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ZIVOTOFSKY II AS PRECEDENT  
IN THE EXECUTIVE BRANCH

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On May 14, 1948, President Harry S. Truman recognized the State of Israel.<sup>1</sup> Recognition of statehood is “a formal acknowledgment by another state that an entity possesses the qualifications for statehood,” including a defined territory, permanent population, government control, and capacity to engage in international relations.<sup>2</sup> It enables diplomatic and related benefits under domestic and international law, and promotes the legitimacy of the recognized state with third parties.<sup>3</sup> President Truman’s recognition of Israel, and his prerecognition maneuvers that fostered Israel’s emergence as a nation, were among the most consequential unilateral presidential acts in the twentieth century.<sup>4</sup>

Also consequential was the Truman Administration’s later decision about sovereignty over the holy city of Jerusalem. When President Truman recognized Israel, control over Jerusalem was divided between Israel and Jordan, and fiercely contested.<sup>5</sup> His Administration didn’t take sides. Instead, it supported United Nations efforts to accord Jerusalem “special and separate treatment from the rest of Palestine” and disclaimed support for Israel’s sovereignty over Jerusalem.<sup>6</sup> No subsequent President has departed from President Truman’s policy, and several have confirmed it on the ground that Jerusalem’s status must

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<sup>1</sup> See Statement by the President Announcing Recognition of the State of Israel, 1 PUB. PAPERS 258 (May 14, 1948).

<sup>2</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 201, 202 cmt. a (AM. LAW INST. 1987).

<sup>3</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2084 (2015); see also VAUGHAN LOWE, INTERNATIONAL LAW 163 (2007).

<sup>4</sup> On the run-up to President Truman’s recognition decision, see ALLIS RADOSH & RONALD RADOSH, A SAFE HAVEN: HARRY S. TRUMAN AND THE FOUNDING OF ISRAEL (2009); JOHN B. JUDIS, GENESIS: TRUMAN, AMERICAN JEWS, AND THE ORIGINS OF THE ARAB/ISRAELI CONFLICT 186–319 (2014); and DAVID MCCULLOUGH, TRUMAN 595–618 (1992).

<sup>5</sup> See SHLOMO SLONIM, JERUSALEM IN AMERICA’S FOREIGN POLICY, 1947–1997, at 3, 87–119 (1998).

<sup>6</sup> G.A. Res. 194 (III), ¶ 8 (Dec. 11, 1948); see also SLONIM, *supra* note 5, at 122–23 (noting that in 1949 the United States represented that it would not attend a meeting of Israel’s Parliament in Jerusalem because it “cannot support any arrangement which would purport to authorize the establishment of Israeli . . . sovereignty over parts of the Jerusalem area,” *id.* at 123).

be part of a final negotiation that includes the Palestinians.<sup>7</sup> One way that the executive branch has implemented this policy has been to require the State Department to record only “Jerusalem,” and no state, as the place of birth in the passports of U.S. citizens who were born in that city after May 14, 1948.<sup>8</sup>

President Truman made these important decisions on his own, with little input and no authorization from Congress.<sup>9</sup> No one doubted that he had the constitutional authority to do so. Much less clear was whether his authority was *exclusive* in the sense that Congress lacked power to legislate otherwise. The question became salient when Congress enacted section 214 of the 2003 Foreign Relations Authorization Act.<sup>10</sup> Section 214(d) sought to countermand the executive branch’s Jerusalem passport policy by requiring the Secretary of State to “record the place of birth as Israel” when a U.S. citizen born in Jerusalem requested the designation.<sup>11</sup> President Bush signed the bill that contained section 214 but asserted in a signing statement that the section was an unconstitutional interference with his constitutional authority to conduct foreign affairs.<sup>12</sup> He made clear that despite section 214, “U.S. policy regarding Jerusalem has not changed.”<sup>13</sup>

Menachem Zivotofsky, the son of U.S. citizens, was born in Jerusalem after section 214(d) came into force.<sup>14</sup> In accordance with the President’s determination that section 214(d) is unconstitutional, the U.S. embassy in Tel Aviv refused his mother’s request to place “Israel” next to “Jerusalem” on the birthplace line of his U.S. passport.<sup>15</sup> Menachem’s parents sued the Secretary of State, seeking to compel the Department to record “Israel” on his passport.<sup>16</sup> This lawsuit has now generated two important Supreme Court decisions on separation of powers in three years. The first, *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), ruled that the constitutional dispute at stake in the lawsuit was justiciable rather than a political question.<sup>17</sup> Then last Term, in *Zivotofsky II*, the Court held that section 214(d) was unconstitutional because it impinged upon the President’s exclusive power to

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<sup>7</sup> See *Zivotofsky II*, 135 S. Ct. at 2081.

<sup>8</sup> See 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL (FAM) § 1383.5-6 (1987).

<sup>9</sup> For various accounts of the influences on President Truman’s decisionmaking process, see sources cited *supra* note 4.

<sup>10</sup> Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350, 1365–66 (2002).

<sup>11</sup> *Id.* § 214(d).

<sup>12</sup> See Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697, 1698 (Sept. 30, 2002).

<sup>13</sup> *Id.*

<sup>14</sup> See *Zivotofsky II*, 135 S. Ct. at 2083.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 132 S. Ct. 1421, 1425 (2012).

recognize the State of Israel and to determine for the United States which nation is sovereign over Jerusalem.<sup>18</sup>

*Zivotofsky II* is the most important Supreme Court decision ever on the sources and scope of the President's independent and exclusive powers to conduct foreign relations — powers that fall in Justice Jackson's *Youngstown* Categories Two and Three, respectively.<sup>19</sup> The Court provided novel guidance on these issues in the course of upholding for the first time “a President's direct defiance of an Act of Congress in the field of foreign affairs,” as the Chief Justice said in dissent.<sup>20</sup> Its analysis made a mess of Justice Jackson's third category in *Youngstown*, revived a functional approach to exclusive presidential power that many scholars thought was dead, and left Congress's legislative power related to diplomacy and foreign affairs in an uncertain but probably shrunken position. These and other elements of the analytically promiscuous decision will influence separation-of-powers disputes far beyond the recognition context.

That influence will be felt primarily in the executive branch rather than in courts. *Zivotofsky II* is the rare case in which the Supreme Court addresses a clash between the political branches concerning foreign relations. Executive branch lawyers, by contrast, address such clashes all the time. Until *Zivotofsky II*, these lawyers had to rely on shards of judicial dicta, in addition to executive branch precedents and practices, in assessing the validity of foreign relations statutes thought to intrude on executive power. But now they have a Supreme Court precedent with broad arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute. One can read *Zivotofsky II* narrowly, and future courts might do so if given the chance. But executive branch lawyers, who are governed by different principles and incentives than judges, won't read the decision narrowly. They will read it generously in favor of the President in resolving everyday foreign policy disputes between the political branches. In this respect, *Zivotofsky II* is a reminder that the impact of a Supreme Court decision depends very much on the institution that interprets and applies it.<sup>21</sup>

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<sup>18</sup> See *Zivotofsky II*, 135 S. Ct. at 2096.

<sup>19</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Justice Jackson elaborated a three-tiered framework that measures presidential powers “depending upon their disjunction or conjunction with those of Congress.” *Id.* at 635. Category One involves presidential acts “pursuant to an express or implied authorization of Congress,” Category Two involves presidential acts “in absence of either a congressional grant or denial of authority,” and Category Three involves presidential acts that are contrary to “the expressed or implied will of Congress.” *Id.* at 635–38. For further analysis, see *infra* at section I.A.

<sup>20</sup> *Zivotofsky II*, 135 S. Ct. at 2113 (Roberts, C.J., dissenting).

<sup>21</sup> See generally NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994) (insisting on attention to institutional choice in seeking policy goals); ADRIAN VERMEULE, JUDGING UNDER

## I. ZIVOTOFSKY II'S INNOVATIONS

*Zivotofsky II* clarified, reoriented, and in some instances disrupted basic understandings about the allocation of authority among the political branches to conduct foreign relations.

## A. Reshaping Justice Jackson's Framework

*Zivotofsky II* analyzed the constitutionality of section 214(d) within “Justice Jackson’s familiar tripartite framework” from *Youngstown*.<sup>22</sup> Justice Jackson maintained that as presidential action moves along a continuum from congressional support for the Executive (Category One) to congressional silence (Category Two) to contravention of a congressional command (Category Three), “doubt” about and “challenge[s]” to presidential power grow.<sup>23</sup> For all the sanctification this framework has received in law reviews and public discourse, the Court prior to *Zivotofsky II* had deployed it in only four cases, all involving foreign relations.<sup>24</sup> Basic issues about the framework thus remained open. *Zivotofsky II* resolved some of these issues, and did so in surprising ways.

1. *Disabling Congress Without Analyzing Article I*. — The Court first addressed the Category Two question of whether the President could recognize foreign nations “in absence of either a congressional grant or denial of authority,” on the basis of his “independent powers.”<sup>25</sup> No one seriously questioned that the President possessed this power, and the Court addressed it only as a prelude to its more extended analysis of whether the President can defy Congress on matters of recognition. The Court’s explanation of the source of the Presi-

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UNCERTAINTY (2006) (arguing that legal interpretation depends on institutional capacities of decisionmakers); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 948 (2003) (“[L]egal interpretation cannot be adequately resolved without attention to institutional questions.”).

<sup>22</sup> *Zivotofsky II*, 135 S. Ct. at 2083 (citing *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring)).

<sup>23</sup> *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

<sup>24</sup> See *Medellín v. Texas*, 552 U.S. 491, 524–28 (2008) (invalidating the President’s attempt to implement an International Court of Justice decision as domestic law); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (ruling that the President is bound by the military-commission restrictions in the Uniform Code of Military Justice); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000) (ruling that Congress’s Burma sanctions law preempts state law); *Dames & Moore v. Regan*, 453 U.S. 654, 668–69, 674, 678, 686 (1981) (concluding that “the President was authorized to suspend [legal] claims” in U.S. court in furtherance of an executive agreement with Iran, *id.* at 686). In none of the Court’s other post-1952 cases measuring presidential power or resolving a clash between the political branches — in domestic or foreign affairs — did the Court deploy Justice Jackson’s tripartite framework. It has often referred to other aspects of Justice Jackson’s concurring opinion, however. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting Justice Jackson’s summary of his “pragmatic, flexible view of differentiated governmental power”).

<sup>25</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

dent's recognition power is nonetheless important to our understanding of Category Two and to the rest of the opinion.

On its face, Article II "empowers the President to do . . . strikingly little" with regard to other nations.<sup>26</sup> It vests "[t]he executive Power" in the President, designates him "Commander in Chief" of the Army and Navy, and obliges him to "receive Ambassadors and other public Ministers" and to "take Care that the Laws be faithfully executed."<sup>27</sup> It also authorizes the President, with Senate consent, to make treaties and appoint ambassadors.<sup>28</sup> That's it.

By contrast, Article I, Section 8 gives Congress legislative authority related to U.S. foreign relations in fifteen of its eighteen clauses, including the Necessary and Proper Clause.<sup>29</sup> And Article II gives the Senate a major role in making treaties and appointing ambassadors.<sup>30</sup> The first branch has exercised these powers to endow the President with massive diplomatic, military, and intelligence bureaucracies, and to authorize him, often in general terms, to deploy the bureaucracies to conduct foreign relations. When the President acts pursuant to such authorizations, few separation-of-powers puzzles arise.

A distinctive feature of the constitutional law of foreign relations, however, is that a considerable amount of consequential presidential action is based on the President's "independent powers" under Article

<sup>26</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 38 (2d ed. 1996).

<sup>27</sup> U.S. CONST. art. II, § 1, cl. 1 ("executive Power"); *id.* § 2, cl. 1 ("Commander in Chief"); *id.* § 3 ("receive Ambassadors"); *id.* § 2, cl. 2 ("take Care").

<sup>28</sup> *Id.* art. II, § 2, cl. 2.

<sup>29</sup> *Id.* art. I, § 8, cl. 1 ("Power [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); *id.* cl. 2 ("[Power] [t]o borrow Money on the credit of the United States"); *id.* cl. 3 ("[Power] [t]o regulate Commerce with foreign Nations"); *id.* cl. 4 ("[Power] [t]o establish a uniform Rule of Naturalization"); *id.* cl. 5 ("[Power] [t]o coin Money, regulate the Value thereof, and of foreign Coin"); *id.* cl. 9 ("[Power] [t]o constitute Tribunals inferior to the supreme Court"); *id.* cl. 10 ("[Power] [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); *id.* cl. 11 ("[Power] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* cl. 12 ("[Power] [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"); *id.* cl. 13 ("[Power] [t]o provide and maintain a Navy"); *id.* cl. 14 ("[Power] [t]o make Rules for the Government and Regulation of the land and naval Forces"); *id.* cl. 15 ("[Power] [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); *id.* cl. 16 ("[Power] [t]o provide for organizing, arming, and disciplining, the Militia"); *id.* cl. 17 ("[Power] [t]o exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings"); *id.* cl. 18 ("[Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). Article I, Section 10 confers (or confirms) some foreign relations powers on states, most, but not all, with a congressional consent requirement. *Id.* art. I, § 10.

<sup>30</sup> See *id.* art. II, § 2, cl. 2.

II.<sup>31</sup> Presidents acting without congressional authorization conclude “pure” executive agreements that trump state law and destroy private rights, determine head-of-state immunity in U.S. courts, assert the content of customary international law for the United States, communicate with foreign nations, terminate relations with them, pursue new foreign policies and diplomatic initiatives, settle foreign claims, declare neutrality and peace, and, perhaps most consequentially, deploy intelligence agents and military forces abroad.<sup>32</sup> Many of President Obama’s most consequential foreign policy initiatives — the nuclear deal with Iran, important international environmental agreements, the re-establishment of diplomatic relations with Cuba, the use of force in Libya in 2011, the initial attacks on the Islamic State in August 2014, the pivot to Asia, and many more — were exercises of independent power under Article II.<sup>33</sup>

The Court has never concretely explained the source of these and other vast presidential powers in foreign relations. It has suggested that the Commander in Chief Clause confers substantive authority, but has not explored its latitude or limits.<sup>34</sup> It has grounded the President’s authority to make executive agreements, especially to settle foreign claims, in nothing more than established presidential practice.<sup>35</sup> It has stated more generally, in dicta, that the President’s “vast share

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<sup>31</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[I]n foreign affairs the President has a degree of independent authority to act.”).

<sup>32</sup> See HENKIN, *supra* note 26, at 31–50, 53–56, 219–22.

<sup>33</sup> See Joint Comprehensive Plan of Action, July 14, 2015, <http://www.state.gov/documents/organization/245317.pdf> [<http://perma.cc/ZE93-UGDD>] (reaching nuclear deal with Iran); Press Release, White House Office of the Press Sec’y, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change> [<http://perma.cc/8QAC-XGM6>]; U.N. Framework Convention on Climate Change, *Rep. of the Conference of the Parties on Its Fifteenth Session* at 5–7, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> [<http://perma.cc/2NVE-5W7X>]; Barack Obama, Statement by the President on the Re-Establishment of Diplomatic Relations with Cuba (July 1, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/01/statement-president-re-establishment-diplomatic-relations-cuba> [<http://perma.cc/JCK3-98ZX>]; Barack Obama, Letter from the President Regarding the Commencement of Operations in Libya (Mar. 21, 2011), <https://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya> [<http://perma.cc/87VP-28NP>]; Barack Obama, Letter from the President — War Powers Resolution Regarding Iraq (Aug. 8, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq> [<http://perma.cc/6R5V-33SW>]; Hillary Clinton, *America’s Pacific Century*, FOREIGN POLICY (Oct. 11, 2011), <http://foreignpolicy.com/2011/10/11/americas-pacific-century> [<http://perma.cc/PL5Z-KJTQ>] (initiating Asian pivot).

<sup>34</sup> See, e.g., *Loving v. United States*, 517 U.S. 748, 772 (1996) (recognizing that the President possesses “independent authority” under the Commander in Chief Clause, and that his “duties . . . require him to take responsible and continuing action to superintend the military, including the courts-martial”).

<sup>35</sup> See, e.g., *Garamendi*, 539 U.S. at 415.

of responsibility for the conduct of our foreign relations” derives from a “historical gloss on the ‘executive Power’ vested in Article II.”<sup>36</sup> It has also identified, in dicta, the President’s “unique responsibility” and “lead role” in foreign relations, without specifying their basis in Article II.<sup>37</sup> Until last Term, however, the Court had provided practically no guidance on how the sparse clauses of Article II connect to the manifold foreign relations powers of the President.

*Zivotofsky II* provided a concrete answer tailored to the recognition power. One Article II candidate for the recognition power was the Reception Clause, which states that the President “shall receive Ambassadors and other public Ministers.”<sup>38</sup> The Court declined to ground the recognition power there alone, probably because it found no evidence that the Founders viewed it to authorize recognition and because the government can also extend recognition to a nation by treaty or by sending ambassadors.<sup>39</sup> These latter vehicles for recognition led the Court to consider the President’s power (with Senate consent) to make treaties and nominate ambassadors and other public ministers.<sup>40</sup> “As a matter of constitutional structure,” it reasoned, these powers, combined with the Reception Clause, imply that “each means” of recognition “is dependent upon Presidential power” and “give the President control over recognition decisions.”<sup>41</sup> The Court added that the Constitution “assigns the President means to effect recognition on his own initiative” and that Congress “has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”<sup>42</sup>

The Court’s focus on Congress’s supposed lack of power as a basis to infer independent presidential powers is odd, especially since it hadn’t at this point analyzed Article I. The arguments also make little sense on their own terms. Two of the three means for effecting recognition that the Court said depend on presidential power also depend on the consent and thus the power of the first branch. The Court was right that “the Senate may not conclude or ratify a treaty without Pres-

<sup>36</sup> *Id.* at 414 (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

<sup>37</sup> *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (noting his “unique responsibility”); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (noting his “lead role”).

<sup>38</sup> U.S. CONST. art. II, § 3.

<sup>39</sup> *See Zivotofsky II*, 135 S. Ct. at 2084–85. There is significant evidence that the Framers viewed the Reception Clause to confer nothing more than “a ministerial duty largely ‘without consequence.’” *Id.* at 2085 (quoting THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). *See generally* David Gray Adler, *The President’s Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 133–57 (David Gray Adler & Larry N. George eds., 1996); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801 (2011).

<sup>40</sup> *Zivotofsky II*, 135 S. Ct. at 2085; U.S. CONST. art. II, § 2, cl. 2.

<sup>41</sup> *Zivotofsky II*, 135 S. Ct. at 2085.

<sup>42</sup> *Id.* at 2086.

idential action” and that “Congress may not send an ambassador without his involvement.”<sup>43</sup> But it was also right when it stated on the next page that “the dispatch of an ambassador . . . and the conclusion of treaties . . . require action by the Senate.”<sup>44</sup> Thus the President cannot “effect recognition” by treaty or by sending an ambassador without the Senate’s consent at some point. On the Court’s logic, these latter “means” of recognizing a foreign nation are “dependent upon” the power of the Senate. And that dependence shows that Article II does not give the President alone the “means to effect recognition.”

More importantly, the Court ignored a fourth potential method of recognition — namely, by statute.<sup>45</sup> As the Court acknowledged, Congress has sometimes been a joint participant in the recognition process.<sup>46</sup> After Abraham Lincoln declined to recognize Haiti and Liberia without Congress’s “approbation,” Congress appropriated funds and “authorized” the President to “appoint diplomatic representatives of the United States” to both “Republics.”<sup>47</sup> Congress also pushed President McKinley to recognize Cuba in 1898 and probably effected recognition in a joint resolution entitled “For the recognition of the independence of the people of Cuba.”<sup>48</sup>

These and other historical episodes suggest that Congress might have the authority to recognize a foreign nation by statute, and thus might be able to do so by overriding a presidential veto.<sup>49</sup> The most plausible basis for such authority is a combination of the Declare War

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2087. According to the Office of the Historian of the State Department, for example, the United States “recognized the Republic of Chile on January 27, 1823, when the U.S. Senate confirmed President James Monroe’s nomination of Heman Allen of Vermont as Envoy Extraordinary and Minister Plenipotentiary to Chile.” See *A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Chile*, U.S. DEP’T ST. OFF. HISTORIAN, <https://history.state.gov/countries/chile> (last visited Sept. 27, 2015) [<http://perma.cc/V4CU-B9FG>].

<sup>45</sup> See Marty Lederman, *Thoughts on Zivotofsky, Part Six: Why the Majority’s Surprising Decision on Executive Exclusivity Is Unpersuasive*, JUST SECURITY (June 13, 2015, 11:39 AM), <http://justsecurity.org/23835/thoughts-zivotofsky-part-six-majoritys-surprising-decision-executive-exclusivity-unpersuasive> [<http://perma.cc/5H3A-3F23>].

<sup>46</sup> See *Zivotofsky II*, 135 S. Ct. at 2088–90.

<sup>47</sup> See Act of June 5, 1862, ch. 96, 12 Stat. 421; Abraham Lincoln, *First Annual Message*, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 44, 47 (James D. Richardson ed., 1908); see also Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 30–32 (2013) (discussing the matter in detail).

<sup>48</sup> See Act of Apr. 20, 1898, ch. 24, 30 Stat. 738. The Act resolved that “the people of the Island of Cuba are, and of right ought to be, free and independent.” *Id.*; see also Reinstein, *supra* note 47, at 35–41 (discussing Congress’s recognition of Cuba as an independent state, albeit noting that Congress withheld recognition of the new government).

<sup>49</sup> For a survey of the historical episodes, see Reinstein, *supra* note 47. A prominent example that the Court ignored involved statutes in 1800 and 1806 that made recognition decisions about territory on the island of Hispaniola (now Haiti and the Dominican Republic). See *id.* at 14–18.



Clause, the Commerce Clause, and the Necessary and Proper Clause.<sup>50</sup> The Court would implicitly reject this possibility when it later determined that the President's recognition power is exclusive. But at this point in the opinion, in purporting to analyze the President's independent power based solely on textual and structural factors in Article II, the Court had no basis to imply that Congress lacked power under Article I to recognize foreign nations.

The Court's poor arguments for the President's independent power to recognize do not mean that it reached the wrong conclusion. It might have grounded the independent power in the unchallenged historical practice of Presidents recognizing foreign nations. It might also have inferred the independent power from the fact that Article II contemplates presidential involvement in every means of recognition, without any suggestion that Congress lacked power over recognition. In taking the extra step of questioning Congress's power based on an analysis of Article II alone, however, the Court prejudged all that was to come.

2. *The "Lowest Ebb" Isn't Very Low.* — Having concluded that the "text and structure of the Constitution grant the President the power to recognize foreign nations and governments," the Court turned to the question of "whether that power is exclusive."<sup>51</sup> This question is especially important in foreign relations law, where the President's broad and mostly unenumerated independent powers often clash with Congress's many enumerated and implied powers. Two very different approaches to resolving this question had emerged from the Court's prior decisions. One, from *United States v. Curtiss-Wright Export Corp.*, carves out a seemingly broad area of exclusive presidential power in foreign affairs.<sup>52</sup> The other, from Justice Jackson's *Youngstown* concurrence, presumes congressional supremacy and implies that the President will rarely prevail.<sup>53</sup> The Court purported to apply Justice Jackson's scheme and to wave off the relevance of *Curtiss-Wright*.<sup>54</sup> But in fact it weakened Justice Jackson's Category Three as a constraint on presidential power and breathed new life into the *Curtiss-Wright* approach.

Justice Jackson maintained that a presidential claim of exclusive power in Category Three faces a "severe" test.<sup>55</sup> Such a claim lies at the "lowest ebb" of presidential power and is "most vulnerable to at-

<sup>50</sup> See Reinstein, *supra* note 39, at 809 n.48.

<sup>51</sup> *Zivotofsky II*, 135 S. Ct. at 2086.

<sup>52</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–22 (1936).

<sup>53</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>54</sup> *Zivotofsky II*, 135 S. Ct. at 2089–90. The Court's analysis of *Curtiss-Wright* is discussed *infra* pp. 128–31.

<sup>55</sup> *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

tack and in the least favorable of possible constitutional postures.”<sup>56</sup> It thus “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”<sup>57</sup>

These sound like tough standards that place a heavy burden on the President. But the standards had never been tested because the Court had never faced a situation where the executive branch argued that an admittedly constraining foreign relations statute must give way to an exclusive presidential power.<sup>58</sup> The Truman Administration did not make this argument in *Youngstown*, even though four Justices analyzed the case in that posture.<sup>59</sup> Nor did the Bush Administration do so in its statutory foreign relations cases before the Supreme Court.<sup>60</sup> The executive branch has invoked the constitutional avoidance canon to argue that a foreign relations statute should not be construed to clash with executive power.<sup>61</sup> And the Court has upheld a congressional restriction on executive power in foreign relations where the executive branch did not make an exclusivity argument.<sup>62</sup> But my research has uncovered no foreign relations case in the Supreme Court before *Zivotofsky II* in which a President argued that he prevailed in the face of an admitted congressional restriction.<sup>63</sup> It is thus significant that in Category Three’s first test, the President won and won big.

The Court wrote one sentence about why text and structure pointed toward an exclusive presidential power over recognition: “The vari-

<sup>56</sup> *Id.* at 637, 640.

<sup>57</sup> *Id.* at 638.

<sup>58</sup> The Executive has made such claims in non-foreign relations contexts, like removal, but the Court has not analyzed such cases under the standards in Justice Jackson’s third category. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 673–77 (1988).

<sup>59</sup> *See* Brief for Petitioner, *Sawyer v. Youngstown Sheet & Tube Co.*, 343 U.S. 579 (1952) (No. 745), in 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 595, 608–782 (Philip B. Kurland & Gerhard Casper eds., 1975); *see also Youngstown*, 343 U.S. at 597, 602–03 (Frankfurter, J., concurring); *id.* at 639–40 (Jackson, J., concurring); *id.* at 659–60 (Burton, J., concurring); *id.* at 661–62 (Clark, J., concurring in the judgment). *See generally* Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 99–106 (2002).

<sup>60</sup> *See, e.g.,* Brief for Respondents, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875; Brief for the Respondents, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020; Brief for the Respondents, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 425739; Brief for the Petitioner, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 542777.

<sup>61</sup> *See, e.g.,* Brief for the Respondents at 22, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 724020.

<sup>62</sup> *See, e.g., Hamdan*, 548 U.S. 557.

<sup>63</sup> I have not been able to discern what the government argued in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), which enforced an implicit congressional restriction against the President in time of war. *Cf.* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 970 (2008) (noting that there was “no evidence that any of the parties, including the Executive, argued . . . that Congress could not limit” the President in *Little*).

ous ways in which the President may unilaterally effect recognition — and the lack of any similar power vested in Congress — suggest” that the President’s power to recognize is exclusive.<sup>64</sup> That sentence was nothing but a summary of why the Court had just concluded that the President possessed independent power over recognition. In using these reasons as a basis for exclusive presidential power, the Court didn’t consider the Senate’s concurrent role in some recognition decisions. It also didn’t consider the textual and structural case for Congress effecting recognition by statute, including the extent to which Congress could “carry[] into Execution” the President’s independent recognition power in a way that restricts it.<sup>65</sup> And the Court failed to examine why Congress’s undoubted power to enact statutes that supersede treaties did not apply as well to presidential determinations of recognition.<sup>66</sup> It simply bootstrapped poor textual and structural arguments for an uncontested independent presidential power into conclusive arguments for a different-in-kind exclusive presidential power — without even looking at Article I.

The Court also took a desultory look at its precedents and the “understandings and practice[s]” of the political branches as a basis for its conclusion about exclusive presidential power.<sup>67</sup> None of the Court’s prior cases involved a clash between the political branches over recognition, and thus all of the statements it looked to were dicta, many of which suggested that the recognition power was shared.<sup>68</sup> As the Chief Justice said: “When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.”<sup>69</sup> As for past practice, the Court acknowledged that “certain historical incidents can be interpreted to support the position that recognition is a shared power,” including the Haiti, Liberia, and Cuba recognitions mentioned above.<sup>70</sup> It insisted nonetheless that “the weight of historical evidence” supported its view about presidential exclusivity.<sup>71</sup> The evidence showed that Presidents had often recognized foreign nations and governments on their own authority, especially since the turn of the twentieth century.<sup>72</sup> Congressional silence in these instances, however, might simply signal policy agreement.<sup>73</sup> It hardly shows institutional

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<sup>64</sup> *Zivotofsky II*, 135 S. Ct. at 2086.

<sup>65</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>66</sup> See *Zivotofsky II*, 135 S. Ct. at 2123 (Scalia, J., dissenting).

<sup>67</sup> *Id.* at 2091 (majority opinion).

<sup>68</sup> See *id.* at 2091–94.

<sup>69</sup> *Id.* at 2114 (Roberts, C.J., dissenting).

<sup>70</sup> *Id.* at 2091, 2093 (majority opinion).

<sup>71</sup> *Id.* at 2091.

<sup>72</sup> See *id.* at 2091–94.

<sup>73</sup> See Curtis A. Bradley, *Agora: Reflections on Zivotofsky v. Kerry: Historical Gloss, the Recognition Power, and Judicial Review*, 109 AJIL UNBOUND 2, 5 (2015). See generally Curtis A.

acquiescence to a claim of exclusive presidential power, especially since Congress sometimes disagreed with the policy and sought to guide the President by statute.<sup>74</sup>

The Court surely understood that text, structure, precedent, and historical practice didn't provide powerful support for an exclusive recognition power in the President, for it leaned heavily throughout its opinion on a fifth factor, "functional considerations."<sup>75</sup> By this phrase, the Court meant characteristics intrinsic to the presidency that made it uniquely suited to determine a "single policy regarding which governments are legitimate in the eyes of the United States."<sup>76</sup> These characteristics include unity and its corollaries, "[d]ecision, activity, secrecy, and dispatch," and the ability to speak with one voice — all of which allow the President to engage in "the delicate and often secret diplomatic contacts that may lead to a decision on recognition" and to "take the decisive, unequivocal action necessary to recognize other states."<sup>77</sup>

The Court is right that "[t]hese qualities explain why the Framers listed the traditional avenues of recognition — receiving ambassadors, making treaties, and sending ambassadors — as among the President's Article II powers."<sup>78</sup> The qualities might also show that the President is uniquely suited to recognize a foreign nation when secrecy and decisiveness necessarily precede recognition. But these arguments don't add up to an exclusive presidential power. The need for a single policy about recognition does not tell us *which* branch of the government must "speak with one voice" for the nation at any particular time, or who gets the final word on the policy. Functional reasons might sometimes argue for the President getting the first word, but they do not explain why that decision cannot later be changed by a determined Congress, just as it can be by a subsequent President.<sup>79</sup>

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Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 447–52 (2012) (outlining dangers of inferring institutional acquiescence from congressional silence).

<sup>74</sup> The Court also marshaled remarks by individual members of Congress who during recognition disputes acknowledged an exclusive presidential power. See *Zivotofsky II*, 135 S. Ct. at 2091–94. But it never explained why these remarks counted as institutional estoppel, especially since other members of Congress over the years had maintained that Congress possessed concurrent authority. See *id.* See generally Reinstein, *supra* note 39.

<sup>75</sup> *Zivotofsky II*, 135 S. Ct. at 2086.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (alteration in original) (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>78</sup> *Id.*

<sup>79</sup> See Lederman, *supra* note 45. The Court may have believed that the executive branch's recognition decisions best promote the national interest, perhaps because it has a more informed and longer-term institutional perspective and because members of the decentralized Congress, lacking a national constituency and relatively preoccupied with reelection, are more subject to distorting special interests. But this is a functional argument that the unelected and inexperienced

More fundamentally, the presidency's functional characteristics of secrecy and dispatch that the Court thought so crucial to recognition have not always (or even usually) been necessary for recognition. Secrecy and dispatch were not necessary in the many cases in U.S. history when Congress was a forceful participant in (and, in some instances, effected by statute) recognition.<sup>80</sup> In fact, secrecy and dispatch were almost never needed during the long period from Washington's reception of Genet in 1793 until Woodrow Wilson's presidency, when the United States usually viewed recognition as "a formality" based on the new state's de facto capacities for governance.<sup>81</sup> President Wilson transformed the recognition power into a discretionary foreign policy judgment based in part on an assessment of the legitimacy of the new nation.<sup>82</sup> This change made secrecy, dispatch, and discretion potentially more relevant to recognition. But only potentially. Many recognition decisions in the twentieth century were based straightforwardly on objective capacity factors.<sup>83</sup> Secrecy and dispatch were crucial in some instances, such as President Nixon's and President Carter's actions effecting recognition of the People's Republic of China.<sup>84</sup> They

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Court could not credit, even if it believed it and even if it were true — especially in a case involving perhaps the most contentious issue in Middle East politics.

<sup>80</sup> See *supra* p. 119. See generally Reinstein, *supra* note 39 (analyzing history of congressional participation in recognition decisions).

<sup>81</sup> Robert T. Crane, Book Review, 10 AM. POL. SCI. REV. 378, 378 (1916) (reviewing JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES (1915)); see also JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES 97–218 (1915); 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 119–64 (1906). The practice of de facto recognition waned briefly during the Civil War but revived when the war ended. GOEBEL, *supra*, at 211–12. For another exception to the nineteenth-century practice of de facto recognition, see Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 AM. J. LEGAL HIST. 141 (2013) (analyzing the United States' refusal to recognize Haiti prior to 1862).

<sup>82</sup> See Green H. Hackworth, *The Policy of the United States in Recognizing New Governments During the Past Twenty-Five Years*, 25 AM. SOC'Y INT'L L. PROC. 120, 124 (1931); Paul V.N. Henderson, *Woodrow Wilson, Victoriano Huerta, and the Recognition Issue in Mexico*, 41 THE AMERICAS 151, 163–73 (1984).

<sup>83</sup> With exceptions arising out of Cold War politics, see Thomas J. Biersteker, *State, Sovereignty and Territory*, in HANDBOOK OF INTERNATIONAL RELATIONS 157, 163 (Walter Carlsnaes et al. eds., 2002), some form of de facto recognition continued to be the dominant policy in the twentieth century. The Hoover Administration repudiated Wilson's principle of legitimacy. See Henry L. Stimson, *The United States and the Other American Republics: A Discussion of Recent Events*, in 4 PUBLICATIONS OF THE DEPARTMENT OF STATE, LATIN AMERICAN SERIES 8 (1931). After World War II, the United States generally recognized former European colonies when they satisfied traditional statehood criteria. See Biersteker, *supra*, at 163. Likewise, in Latin America the United States generally ceased using diplomatic recognition as a tool for expressing political judgments. See Gregory Weeks, *Almost Jeffersonian: U.S. Recognition Policy Toward Latin America*, 31 PRESIDENTIAL STUD. Q. 490, 497–503 (2001).

<sup>84</sup> Maintaining secrecy from the public, the Soviets, and the State Department was vital to the success of Secretary of State Henry Kissinger's negotiations with the People's Republic of China in the run-up to the Shanghai Communiqué that the United States and China announced during

were less relevant to President Franklin D. Roosevelt's recognition of the Soviet Union.<sup>85</sup> And they played no important role in the recognition of the former Yugoslav republics.<sup>86</sup>

In sum, the Court held that the President possessed an exclusive power of recognition based on weak textual and structural arguments, a tendentious reading of precedent and history, and functional arguments that don't apply to most recognition decisions in U.S. history. Even if one reads the Court's arguments charitably, they do not come close to a compelling case for an exclusive presidential power over recognition. The overall weakness of these arguments, and not the arguments' details, is what's important. Justice Jackson's framework has long been criticized on the grounds that courts can glide among the three categories through manipulative statutory interpretation and that the framework supplies no guidance for identifying the source and limits of the President's independent power in Category Two.<sup>87</sup> The one place where the framework is supposed to have bite is a case that indisputably falls within Category Three, where exclusive power is narrow and the President must overcome a heavy burden in order to prevail. Yet in the first case ever in which Category Three was tested,

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President Richard Nixon's visit to China in February 1972. See WALTER C. CLEMENS, JR., *DYNAMICS OF INTERNATIONAL RELATIONS* 255–57 (2d ed. 2004); YUKINORI KOMINE, *SECRECY IN US FOREIGN POLICY: NIXON, KISSINGER AND THE RAPPROCHEMENT WITH CHINA* (2008). President Carter completed the normalization process begun by the Shanghai Communiqué when he recognized the People's Republic of China on January 1, 1979. See Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, 2 *PUB. PAPERS* 2264, 2264–65 (Dec. 15, 1978). The recognition was politically fraught and controversial, both domestically and internationally, and by all accounts secrecy and dispatch were crucial to its resolution. See ZBIGNIEW BRZEZINSKI, *POWER AND PRINCIPLE: MEMOIRS OF THE NATIONAL SECURITY ADVISOR, 1977–1981*, at 219–33 (1983); Gottfried-Karl Kindermann, *Washington Between Beijing and Taipei: The Restructured Triangle 1978–1980*, 20 *ASIAN SURV.* 457, 459 (1980); Patrick Tyler, *The (Ab)normalization of U.S.-Chinese Relations*, 78 *FOREIGN AFF.* 93, 105–22 (1999).

<sup>85</sup> For over a year prior to his recognition of the Soviet Union on November 16, 1933, President Franklin D. Roosevelt had openly discussed and sought support for the recognition, both domestically and internationally, and his decision was not a surprise. See EDWARD M. BENNETT, *FRANKLIN D. ROOSEVELT AND THE SEARCH FOR SECURITY* 1–12 (1985); DONALD G. BISHOP, *THE ROOSEVELT-LITVINOV AGREEMENTS* 7, 10 (1965). But Roosevelt's singular leadership and decisionmaking were vital to the decision, which every President since President Wilson had declined to take. See BENNETT, *supra*, at 12–19; ROBERT PAUL BROWDER, *THE ORIGINS OF SOVIET-AMERICAN DIPLOMACY* 99–152 (1953).

<sup>86</sup> The George H.W. Bush Administration opposed the breakup of Yugoslavia and recognition of the republics for almost a year. See JONATHAN PAQUIN, *A STABILITY-SEEKING POWER* 55–56, 59–62 (2010); DANIELLE S. SREMAC, *WAR OF WORDS: WASHINGTON TACKLES THE YUGOSLAV CONFLICT* 92 (1999). Under intense pressure from Congress, the Administration came around to the fait accompli of recognition on April 7, 1992, after European nations had recognized the former republics. See PAQUIN, *supra*, at 68–71; SREMAC, *supra*, at 92–94. Secrecy and dispatch were thus not important to the decision to recognize.

<sup>87</sup> See, e.g., Bellia, *supra* note 59, at 121–24; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *HARV. L. REV.* 1095, 1141–42 (2009).

when inconclusive evidence for an exclusive presidential power might have made the presumption relevant, the Court failed to mention the presumption in its analysis of the evidence.<sup>88</sup> If anything, the Court reversed the burden by accepting weak arguments for an exclusive presidential power over recognition without even considering the “constitutional powers of Congress over the matter,” as Category Three appeared to require.<sup>89</sup>

3. *A Gerrymandered Holding?* — The Court’s ruling that the President has the exclusive power of recognition did not resolve the case because, as the Court acknowledged, the statement required by section 214(d) “[does] not itself constitute a formal act of recognition.”<sup>90</sup> To find section 214(d) unconstitutional, the Court had to expand the scope of the recognition power (and in the process backtrack from its assurance that it “extends no further than his formal recognition determination”).<sup>91</sup> With no legal analysis, it stretched the President’s (implied) exclusive recognition power to include a power to make determinations about a state’s territorial bounds, as well as a power to “maintain that determination in his and his agent’s statements.”<sup>92</sup> The Court then asserted that section 214(d) violated Article II because it commanded the President to say something in a passport that contradicted his recognition determination. “If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement,” the Court said.<sup>93</sup> It then reiterated the broad functional argument driving the analysis: “That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.”<sup>94</sup>

The ruling sparked an inconclusive debate between the Court and the dissenters about whether the passport indication required by section 214(d) does or doesn’t amount to a statement that forces the Executive to contradict its recognition determination.<sup>95</sup> Of greater significance

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<sup>88</sup> The Court mentioned Justice Jackson’s third category in its analysis only when it defined an “exclusive” executive power as one that “disabl[es] the Congress from acting upon the subject.” *Zivotofsky II*, 135 S. Ct. at 2095 (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (Jackson, J., concurring)).

<sup>89</sup> *Youngstown*, 343 U.S. at 637 (Jackson J., concurring).

<sup>90</sup> *Zivotofsky II*, 135 S. Ct. at 2095; see also *id.* at 2114 (Roberts, C.J., dissenting) (“[E]ven if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition.*”); *id.* at 2118 (Scalia, J., dissenting) (arguing that “§ 214(d) has nothing to do with recognition”).

<sup>91</sup> *Id.* at 2095 (majority opinion).

<sup>92</sup> *Id.* at 2094–95.

<sup>93</sup> *Id.* at 2095.

<sup>94</sup> *Id.*

<sup>95</sup> Compare *id.* at 2095–96 (majority opinion) (arguing that it does), with *id.* at 2114–15 (Roberts, C.J., dissenting) (arguing that it doesn’t), and *id.* at 2121–23 (Scalia, J., dissenting) (similar).

than this case-specific disagreement is how the Court arrived at the ruling in the first place. Justice Scalia said the ruling was “gerrymandered to the facts of this case.”<sup>96</sup> If this characterization is correct, and the Court wished merely to craft a rule to invalidate section 214(d), it could have accomplished that goal by barring Congress from compelling diplomatic speech without tying the prohibition to a broad infeasible presidential power over recognition.<sup>97</sup>

Instead, the Court spent the bulk of the opinion explaining why the recognition power is exclusively the President’s and why that power extends to preserving presidential statements about sovereignty over particular territory. It did these things without considering how Congress’s power under Article I bore on the issue. Knowing how the play ends, the Court finally glanced at Article I on the last page of its opinion, though it did so not to assess Congress’s power over recognition, but rather to evaluate its authority to regulate passports. The Court acknowledged that Congress can “enact passport legislation of wide scope” but noted without further explanation that it was improper for “Congress to ‘aggrandiz[e] its power at the expense of another branch’ by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch.”<sup>98</sup>

Here the Court completed its inversion of Justice Jackson’s third category. Having identified the exclusive presidential power over recognition without first having looked at Article I, the Court then concluded without qualification that the President’s exercise of the power prevails in the face of Congress’s exercise of an otherwise legitimate, concurrent Article I power to regulate passports. It reached this conclusion based on a vague conclusion about “aggrandizement” without any suggestion that the President faced a special burden or “severe test[.]”<sup>99</sup> And it did all of this without considering Congress’s power to make “all Laws which shall be necessary and proper for carrying into Execution” the President’s power under Article II.<sup>100</sup>

<sup>96</sup> *Id.* at 2121 (Scalia, J., dissenting).

<sup>97</sup> For an explanation and defense of this view, see 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), <https://www.justsecurity.org/23875/thoughts-zivotofsky-part-seven-fate-exclusive-diplomatic-authority-and-sole-organ-argument> [<http://perma.cc/GWT9-VATV>].

<sup>98</sup> *Zivotofsky II*, 135 S. Ct. at 2096 (alteration in original) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991)).

<sup>99</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

<sup>100</sup> U.S. CONST. art. I, § 8, cl. 18. Justice Thomas in concurrence considered the role of the Necessary and Proper Clause at length. See *Zivotofsky II*, 135 S. Ct. at 2104–09 (Thomas, J., concurring in the judgment in part and dissenting in part). He concluded (among other things) that section 214(d) could not “be justified as an exercise of Congress’ power to enact laws to carry into execution the President’s residual foreign affairs powers.” *Id.* at 2105. Justice Scalia sharply disagreed with this conclusion in his dissent. See *id.* at 2125–26 (Scalia, J., dissenting).



*B. The Ghost of Curtiss-Wright*

The Court did more than upend Justice Jackson's Category Three. It also breathed ambiguous new life into its main competitor for resolving whether the President can prevail in the face of a restraining foreign relations statute — *Curtiss-Wright*.<sup>101</sup> To an opinion upholding a simple delegation to impose an arms embargo, Justice Sutherland larded on famously broad dicta about the President's "exclusive power . . . as the *sole* organ of the federal government in the field of international relations," where "the President *alone* has the power to speak or listen as a representative of the nation."<sup>102</sup> Justice Sutherland ignored Article II in making these loose claims, probably because the premise of his analysis was that the federal foreign relations power did not derive from the Constitution.<sup>103</sup> Instead, he emphasized the President's functional advantages in foreign relations: "unity of design," "secrecy and dispatch," and the "better opportunity of knowing the conditions which prevail in foreign countries."<sup>104</sup>

Scholars have excoriated *Curtiss-Wright* since it was decided.<sup>105</sup> Its historical claims and extraconstitutional theory of the U.S. foreign relations power are clearly wrong, and its dicta about presidential exclusivity threaten to swallow up Congress's Article I foreign relations powers. And yet the dicta remain influential. The Supreme Court never applied them to uphold presidential defiance of a foreign relations statute, but the Court and especially the lower courts have often relied on the dicta to support a generous reading of the President's foreign relations powers.<sup>106</sup> The Solicitor General often invokes the decision for the same reason and did so ten times in his merits brief in *Zivotofsky II*.<sup>107</sup>

<sup>101</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

<sup>102</sup> *Id.* at 319–20 (emphasis added).

<sup>103</sup> *Id.* at 315–18.

<sup>104</sup> *Id.* at 319–20 (quoting S. COMM. ON FOREIGN RELATIONS, REPORT, S. REP. NO. 24-406 (1st Sess. 1836)).

<sup>105</sup> For a summary, see Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 149–50 (2007).

<sup>106</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 661–62 (1981); *Haig v. Agee*, 453 U.S. 280, 291–92 (1981); *United States v. Pink*, 315 U.S. 203, 229–30 (1942); *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 211 (D.C. Cir. 2013); *Al-Bihani v. Obama*, 619 F.3d 1, 38–40 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc); *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (en banc).

<sup>107</sup> Brief for the Respondent, *Zivotofsky II*, 135 S. Ct. 2076 (2015) (No. 13-628); see also, e.g., Brief for the United States as Amicus Curiae Supporting Respondent at 40, 44, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Brief for the United States at 15, 41, *Loving v. United States*, 517 U.S. 748 (1996) (No. 94-1966); Brief for the Petitioner at 47–48, *Haig*, 453 U.S. 280 (No. 80-83); Brief for the United States at 14–15, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873).

On the surface, the majority in *Zivotofsky II* appeared to distance itself from some aspects of *Curtiss-Wright*. It emphasized the *Curtiss-Wright* decision's limited holding and noted that the statements about presidential exclusivity were dicta.<sup>108</sup> It also "decline[d] to acknowledge" that the President had the "broad, undefined powers over foreign affairs" claimed by the Solicitor General in reliance on *Curtiss-Wright*, which the Court described as "unbounded power."<sup>109</sup>

Despite these qualifications, it is wrong to conclude that *Zivotofsky II* "expressly repudiates the *Curtiss-Wright* dicta."<sup>110</sup> The Court didn't repudiate any aspect of *Curtiss-Wright*. As Justice Jackson had similarly done sixty-three years earlier in *Youngstown*, the Court simply noted that some of Justice Sutherland's statements were dicta and refused to rely on parts of it or to affirm broad claims the government made on its behalf.<sup>111</sup> The Court also failed to retract dicta similar to *Curtiss-Wright*'s in other decisions.<sup>112</sup>

At the same time, the Court affirmed the President's "unique role in communicating with foreign governments" and explained this role by reference to *Curtiss-Wright*'s invocation of then-Congressman John Marshall's statement that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>113</sup> The Court also cited *Curtiss-Wright* for the proposition that the "President has the sole power to negotiate treaties."<sup>114</sup> And as not-

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<sup>108</sup> See *Zivotofsky II*, 135 S. Ct. at 2089–90.

<sup>109</sup> *Id.* at 2089.

<sup>110</sup> Michael Dorf, *Zivotofsky May Be Remembered as Limiting Exclusive Presidential Power*, DORF ON LAW (June 8, 2015, 12:52 PM), <http://www.dorfonlaw.org/2015/06/zivotofsky-may-be-remembered-as.html> [<http://perma.cc/P3DZ-YNZ6>]; see also Michael J. Glennon, *Recognizable Power: The Supreme Court Deals a Blow to Executive Authority*, FOREIGN AFFAIRS (June 23, 2015), <https://www.foreignaffairs.com/articles/united-states/2015-06-23/recognizable-power> [<http://perma.cc/QK7H-K994>] ("The Court deflated the executive's perennial favorite, the 1936 *Curtiss-Wright* case . . .").

<sup>111</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring) (noting that the government relied on *Curtiss-Wright* but that the case involved the President's "right to act under and in accord with an Act of Congress," that "[m]uch of the Court's opinion is *dictum*," and that the case "does not solve the present controversy," because it simply "held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs").

<sup>112</sup> See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (arguing that "the President has unique responsibility" for the conduct of "foreign . . . affairs"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 235 (1839) ("As the executive magistrate of the country, [the President] is the only functionary intrusted with the foreign relations of the nation.")

<sup>113</sup> See *Zivotofsky II*, 135 S. Ct. at 2090 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936)).

<sup>114</sup> *Id.* at 2086 (citing *Curtiss-Wright*, 299 U.S. at 319).

ed above, it relied on expansive *Curtiss-Wright*-like functional arguments for presidential exclusivity throughout the opinion.<sup>115</sup>

In all of these ways, *Zivotofsky II* affirms *Curtiss-Wright*'s functional approach to exclusive presidential power. Except this time the Court embraced such a functional approach not in dicta in a case about delegation, as in *Curtiss-Wright*, but rather as the basis for holding that the President can defy a statute. Six months ago, Professors Ganesh Sitaraman and Ingrid Wuerth argued that a "revolution" and "fundamental paradigm shift" had resulted in a "new normal" in foreign relations law.<sup>116</sup> The core of the shift was the Supreme Court's rejection of the presidency's functional characteristics (speed, secrecy, dispatch, and the like) as the touchstone for assessing presidential power or resolving separation-of-powers disputes related to foreign relations.<sup>117</sup> These descriptive claims lacked a supporting causal mechanism.<sup>118</sup> And *Zivotofsky II* defied the claims one month after they were published, when it made clear that the Court had not in fact rejected functional considerations as a basis for measuring presidential power in foreign relations, and could switch back to it on a dime.<sup>119</sup>

We cannot say whether the Court will now revert to what seemed like a pattern of formalism prior to *Zivotofsky II*. What is clear, however, is that the functional arguments the Court embraced "*systematically* favor the unitary President over the plural Congress in disputes

<sup>115</sup> See *id.* at 2086–87, 2088, 2090, 2094–96; see also *supra* section I.A.3.

<sup>116</sup> See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1901, 1906 (2015).

<sup>117</sup> See *id.* at 1901 (defining the "second revolution" in foreign affairs as "the reverse of . . . the Sutherland revolution in the early twentieth century"); *id.* at 1935–42 (criticizing the supposedly unique functional characteristics of the presidency in foreign relations that the revolution rejected); see also Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 380, 384 (2015) (arguing that the Court had "jettisoned its traditional functionalism" and that "foreign affairs formalism . . . is the new reality" in foreign relations law); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999) (making a similar descriptive argument in an earlier era).

<sup>118</sup> See Sitaraman & Wuerth, *supra* note 116, at 1905–06 (acknowledging that authors "do not seek here to explain *why* normalization is taking place" and that "a thorough account of the reasons for why normalization has taken root must be left to another day").

<sup>119</sup> The Court also acted contrary to Sitaraman and Wuerth's normalization thesis, see *id.* at 1930–33, in adopting the Solicitor General's constitutional arguments for presidential exclusivity, see Brief for the Respondent, *Zivotofsky II*, 135 S. Ct. 2076 (2015) (No. 13-628), and in giving deference to the executive branch's assessment of the effect of section 214(d) on the President's recognition policy, see Bradley, *supra* note 73, at 8 n.43 (noting the "subtle" form of deference under which the Court concluded that section 214(d) had the effect of contradicting the executive branch's recognition policy concerning Jerusalem by citing the D.C. Circuit's express reliance on executive branch deference). The Court's emphasis on the need for the President to speak with "one voice," *Zivotofsky II*, 135 S. Ct. at 2086, 2094, 2095, is also at odds with the normalization thesis, see Sitaraman & Wuerth, *supra* note 116, at 1925–27. The Court in *Zivotofsky II* had no occasion to address the other elements of normalization, and *Zivotofsky I*'s holding on the political question doctrine was a piece of evidence in favor of normalization. See *id.*

involving foreign affairs,” as Justice Scalia noted in dissent.<sup>120</sup> They potentially apply to situations far beyond the recognition context, and the Court provided no principled limit on their broader application.

### C. Uncertain Limits

Although the Court did not articulate principled limits on its functional approach to presidential exclusivity, it did say that its holding applies only to the recognition power (and its corollaries about territorial sovereignty and presidential speech) and that Congress retains important legislative powers in foreign relations.<sup>121</sup> Some commentators read these statements to indicate that future courts might limit *Zivotofsky II* to the recognition context, and that the decision might one day be seen as a victory for congressional supremacy.<sup>122</sup>

Perhaps, but the statements also support a quite different reading. Most of them seem like an ironic commentary on the Court’s broad holding about exclusive presidential power. Until *Zivotofsky II*, the Court had little need to provide comfort with remarks like “it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course.”<sup>123</sup> The Court also reminded us that “it is for the Congress to enact the laws, including ‘all Laws which shall be necessary and proper for carrying into Execution’ the powers of the Federal Government.”<sup>124</sup> This truism might have carried more weight had the Court examined the Necessary and Proper Clause’s relevance to the case before it. But the Court never again mentions the clause. It thus provides no guidance on the crucial question of how Congress’s authority to carry into execution presidential power relates to the President’s independent and exclusive foreign relations powers.<sup>125</sup> If anything, the Court’s detailed functional analysis in support of exclusive presidential power, followed by mostly platitudinous statements about Congress’s still-important role in this area, unsettles what most com-

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<sup>120</sup> *Zivotofsky II*, 135 S. Ct. at 2123 (Scalia, J., dissenting).

<sup>121</sup> See *id.* at 2086–88, 2090, 2095–96 (majority opinion).

<sup>122</sup> See, e.g., Dorf, *supra* note 110; Glennon, *supra* note 110.

<sup>123</sup> *Zivotofsky II*, 135 S. Ct. at 2090. To similar effect, see, for example, *id.* at 2087 (“[M]any decisions affecting foreign relations — including decisions that may determine the course of our relations with recognized countries — require congressional action.”); *id.* at 2088 (“Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts.”); *id.* at 2090 (“The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation’s foreign policy.”) (internal citations omitted).

<sup>124</sup> *Id.* at 2087 (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>125</sup> Justice Thomas in concurrence and Justice Scalia in dissent discussed elements of this issue at length. See *supra* note 100; see also John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 43–48, 78–83 (articulating a theory for how the Necessary and Proper Clause should operate in regard to the President’s Article II powers).

mentators assumed was Congress's ultimate ex post control over the direction of U.S. foreign policy.<sup>126</sup> The Court may be right that "[i]n a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected."<sup>127</sup> But the Court failed utterly in that essential aim.

The Court's most significant statement about congressional power came when it distinguished between the President's exclusive "formal act of recognition" and Congress's authority under Article I "regarding many of the policy determinations that precede and follow the act of recognition itself."<sup>128</sup> Congress can "disagree[] with the President's recognition policy" through legislation, said the Court, adding that "[f]ormal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties."<sup>129</sup> The implication here and in other places is that Congress can exercise its powers under Article I to *affect* the President's recognition determination as long as it does not *effect* recognition. The Court seemed to be groping toward a formalist distinction: Congress can exercise its Article I powers to burden an exclusive Article II power as long as it doesn't exercise an Article II power.

The problem with this potentially limiting formalist principle is that *Zivotofsky II* did not apply it. A formalist ruling became hard once the Court acknowledged that section 214(d) was not "a formal act of recognition," and moved instead to the nonformalist assessments of "whether § 214(d) *infringes on* the Executive's . . . recognition with respect to Jerusalem," and whether Congress's exercise of its authority over passports unduly "*aggrandiz[ed]* its power."<sup>130</sup> In the end, the Court made the qualitative judgment that Congress burdened rather than exercised the recognition power. The Court thus provided no guidance for distinguishing (i) proper exercises of Article I concerning "policy determinations that precede and follow" recognition that can render recognition a "hollow act," from (ii) the improper exercises of Article I (like the passport legislation) that "contradict [the President's] prior recognition determination."<sup>131</sup>

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<sup>126</sup> See, e.g., Bellia, *supra* note 59, at 114–21 (collecting authorities).

<sup>127</sup> *Zivotofsky II*, 135 S. Ct. at 2090.

<sup>128</sup> *Id.* at 2087.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2094 (emphasis added); *id.* at 2096 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)) (emphasis added).

<sup>131</sup> *Id.* at 2087, 2095.

## II. *ZIVOTOFSKY II* AS PRECEDENT IN THE EXECUTIVE BRANCH

*Zivotofsky II* is a victory for presidential foreign relations power. But it almost certainly does not portend a new era of judicial indulgence of broad exercises of that power.

Separation-of-powers disputes between the branches in foreign relations — including direct clashes of the sort at issue in *Zivotofsky II* — arise all the time but are rarely adjudicated. The main reason this is so is the absence of a plaintiff with standing and a cause of action, but other reasons include the political question doctrine (which despite *Zivotofsky I* is not dead) and related justiciability and practical factors, including secrecy, ripeness, jurisdictional limitations, and more.<sup>132</sup> Judicial review is unavailable for most of the instances in which Presidents arguably stretch or defy congressional authorizations, or act contrary to congressional restraints in diplomatic, intelligence, and military affairs. *Zivotofsky II* is unusual not just for its analysis and holding, but also for the uncommon set of circumstances that led it to be resolved in court at all.<sup>133</sup>

Even when foreign relations clashes reach the Court, *Zivotofsky II*'s internal logic will not likely have predictable consequences there. The Supreme Court has no institutional predilection in favor of presidential power, and if anything has shown a tendency to read it narrowly in the foreign relations context in recent years.<sup>134</sup> Especially in foreign relations cases, as *Zivotofsky II* suggests, judicial outcomes and the doctrines used to justify them are largely driven, as Justice Jackson said in a narrower context, by “imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>135</sup> In the next foreign relations dispute between the branches, the judiciary can latch on to *Zivotofsky II*'s stated limitations, or ignore the mess it made of Jackson's third category, or distinguish its odd use of constitutional structure and historical practice as unique to the recognition and passport context.

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<sup>132</sup> See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 49–71 (5th ed. 2014); HENKIN, *supra* note 26, at 4, 135–36, 141–48; Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

<sup>133</sup> For example, there was a significant question in the case, not raised by the government, of whether *Zivotofsky* had standing. See Marty Lederman, *Thoughts on Zivotofsky, Part Two: Whither Article III Standing?*, JUST SECURITY (June 10, 2015, 5:55 PM), <https://www.justsecurity.org/23659/thoughts-zivotofsky-part-two-article-iii-standing> [<http://perma.cc/RV58-77BV>]; William Baude, *Opinion, The Legal Power of “Standing,”* N.Y. TIMES (May 14, 2015), <http://www.nytimes.com/2015/05/14/opinion/the-legal-power-of-standing.html> [<http://perma.cc/26SM-2SX5>]. The Court has taken a case for next term that raises standing issues similar to the ones present but unaddressed by the Court in *Zivotofsky II*. See *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

<sup>134</sup> See Sitaraman & Wuerth, *supra* note 116, at 1922–23, 1930–34.

<sup>135</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

To say that *Zivotofsky II* lacks predictable consequences in the judiciary is not to say that it lacks predictable consequences on presidential power. It will have such consequences in the executive branch, which operates under very different principles and incentives than the judiciary. Unlike judges, executive branch lawyers have an institutional predilection to read presidential power broadly. They will accordingly tend to construe *Zivotofsky II*'s holding, dicta, and ambiguities in the President's favor.

*A. How the Executive Branch Views Supreme Court Precedent*

The President's duty to "take Care that the Laws be faithfully executed" requires him to obey and enforce the mass of laws enacted by Congress.<sup>136</sup> Before the President can obey and enforce the laws, he must determine their meaning, what they authorize and prohibit, and how they fit together. He also "has an independent constitutional obligation to interpret and apply the Constitution" that flows not just from the Take Care Clause but from his constitutional oath as well.<sup>137</sup> When the President believes a law violates a constitutional provision, including Article II, the Take Care and Oath Clauses counsel against enforcing or obeying the statute because, as *Marbury* teaches, "a legislative act contrary to the constitution is not law."<sup>138</sup>

Although the President has the final word in the executive branch on these legal issues, the Attorney General has provided the President and executive agencies with advice on such issues since 1789.<sup>139</sup> The Attorney General in turn delegates her advisory function to the Office of Legal Counsel (OLC).<sup>140</sup> OLC is not the only executive branch office that will interpret and apply *Zivotofsky II*. But it is at the forefront of executive branch clashes with Congress, and it often publishes its legal advice on separation-of-powers disputes. What it says reflects

<sup>136</sup> U.S. CONST. art. II, § 3.

<sup>137</sup> The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 128 (1996); see also U.S. CONST. art. II, § 1, cl. 8 (requiring President to swear that he will "to the best of [his] Ability, preserve, protect and defend the Constitution of the United States"). The President's duty to interpret and apply the Constitution is heightened in the many situations that are beyond judicial review because of jurisdiction or justiciability limits, or in situations when courts defer to political branches' views of the Constitution. See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1694–97 (2011).

<sup>138</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 46–52 (1990). The executive branch has also stated that the constitutional objection must be "well-founded," Presidential Signing Statements: Memorandum for the Heads of Exec. Dep'ts & Agencies, 74 Fed. Reg. 10,669, 10,669 (Mar. 9, 2009), and that the decision to disregard is "necessarily specific to context," Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994).

<sup>139</sup> 28 U.S.C. §§ 511–513 (2012); Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

<sup>140</sup> General Functions, 28 C.F.R. § 0.25 (2014).

the executive branch view of both separation of powers and judicial precedent.

OLC says its legal advice is “based on its best understanding of what the law requires — not simply an advocate’s defense of the contemplated action or position proposed by an agency or the Administration.”<sup>141</sup> In performing this task it follows Supreme Court precedents and in general looks at the same sources as courts, with some important modifications.<sup>142</sup> Because OLC is part of the executive branch, “its analyses may also reflect the institutional traditions and competencies of that branch of the Government.”<sup>143</sup> Among other things, this means that OLC “ordinarily give[s] great weight to any relevant past opinions of Attorneys General and the Office,” and that its work “may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law.”<sup>144</sup>

OLC’s self-description is largely borne out in its opinions but is not a complete picture.<sup>145</sup> The head of OLC is nominated by the President, shares his general legal and political outlook, and sees his task of facilitating the President’s objectives through that lens.<sup>146</sup> Because OLC addresses many issues that never reach court and for which there is no controlling precedent, it tends to rely on general principles embodied in Supreme Court dicta, especially ones that favor presidential power.<sup>147</sup> It also relies heavily on executive branch opinions and precedents, and on legally undertheorized statements by Presidents and other executive officials in signing statements and speeches. The “institutional traditions and competencies” that inform OLC’s reading of precedent and dicta include proprietary intelligence information and the President’s unique responsibilities for conducting U.S. foreign relations.<sup>148</sup> These factors together lead OLC (and the executive branch

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<sup>141</sup> Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Att’y’s of the Office, Re: Best Practices for OLC Legal Advice & Written Opinions 1 (July 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> [<http://perma.cc/WW6D-SVQJ>].

<sup>142</sup> *Id.* at 2.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* For an explanation and defense of why the executive branch views its practices and opinions as legal precedents, see H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 530–31 (1999).

<sup>145</sup> See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

<sup>146</sup> See, e.g., William H. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 252 (1970) (“[A]ny President, and any Attorney General, wants his immediate underlings to be not only competent attorneys, but to be politically and philosophically attuned to the policies of the administration.”).

<sup>147</sup> For examples from the foreign relations context, see sources cited *infra* notes 167, 169.

<sup>148</sup> See GOLDSMITH, *supra* note 145, at 35; David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 92–95 (2000).



generally) to take a broader, and perhaps much broader, view of presidential power than the Supreme Court.<sup>149</sup> OLC also believes it has an “enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency,” especially in cases beyond judicial review.<sup>150</sup> In the aggregate, OLC’s legal judgments “tend to be protective of executive power.”<sup>151</sup>

### B. *Zivotofsky II in the Executive Branch*

One of course cannot precisely predict how OLC will interpret *Zivotofsky II*. OLC heads within and across different administrations possess different interpretive commitments despite their generally shared institutional outlook. And we cannot know the factual contexts or full range of issues in which *Zivotofsky II* may be relevant. We can be sure, however, that OLC will interpret the decision to favor the executive branch in its manifold interactions and disputes with Congress. What follows are some illustrative overlapping contexts in which OLC might do so.

1. *The President’s Exclusive Recognition Power.* — The President’s recognition power has dimensions beyond those identified in *Zivotofsky II*.<sup>152</sup> In *United States v. Belmont*, the Court held that as an incident to his recognition of the Soviet Union, President Roosevelt had the power to make an executive agreement that accepted an assignment of Soviet property with the effect of validating Soviet government acts in the United States and preempting state law.<sup>153</sup> The Court viewed “[t]he recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto” as “all parts of one transaction,” and added that “in respect of what was done here, the Executive had authority to speak as the sole organ of that govern-

<sup>149</sup> See GOLDSMITH, *supra* note 145, at 36–37.

<sup>150</sup> Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994).

<sup>151</sup> Morrison, *supra* note 137, at 1715. Some commentators maintain that OLC is guided entirely by obedience to the President rather than law. See, e.g., BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010). If true, *Zivotofsky II* couldn’t influence OLC to make broader claims of presidential power in disputes with Congress because OLC would already maximize presidential discretion independent of Supreme Court precedent. But such critics exaggerate the political influences on OLC and too heavily discount the cultural norms and professional and institutional incentives that prevent it from being cowed by the White House. See Morrison, *supra* note 137, at 1713–23. They also ignore the numerous times, in both high- and low-profile contexts, that OLC applies Supreme Court and executive branch precedent to conclude that proposed presidential initiatives are unlawful. *Id.* at 1717–18. See generally Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (book review) (exploring various ways that law, including judicial precedent, constrains presidential power). It is as implausible to say that OLC is indifferent to Supreme Court precedents as it is to say that OLC reads those precedents just like courts do.

<sup>152</sup> See Powell, *supra* note 144, at 556–57; Reinstein, *supra* note 47, at 56 n.370.

<sup>153</sup> See 301 U.S. 324, 330–31 (1937).

ment.”<sup>154</sup> The Court’s subsequent decision in *United States v. Pink* noted that the President’s recognition authority “is not limited to a determination of the government to be recognized,” but includes as well “the power to determine the policy which is to govern the question of recognition.”<sup>155</sup> *Pink* also suggested that the recognition power should be read broadly enough to be effective in “handling the delicate problems of foreign relations” and thus to authorize executive actions related to recognition (including preemption of state law) that would “thwart[] or seriously dilute[]” the President’s exercise of the recognition power.<sup>156</sup>

These decisions will permit OLC to read the President’s exclusive recognition power to include both powers incidental to recognition and any related “policy” that governs recognition. This reading seems especially apt since *Zivotofsky II* discussed these factors in the context of interpreting *Belmont* and *Pink* to support the President’s exclusive recognition power.<sup>157</sup> These factors might be relevant to any number of questions. For example, lower court precedent has suggested that executive agreements are subservient to federal statutes.<sup>158</sup> That understanding is now up for grabs in the context of recognition. After *Zivotofsky II*, OLC could plausibly maintain that Congress cannot constrain or alter a tightly integrated bundle of presidential policy decisions in an executive agreement premised on his exclusive recognition power. The Court’s reasoning could support this interpretation even if Congress were exercising its commerce power, or if the executive action at issue was a recognition decision not tied to an executive agreement. This line of argument is especially significant because the President’s recognition power extends not just to states but also to governments, which change more frequently than do states.<sup>159</sup>

More broadly, Justice Scalia listed “a range of settings” where Congress has legislated on matters that burden a President’s recognition determination.<sup>160</sup> *Zivotofsky II* gives the executive branch more tools than before to resist these intrusions on presidential recognition decisions. Consider the Taiwan Relations Act.<sup>161</sup> It did not formally reverse President Carter’s recognition of the People’s Republic of China

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<sup>154</sup> *Id.* at 330.

<sup>155</sup> 315 U.S. 203, 229 (1942).

<sup>156</sup> *Id.* at 229–30.

<sup>157</sup> See *Zivotofsky II*, 135 S. Ct. at 2087–91.

<sup>158</sup> See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659–60 (4th Cir. 1953).

<sup>159</sup> See *Zivotofsky II*, 135 S. Ct. at 2084, 2086.

<sup>160</sup> *Id.* at 2122 (Scalia, J., dissenting).

<sup>161</sup> Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)).

and his derecognition of the Republic of China (ROC).<sup>162</sup> But it did “determine the scope of, and set conditions on” his recognition decision, and diminished its “strategic ambiguity” by giving “the ROC practically all domestic and international rights of a recognized Taiwanese government.”<sup>163</sup> It is unclear under *Zivotofsky II* whether the Taiwan Relations Act amounts to “policy determinations that precede and follow the act of recognition itself,” which the Court says Congress can legislate, or attempts to “contradict [the President’s] prior recognition determination,” which the Court says Congress cannot do.<sup>164</sup> As noted above, the Court’s hazy line ultimately turns on the nebulous determination of whether Congress “infringes” on or “aggrandizes” the Executive’s recognition power.<sup>165</sup> While many factors inform this decision, *Zivotofsky II*’s reliance on functional factors in resolving the scope of the recognition power, as well as its clarification that *Pink* and *Belmont* are bases for presidential exclusivity vis-à-vis Congress, gives the executive branch leeway in characterizing congressional actions as inappropriately intruding into the President’s exclusive competencies.<sup>166</sup>

2. *The President’s Exclusive Power to Conduct Diplomacy.* — Long before *Zivotofsky II*, OLC had identified and applied what it describes as the President’s “exclusive prerogatives in conducting the Nation’s diplomatic relations.”<sup>167</sup> Its most recent published opinion on the topic says this authority extends to “any subject that has bearing on the national interest” and “includes the ‘exclusive authority to determine the time, scope, and objectives’ of international negotiations and the individuals who will represent the United States in those contexts,” as well as “activities, functions, and preparatory work necessary to carry out meaningful diplomatic interaction with foreign officials.”<sup>168</sup> OLC grounds this exclusive presidential power in several clauses of Article II, in Supreme Court dicta (including, sometimes,

<sup>162</sup> Compare *id.*, with Joint Communique on the Establishment of Diplomatic Relations Between the United States and the People’s Republic of China, 2 PUB. PAPERS 2264 (Dec. 15, 1978).

<sup>163</sup> Reinstein, *supra* note 47, at 48–49.

<sup>164</sup> *Zivotofsky II*, 135 S. Ct. at 2087, 2095.

<sup>165</sup> See *supra* p. 132.

<sup>166</sup> The Court briefly discussed the Taiwan Relations Act in a way that (without analysis) implied the Act was consistent with its ruling about presidential exclusivity. See *Zivotofsky II*, 135 S. Ct. at 2094. My claim is not that the Taiwan Relations Act is unconstitutional, but rather that in related future contexts *Zivotofsky II* gives OLC new legal tools to object to similar legislation.

<sup>167</sup> Unconstitutional Restrictions on Activities of the Office of Sci. & Tech. Policy in Section 1340(a) of the Dep’t of Def. & Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C., 2011 WL 4503236, at \*4 (Sept. 19, 2011) [hereinafter Section 1340 Opinion].

<sup>168</sup> *Id.* (quoting The President — Auth. to Participate in Int’l Negotiations — Trade Act of 1974 (19 U.S.C. § 2101) — Participation in Producer-Consumer Fora, 2 Op. O.L.C. 227, 228 (1978); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454, at \*6 (June 1, 2009)).

*Curtiss-Wright*), in executive branch practice, and in the functional “one-voice” advantages of presidential diplomacy.<sup>169</sup> OLC has invoked this authority to disregard statutes on “widely varied subject matters,” ranging from international discussion about international fishing restrictions to inquiries about the status of missing Israeli soldiers to U.S. government requests for assistance to foreign governments for covert action.<sup>170</sup>

OLC will read *Zivotofsky II* to strengthen and likely expand the case for the President’s exclusive power to conduct diplomacy. The holding, combined with its functional rationale, can be read at least for the broad proposition that the President “has exclusive authority to dictate the content of official communications on issues for which unity of message is important.”<sup>171</sup> The Court further stated, in what will become a staple in OLC opinions, that “the President . . . has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers” while Congress has “no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”<sup>172</sup> The decision also affirms the President’s “unique role in communicating with foreign governments” as well as the constitutional validity of then-Congressman Marshall’s “sole organ” statement, on which OLC frequently relies.<sup>173</sup> In harvesting these points to support the President’s exclusive diplomatic powers, OLC is unlikely to give much weight to the Court’s abstract statements about Congress’s role in foreign relations, which OLC opinions often acknowledge in terms similar to those used by the Court.<sup>174</sup> Moreover, *Zivotofsky II* said little concrete about Congress’s Article I

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<sup>169</sup> See, e.g., *id.*; Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009) [hereinafter Section 7054 Opinion]. OLC traces this power to an opinion written by Secretary of State Thomas Jefferson. See *id.* (extensively discussing Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), reprinted in 16 THE PAPERS OF THOMAS JEFFERSON 378, 378–80 (Julian P. Boyd ed., 1961)).

<sup>170</sup> Section 1340 Opinion, *supra* note 167, at \*4; see also Section 7054 Opinion, *supra* note 169, at \*7 (noting that in the past OLC has deemed unconstitutional congressional requirements that the President enter negotiations to modify World Trade Organization rules, include legislative representatives in international negotiations, and not negotiate with or recognize the Palestine Liberation Organization).

<sup>171</sup> Ryan Scoville, *Legislative Diplomacy After Zivotofsky*, LAWFARE (June 15, 2015, 9:00 AM), <http://www.lawfareblog.com/legislative-diplomacy-after-zivotofsky> [<http://perma.cc/H5CT-WQDR>].

<sup>172</sup> *Zivotofsky II*, 135 S. Ct. at 2079, 2086.

<sup>173</sup> *Id.* at 2090.

<sup>174</sup> See, e.g., Section 1340 Opinion, *supra* note 167, at \*3 (noting in an opinion concerning the President’s exclusive power that Congress “clearly possesses significant Article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration, . . . and Congress’s exercise of those powers has sometimes limited the President’s options in implementing foreign policy” (quoting Section 7054 Opinion, *supra* note 169, at \*3)).

powers in this area, and nothing at all about how Congress might deploy the Necessary and Proper Clause to constrain the President. The opinion's nods to Congress will thus likely have less influence on OLC than its concrete statements related to presidential diplomacy.

Several examples illustrate how the executive branch might apply *Zivotofsky II* to bolster the President's exclusive power to conduct diplomacy. The trade-promotion authority Congress recently gave the President stated that the United States' "principal negotiating objectives" include the discouragement of actions to "boycott, divest from, or sanction Israel," including actions designed to penalize commercial relations with persons doing business in "Israeli-controlled territories."<sup>175</sup> Soon after the enactment of this law, the State Department implied that the executive branch would not honor the provision as it applied to the "occupied territories" in the West Bank, on the ground that the provision "runs counter to longstanding U.S. policy towards the occupied territories, including with regard to settlement activity."<sup>176</sup> The State Department did not reveal the legal basis for this conclusion. But the executive branch could easily have cited *Zivotofsky II* in support of the proposition that it can disregard the provision on the ground either that it intrudes into the President's exclusive power to negotiate, or that it seeks to compel the Executive to negotiate in a manner contrary to his recognition decision related to territorial sovereignty, or both.

Another example grows out of the Obama Administration's release in 2014 of five Taliban soldiers from the Guantánamo Bay detention center in exchange for Bowe Bergdahl, a U.S. soldier detained by the Taliban.<sup>177</sup> In so doing, the Administration disregarded a statute that required thirty days of prior notice to Congress before releasing Guantánamo detainees.<sup>178</sup> The Administration's weak public justifications for ignoring the statute relied on inferences from separation-of-powers decisions that had nothing to do with detention or foreign affairs.<sup>179</sup>

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<sup>175</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 102(b)(20), 129 Stat. 320, 331-32 (to be codified at 19 U.S.C. § 4201).

<sup>176</sup> Nahal Toosi, *Administration Objects to Israeli-Linked Provision in Trade Bill*, POLITICO (June 30, 2015, 7:57 PM), <http://www.politico.com/story/2015/06/administration-objects-to-israeli-settlements-provision-in-trade-bill-119620.html> [<http://perma.cc/2SZ3-UNLC>]. I use the caveat "implied" because it is not clear whether the subsection referencing occupied territories is a directive to the President or merely hortatory. In either event the example illustrates the potential impact of *Zivotofsky II*.

<sup>177</sup> See Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES (May 31, 2014), <http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html> [<http://perma.cc/DFY7-MP92>].

<sup>178</sup> See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013).

<sup>179</sup> See Memorandum from Dep't of Def. to the Gov't Accountability Office, as reprinted in Jack Goldsmith, *Was the Bergdahl Swap Lawful?*, LAWFARE (Mar. 25, 2015, 9:19 PM),

The Administration also said, however, that the notice requirement “jeopardize[d] negotiations to secure the soldier’s release and endanger[ed] the soldier’s life.”<sup>180</sup> It appeared to believe that the statute burdened the President’s exclusive power over diplomacy, a power the executive branch will view to be strengthened by *Zivotofsky II*. It could have made a similar argument had Congress tried to control the content of the President’s negotiations with Iran before the conclusion of the deal, or to restrict what the President could say or how he could vote in the United Nations Security Council on the matter.<sup>181</sup> These examples illustrate how easily congressional directives can affect presidential diplomacy and negotiations, which at bottom are mostly forms of speech. In such cases, OLC can look to *Zivotofsky II* to strengthen and broaden the President’s claim to exclusive diplomatic powers and to muddy the extent to which Congress can regulate these powers.

Finally, *Zivotofsky II* gives the President new leverage in the rare instances when he wants to oppose an exercise of “legislative diplomacy,” the practice of members of Congress in receiving, communicating with, and maintaining contacts with foreign leaders, and travelling abroad to confer with foreign leaders on various topics.<sup>182</sup> One can read *Zivotofsky II* to confirm constitutional space for aspects of this practice, especially in light of the practice’s long pedigree.<sup>183</sup> But this reading assumes an abstract interpretation of the opinion, not one from the executive branch’s perspective. From the latter perspective, *Zivotofsky II* provides new legal arguments about the President’s exclusive power to control communication with foreign governments for the relatively rare case when the executive branch wants to oppose

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<http://www.lawfareblog.com/was-bergdahl-swap-lawful> [<http://perma.cc/2SDJ-N7WF>] (concluding that compliance with the notice requirement would have “prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions,” *id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)), “without being ‘justified by an overriding need’ to promote legitimate objectives of Congress,” *id.* (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977))).

<sup>180</sup> *Id.* (emphasis added).

<sup>181</sup> The Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, § 135(b)(3), 129 Stat. 201, 203, required the President to delay the waivers of domestic sanctions against Iran that President Obama agreed to in the Joint Comprehensive Plan of Action, *supra* note 33, in order to give Congress time to consider and approve or disapprove the waivers. The Obama Administration subsequently voted in the United Nations Security Council to lift international sanctions against Iran. S.C. Res. 2231 (July 20, 2015). President Obama once maintained that he would “treat . . . as non-binding” the requirement in Section 1245 of the Defense Authorization Act of 2012 that the President must carry out a diplomatic initiative to control the uses of revenues from certain oil purchases from Iran on the ground that it “would interfere with [his] constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with foreign governments.” Press Release, President Barack Obama, Statement by the President on H.R. 1540 (Dec. 31, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540> [<http://perma.cc/6YE8-7W8L>].

<sup>182</sup> See Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 333 (2013).

<sup>183</sup> See Scoville, *supra* note 171.

legislative diplomacy, especially in contexts (like congressional travel abroad on diplomatic missions) where the Executive often controls logistics and security and thus can relatively easily enforce its will.<sup>184</sup>

3. *Military and Intelligence*. — *Zivotofsky II* will also prove to be a useful precedent in the military and intelligence contexts. In part this is because of the “close connection between the conduct of foreign affairs and the preservation of the nation’s security.”<sup>185</sup> OLC opinions often draw on the President’s independent and exclusive powers related to diplomacy in measuring his powers related to military and intelligence affairs.<sup>186</sup> OLC also deploys functional arguments in determining the scope of presidential power related to intelligence and military affairs.<sup>187</sup> *Zivotofsky II* will thus prove influential in OLC across the entire range of military and intelligence contexts because of its contemporary affirmation of the relationship between the President’s unique functional characteristics and his constitutional power in a decision that, unlike *Curtiss-Wright*, actually invalidated an act of Congress.<sup>188</sup>

<sup>184</sup> Scoville, *supra* note 182, at 339–40.

<sup>185</sup> Powell, *supra* note 144, at 564–65; *see also* Haig v. Agee, 453 U.S. 280, 307 (1981) (“[F]oreign policy and national security considerations cannot neatly be compartmentalized.”).

<sup>186</sup> *See, e.g.*, Authority to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998 at \*9 (Apr. 1, 2011) (grounding the President’s independent authority to use force abroad in part in his “constitutional authority to conduct the foreign relations” (quoting Letter to Congressional Leaders Reporting on the Deployment of United States Aircraft to Bosnia-Herzegovina, 2 PUB. PAPERS 1279, 1280 (Sept. 1, 1995))); Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 183–86 (1996) (linking President’s “constitutional authority as Commander-in-Chief” with his “constitutional role as the United States’ representative in foreign relations” and concluding that a congressional proposal to bar the President from placing U.S. armed forces under the operational or tactical control of the United Nations would, among other things, undermine the President’s exclusive constitutional authority with respect to the conduct of diplomacy).

<sup>187</sup> *See, e.g.*, The President’s Constitutional Auth. to Conduct Military Operations Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188, 190–96 (2001) (invoking the functional advantages of the presidency in support of “inherent constitutional powers to use military force,” *id.* at 190); Presidential Discretion to Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306, 310–11 (1995) (invoking functional considerations to support charitable reading of the President’s discretion to delay making factual determinations under arms control statute); Constitutionality of Proposed Statutory Provision Requiring Prior Cong. Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 258–59 (1989) (relying in part on the President’s functional characteristics to rule that proposed statutory restriction violated the “President’s authority to conduct covert activities abroad”); The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the Nat’l Sec. Act, 10 Op. O.L.C. 159, 160 (1986) (using functional advantages of the presidency to support construing away and practically disregarding statutory notice requirement on covert actions).

<sup>188</sup> This conclusion is unaffected by *Zivotofsky II*’s comments about *Curtiss-Wright*’s dicta, which the Court technically did not reject and, in many respects, embraced. *See supra* pp. 129–30. Moreover, much of *Curtiss-Wright*’s relevant dicta about the functional advantages of the presidency as a basis for exclusive presidential power can be found in *Zivotofsky II* itself. *Id.* In many contexts, OLC can switch citations from *Curtiss-Wright* to *Zivotofsky II*.

4. *Other Doctrinal Innovations.* — It is hard to say much concrete about the contexts in which OLC might invoke *Zivotofsky II*'s other doctrinal innovations — its singular analysis of text, structure, precedent, and historical practice — to infer an exclusive presidential power. OLC could read the decision to alter or at least cloud the burden of proof in Category Three cases. Or it could read *Zivotofsky II* to conclude that Congress's necessary and proper power applies sparingly to presidential foreign relations powers. OLC might also be influenced by the Court's analysis of historical practice, and especially its apparent inference of exclusive presidential power from a practice that consisted primarily of congressional silence in the face of the President's assertions of an independent power.<sup>189</sup>

### C. Mechanisms of Influence

OLC's interpretations of *Zivotofsky II* will influence executive branch power vis-à-vis Congress through many mechanisms.

OLC records its constitutional objections to bills in Congress that the Office of Management and Budget packages with policy comments and conveys to Congress.<sup>190</sup> White House and other executive officials may use bill comments to pressure Congress to alter a bill.<sup>191</sup> If the executive branch fails to eliminate a constitutionally objectionable provision, the President can veto the bill. Alternatively, he can summarize his constitutional views in a signing statement.<sup>192</sup> A constitutional argument in a signing statement, by itself, does little to alter the power between the branches.<sup>193</sup> But OLC uses signing statements as evidence of historical practice that can over time undergird a legal principle.<sup>194</sup> And of course some signing statements, like the one related to section 214(d), can be accompanied by nonenforcement.

<sup>189</sup> An argument like the one accepted in *Zivotofsky II* would have been useful to the executive branch in opposing the War Powers Resolution in 1973, since Congress until that point had been mostly silent in opposing unilateral presidential uses of force. Congress had of course long regulated the conduct of war even if it had not long regulated the initiation of war. See generally Baron & Lederman, *supra* note 63.

<sup>190</sup> Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711–12 (2005).

<sup>191</sup> See *id.* It is hard to isolate the extent to which such legal arguments, as opposed to political factors, do the work when Congress does alter a bill, but the participants act as if law matters.

<sup>192</sup> See *id.* *Zivotofsky II* should end claims about the illegitimacy of signing statements, since the Court noted without criticism the constitutional objections in President Bush's signing statement about section 214(d) before it vindicated those objections. See *Zivotofsky II*, 135 S. Ct. at 2082, 2096.

<sup>193</sup> See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 307 (2006).

<sup>194</sup> See, e.g., Section 7054 Opinion, *supra* note 169, at \*2; Section 1340 Opinion, *supra* note 167, at \*4 n.3, \*5 n.5.



*Zivotofsky II*'s greatest impact will come when OLC uses the decision to inform the President's actual enforcement of the laws. OLC might use *Zivotofsky II* to identify an independent presidential foreign relations power that in turn informs, and expands, a congressional delegation or authorization that the President uses as a basis for action.<sup>195</sup> OLC might use the decision as the basis for a constitutional objection to a statute that, through the canon of avoidance, interprets the statute in a way that avoids a hurdle to executive action.<sup>196</sup> And it might use the decision as a basis for determining that, like the Jerusalem passport law, a statute impinges on an exclusive presidential power and can be disregarded. In all of these contexts, the executive branch's combined powers of interpretation and enforcement outside of judicial review give it enormous leverage in shaping and resolving clashes with Congress. Congress of course can use its political tools to fight back, and it often does. But in the vast majority of its many disputes with Congress, the executive branch gets the first and last word in defining the President's authority. *Zivotofsky II* will help in that endeavor.

There is a final subtle but important mechanism through which *Zivotofsky II* will influence the expansion of presidential power. It comes when the diplomatic, military, or intelligence stakes are high and OLC's client seeks approval for an action that bumps up against an arguably unconstitutional limitation on presidential power. The reality is that these situations are rarely clear-cut legally, and OLC's decision about where and how to draw the line between permissible and impermissible action involves a great deal of judgment and prudence. Prior to *Zivotofsky II*, a cautious head of the Office (or any other cautious executive branch lawyer) could resist client pressure to disregard a constraining statute in this area on the ground that it had never been done before, and could distinguish the many Supreme Court statements about exclusive presidential foreign relations power as dicta. *Zivotofsky II* diminishes that avenue of restraint. The informed client — and in high-stakes situations the client is very informed — can now point to *Zivotofsky II* and its broad statements and forms of argument for exclusive presidential power and ask why the same logic should not extend to the new context. Of course, the OLC head or executive branch lawyer has tools to respond. But *Zivotofsky II* weakens this dynamic of restraint.

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<sup>195</sup> For past examples of the OLC using the existence of a presidential power to read delegations and authorizations broadly, see Serv. by Fed. Officials on the Bd. of Dirs. of the Bank for Int'l Settlements, 21 Op. O.L.C. 88, 90 (1997); Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 277–78 (1996). For examples from courts, see Bellia, *supra* note 59, at 126–39.

<sup>196</sup> For a description and critique of this practice in OLC, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218–19 (2006).

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It is difficult to foresee exactly how a judicial precedent will play out in the executive branch because we cannot know in advance the actual circumstances in which the precedent may be relevant. Some of the examples above involve novel contexts in which the executive branch might invoke *Zivotofsky II* to facilitate expansion of executive power. Other examples involve extant presidential practices that executive branch lawyers will view *Zivotofsky II* to validate, and that will invariably expand as a result of the new decision. I do not claim that executive branch lawyers will view *Zivotofsky II* to wipe out a wide swath of foreign relations statutes. The decision's impact will usually be marginal and subtle, and the circumstances in which it may be relevant will often be surprising. But its aggregate effect over the run of many foreign relations disputes between the executive branch and Congress will likely be significant.

#### CONCLUSION

Justice Jackson's concurrence in *Youngstown* is a penetrating reflection on presidential power even if it has not been easy to operationalize as constitutional doctrine. Justice Jackson's insights about the "practical advantages *and grave dangers*" of executive power were deeply informed, he implied in the first sentence of the opinion, by his service "as legal adviser to a President in time of transition and public anxiety."<sup>197</sup> As President Roosevelt's Attorney General in the run-up to World War II, Justice Jackson wrote opinions upholding broad assertions of presidential power.<sup>198</sup> At the *Youngstown* oral argument, Justice Jackson acknowledged that he "claimed everything" on behalf of the President while in the executive branch, and he noted that the "custom . . . did not leave the Department of Justice when [he] did."<sup>199</sup>

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<sup>197</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (emphasis added).

<sup>198</sup> See, e.g., Acquisition of Naval and Air Bases in Exch. for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (Aug. 27, 1940); Statement of Attorney General Robert H. Jackson Concerning Seizure of the North American Aviation Plant, June 9, 1941, reprinted in Patricia L. Bellia, *The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES 233, 238–39 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009). The Department of Justice considered this statement to constitute an opinion of the Attorney General. Letter of Jan. 12, 1945, from Hugh B. Cox, Assistant Solicitor General, to Al Woll, United States Attorney, *United States v. Montgomery Ward & Co.*, No. 44 C 1611; Box No. 899; Civil Action Files; N.D. Ill.; RG 21; NARA — Chicago.

<sup>199</sup> Transcript of Oral Argument, *Youngstown*, 343 U.S. 579 (Nos. 744, 745), reprinted in 48 LANDMARK BRIEFS, *supra* note 59, at 920. In his concurring opinion, however, Justice Jackson stated that even if his Justice Department opinion were a precedent for President Truman's action, "I should not bind present judicial judgment by earlier partisan advocacy." *Youngstown*, 343 U.S. at 649 n.17 (Jackson, J., concurring).

This essay has avoided a normative assessment of this continuing custom, and has instead tried only to understand its consequences. One consequence, I have argued, is that the executive branch in its many foreign policy disputes with Congress will significantly magnify the impact of Supreme Court decisions that favor presidential power. This is an important lesson not just for scholars but for the Court as well. The Justices in the *Zivotofsky II* majority appeared to believe that they could arbitrarily limit the opinion's untidy reasoning and otherwise very broad implications with some caveats about the limited scope of the holding and paeans to the breadth of Congress's Article I powers in the field of foreign affairs. This strategy (if it is that) overlooks that the "law" of *Zivotofsky II* will largely be written not by the Court, but by executive branch lawyers who will interpret its pro-executive elements for all they're worth. It is no accident that the three dissenting Justices who characterized *Zivotofsky II* as a "perilous step" or a decision that "will erode the structure of separated powers" all (like Justice Jackson) served previously in roles providing legal advice to the President.<sup>200</sup>

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<sup>200</sup> *Zivotofsky II*, 135 S. Ct. at 2116 (Roberts, C.J., dissenting) ("perilous step"); *id.* at 2123 (Scalia, J., dissenting) ("erode"). Chief Justice Roberts served as a Special Assistant to the Attorney General and as Associate Counsel to the President. *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 27, 2015) [<http://perma.cc/64JW-ZJBZ>]. Justice Scalia served as Assistant Attorney General in charge of the Office of Legal Counsel. *Id.* And Justice Alito served as Deputy Assistant Attorney General in the Office of Legal Counsel. *Id.*; *Samuel A. Alito*, LIBR. CONGRESS, <http://www.loc.gov/law/find/alito.php> (last updated Jun. 3, 2015) [<http://perma.cc/BH5H-ALLL>].