

**Louis Fisher.** *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings.* Lawrence, KS: University Press of Kansas, 2017. xv, 352 pp. (cloth, \$39.95).

“...the Framers got this right.” So Louis Fisher writes (p. 2), and if the Supreme Court, the President, and Congress actually followed the Constitution that would be both the beginning and end of Louis Fisher’s latest fascinating book on the presidency. Unfortunately, as Fisher documents in extraordinary detail, it could be said that the framers got it right and almost everyone else got it wrong. There is a long tradition of books that assign the blame for the accelerated expansion of presidential power with the U. S. Congress, on treaties that have expanded the U.S. role in foreign affairs, and on public expectations that demand an active commander in chief. One can also find roots for this development in the changing technologies that place America in greater danger, such as President Trump’s oversized red nuclear button. Yet, while law reviews have regularly castigated the courts for a lack of proper oversight, particularly with regard to viciously inaccurate dicta such as is contained in the Justice Sutherland’s *Curtis-Wright* decision, the court’s role in the unwarranted expansion of presidential power has never been as convincingly presented as in Fisher’s newest book. This is a book that should be required reading in a variety of different classes, from law school to political science and history. And yet, stripped down to its basics, all Fisher does is make a rather simple and fundamental point: “the framers got this right.”

The basic problem, as Fisher describes on page 3, “Supreme Court support for independent presidential power is drawn from both judicial rulings and dicta carelessly added to holdings. Dicta can be demonstrably false, as with the sole-organ doctrine that found its way into the *Curtis-Wright* decision.” As Fisher demonstrates in his careful analysis of federal court decisions beginning at the Founding, the courts were not always so careless. The federal courts regularly interpreted the president’s authority consistent with the U.S. Constitution. While Fisher notes cases where these earlier courts, particularly in wartime, leaned toward greater presidential power, the federal courts carefully guarded the Founder’s original design. As America approached World War II, and especially with the erroneous dicta of the *Curtis-Wright* decision, however the Supreme Court tossed both the Constitution and history to the side. The *Curtis-Wright* decision is of particular interest. Based on a speech delivered by John Marshall when he was a member of the House of Representatives, Justice Sutherland’s decision entirely misstates Marshall’s original meaning. But even if he had not, how can an interpretation of presidential power be based on a congressional speech, whether delivered by John Marshall or anyone else? Sutherland then compounds this misuse of congressional rhetoric with the citation of copious other historical inaccuracies. While Fisher does not recommend it, the clear inference from *Curtis-Wright* and many of the federal court’s decisions in subsequent decades, is that justices would be wise to employ historians on their legal staff, as well as lawyers. Differently stated, lawyers do not make good historians. Many of the post-World War II decisions that Fisher cites would receive failing grades in even the most basic history classes. And not only have justices repeatedly and carelessly misread history, they have compounded this error by re-citing false dicta and inappropriate readings of the Constitution.

It is in this regard that I find Fisher's book most compelling. We can excuse judges for making an occasional misreading of history, but Fisher demonstrates that there is a consistent pattern of ignoring basic and inarguable facts. Such a misreading of history does severe damage to both our judicial institutions and the Founders' carefully constructed system of checks and balances. It also established the idea that the president alone is our savior in foreign affairs. As Fisher demonstrates repeatedly, but with the greatest effect with regard to the presidency of George W. Bush, presidents are decidedly fallible. We cannot trust that they alone should have the information necessary to preserve our basic freedoms or our security. Presidents sometime dissemble the truth, presenting a version of it that comports with their policy requirements. In such cases, we have rushed needlessly and carelessly to war, creating ever greater foreign policy fiascoes. The Founders warned that unbridled presidential power, such as the power of a monarch, is dangerous. Consultation with Congress and strong judicial oversight can do more to protect our nation's national defense than delegating power to an unchecked unitary executive. Consequently, as Fisher warns, "The decision to vest independent power in the President in external affairs comes at a high cost to constitutional principles, congressional authority, the system of checks and balances, and public trust in government" (p. 309). When one adds that we can hardly vouch for the stability and genius of all of our presidents, the idea of providing any individual with unbridled power raises serious risks to our nation's security. The federal courts therefore have not safeguarded America at the cost of constitutional principles. The risk runs both ways. Furthermore, as Fisher notes, "Scholarly repetition of judicial errors spreads misconceptions about presidential power" (p. 311). These misconceptions are reprinted endlessly in scholarly work, thus further propagating bad history and bad precedent. It may be useful for a committee of historians and lawyers to document the entire panoply of judicial misstatements of history in court decisions. The task of doing so should not end with Fisher's book. Rather, Fisher's work should inspire others to place court decisions in their proper historical perspective, as well as shifting the powers of the three branches back to their constitutional roots. As we face a world of ever greater uncertainty and danger, there is no greater task than bringing accountability to our constitutional system. As with so much else, that task should begin with a proper understanding of the role of history.

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