting in and of itself because both cases, coming from two different constitutional orders, rely on Marshall's assertions. In the first case, Marshall denounces unilateral executive claims and, in the second, Sutherland misrepresents Marshall's assertions that the President is the sole organ of foreign policy.

the Court held an Act of Congress trumps an executive circumventing it. Citing *Barreme*, the *Zivotofsky* Court held the President "is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[203] The Court added it is not the sole authority of the Executive to conduct the nation's foreign policy. These remarks might cause some concern for the imperial president moving forward.

It appears the Court is staying the course it established in the detainee cases, however. If you recall Kennedy wrote the majority opinion in *Boumediene* (2008)—the last of the five cases—that criticized the Bush administration's use of tribunals. Kennedy reasoned the tribunals gave the political branches the power to "switch the Constitution on or off" and it would therefore "leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"[204] The Court ultimately checked the executive branch, and the current case, *Zivotofsky*, suggests the judicial branch is keen to rein in the President's use of executive prerogatives. Judicial decisions addressing continued foreign policy disputes rest on precedents that are predictably elastic, *Curtiss-Wright* being that exception until *Zivotofsky*. However, the 2015 decision is narrow in scope, which leaves the unilateral powers door wide open for future Presidents—the *Zivotofsky* majority relied on such phrases as "one voice" and speaking "for the nation" that echo *Curtiss-Wright*.

Ultimately, presidential ascendancy remains intact. The holding of *Zivotofksy* emphasizes the continued task of asking questions about courts as agents of change: the feedback loop between those factors that influence decision-making and in turn how judicial decision-making influences constitutional and political development.[205]

IV. CONCLUSION

At the onset of military exigencies, Congress and the public at large give Presidents enormous freedom of action in the realm of foreign and security policy. But how the federal courts define the appropriate balance between security and liberty, which has the potential effect of constraining the President, is relevant to understanding how U.S. foreign policy and the relationship between Congress, the President, and the courts have evolved. Adjudicating competing concerns over the security of the nation and the liberty of the individual presents a more significant challenge for the Supreme Court than simply resolving domestic policy disputes. To understand judicial deci-

203. *Id.*
204. Boumediene v. Bush, 553 U.S. 723, 765 (2008).
205. Fletcher, *supra* note 1.

sion-making requires a better grasp of the factors affecting each Justice's decision, including their alliance to bedfellows on the Court and political leanings. In short, the Supreme Court tends to support a President's Hamiltonian view of his role in foreign policy. This is evident with Justice Sutherland's 1936 opinion in *Curtiss-Wright*—that the President is the "sole organ of the federal government in the field of international relations."[206]

While Justice Jackson's concurring opinion in *Youngstown* all but relegated *Curtiss-Wright* to a footnote, this has not curbed executives from asserting a unilateral role in foreign policymaking. In fact, Justice Sutherland's opinion is oft-cited by the judicial branch to support claims of "broad delegations of legislative power to the President" and "the existence of independent, implied, and inherent powers for the President."[207] Moreover, politicians from both sides of the aisle and the public at large have generally accepted this assertion. This trend has exalted presidential power far beyond the constitutional blueprint advocated by the Court prior to 1936 and jettisons us into a state of unilateral executive dominance. While the decisions rendered by the Court have not always invoked *Curtiss-Wright* directly, its spirit remains.

This overview of the past eight decades demonstrates a trend that perpetuates the usurpation of powers by the President and the overarching claim that the President is granted superior authority in foreign affairs. Given this trend, extra-constitutional arguments as presented by those supporting a powerful executive have a sturdy foundation.

Curtiss-Wright has been an "authority" on which those rallying for support of plenary presidential powers independent of congressional delegation rely. For those intent on championing unilateral presidential action in the area of foreign affairs, or in challenging congressional attempts to limit the Executive's discretion in this realm, Justice Sutherland's profuse language has shown to be alluring: "the President alone has the power to speak or listen . . . Congress itself is powerless to invade . . . ."[208]

Critics of *Curtiss-Wright* have vehemently tried to undermine Sutherland's opinion, but they have unsuccessfully kept it out of briefs and judicial opinions.[209] While it is evident that no post-*Youngstown* decision by the Court has visibly rested on the *Curtiss-Wright* decision as controlling precedent, it is evident that there exists a discernible change in path trajectory, which was established by Sutherland in 1936. Additionally, the Courts entrenched the sole organ doctrine; this is evident by the significant number of citations that have risen exponentially. The Court's dynamic institutional role

206. United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 320 (1936).
207. FISHER, *supra* note 32, at 73.
208. *Curtiss-Wright*, 299 U.S. at 319-20.
209. Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 415 (1996).

over developmental time influenced the subsequent development of constitutional law and the political development of the executive branch. The Court alters the path taken by the Executive with little institutional costs to both the executive and the judicial branches. Thus, the sole organ doctrine weaves itself into the very fabric of American foreign policy making.

The Court's judicial tilt toward the executive branch caught the attention of many scholars, including Edward Corwin, who argues that courts often defer to the executive branch because presidential control over foreign affairs frequently generates changes in the world that the U.S. judiciary feels powerless to invalidate.[210] This paper, however, demonstrates the constitutive role of the judicial branch in redefining and reconfiguring the division of powers between the Executive vis-à-vis the legislative branch in foreign policymaking and allocating to the President the lion's share. The imperial president is constitutionally legalized with the institution and continued adherence of a new constitutional order established in 1936.

The Court is an architect in redefining presidential unilateral powers in international relations. It is the continuous and constitutive relationship between the judicial branch and the executive branch that has elevated the President's authority far beyond the Court's early judicial rulings. As Keith Whittington noted, "[t]he creation or recognition of a new power by one president necessarily empowers his successors . . . ."[211] I would contend that as the Supreme Court redefined the President's power in 1936 to unilaterally conduct our nation's foreign affairs and legally sanctioned broad claims of executive authority, the Court not only empowered President Roosevelt, but also granted to succeeding Presidents the empowerment to act forthwith. The Court transforms power, shapes politics, and redirects history.

210. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 16 (4th ed. 1957).

211. WHITTINGTON, *supra* note 193, at 17.