

AGORA: REFLECTIONS ON *ZIVOTOFSKY V. KERRY*
NORMALIZING FOREIGN RELATIONS LAW AFTER *ZIVOTOFSKY II*

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These have been heady times for those interested in foreign relations law. The last twenty years have seen the field transformed. In the 1970s and 1980s, Vietnam had triggered significant attention on constitutional war powers, but that interest was more political than scholarly. Other foreign relations law issues were debated only at the margins. The *Restatement (Third)* supplied a largely unchallenged conventional wisdom in the area, even if some of its main points were more aspirational than descriptive. The courts had long been missing in action; though they had been active in the first century or so of the Republic on international law and foreign relations law issues, probably the most important Supreme Court ruling in the area from the second half of the twentieth-century merely served to confirm the judicial timidity.¹ On many of the most important issues of foreign relations, sparse judicial precedents (such as they existed) had no more than oracular application to contemporary questions. Other actors nonetheless managed to achieve constitutional equilibria with little help from the courts or scholars. The second half of the twentieth-century was characterized by a remarkable level of constitutional stability regarding the allocation of foreign relations powers.

That began to change with the end of the Cold War, the slow rise of more robust international legal regimes and institutions, and the shifting dynamics of globalization. Conservatives who once derided international law now saw a credible threat to constitutional autonomy. Curtis Bradley and Jack Goldsmith opened the bidding with a manifesto against the application of customary international law as federal common law,² the first round in a series of debates that have focused scholars on even the far constitutional reaches. Long-forgotten clauses have been rediscovered, others have been reconceived, longstanding practices have been parsed and contested as material developments on the ground have prompted a resituating of U.S. law in an international context.

The courts are now participating in the exercise. The last decade has seen a raft of Supreme Court cases on foreign relations law issues. There is now doctrine on questions where there was once none. The Court is shedding its reticence in the area. It has also shown unprecedented confidence in checking executive branch discretion in the area, with *Medellin* and the terror detainee rulings as the lead examples. These rulings have suggested a trajectory towards “normalization” of foreign relations law.³

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¹ *Goldwater v. Carter*, 444 U.S. 996 (1979) (refusing to reach merits regarding constitutional challenge to President Carter’s termination of Taiwan mutual security agreement).

² Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 100 HARV. L. REV. 815 (1997).

³ See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015); see also Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015) (arguing that Roberts Court has moved from functionalist to formalist approach in foreign relations law cases). For my earlier prediction that the courts would abandon foreign relations exceptionalism in the wake of changes in the global context, see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002).

I. A Twentieth-Century Man

On this score, the Supreme Court's recent decision in *Zivotofsky v. Kerry* (*Zivotofsky II*)⁴ is at best a letdown. Justice Kennedy's opinion for the Court betrays a twentieth-century mindset in striking down the Jerusalem passport legislation. It's the kind of decision that one would have expected from the Burger or Rehnquist Courts, if they had ever gotten to the merits of such controversies. Kennedy makes a nod to constitutional text, judicial precedents, and historical practice. But functional analysis does the heavy lifting:

Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. . . . Recognition is a topic on which the Nation must "speak with one voice." That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch."

Not that there's anything necessarily wrong with that. Functional considerations were central to the development of the Court's twentieth-century jurisprudence in foreign relations.⁵ The need for centralized decisionmaking in foreign affairs drove the Court's touchstone ruling in *Curtiss-Wright*, which also vaunted secrecy, dispatch, and other functional virtues of the presidency. Kennedy's use of the "one voice" dictum borrows from the Court's jurisprudence on federalism and foreign affairs, the sole constitutional issue relating to foreign affairs which the Court has consistently addressed and in which functional considerations figured prominently.

In these respects the *Zivotofsky II* opinion fits the conventional, exceptionalist approach to foreign relations. The opinion is also consistent with Justice Kennedy's own jurisprudence. In 2012, he wrote for the Court in *Arizona v. United States*⁶, which struck down a state measure relating to undocumented immigration. "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States," wrote Kennedy in a functionalist vein, "must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." Functional considerations also figured prominently in his concurrences in *Verdugo-Urquidez* and *Kiobel*, his majority opinion in *Boumediene*, and in his 2001 dissent in *Zadvydas v. Davis*⁷, in which the Court barred the prolonged detention of deportable aliens whose home countries refused repatriation. Kennedy there excoriated the majority for committing "grave constitutional error" by interfering with sensitive negotiations with foreign countries on repatriation controversies, "undermin[ing] the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters," and thus "weakening the hand of our Government."

None of this, again, is to dismiss the force of these functional justifications for adjusting the Constitution to what have been the distinctive and high-stakes features of foreign affairs as they developed in the twentieth century. How else to explain the emergence of modern foreign relations law than through the global context and America's place within it? The logic of *Curtiss-Wright* made sense—indeed it presented an imperative—in the hair-trigger world in which the United States was a leading player. Textual niceties couldn't get in the way of the safe and efficient execution of the nation's foreign policy in a world that had never been more dangerous. That functionalist approach, as Justice Scalia notes in *Zivotofsky II*, will (and did) "systematically favor the unitary

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

⁵ See Cohen, *supra* note 3, at 386; Sitaraman & Wuerth, *supra* note 3, at 1917.

⁶ *Arizona v. United States*, 132 S.Ct. 2492 (2012).

⁷ *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001).

President over the plural Congress in disputes over foreign affairs.”⁸ That was a good thing in the twentieth century, and in some cases it may remain a good thing today.

II. *Zivotofsky II* as *Legacy Decision*

To the extent it is consistent with the twentieth-century approach, *Zivotofsky II* presents an obstacle to foreign relations law scholars who see a pivot in the Court’s approach to foreign relations. A contrary result sustaining the passport legislation would have marked a clear judicial shift. The text and history could cut either way, but vindicating Congress would have required the implicit rejection, at least, of a functionalist orientation.

But *Zivotofsky II* can be finessed to fit the normalization discourse or at least not to defeat it. This is true first of all within the four corners of Kennedy’s opinion. Kennedy strikes a blow against *Curtiss-Wright*,⁹ which set out an expansive articulation of executive branch powers over foreign affairs in terms of text, history, and institutional capacity. Though balanced (somewhat asymmetrically) by the Jackson concurrence in *Youngstown*, *Curtiss-Wright* long supplied a kind of trump card in interbranch engagement.¹⁰ Kennedy’s opinion in *Zivotofsky* crimps the utility of *Curtiss-Wright* going forward, dismissing its depiction of exclusive presidential power over foreign relations as dictum. “The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue,” Kennedy cautions. “It is not for the President alone to determine the whole content of the Nation’s foreign policy.” (In his *Zivotofsky II* dissent, Chief Justice Roberts almost mockingly highlights the Government’s heavy reliance on *Curtiss-Wright*.) By qualifying *Curtiss-Wright*’s absolutist executive power worldview—a regular exercise in the academy but never before undertaken by the Supreme Court—*Zivotofsky II* may in the long run advance the normalization project.¹¹

The facts of *Zivotofsky II* made it a particularly bad vehicle for abandoning the exceptionalist model. Functionalism was rooted in the high stakes nature of foreign relations and the presence of actors beyond U.S. control. The twentieth century was a very dangerous world.¹² Normalization, to the extent it has already occurred, has been enabled by a change in global circumstances. The stakes may still be high, but in more cases they are predictably contained. *Medellin*, rightly a lead example in the normalization narrative, involved an important issue of foreign relations. But in ruling against the President there, the justices could rest assured from their *New York Times* understanding of the world that U.S. relations with Mexico and other concerned states would weather any irritation caused by their ruling in the case. There was no risk that judicial error was going to lead the country into some kind of foreign policy disaster. Even more clearly, when the Court found the Chemical Weapons Convention not to support the federal prosecution of Carol Anne Bond, it knew that the

⁸ See also Cohen, *supra* note 3, at 395-96 (“Given the comparatively few explicit powers granted to the President in the Constitution, it may take a functionalist account rather than a formalist one to find in favor of the Executive.”).

⁹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

¹⁰ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

¹¹ Jack Goldsmith suggests that this pruning of *Curtiss-Wright* is of no consequence now that *Zivotofsky II* itself delivers a substitute vehicle to the same destination. See Jack Goldsmith, *Why Zivotofsky Is a Significant Victory for the Executive Branch*, LAWFARE, (June 8, 2015, 3:44 PM). *Zivotofsky II* is an executive branch win, and it will give future presidents a new card to play in pressing presidential power. But *Zivotofsky II* has little chance of achieving the iconic status that *Curtiss-Wright* has commanded for so long; in terms of firepower, *Curtiss-Wright*’s heavy-caliber exposition and pedigree will not be matched by a new and equivocating opinion of the nature of *Zivotofsky II*. Executive branch lawyers will take the win here, but they must also be feeling the sting of being deprived of one of their favorite doctrinal weapons.

¹² Domestic cases can involve huge stakes, too, as Sitaraman and Wuerth observe. Sitaraman & Wuerth, *supra* note 3, at 1946. But domestic cases (by definition) will involve actors within U.S. control. Whatever ills may result from judicial missteps in deciding domestic law cases, nuclear conflagration won’t be one of them.

foreign policy consequences would be minimal, and it could address the case with the ordinary tools of statutory interpretation. The stability that now pervades most global relationships eliminates exceptionalism's rationale in most cases.

But not all. The Israel-Palestine dynamic is a throwback to the twentieth century if not a much earlier one. Upholding the passport measure could have triggered protests and worse in Palestinian quarters notwithstanding arguments that the passport designation involved no change in U.S. government policy on Jerusalem. That risk was credible enough to revert to the old posture in foreign relations cases—defer to the institution best positioned to judge global risks and to guide national policy accordingly.

So those pressing a normalization thesis (myself included) can take comfort in situating *Zivotofsky II* as a twentieth-century case. The functionalist account rationalizes the outcome on the facts. It's another way of saying that this case was correctly decided on exceptionalist premises. It also implies some limitations to normalization. The courts are unlikely ever to normalize war powers, for instance; the error costs will always be too high.¹³ But fewer foreign relations cases are likely to implicate these kinds of tinderbox dangers. The Court will feel increasingly comfortable applying its ordinary methodologies. Normalization becomes a logical incident of the changed nature of international relations.

Finally, the best evidence out of *Zivotofsky II* that normalization has taken hold is the fact that the Court got to the merits at all. However one defines “normalization,”¹⁴ the assertion of ordinary powers of judicial review has to be at its core. On that score, the Court's abandonment of the political question doctrine in its first engagement with the passport measure lays the groundwork for expanded participation in foreign relations-related disputes. The more cases it takes, the more comfortable the Court will get with them, and the more likely that it will approach them in the same (diverse) modes as it approaches other cases. That is not to say that normalization necessarily involves formalist methodologies, for example, only that foreign affairs subject matter will no longer trigger a bar to review or blind validation of executive branch positions. There will be judicial refinements of foreign relations questions in the way there are judicial refinements of domestic constitutional questions. The normalization of foreign relations law will also translate into the doctrinalization of foreign relations law.

III. Normalization Beyond the Courts

The normalization narrative has to date been confined to judicial normalization, focusing on how the courts approach the Constitution as it applies to foreign affairs. There is evidence that foreign relations is also being normalized among non-judicial actors. The twentieth-century mindset was not just a judicial one. The courts could not have created and sustained a *Curtiss-Wright* world on their own. As with all clichés, there was a lot of truth to the notion that politics stopped at the water's edge. In interbranch relations, Congress might have disagreed with presidential foreign policies but typically allowed presidents to have their way in the end, in obvious contrast to domestic policy. That is changing. Foreign relations will increasingly be addressed in the same mode as other issues, pathologies included.

Twentieth-century congressional action on foreign relations, for example, almost always included waiver authorities under which the President could sidestep legislative mandates, even on issues of sharp division.

¹³ While Sitaraman and Wuerth argue that the 2001 Authorization to Use Force should get the Chevron treatment, they don't appear to argue that it should be in court. *Id.* at 1965.

¹⁴ As Carlos Vázquez and Curtis Bradley both note in response to Sitaraman and Wuerth, ordinary constitutional methodologies will sometimes point to distinctive resolution of foreign relations law issues. See Carlos M. Vazquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. F. 305 (2015); Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From “Exceptionalism”*, 128 HARV. L. REV. F. 294 (2015).

Legislative waivers have allowed Congress to score political points for powerful constituencies while quietly respecting the “water’s edge” norm and protecting the functional advantages of executive discretion. While waiver authorities are also common in domestic legislation, they are the exception not the rule. The default practice in foreign relations has reflected and reinforced foreign relations exceptionalism, playing out almost entirely beyond the courts.

Abandonment of the waiver practice would thus support the normalization narrative. *Zivotofsky II* itself is an example. Unlike the 1995 Jerusalem Embassy Act, which mandated the relocation of the U.S. embassy to Jerusalem, the 2003 passport legislation did not include waiver authority. As the first instance ever in which Congress and the President had come to an impasse on a recognition question, *Zivotofsky II* itself portends a shift in the interbranch dynamic, judicial action aside.¹⁵ Congress is unlikely to pivot away from waivers uniformly, in the same way that normalization is not occurring lockstep in the Supreme Court. But the practice could become less reflexive, feeding judicial normalization by generating more cases like *Zivotofsky II*.

Also noteworthy is the erosion of softer norms governing institutional prerogatives in the field. As part of a variant of “one voice,” members of Congress have refrained from engaging in certain kinds of interaction with foreign governments. That practice is under stress. In January 2015, House Speaker John Boehner defiantly invited Israeli Prime Minister Benjamin Netanyahu to address a joint session of Congress without the prior approval of the State Department or White House. Although many foreign leaders have addressed Congress, none had been invited without executive branch coordination. Congress was going it alone in formally communicating with a foreign head of state. More controversially, in March 2015, Senator Tom Cotton and 46 Republican colleagues released an “open letter” addressed to the leaders of the Islamic Republic of Iran purporting to advise them on aspects of U.S. constitutional law relating to international agreement-making, in effect warning Iranian leaders that an agreement with President Obama might not be worth very much. The letter was also unprecedented in form.

At one level, both the Boehner and Cotton episodes are the inevitable consequence of a world in which communications are almost frictionless. Members of Congress frequently interact with foreign authorities on overseas factfinding missions, meet with foreign diplomats stationed in or travelling through Washington, and are constantly plied by high-priced Washington lobbyists retained by foreign governments. Although Congressmen and foreign diplomats have no doubt long hobnobbed on the Washington cocktail party circuit, the density of these communications has surely increased in recent years.

This activity notwithstanding, Boehner and Cotton were harshly critiqued as departing from what was variously described as constitutional norms, understandings, conventions, protocols, decorum. The forays hit a constitutional nerve. But neither member recanted. Foreign relations may be normalizing into prevailing pathologies of interbranch conflict. The gloves have long been off with respect to domestic issues; they are now coming off with respect to foreign relations issues, too.

That’s not a pretty picture, and it will almost certainly detract from the efficient execution of U.S. foreign policy. But as with judicial moves towards normalization, the normalized activity of other actors has been enabled by changes in the global landscape. It would once have been dangerous to allow Congress to freelance in the mode of Boehner and Cotton. Other states would have had a hard time interpreting the significance of congressional moves in tension or conflict with the president’s, and the downside risks of congressional activity upsetting sensitive relationships were intolerable in a world with no failsafes on the way to war.¹⁶ But that’s less

¹⁵ Legislation relating to Iran nuclear agreement is consistent with this development. The measure takes away the President’s waiver authority extended under sanctions regimes for a set period of time upon the conclusion of an agreement to allow Congress to pass on its terms. See S. 615, 114th Cong. (2015).

¹⁶ Hence the ostensible criminalization of such activity by the 1799 Logan Act, which prohibits engaging with foreign governments with intent to influence their posture with respect to ongoing disputes or controversies with the United States. See 18 U.S.C. 953.

of a concern today, especially as the rest of the world secures a sophisticated understanding of our internal constitutional structure. In an earlier era, the Cotton letter might have torpedoed negotiations with Iran. As it was, the foreign minister of Iran (who went to college and graduate school in the United States) engaged in a Twitter debate with Cotton over U.S. constitutional law relating to agreement making, and the congressional meddling was brushed off.¹⁷

This evidence of normalization outside the courts is anecdotal, and it remains unclear whether the Boehner and Cotton episodes have set precedents for future action. But institutional logics suggest a possible trajectory. Especially as foreign relations law becomes more attuned to the constitutional consequence of practice,¹⁸ the normalization project should peer beyond its doctrinal confines. *Zivotofsky II* may be the last word for now from the Supreme Court, stuck in an inconclusive position between the old and new regimes. The center of the action may now shift to other venues.

¹⁷ Hunter Schwarz, *Tom Cotton goes after Iran foreign minister—on twitter and in pretty personal terms*, WASH. POST, Apr. 30, 2015.

¹⁸ See, e.g., Curtis A. Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEXAS L. REV. 961 (2001).