

Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?

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By Jamie Schuman

Louis Fisher, a leading expert on the separation of powers, has taught a law school course on U.S. Supreme Court decisions that have harmed the court and the country.

High on his list is *United States v. Curtiss-Wright Export Corp.*, a 1936 ruling that Fisher says contains dicta wrongly assigning the president too much power in foreign affairs.

Fisher used an amicus brief in *Zivotofsky v. Kerry*—which pits Congress against the president’s power to recognize foreign governments—to urge the court to correct *Curtiss-Wright*. The case was argued on Monday.

“Part of my purpose in writing the brief was to learn two things: Is the Supreme Court capable of correcting erroneous dicta, and, two, is it not?” said Fisher, who is scholar in residence at The Constitution Project, a think tank in Washington. “I’m going to learn one way or another.”

At issue in the *Zivotofsky* case is a law that would force the State Department to comply with requests from U.S. citizens born in Jerusalem to list “Israel” as their birthplace on passports. President George W. Bush rejected that requirement in September 2002, saying it interfered with his ability to conduct foreign affairs.

The parents of Menachem Zivotofsky sued to enforce the law after their son, a U.S. citizen, was born in Jerusalem in October 2002. They want his passport to list “Israel” rather than “Jerusalem” as his birthplace. In 2012, the Supreme Court found that he has standing to sue because the matter is not a “political question.”

Ruling on the merits in July 2013, the U.S. Court of Appeals for the District of Columbia Circuit found that the President has “exclusive” power to recognize foreign governments. Five times, the court relied on dicta from *Curtiss-Wright*, including a passage in which Justice George Sutherland called the president “the sole organ of the nation in its external relations.”

To Fisher, the court’s use of this decades-old case may reinforce the mistaken notion that the president has exclusive authority in foreign affairs. That’s the British approach, which “clearly, the Framers rejected,” he said.

At 80, Fisher has devoted his career to studying the separation of powers. For 36 years, he was Senior Specialist in Separation of Powers with Congressional Research Service, a branch of the Library of Congress that provides policy recommendations. He has testified more than 50 times before Congress.

Though not a lawyer, Fisher previously has drafted Supreme Court briefs at attorneys' requests. This is the first time he did so without being asked, and the first time he did many administrative tasks—from formatting tables to paying \$1,600 for printing—by himself.

Counsel of record is Fisher's friend Charles Tiefer, who teaches at the University of Baltimore School of Law and was solicitor and deputy general counsel of the U.S. House of Representatives.

Fisher explains in his brief that the dicta on which the D.C. Circuit relied was taken out of context from remarks that John Marshall gave when he was a congressman in 1800. Marshall was defending President John Adams for enforcing a provision in a treaty that the legislative and executive branches jointly made with Great Britain. The "sole organ" quote meant that Adams had the authority to implement the treaty but not the singular power to formulate it, Fisher argues.

Fisher continues that Curtiss-Wright wasn't even about executive authority, and that Sutherland's writing was a "deliberate effort, though deceit, to inflate presidential power in foreign affairs."

Historians have long criticized the dicta, and Fisher had his students at William & Mary Law School read primary source material behind the case. They, too, concluded that Sutherland was wrong.

"They've all been taught in law school that the Supreme Court is a reliable institution to get it right," Fisher said. "They see the error. It's an obvious error. It's quite a wakeup call to them."

Fisher also used his brief to caution against treating dicta as precedent. He says the language is prone to mistakes because judges do not scrutinize it as much as holdings, and it is easy for readers to take out of context.

Moreover, Fisher says, courts—unlike many other professions—can be hesitant to fix errors.

"There's something about the legal profession," Fisher said. "If it's a precedent, it has a magic to it no matter how erroneous."

<http://www.nationallawjournal.com/supremecourtbrief/home/id=1202675381493/Brief-of-the-Week-Can-the-Supreme-Court-Correct-Erroneous-Dicta?mcode=1202615432728&curindex=2&back=NLJ&slreturn=20141005104801>