

AGORA: REFLECTIONS ON *ZIVOTOFSKY V. KERRY*
ZIVOTOFSKY V. KERRY AND THE BALANCE OF POWER

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Zivotofsky v. Kerry (*Zivotofsky II*) is a case about the constitutional distribution of power. The narrow question is whether Congress or the President has the power to determine whether a U.S. citizen born in Jerusalem can have “Israel” listed as his country of birth on his passport when the President does not formally recognize Jerusalem as part of Israel. As for the broader question—well, the case is packed with broader questions. Does the President have the exclusive constitutional authority to undertake the international legal act of recognition? Does the President have further exclusive constitutional authority to control the content of executive-branch communications with foreign nations? What powers does Congress have in foreign affairs? And are these justiciable issues for the federal courts to resolve?

The first round of *Zivotofsky* asserted judicial power. Now, in the second round, the Supreme Court has backed executive power—albeit with some reminders that Congress has considerable foreign affairs powers. At a minimum, *Zivotofsky II* confirms, or one might say dictates, that the recognition power is exclusive to the President. It also offers some signals about executive power in foreign relations law more generally, although the impact of these signals must await further practice.

In what follows, I situate *Zivotofsky II* within the Court’s broader decision-making with respect to the separation of foreign affairs powers. I begin with some comments on the merits and outcome of the case. I then offer two observations about the signals *Zivotofsky II* sends for foreign relations law going forward. First, although at one point the Court throws cold water on some famous dicta from *United States v. Curtiss-Wright Export Corp.*, the totality of its opinion suggests the continuing influence of this dicta in foreign relations law. Second, *Zivotofsky II* makes clear that the Court remains willing to treat foreign relations law differently and, among other things, to draw on international law in its interpretation of the Constitution’s distribution of foreign affairs authority.

I. The Merits of a Hard Case

Zivotofsky II is a hard case. It lies “in relatively uncharted waters with few fixed stars by which to navigate.”¹ Weighing the case with each single tool of constitutional interpretation—such as text, structure, historical practice, precedent, and functionalism—there is something substantial to put on either side of the scale. Textually, the President is to “receive Ambassadors,” but evidence from the Framing associates this with a dignitary role, and in any event, it does not squarely speak to the exclusivity of a recognition power. Structurally, ordinarily Congress is the body to establish policy through law, but the President has a traditionally greater role in the foreign affairs context. Historically, the President has taken the lead on recognition and Congress has never

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¹ *Zivotofsky v. Sec. of State*, 725 F.3d 197, 221 (2013) (Tatel, J., concurring).

forced its position on recognition over presidential objections, but then again, prior to the events leading up to this case, there is little if any practice of presidents squarely defying congressional statutes relating to recognition. In terms of precedent, the Court has never ruled on the recognition power, although some twentieth-century dicta states that the power is exclusively the President's. Functionally, there is undoubtedly value to having clear U.S. foreign policy, but there are plenty of foreign policy contexts in which we accept substantial cacophony. And the case is even hard as to how much the recognition power is implicated: while the content of a passport does not amount to formal recognition, it nonetheless is a signal of a country's positions on recognition, and it is clear that Congress passed the statute at issue precisely to send such a signal.

Justice Kennedy's majority opinion does a good job of acknowledging the point-counterpoint quality of the issue. Yet it ends up finding that each tool of constitutional interpretation ultimately favors (or at least does not disfavor) an exclusive presidential recognition power which it views the statute as impinging upon. By contrast, while the three dissenters do not formally reach the issue of whether the President holds the exclusive recognition power, their analysis, in the course of finding that the statute does not intrude on recognition, strongly suggests that they see all the tools of constitutional interpretation lining up in the other direction. The confidence on both sides seems overstated.

More broadly, this case triggers thoughts about whether, as a matter of constitutional and institutional design, continued uncertainty might be better than a resolution from the Court. Edward Corwin famously described the Constitution as "an invitation to struggle for the privilege of directing American foreign policy,"² and there are benefits to substantive uncertainty about where the boundary between Congress and the President lies. This uncertainty may spur cooperation, compromise, and reflection, as well as allowing for shifting resolutions that fit shifting times. In his opinion for the Court in the first round of *Zivotofsky*, Chief Justice Roberts showed no interest in this perspective and thus no interest in the prudential aspects to the political question doctrine as traditionally formulated. As he put it, "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid."³ Yet in the second round of *Zivotofsky*, the Chief Justice came to signal some appreciation for uncertainty. "It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power," he wrote.⁴ "Perhaps we could have waited another 225 years."⁵ While the Chief Justice blames the loss of uncertainty on the majority opinion, it stems in the first instance from the Court's decision to decide the case on the merits. Once the Court took up the merits, it would inevitably have to choose sides between Congress and the President.

Because the merits were so close and there are benefits to uncertainty, the outcome I think would have been best is an unusual one. Treatment of the case as a political question would not do a lot to preserve uncertainty, since that outcome would effectively have handed a long-term institutional victory to the executive branch by removing the threat of judicial review. But uncertainty could have been preserved, at least to a greater degree, if the Court had decided this case without any single controlling opinion or rationale. Regardless of whether a justice can appropriately take into account the virtues of uncertainty in deciding how to vote or what opinion to join, this outcome could occur naturally in several ways. One such way might well have occurred if the Court had decided the merits of *Zivotofsky* the first time that it heard the case. At that time, there would have been no precedent on the issue of whether the case posed a political question. Thus Justice Breyer, who formed the

² EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 200 (1940).

³ *Zivotofsky v. Clinton*, 123 S. Ct. 1421, 1427 (2012) (citations and quotation marks omitted).

⁴ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2116 (2015) (Roberts, C.J., dissenting) [hereinafter *Zivotofsky II*].

⁵ *Id.*

fifth vote in the majority opinion, would have been free to simply vote to dismiss the case as a political question.⁶ Had that happened, there would have been no controlling opinion for the Court on the merits. Instead, there would have been a four-justice plurality plus Justice Thomas's separate opinion, which agrees with the others about the ultimate outcome of the passport issue, but has little in common with them in terms of methodology or reasoning. This approach would have resolved the particular case but done comparatively little to change the balance of perceived legality going forward. Instead of this outcome, however, we have a clear five-justice majority finding that the President has an exclusive recognition power upon which the passport statute infringed.

II. Foreign Relations Law after *Zivotofsky II*

Zivotofsky II is clearly a major precedent on the recognition power, but what else does it do to foreign relations law? It is far too early to answer this question with confidence, since the reach of Supreme Court opinions depends largely on their legacy. Yet there are signals, and I discuss some of these below.

Curtiss-Wright—*can't live with it, can't live without it*

At first glance, one notable thing about the majority opinion is its deliberate wariness about dicta from *United States v. Curtiss-Wright Export Corp.*⁷ This famous dicta in Justice Sutherland's opinion for the Court had stated that in the "vast external realm" of foreign relations, the "President alone has the power to speak or listen as a representative of the nation;" that "he alone negotiates"; and that he is "the sole organ of the nation in its external relations."⁸ The *Zivotofsky II* majority goes out of its way to emphasize that this language in *Curtiss-Wright* was dicta and to suggest that this language does not necessarily characterize the relationship between Congress and the President with regard to the conduct of diplomatic relations. Instead, while the "President does have a unique role in communicating with foreign governments ... it is still the Legislative Branch, not the Executive Branch, that makes the law."⁹

Yet taking the *Zivotofsky II* majority opinion as a whole, this disavowal doth protest too much. For much of the Court's holding on the recognition power is built implicitly—and at one point even explicitly—on this broad language in *Curtiss-Wright*. Consider the following:

- Some language in the Court's opinion sounds strikingly like the disapproved dicta from *Curtiss-Wright*. For example, the Court states that "[r]ecognition is a topic on which the 'Nation must speak with one voice.' That voice must be the President's. Between the two branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater

⁶ See *id.* at 2096 (Breyer, J., concurring) (noting that "I continue to believe that this case presents a political question . . . [b]ut because precedent precludes resolving this question on political question ground . . . I join the Court's opinion"). Justice Breyer had been the lone dissenter in the first round of *Zivotofsky*.

⁷ Several commentators have noted the Court's apparent disapproval of the *Curtiss-Wright* dicta. See, e.g., Marty Lederman, *Thoughts on Zivotofsky, Part Seven: "Curtiss-Wright—out of sight," and the fate of the argument for an exclusive executive diplomatic authority*, JUST SECURITY (June 14, 2015, 12:56 PM); Michael J. Glennon, *The Supreme Court Deals a Blow to Executive Authority*, FOREIGN AFFAIRS SNAPSHOT (June 23, 2015); Ryan Scoville, *Legislative Diplomacy after Zivotofsky*, LAWFARE (June 15, 2015, 9:00 AM); Michael Dorf, *Zivotofsky May Be Remembered as Limiting Exclusive Presidential Power*, DORF ON LAW (June 8, 2015, 12:52 PM); but see Jack Goldsmith, *Why Zivotofsky Is a Significant Victory for the Executive Branch*, LAWFARE (June 8, 2015, 3:44 PM) (observing that the Court has some "unadulterated *Curtiss-Wright*-ism" even while it nominally offers "pooh-poohing of *Curtiss-Wright*").

⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); see also *Zivotofsky II*, 135 S.Ct. at 2089 (quoting this language).

⁹ *Zivotofsky II*, 135 S.Ct. at 2090.

degree, ‘decision, activity, secrecy, and dispatch.’”¹⁰ The Court adds that “[t]he President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition.”¹¹ All this language sounds like *Curtiss-Wright*, except that it is focused specifically on the recognition power as opposed to a broader diplomatic power. And although it is focused specifically on recognition, the points made here seem functionally as apt for diplomatic communication generally as for recognition.

- The Court cites approvingly to precedents that use language which resemble the disapproved dicta from *Curtiss-Wright*. For example, the Court cites three times to a page of *United States v. Pink* that in turn drew upon the *Curtiss-Wright*’s famous dicta.¹² The Court also cites favorably to *United States v. Belmont*,¹³ which was written by Justice Sutherland in the same term as *Curtiss-Wright* and shares a similar perspective on the President’s role in foreign affairs.
- The Court even cites with approval in another part of its opinion to the exact same passage in *Curtiss-Wright* that it elsewhere disavowed. Specifically, it observes that the “President has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).”¹⁴

What are we to make of all this? Time will tell, but my impression is that in disavowing the *Curtiss-Wright* dicta as it relates to a broader diplomatic power, the Court is just trying to keep issues open for the future. Without that disapproval, it would be a relatively easy extension from recognition to a conclusion that the President has sole control over the content of diplomatic communications. But by combining its tacit (and at one point explicit) reliance on *Curtiss-Wright* with this express disavowal, the Court makes clear its intent to preserve its future options.

The Court’s mixed use of *Curtiss-Wright* comes at some cost to the consistency of judicial reasoning. But overall, this seems like a fair price to pay. With its mixed signals, the Court preserves a defining feature of foreign relations law, which is its dialectic nature.¹⁵ *Zivotofsky II* may end or curtail citation to *Curtiss-Wright*’s famous dicta (although I have doubts about this), but it will not end the importance to foreign relations law of the principles underlying this dicta. These principles are deeply embedded in function, practice, and precedent. The safeguards against their abuse rest in the countervailing principles set forth in cases like *Little v. Barreme* and *Youngstown*.

Zivotofsky II and Methodology in Foreign Relations Law

Another significant feature of *Zivotofsky II* is that it fits uneasily with some of the Court’s other recent cases in foreign relations law. As a narrow example, there is sharp tension between Justice Scalia’s pragmatic approach to the Necessary and Proper Clause in *Zivotofsky II* and the stilted reading of this Clause that he recently offered

¹⁰ *Id.* at 2086 (citations omitted).

¹¹ *Id.*

¹² *Id.* at 2086, 2088; see also *United States v. Pink*, 315 U.S. 203, 229 (1942).

¹³ E.g., *Zivotofsky II*, 135 S.Ct. at 2088 (quoting *United States v. Belmont*, 301 U.S. 324, 330 (1937)).

¹⁴ *Id.* at 2086.

¹⁵ For elaboration on this claim, see Jean Galbraith, *Human Rights Treaties in and beyond the Senate: The Spirit of Senator Proxmire*, in FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS: ESSAYS ON INTERNATIONAL LAW, CRIME AND JUSTICE IN HONOUR OF ROGER S. CLARK (Suzannah Linton et al. eds., forthcoming 2015).

in his separate opinion in *Bond v. United States*.¹⁶ At a broader level, the opinion of the Court is notable in its distinctive treatment of foreign relations law and in its use of international law in the course of constitutional interpretation.

Some scholars have recently argued that the Roberts Court is formalistic or unexceptional in its treatment of foreign relations law.¹⁷ *Zivotofsky II* is a counter-example. The opinion draws with impressive symmetry on different types of constitutional reasoning. An eight-page subsection addresses text, structure, and function; a six-page subsection addresses precedent; and another six-page subsection addresses historical practice.¹⁸ Overall, the Court's conclusion that the President holds an exclusive recognition power is strongly rooted in its characterization of precedents, historical practice, and functional considerations that are specific to the foreign affairs context. The repeated invocations of *Belmont* and *Pink* are examples of this, as is the lengthy discussion of practices from the time of President Washington through to that of President Carter. Although the Court pays homage in the abstract to structural principles of congressional control, its reasoning in the particulars relies on a robust view of executive power. The Court also seems concerned about how other countries will perceive and interact with the United States government—a concern that is specific to foreign relations law.

One particularly interesting methodological feature of *Zivotofsky II* is the role that international law plays in constitutional interpretation. Both the Court's opinion and Justice Scalia's dissent use international legal concepts relating to recognition in their constitutional interpretation. Justice Scalia uses international law to understand the scope of the constitutional power of recognition—and thereby to conclude that this power is not implicated by a congressional statute about passports.¹⁹ As for the Court, it uses international law in several different ways. It draws on international law from the time of the Framing in interpreting the meaning of the “receive Ambassadors” clause.²⁰ It also uses international law in its structural constitutional analysis. The Court claims that “[a]t international law, recognition may be effected by different means, but each means is dependent upon Presidential power,” such as receiving ambassadors, negotiating treaties, or engaging in diplomatic communications.²¹ Because of this, the Court infers that the President must have the power to recognize foreign nations as a matter of constitutional law. Unfortunately, the Court does not additionally consider how international law has played a role in historical practice. As I have shown elsewhere, Presidents drew on international legal concepts in the nineteenth and early twentieth centuries in asserting an exclusive recognition power under the Constitution.²² Despite this omission, however, *Zivotofsky II* shows acknowledgement on the part of the Court of the connections between international law and the constitutional distribution of foreign affairs powers.

III. Conclusion

One of my most-marked passages in Louis Henkin's *Foreign Affairs and the United States Constitution* is this one:

¹⁶ Compare *Zivotofsky II*, 135 S.Ct. at 2117 (Scalia, J., dissenting) (concluding that even a “miserly understanding” of the Necessary and Proper Clause authorizes Congress to “make grants of citizenship ‘effectual’ by providing for the issuance of certificates authenticating them”) with *Bond v. United States*, 134 S. Ct. 2077, 2098-99 (2014) (Scalia, J., concurring in the judgment) (claiming that the Necessary and Proper Clause does not authorize Congress to make treaties effectual by implementing them).

¹⁷ See Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

¹⁸ *Zivotofsky II*, 135 S.Ct. at 2084-2094 (Part II.A, Part II.B, and Part II.C respectively). For a discussion of this mixed-method approach, see Curtis A. Bradley, *Zivotofsky and pragmatic foreign relations law*, SCOTUSBLOG (June 9, 2015, 9:16 AM).

¹⁹ *Id.* at 2118-2119 (Scalia, J., dissenting).

²⁰ *Id.* at 2085.

²¹ *Id.*

²² Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1009-18 (2013).

The courts, despite sometimes misguided efforts to compel them to do so are not likely to step into intense confrontations between President and Congress. . . . [They] will not rush to make certain what was left uncertain, to curtail the power of the political branches, to arbitrate their differences. Then, in time, the issues may recede, stirring neither controversy nor case. If the courts do speak to Separation occasionally, they will speak only delphically; hard cases will make as little law as possible, as the Justices reach for the narrowest grounds; and struggle and uncertainty will continue.²³

So how does *Zivotofsky II* stack up against this language? Looking just at the case itself, *Zivotofsky II* seems a refutation of Professor Henkin's prediction. The Court did not treat the recognition power as a political question or otherwise leave it indeterminate for the future. Instead, it squarely found that the recognition power is an exclusive presidential power and that Congress could not constitutionally force the executive branch "to issue a formal statement that contradicts the earlier recognition."²⁴ Going forward, the President will not merely claim, but also clearly have, exclusive power in this context.

Yet if *Zivotofsky II* counters Professor Henkin's prediction in a narrow sense, in a broader way, it could be said to fulfill it. For when *Zivotofsky II* is taken in context with other foreign relations law cases, it enhances the delphic nature of the Court's jurisprudence overall. In the future, we can be sure that the struggle and uncertainty will continue. And that is probably a good thing.

²³ LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 316 (1996). It is worth noting that Henkin considered the recognition power to be exclusive to the President. *See id.* at 88.

²⁴ Zivotofsky II, 135 S.Ct. at 2081.