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The U.S. Supreme Court's June 2015 decision in *Zivotofsky v. Kerry*[1] resolved a narrow question of constitutional law. But the Justices' reasoning and language are significant -- or at least fodder -- for many doctrinal debates in U.S. foreign relations law. The plaintiff, Menachem Binyamin Zivotofsky, was born to U.S. citizens living in Jerusalem. His parents, exercising a statutory right, requested that the State Department list Zivotofsky's place of birth as "Israel" on his passport.[2] The State Department refused. In an effort to remain neutral in the political debates about the sovereignty over Jerusalem, the Department instead followed its long-standing policy of listing the place of birth as "Jerusalem." Zivotofsky sued to vindicate the statutory right to have his passport designate "Israel" as his place of birth. The Supreme Court held, however, for the State Department in a 6-3 decision.

Justice Kennedy's majority opinion for five justices sweeps broadly, relying on constitutional text and structure, constitutional history, historical practice of the Congress and President, international law, and functional arguments to buttress its conclusion. The *Zivotofsky* opinions as a whole are a bonanza of foreign relations issues and doctrine; the executive Vesting Clause, the President as the "sole organ" of the nation, the need for the nation to speak with "one voice," *Curtiss-Wright*, *Youngstown*, diplomatic history and practice, the Republic of Texas, secrecy and dispatch, Citizen Genet, the Spanish-American war, international law in constitutional interpretation, formalism and functionalism, the list goes on and on! This case has

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[*] An edited version of this comment is forthcoming in 109 Am. J. Int'l L. (July 2015).

[1] 576 U.S. __ (2015).

[2] Foreign Relations Authorization Act, Fiscal year 2003, 116 Stat 1350.

all the hallmarks of a *Curtiss-Wright* or a *Sabbatino* of our generation – even if its actual impact on the outcome of inter-branch disputes winds up being minimal. For in the end, the narrow holding, the narrow majority in support of it, and Justice Kennedy's narrowing language all mean that the ultimate significance of the opinion for presidential power lies in the hands of future courts and future political actors. The *Zivotofsky* litigation writ large is immediately significant in one sense, however: the Supreme Court has put itself at the center of foreign relations disputes, just as the Court is at the center of many other major political and ideological disputes in American life.[3]

The first court to consider Zivotofsky's case held that it presented a non-justiciable political question and that Zivotofsky lacked standing. These closely related doctrines ensure that the federal courts only hear cases well-suited to judicial resolution. As to standing, the district court reasoned that Zivotofsky alleged only a conjectural harm, not an actual or imminent injury, from having Jerusalem listed as the place of birth on his passport. The D.C. Circuit reversed, holding that the invasion of the statutory right to have Israel listed itself creates standing, even when the plaintiff would otherwise have suffered no cognizable injury.[4] Whether a statutory right itself is enough to confer standing is an issue currently before the Supreme Court in another case;[5] the Supreme Court did not address the standing issue in the Zivotofsky litigation. The Supreme Court did address the political question doctrine, however, holding in an 8-1 decision in *Zivotofsky I* that the doctrine did not bar Zivotofsky's claims against the State

[3] In the month of the June 2015 alone these included gay marriage, health care reform, environmental protection and free speech.

[4] Zivotofsky ex rel. v. Sec'y of State, 444 F.3d 614, 619 (D.C. Cir. 2006).

[5] Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014) cert. granted, 135 S. Ct. 1892 (2015); *see also* Ingrid Wuerth, Spokeo *and National Security/Foreign Relations Law – Especially* Zivotofsky, LAWFARE, (May 1, 2015, 3:02 PM). http://www.lawfareblog.com/spokeo-and-national-securityforeign-relations-law-%E2%80%93-especially-zivotofsky

Department.[6] The case went back down to the lower court for a determination on the merits. The D.C. Circuit held the statute unconstitutional because it conflicted with a longstanding presidential policy of neutrality toward the political status of Jerusalem.[7] The Supreme Court granted certiorari again and affirmed in *Zivotofsky II*.

Zivotofsky argued to the Supreme Court that the statute was a constitutional exercise of Congress' power to regulate passports, that the President has no exclusive power to recognize foreign countries and governments, and that in any event the birth place designation of "Israel" on a passport at did not implicate recognition. The State Department argued that the President, acting through the Secretary of State, has the exclusive power to recognize foreign sovereigns based on constitutional text and Founding-era history, long-standing practice of the President in which Congress has acquiesced, and the functional attributes of the presidency. The government emphasized the foreign policy implications of the case, especially in support of the argument that there was a conflict between the statute and the exclusive powers of the President, maintaining for example that listing "Israel" on the passports of U.S. citizens born in Jerusalem who so request could "significantly harm 'U.S. national security interests,' and 'cause irreversible damage' to the United States' ability to facilitate the peace process" between the Israelis and Palestinians.[8]

At oral argument, several justices voiced open skepticism about that last proposition. Justice Kennedy, for example, asked why the government did not just simply issue a disclaimer stating the passport designation was not a "formal recognition" of the status of Jerusalem. The

[6] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430 (2012); *see also U.S. Supreme Court Rules Statute Directing State Department to Record Jerusalem-Born Citizen's Birthplace As "Israel" Does Not Raise Political Question*, 106 AM. J. INT'L L. 644, 644-45 (2012).

[7] 725 F.3d 197, 216-17 (D.C. Cir. 2013).

[8] Brief for Petitioner, Zivotofsky v. Kerry, 2014 WL 4726506 (U.S.), 5 (U.S. 2014) (further citation omitted).

Chief Justice, and Justices Scalia and Alito were also openly skeptical of the Solicitor General's argument about the foreign policy consequences of a decision for Zivotofsky; the Chief Justice maintained, for example, that the government itself had made a "big deal" out of the statute when President Bush attached a signing statement which said the statute implicated the President's exclusive recognition power, and Justice Alito questioned whether the constitutionality of the statute could really hinge on the possibility that some people would misunderstand the meaning of the passport designation of place of birth.[9] Based on the oral argument, it seemed plausible that the government would lose in a classic partisan 5-4 split, with all the conservatives as well as Justice Kennedy voting in favor of Zivotofsky.

But the government won. Justice Thomas wrote separately but voted with the liberals, perhaps surprising some scholars. Justice Thomas, however, has a generally expansive view of executive power in foreign relations and national security cases.[10] Justice Kennedy wrote the majority opinion for himself and the four liberal justices. As noted above, the majority opinion is wide ranging but the holding is narrow. After providing a history of the case and noting that it falls within *Youngstown* category III, the majority opinion analyzes in turn whether the President has the power to recognize foreign nations and government, whether that power is exclusive, and then whether the statute infringes on that power.

All of the Justices agreed on the first issue: the President has the power to recognize foreign governments and states. As described below, all of the Justices also define the President's recognition power in terms of international law. On the second issue, the majority holds that the President's power over recognition is exclusive, citing "functional considerations"

[9] Oral argument Transcript at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-628_fe9g.pdf

[10] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (Roberts, C.J., dissenting); Hamdan v. Rumsfeld, 548 U.S. 557, 679-80 (2006) (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

(including the need for the nation to speak with "one voice"), case law on recognition, the historical practice of the executive branch and Congress. The majority acknowledges that "no single precedent resolves" the exclusivity question and that each category of evidence includes counter-examples. Indeed, the contrary evidence has lead the leading scholar on the topic to conclude that the recognition power is not exclusive.[11] The dissenting Justices expressed doubt about the majority's exclusivity analysis, but they did not reach the issue because they concluded that the statute did not in any event infringe upon the recognition power.

The third issue is therefore the crux of the disagreement between the majority and the dissenting opinions. The majority acknowledges, as it must, that the place of birth designation required by the statute is not itself a formal act of recognition. The majority also defines the exclusive recognition power narrowly to extend no further than the act of recognition itself. The conflict, the majority reasons arises because the passport designation "contradicts" the President's earlier recognition determination. If the passport is not a statement of recognition what, then, generates the conflict? According to the majority, the long-standing view of the Executive Branch is that the passport-designation can undercut its recognition decisions, Congress's purpose in enacting the statute was to undermine the President's policy on Jerusalem, and international law requires that recognition be unequivocal, all point to the statute's conflict with the President's recognition decisions. The dissenting opinions found no conflict between the designation required by the statute and the power of recognition.

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[11] Robert J. Reinstein, *Is the President's Recognition Power Exclusive*? 86 TEMP. L. REV. 1, 3–50 (2013).

The *Zivotofsky* opinions are notable in part for their reliance on international law to define the scope of the President's constitutional power over recognition. Recognition is a constitutionally significant category for all nine justices, and modern international law helps determine the meaning and scope of this category of this category, again for all nine justices. Contemporary international law is used by the Justices as a direct source of constitutional meaning and also to support functional reasoning; both uses of international law are discussed below. The majority opinion also uses 18th century international law to interpret the Ambassadorial Reception Clause in Article 2 of the Constitution as including the "recognition" of "other nations," this third use of international law is consistent with textualist or originalist approaches to the Constitution which has garnered less controversy. It is not examined here in any further detail.

Opinions authored or joined by all of the Justices use modern international law to determine the scope of the recognition power. As Justice Thomas accurately notes in his opinion; "[t]he majority [assumes], that the recognition power conferred on the President by the Constitution is the power to accomplish the act of recognition as that act is defined under international law."[12] The majority opinion defines recognition as a '"formal acknowledgement' that a particular 'entity possesses the qualifications for statehood' or 'that a particular regime is the effective government of a state.'"[13] The case did not involve an underlying dispute over Israeli statehood or its legitimate government, but instead an underlying dispute over whether

[12] 135 S. Ct. at 2112, n.9. (Thomas, J. concurring in the judgment in part and dissenting in part). Justice Thomas is the only Justice who addresses international law as a matter of methodology. He joins the majority's assumption that the recognition power is the power to recognize as defined at international law because there is no evidence that the modern practice is different from the historical practice, nor is there evidence "that the original understanding of the recognition power was something other than the power to take part in that practice." *Id*.

[13] 135 S. Ct. at 2084 (quoting from the Restatement (Third) of Foreign Relations Law of the United States § 203, Comment a, p. 84 (1986)).

Jerusalem is part of Israel. Thus the Court, relying only on a contemporary international law treatise, makes this addition to the definition of recognition: "[i]t may also involve the determination of a state's territorial bounds."[14]

The majority opinion also uses international law in its analysis of the structure of the Constitution. The Court reasons that implied recognition takes place through the conclusion of a bilateral treaty or through the "'formal initiation of diplomatic relations,' including the dispatch of an ambassador," citing international law in support.[15] The various methods of implied recognition are, in turn, granted by the Constitution to the President through the powers to negotiate treaties, to nominate ambassadors, and to dispatch other diplomatic agents.[16] These textual grants of power to the President say nothing about recognition, of course. International law provides the link between these section of the Constitution -- which the Court describes as constitutional structure – and the recognition power.

Justice Scalia, in a dissenting opinion joined by Chief Justice Roberts and Justice Alito, relies on international law to conclude that the statute does not infringe upon the recognition power. "Recognition" Justice Scalia reasons "is a formal legal act with effects under international law."[17] To extend recognition, a "state must perform an act that unequivocally manifests that intention."[18] With this understanding in place, Justice Scalia argues, it is obvious that the statute has "nothing to do with recognition," because it requires no formal declaration about the Israel's sovereignty over Jerusalem, nor does "international custom infers acceptance of

[14] 135 S. Ct. at 2084 (citing to and quoting from 2 M. Whiteman, Digest of International Law § 1, p. 1 (1963)

[15] 135 S. Ct. at 2085-86.

[16] *Id.*

[17] 135 S. Ct. at 2118 (Scalia, J. dissenting) (citing Convention on the Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3100, T.S. No. 88).

[18] 135 S. Ct. at 2118 (Scalia, J. dissenting) (citing Whiteman § 3).

sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors."[19]

The majority opinion also uses international law as part of its functional reasoning to support the conclusions that the President's recognition power is exclusive and that the statute conflicts with that exclusive power. In support of its exclusivity analysis, the Court reasons that the President is better positioned than Congress to take "the decisive, unequivocal action necessary to recognize other states at international law."[20] These qualities, Justice Kennedy explains, are why the Framers assigned to the President "the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors."[21]

Functional reasoning is at the core of the Court's conclusion that the statute infringes upon the President's exclusive recognition power and the Court relies upon international law to support this conclusion as well. The Justices all noted that under international law an act of recognition must be clear and unequivocal, leaving no doubt about the intention to grant it. Justice Scalia concluded on this basis that the statute, which is not an unequivocal act of recognition, did not implicate recognition at all. The majority opinion relied on the same attributes of recognition under international law to conclude the opposite: that the statute did infringe upon the President's recognition power, because that power must be exercised unequivocally so that "the President not only makes the initial, formal recognition determination but also…may maintain that determination in his and his agent's statements."[22]

[19] 135 S. Ct. at 2118. (Scalia, J. dissenting).

[20] 135 S. Ct. at 2086.

[21] *Id.*

[22] 135 S. Ct. at 2094-95.

The Court's engagement with international law in *Zivotofksy* is remarkable for several reasons. First, it spans several implicit and explicit methodologies used by the Court: originalism, textualism, constitutional structure, and functionalism.[23] Second, the opinions rely on contemporary international law as a tool of constitutional interpretation, a practice which has drawn controversy,[24] but with the exception of Justice Thomas the Justices provide no methodological reason for doing so, nor do any of the Justices explicitly consider whether the modern international law they rely upon has the same relevant content today as it did in the late 18th Century.[25] Third, international law is unusually central to the Court's reasoning. The terms "Captures" and "Declare War" are, like "recognition," important terms in international law, so that international law informs their interpretation,[26] but unlike "recognition" they are also part of the text of the Constitution. "Recognition" is not a constitutional term, instead it is a category of conduct defined by international law. Recognition as a category now has great constitutional significance, of course, for conduct that falls within this category is reserved exclusively for the President, just as if the term "recognition" appeared in the text of the Constitution. Although international law in constitutional interpretation has a strong historical pedigree,[27] there is no

[23] For a defense of using changing norms of international law in separation of powers cases as part a functional analysis or to evaluate the past practice of the Executive Branch, see Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: the Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 7-82 (2007) (exploring international law as a "second order" – or non-textualist – tool of constitutional interpretation). The Court in *Zivotofsky* could have also used international law to interpret the historical interaction of Congress and the President over recognition. *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1009-20 (2013).

[24] *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 3 (2006) (describing the controversy around international and foreign sources in constitutional interpretation).

[25] *See, e.g.*, 135 S.Ct. at 2118 (Scalia, J. dissenting) (discussing the legal effects of recognition at international law and citing a treaty from 1933 and a British treatise from 1957 by G. Schwarzenberger; the treatise in turn cites only a 1933 Judgment by the World Court to support its statement about estoppel); *see also id*. 2084 (defining recognition based on 20th Century treatises and the Restatement Third, without suggesting that they reflect 18th Century international law).

[26] *See* Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009); Michael D. Ramsey, *Textualism and War Powers*, 69 U. Chi. L. Rev. 1543, 1587 (2002).

[27] *See* Cleveland, *supra* note 24.

contemporary case (and few historical ones) in which international law has played such a central role in interpreting the Constitution. All in all, the case is a strong endorsement international law in constitutional interpretation.

A second notable aspect of the case is what it means for the Court's approach to foreign relations law generally. There is strong evidence that the Court is "normalizing" its treatment of foreign relations issues, meaning that it analyzes them in the same ways that it analyzes domestic issues.[28] An "exceptionalist" approach to foreign relations cases, often associated in part with the Court's broad dicta in *Curtiss Wright*, is characterized by judicial reluctance to resolve foreign relations cases, a high level of deference to the executive branch, and broad power of the federal government at the expense of the states.[29] The Supreme Court's decision in *Zivotofsky I* rejecting the political question doctrine and forcing a resolution of the case on the merits was a significant step toward normalization.[30]

The significance of *Zivotosfky II* for normalization is less clear. The Court held for the executive branch; expansive executive power over foreign relations is one aspect of exceptionalism, not normalization. The Court's reasoning is also functional at times, and functional reasoning has historically been associated with the courts' exceptional treatment of foreign relations cases and with *Curtiss-Wright*. The Court also relied upon *U.S. v. Belmont* and *U.S. v. Pink*, cases which gave the president the power to make domestic law through executive claim settlement agreements. In the domestic context, the president lacks this power to make

[28] Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002); *see also* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015) (describing the Court's approach to foreign affairs as increasingly formalist).

[29] Sitaraman & Wuerth, *supra* note 27, at 1906-11.

[30] *Id*. at 1925-26; see also Peter J. Spiro, *Normalizing Foreign Relations Law after* Zivotofsky II, 109 AJIL Unbound 22 (2015).

law binding on domestic courts. In these ways, Justice Kennedy's opinion for a five-Justice majority does not support normalization.

The case does support the normalization of foreign relations law in other ways, however. For example, the Court decided the case based on the narrow reasoning that the President has the exclusive power to recognize foreign states and foreign government, not on the broader argument advanced by the government that the President has "'exclusive authority to conduct diplomatic relations,' along with 'the bulk of foreign-affairs powers.'"[31] The Court pointedly rejects the government's argument, but it does so at the price of analytical clarity later in the opinion. Relying solely on the President's recognition power meant that the Court must explain how the statute conflicts with the recognition power, a strained analysis heavily criticized in the dissenting opinions. Had the Court accepted the government's argument that the President has exclusive power to conduct diplomatic relations, however, the conflict between the statute and the President's power would have been far clearer because passports *are* a form of diplomatic communication whether or not they relate to recognition. The narrow reading of the President's power was unquestionably a deliberate choice by the majority and one that came at the cost of weak analysis on a central issue in the litigation.

The case also supports normalization because both the majority and dissenting opinions disavow exceptionalist language in *Curtiss-Wright*. The Court does use functional reasoning in favor of the President elsewhere in its opinion, leading some scholars to question whether the Court meant what it said in its repudiation of the *Curtiss-Wright* dicta.[32] But there is less tension between these parts of the opinion than some of the commentary suggests. The Court's

[31] 135 S. Ct. at 2089 (quoting from Brief for Respondent 18, 16).

[32] *See, e.g.*, Jean Galbraith, Zivotofsky v. Kerry *and the Balance of Power*, AJIL Unbound (forthcoming)

functional reasoning in *Zivotofsky II* is more narrowly tailored to recognition and to the facts of this case than was the Court's broad dicta in *Curtiss-Wright*. So, for example, the Court focuses on the Nation's need to speak with "one voice" specifically on the topic of recognition, not with respect to foreign relations generally.[33] The Court uses functional reasoning in non-foreign relations case, too, so narrowly-tailored functional analysis is a move toward normalization. Future litigants and political actors will certainly use the functional analysis from *Zivotofsky* outside the narrow context of recognition[34] – but whether they will be successful is an issue for another day and another case.

Finally, through its decision in *Zivotofksy I*, the Court interjected itself into the middle of a long-standing and difficult foreign policy issue – the status of Jerusalem – signaling its unwillingness to stand on the sidelines when it comes to foreign policy. There were good reasons *not* to grant certiorari in this difficult case, especially because the Court ultimately affirmed the decision of the D.C. Circuit, but the Roberts Court appears to enjoy high profile separation of powers cases,[35] whether or not they involve foreign relations.

[33] 135 S.Ct. at 2087.

[34] *See* Jack Goldsmith, *Why Zivotofsky Is a Significant Victory for the Executive Branch*, LAWFARE (June 8, 2015, 3:44 PM), http://www.lawfareblog.com/why-zivotofsky-significant-victory-executive-branch**.**

[35] *See* Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550 (2014).