

AGORA: REFLECTIONS ON *ZIVOTOFSKY V. KERRY*
ZIVOTOFSKY: THE DIFFERENCE BETWEEN INHERENT AND
EXCLUSIVE PRESIDENTIAL POWER

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If we stipulate that the Foreign Relations Authorization Act of 2002 presented a genuine constitutional conflict between the President and Congress, reasonable minds can differ about the outcome in *Zivotofsky v. Kerry* (*Zivotofsky II*).¹ The Court's answer to the specific question presented is actually the least interesting thing about the decision—indeed, the majority avers its insignificance so often that a casual reader might be forgiven for wondering why certiorari was granted in the first place.

Far more important is the way the majority gets where it is going, and what that tells us about how courts and government lawyers should approach the problem of a President who would prefer not to comply with a duly enacted statute. Can the President ignore the Foreign Intelligence Surveillance Act? How about the War Powers Resolution's time limits? What about congressional oversight of classified programs? *Zivotofsky II* does not answer these questions, but it cleans up significantly the doctrinal infrastructure from which answers may eventually emerge.

This brief comment has three goals. First, it will show how the majority spells out beyond cavil that *Youngstown Zone 3* requires the executive to show that its power is not just inherent, but exclusive. Second, it will suggest that the Court seems to understand its opinion as being extremely narrow in both reasoning and holding. Third, it will flag several issues that remain unsettled.

I. Clarifying Youngstown

Since at least *Dames & Moore v. Regan*,² the Jackson and Frankfurter concurrences in *Youngstown Sheet & Tube Co. v. Sawyer* have provided an authoritative structure for thinking about separation of powers problems, particularly in the field of foreign affairs law.³ But the point of this framework has too often been missed.

The Solicitor General's brief in *Zivotofsky II* is a case in point. The basic structure of his argument was straightforward:

- (1) If Article II contains an inherent power, Congress may not prohibit the President from exercising that power as he sees fit.

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¹ I tend to be persuaded by the dissenting argument that, in context, Section 214(d) does not actually implicate recognition. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 2076, 2114-2115 (2015) [hereinafter *Zivotofsky II*] (Roberts, C.J., dissenting) (finding no basis in international law for inferring de facto recognition from information on a passport, where the issuing executive's frequently reiterated policy is against adopting any such recognition); *id.* at 2118-2120 (Scalia, J. dissenting) (similar).

² 453 U.S. 654 (1981).

³ 343 U.S. 579, 634 (1952) (Jackson, J., concurring); *id.* at 593 (Frankfurter, J., concurring).

- (2) The President possesses an inherent power to recognize foreign states.
- (3) Therefore, Congress cannot prohibit the President from exercising the recognition power as he sees fit.

Observing that the executive branch has “unilaterally made hundreds of recognition decisions concerning states, governments, and territorial shifts,” the Solicitor General thus argued that the President “possess[es] *inherent* constitutional authority to determine passport content as it pertains to the conduct of diplomacy.” On the logic above, this necessarily entailed the conclusion that “the recognition power belongs *exclusively* to the Executive.”⁴

This argument, however, misunderstands the *Youngstown* framework almost completely. Jackson describes—and the *Dames & Moore* majority formally adopts—a spectrum divided loosely into three zones, each defined by the relationship between a presidential action and the existing statutory framework.⁵ While correctly categorizing an executive act does not itself answer the legal question,⁶ *Youngstown* is an immensely useful tool for disciplining separation of powers analysis. In particular, it forces us to confront the category error presented by the Solicitor General’s claim that precedent and logic from Zone 1 and Zone 2 should be decisive of a question located in Zone 3. They are not. The fact that the President has historically taken some action in the face of congressional silence does not in itself mean that the President gets to keep doing it once Congress tells him to cut it out. While this has always been the best understanding of the doctrine,⁷ it has remained unaccountably murky both in litigation and in some scholarship.

Zivotofsky II has gone a long way toward mopping up the muck. The opinion is admirably precise about the structure of analysis. “To succeed in this third [*Youngstown*] category,” the Court says, “the President’s power must be both ‘exclusive’ and ‘conclusive’ on the issue.” So even if “the text and structure of the Constitution grant the President the power to recognize foreign nations and governments” the Zone 3 “question then becomes whether that power is *exclusive*.”⁸ Eight justices are not just clear on this point, but insistent about it⁹—and for good reason. The entire power of *Youngstown* is to avoid the seductive either/or-ism offered by the Solicitor General’s suggestion that the President either has an exclusive power or no power at all.

Why do we structure our Constitution that way? Why might the President have an inherent power that can be displaced by Congress if it so decides? The answer emerges from the gap between the demands of governance and the limited specifications of the Constitution itself. Especially in the realm of foreign affairs, which the Constitution leaves famously underspecified, the President sometimes has default authority to take the

⁴ See generally Brief for Respondent, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-0628), 2014 WL 4726506, at 10-11 (emphasis added).

⁵ *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring). As a reminder, Zone 1 cases are those where “the President acts pursuant to an express or implied authorization of Congress”; Zone 2 cases involve executive “acts in absence of either a congressional grant or denial of authority”; and Zone 3 cases involve executive “measures incompatible with the express or implied will of Congress.” *Id.*

⁶ Zone 2’s reference to “contemporary imponderables” as a rule of decision speaks for itself. But the uncertainty does not end there. Although presidential authority is “at its maximum” in Zone 1, even authorized presidential action may sometimes nonetheless violate the Constitution. And although Zone 3 puts executive “power at its lowest ebb,” even presidential action that is flatly prohibited may sometimes be a matter of constitutional entitlement.

⁷ My favorite example of a rigorous analytic breakdown on this point is Saikrishna Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327 (2008). For more on the constitutional logic of this distinction, see Julian Davis Mortenson, *A Theory of Republican Prerogative*, 87 S. CAL. L. REV. 45, 52-61 (2015).

⁸ *Zivotofsky II*, 135 S. Ct. at 2084, 2086.

⁹ *Id.* at 2084, 2086; *Id.* at 2118, 2124 (Scalia, J., dissenting) (“I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. . . . To be sure, early Presidents granted passports without express congressional authorization. But this point establishes Presidential authority over passports in the face of congressional *silence*, not Presidential authority in the face of congressional *opposition*.”).

initiative if Congress hasn't provided a clear mechanism to deal with some problem. And having asserted such authority, the executive branch may enjoy it for a good while, especially if Presidents are smart about the politics of asserting it. But that doesn't stop Congress from setting a new rule for executive action, at least not unless the presidential power is both inherent *and* exclusive. And it is this, above all else, that *Zivotofsky II* appears to have settled conclusively.

II. *A Narrow Opinion Recognizing a Narrow Application of a Narrow Power*

How, then, did the Court decide that the recognition power falls into the category of presidential powers that are not just inherent, but exclusive? There is nothing particularly surprising here. The majority consulted all the authorities you would expect, in pretty much the order you would expect. *Pave* Scalia, functionalism is only one factor in the majority's analysis, and a secondary one at that. And the opinion as a whole is limited by a number of factors that the Court appears to believe are highly particular to this case, if not necessarily unique. The crucial points seem to be the following.

As a textual matter, the Court suggests that at least two specific Article II powers, in their unilateral exercise, necessarily empower the President to effectuate a de jure recognition under international law: the reception of an ambassador as the legal representative of a specific state and the mere negotiation of a formally international treaty with a sovereign counterpart.¹⁰ (The majority's additional reference to the appointment of ambassadors is unconvincing, given the limitation of advice and consent that checks mere nomination.) In contrast, it finds no comparably specific Article I provision to which a congressional power of *recognition* necessarily attaches. The majority does not dispute that Congress has a power to regulate passports and that the particular recognition effectuated here by Congress is done through the medium of passport regulation.¹¹ But it finds that more general power insufficient where it is used not merely to *interfere* with but *actually to usurp directly for its own exercise* a President's far more particularized power to effectuate legal change.¹² What the Court views as a stark difference in textual specificity looms large in shaping the rest of the majority's analysis.

As a structural matter, the Court focuses especially on how the statute regulates the nontrivially substantive content of presidential communications—in a word, the president's speech. Without suggesting that such control is always illegitimate,¹³ the *Zivotofsky II* majority found special reason to be troubled by an effort to control what the President says.¹⁴ The question was thus framed from the outset as “[w]hether Congress can command the President and his Secretary of State to issue a formal statement that contradicts [their] earlier recognition.”¹⁵ This theme of “control [over] the president's communication” dominates the Court's description of the constitutional issue, with a persistent focus on the statutory “command to the President to state” a particular view, to “force the President himself to contradict his earlier statement,” and to “prevent the Executive itself” from

¹⁰ *Id.* at 2084–86.

¹¹ *Id.* at 2096.

¹² *Id.* As the Court saw it, the problem with 214(d) “lies in *how* Congress exercised its authority over passports. . . . To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress *to exercise that exclusive power itself*.” It thus became the Court's painful duty to declare unlawful this effort by Congress, under the pretext of executing its Article I powers, to pass a law for the accomplishment of objects not entrusted to the Government.

¹³ See Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AJIL 517 (2013).

¹⁴ *Zivotofsky II*, 135 S. Ct. at 2094–95.

¹⁵ *Id.* at 2076, 2081.

“speaking with one voice.”¹⁶ In the context of the executive’s “unique role in communicating with foreign governments,”¹⁷ this compelled speech was a serious strike against the statute.

As a functional matter, the Court focused primarily on its belief that this speech act is of limited practical significance—and, it seemed to think, of no significance at all to the domestic rule of law. The usual reference was made to dispatch and unity, of course.¹⁸ But more importantly—and more specific to the particulars of the case—the Court described the functional power of recognition as “quite narrow,” “limited,” and even “hollow”: conceptually and politically important, but practically nugatory without congressional cooperation.¹⁹ Lest its readers misunderstand this as a reference to the blunt instrument of appropriations, the majority emphasized that it had principally in mind those checks that take the form of countervailing law. In a lengthy recitation of plausible congressional checks on recognition, the Court did not even mention appropriations until after first discussing the regulation of foreign commerce and naturalization, the punishment of piracies and offenses against the law of nations, the declaration of war and grant of letters of marque, the government of the armed forces, the making of treaties, and the appointment of ambassadors.²⁰ Functionally, then, the recognition power is exceedingly narrow and can readily be checked by a variety of statutory methods—and not merely by an appropriations tantrum—if Congress so chooses.

As for history, the Court is candid that it plays a supporting rather than leading role; the main significance of historical evidence seems to be that it fails to rebut what the Court sees as the implications of text, structure, and functionality. Citing leading twentieth century commentaries that asserted presidential exclusivity,²¹ along with assertive dictum from cases like *Banco Nacional v. Sabbatino*, *Baker v. Carr*, and *National City Bank v. China*,²² the court suggests that the “strong support” of historical understandings “confirms the Court’s conclusion” about the recognition power.²³ As for the political branches’ actual practice, however, the Court concedes that it is “not all on one side.” Indeed, the recognition practice turns out to be pretty typical in this respect: some legislators have been constitutionally hesitant about claiming recognition power; other legislators have been inclined to agree with a sitting president’s recognition decisions on policy grounds; and some Presidents have deferred to Congress when the politics of recognition were running strongly in one direction. The lessons of history are, in short, a muddle. But “the most striking thing’ about the history of recognition ‘is what is absent from it: a situation like this one.”²⁴

In application, then, the *Zivotofsky II* majority seems to understand itself as issuing an extremely narrow opinion about an extremely narrow power with extremely narrow practical consequences: “It is not for the president alone to determine the whole content of the nation’s foreign policy. That said, it *is* for the president alone to make the specific decision of which foreign power he will recognize as legitimate.”²⁵ Besides taking every opportunity to emphasize the narrowness of its holding, the majority seems repeatedly to go out of its way to celebrate the role of the legislature: “[W]hether the realm is foreign or domestic,” the opinion urges over

¹⁶ *Id.* at 2095-96.

¹⁷ *Id.* at 2090.

¹⁸ *Id.* at 2086.

¹⁹ *Id.* at 2087, 2095.

²⁰ *Id.* at 2087.

²¹ *Id.* at 2086-87.

²² *Id.* at 2089 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *Baker v. Carr*, 369 U.S. 186 (1962), and *Nat’l City Bank of N.Y. v. Republic of China*, 348 U.S. 356 (1955)).

²³ *Id.*, 135 S. Ct. at 2091, 2094.

²⁴ *Id.* at 2091-94 (quoting *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 221 (D.C. Cir. 2013) (Tatel, J., concurring)).

²⁵ *Id.* at 2090.

and over again, “it is still the Legislative Branch, not the Executive Branch, that makes the law.”²⁶ There is reason for more than a little suspicion that *Marbury*-style jiu jitsu may be at work here: this decision reaches a pro-executive outcome, but does so through the creation of a vehicle whose analytical structure and overall atmosphere is strikingly pro-congressional.

III. Unsettled Issues

At least three important issues remain unsettled: the nature of residual foreign affairs authority; the baseline presumption about whether a given presidential power is inherent or exclusive; and the scope of appropriations power as a tool of congressional will.

(a) *Residual Foreign Affairs Authority*. As it has so often done, the executive branch grounded its arguments in a claim about “the Constitution’s assignment of the bulk of foreign-affairs powers to the President.”²⁷ This argument was made on two separate doctrinal grounds: the precedent of *Curtiss-Wright* and the text of the Article II Vesting Clause. At long last, the Court put a fork in the former, rejecting the proposition that the President has “broad, undefined powers over foreign affairs” and cabining the broader significance of *Curtiss-Wright* to the vanishing point.²⁸

The Vesting Clause was left more ambiguous. The majority merely “declin[ed] to acknowledge that unbounded power,” which was “unnecessary to the resolution of this case.”²⁹ But it did so in the course of an opinion whose tone and substance seems flatly inconsistent with the strong form of the substantive Vesting Clause thesis, emphasizing repeatedly that “it is essential the congressional role in foreign affairs be understood and respected” and that “the executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”³⁰ The dissenters were even less equivocal, calling the argument “more reminiscent of George III than George Washington.”³¹ Whether any exclusive residual foreign affairs authority exists has yet to be determined. But if these nine justices were to vote on that claim, I am not so sure that the result might not be a lopsided vote against.

(b) *Baseline Presumption Where Authority Is Shared*. Unlike in *Zivotofsky II*, the President and Congress may sometimes *both* have reasonably specific grounds to lay claim to a given power. We need some way to resolve the clashes that arise in such instances. Some presidential powers will be “merely” inherent and therefore able to survive review in Zone 2, but not Zone 3. Some fewer will be both inherent and exclusive, and thus able to withstand even the lowest ebb of judicial deference. But what should the presumption be, where the answer does not announce itself on the face of the Constitution? I tend to side with Justice Scalia, who put the point bluntly in response to Justice Thomas’s embrace of the Vesting Clause: “it turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around.”³² But, it is for the Court to decide, eventually, whether it agrees.

(c) *Power of the Purse*. In the federalism context, as Congress has become more legally constrained in its ability to subject the states to direct statutory obligation, the appropriations power has loomed ever larger as a way for the federal government to get its way. As the appropriations power has loomed ever larger, coercion analysis

²⁶ *Id.* at 2090.

²⁷ Brief for Respondent, *supra* note 4, at 16.

²⁸ *Zivotofsky II*, 135 S. Ct. at 2089.

²⁹ *Id.* at 2089.

³⁰ *Id.* at 2090.

³¹ *Id.* at 2126 (Scalia, J., dissenting).

³² *Id.* at 2125 (Scalia, J., dissenting).

has become correspondingly more important.³³ We may see the same phenomenon develop in the separation of powers context, where it has been given remarkably little attention since the debates sparked by the Boland Amendment.³⁴ Although not at issue in *Zivotofsky II*, Section 214(b) of the 2002 Foreign Relations Authorization Act provides that “none of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.”³⁵ What happens when Congress passes the same kind of provision, except for Section 214(d)’s rule about the place-of-birth line on passports? Stay tuned.

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As noted at the outset, the point here is not to argue with certainty that the Court got it right on the precise question presented. The object, instead, is to highlight the opinion’s clarification of *Youngstown* analysis and to suggest how the Court seems subjectively to understand the scope and implications of its own opinion. While the decision could scarcely have resolved every open question about executive power, it establishes a usefully firm foundation for engaging with them in cases and controversies to come.

³³ See generally Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L.J. 861 (2013).

³⁴ See, e.g., Peter Raven-Hansen & William Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); Kate Stith, *Congress’s Power of the Purse*, 97 YALE L. J. 1343 (1998).

³⁵ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(b), 116 Stat. 1350, 1365–66 (2002).