

AGORA: REFLECTIONS ON *ZIVOTOFSKY V. KERRY*
ZIVOTOFSKY IP'S TWO VISIONS FOR FOREIGN RELATIONS LAW

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Perhaps the most striking aspect of the Supreme Court's decision in *Zivotofsky v. Kerry* (*Zivotofsky II*),¹ was the open disagreement between Justice Kennedy and Chief Justice Roberts. What Justice Kennedy's majority opinion, holding that the President has exclusive power to recognize states and governments and that Congress cannot constitutionally impinge on that power by requiring the President to list Israel in the passports of U.S. citizens born in Jerusalem, means for future foreign relations law cases is something of a puzzle. Solving it requires understanding the two competing visions at the case's center and the fluctuating relationship between the two Justices who hold them.

I. The Roberts-Kennedy Foreign Relations Law Fulcrum

Justice Kennedy and Chief Justice Roberts have been allies in most of the Roberts Court's foreign relations law jurisprudence. Justice Kennedy joined the Chief Justice's majority opinions in *Medellín*,² *Kiobel*,³ *Zivotofsky I*,⁴ and *Bond*⁵ and his dissent in *BG Group*.⁶ Chief Justice Roberts joined Justice Kennedy's majority opinion *Arizona v. United States*.⁷ But there have been notable disagreements. Justice Kennedy concurred in Justice Stevens' majority opinion in *Hamdan*.⁸ The Chief Justice did not take part in the Court's decision, but as Circuit court judge, authored the DC Circuit opinion that the Court overruled. Justice Kennedy wrote the majority opinion in *Boumediene*⁹ with the Chief Justice writing a vociferous dissent.¹⁰ And even as he joined the Chief Justice's majority opinion in *Kiobel*,¹¹ Justice Kennedy added a concurrence in many ways at odds with the majority's logic.¹²

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¹ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015) [hereinafter *Zivotofsky II*].

² *Medellín v. Texas*, 552 U.S. 491 (2008).

³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

⁴ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).

⁵ *Bond v. United States*, 134 S.Ct. 2077 (2014).

⁶ *BG Grp. PLC v. Republic of Arg.*, 134 S.Ct. 1198 (2014).

⁷ *Arizona v. United States*, 132 S.Ct. 2492 (2012).

⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁹ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

¹⁰ *Id.* at 2278-2293 (Roberts, C.J., dissenting).

¹¹ *Kiobel*, 133 S. Ct. at 1659.

¹² *Id.* at 1669 (Kennedy, J., concurring).

These moments of disagreement are revealing. As I have explained elsewhere,¹³ the dominant trend in Robert's Court foreign relations law jurisprudence has been a shift from functionalist approaches and rhetoric toward formalist ones. Whereas the Court has in the past used functionalist logic to empower the political branches in foreign relations, the Roberts Court has been methodically reining them in, using the rhetoric of formalism to subject foreign relations to judicial scrutiny by narrowing the political question doctrine in *Zivotofsky I*¹⁴ and to tie the political branches to clear statutory and constitutional authorizations, denying the President authority to order Texas to comply with the decision of the International Court of Justice in *Medellín* in the absence of specific Congressional action,¹⁵ and using presumptions in *Morrison*,¹⁶ *Kiobel*,¹⁷ and *Bond*¹⁸ to narrow discretion in the absence of clear Congressional mandates. Chief Justice Roberts has been at the forefront of this trend, authoring many of the Court's signature formalist opinions.

Justice Kennedy's opinions do not join this trend from functionalism to formalism. *Boumediene* took a highly functionalist, pragmatic approach to both the history and purpose of habeas corpus and to its application to specific situations.¹⁹ In this regard, *Boumediene* is an heir to Justice Kennedy's pre-Roberts Court concurrences on *Rasul v. Bush*²⁰ and *Verdugo-Urquidez*,²¹ in which he borrowed Justice Harlan's pragmatic "what process is due"²² approach to constitutional rights. Chief Justice Roberts, in dissent in *Boumediene*, condemned the unpredictable nature of Justice Kennedy's multi-factor analysis.²³ In *Arizona*, Justice Kennedy adopted a functionalist view of immigration and preemption. Noting the serious foreign policy implications of immigration law and enforcement, Justice Kennedy was quick to preempt state laws that might undermine Congress' and the President's carefully balanced immigration policies.²⁴ And in *Kiobel*, concurring in Chief Justice Roberts majority opinion, Justice Kennedy struck a blow for pragmatism, emphasizing that "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."²⁵

II. Formalism and Functionalism in *Zivotofsky II*

This fissure is powerfully evident in *Zivotofsky II*. For Justice Kennedy, the President's exclusive power to recognize states and governments is a practical function of constitutional structure. All means of recognition—receiving an ambassador, negotiating a treaty, sending an ambassador, or opening diplomatic channels—are "dependent on Presidential power." Beyond that, "the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States." "[T]he Nation must 'speak with one voice,'" and the President is better situated to take "decisive, unequivocal action" and to engage "in delicate and often secret

¹³ Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015).

¹⁴ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).

¹⁵ *Medellín*, 552 U.S. at 529–30.

¹⁶ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

¹⁷ *Kiobel*, 133 S.Ct. at 1664.

¹⁸ *Bond*, 134 S. Ct. at 2091.

¹⁹ *Boumediene*, 128 S.Ct. at 2276–2277.

²⁰ *Rasul v. Bush*, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring).

²¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990).

²² *Id.* at 278 (Kennedy, J., concurring) (internal quotation marks omitted) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

²³ *Boumediene*, 128 S.Ct. at 2293 (Roberts, C.J., dissenting).

²⁴ *Arizona*, 132 S.Ct. at 2492.

²⁵ *Kiobel*, 133 S.Ct. at 1659 (Kennedy, J., concurring).

diplomatic contacts.”²⁶ Justice Kennedy wrote of “logical and proper inference,”²⁷ of “functional considerations,”²⁸ and of “common sense and necessity.”²⁹ Even as he buries Justice Sutherland’s famous functionalist pro-President dicta in *Curtiss-Wright*,³⁰ Justice Kennedy revealed himself Sutherland’s true heir, embracing the logic and tropes that defined Sutherland-authored opinions in *Curtiss-Wright*³¹ and *Belmont*.³²

This functionalism extends too to Justice Kennedy’s use of history.³³ Much as in *Boumediene*, Justice Kennedy found the historical practice to be complicated and contestable.³⁴ Adopting a holistic and functional approach though, he concluded that “on balance [the history] provides strong support for the conclusion that the recognition power is the President’s alone.”³⁵ Justice Kennedy’s approach stands in contrast to the stricter requirement that a practice be “open, widespread, and unchallenged since the early days of the Republic” endorsed by Justice Thomas.³⁶

None of this analysis passed muster with the more formalist Chief Justice. Dissenting, Chief Justice Roberts takes a more formalist, textualist view of the Reception clause of the U.S. Constitution. For him, the clause creates a Presidential duty to receive ambassadors rather than a Presidential power.³⁷ And neither the precedents nor the history discussed by Justice Kennedy would have met Chief Justice Roberts’ stricter standards for the use of either.³⁸

But at the heart of the disagreement between Justice Kennedy and Chief Justice Roberts are their competing approaches to Justice Jackson’s famous *Youngstown* concurrence³⁹ and its tripartite analysis of separation of powers questions. Justice Kennedy read the framework as a flexible one. Because the President is, in this case, acting contrary to a clear statutory mandate, “his claim must be ‘scrutinized with caution.’”⁴⁰ That said, Justice Jackson left some room for the President to act even in that third category, and as Justice Kennedy noted, “when a Presidential power is ‘exclusive,’” as Justice Kennedy found the recognition power to be in this case, “it ‘disabl[es] the Congress from acting upon the subject.’”⁴¹

Chief Justice Roberts read Justice Jackson’s framework much more strictly. Quoting from Justice Jackson’s *Youngstown* concurrence, the Chief Justice observed that “[a]ssertions of exclusive and preclusive power leave the Executive ‘in the least favorable of possible postures,’ and such claims have been scrutinized with caution throughout this Court’s history.” Noting that “[f]or our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs,”⁴² Chief Justice Roberts suggested that the category of exclusive

²⁶ *Zivotofsky II*, 135 S.Ct. at 2085-86.

²⁷ *Id.* at 8.

²⁸ *Id.* at 9.

²⁹ *Id.* at 18.

³⁰ See *infra* note 52-54 and accompanying text.

³¹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

³² *United States v. Belmont*, 301 U.S. 324 (1937).

³³ See Curtis A. Bradley, *Historical Gloss, the Recognition Power, and Judicial Review*, 109 AJIL UNBOUND 2 (2015).

³⁴ *Boumediene*, 128 S. Ct. at 2249.

³⁵ *Zivotofsky II*, 135 S.Ct. at 2091.

³⁶ *Id.* at 2102 (Thomas, J., concurring) (internal citation omitted).

³⁷ *Id.* at 2113 (Roberts, C.J., dissenting).

³⁸ *Id.* at 2114 (Roberts, C.J., dissenting).

³⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

⁴⁰ *Zivotofsky II*, 138 S.Ct. at 2113.

⁴¹ *Id.* at 2095 (quoting *Youngstown*, 343 U. S., at 637-638 (Jackson, J., concurring)).

⁴² *Id.* at 2113 (Roberts, C.J., dissenting)

Presidential powers that would allow the President to disregard a contrary congressional act may be an empty set.

The Chief Justice thus makes explicit a project only implied by his earlier treatment of *Youngstown* in *Medellin*. That opinion seemed to narrow and formalize *Youngstown's* categories, making Presidential action conflicting with Congress' prior acts—the third category—essentially forbidden.⁴³ This followed Justice Stevens' similar treatment of *Youngstown's* third category in *Hamdan*.⁴⁴ The Chief Justice cites the rejection of Executive actions in both those cases as support for his approach here.⁴⁵

This shines new light on the Roberts-Kennedy foreign relations law fulcrum. Whereas Justice Kennedy has been the Court's supreme functionalist, Chief Justice Roberts has often seemed a less-than-committed formalist. While opinions in *Medellin*, *Kiobel*, and *Bond* all partake of formalist rhetoric, they each have functionalist elements—a functional understanding of the United States' intentions in ratifying the UN Charter, a functional touch-and-concern test for jurisdiction in Alien Tort Statute cases, or a functional approach to the meaning of “chemical weapons.” In *Zivotofsky II*, he writes in more uncompromisingly formalist terms. Were the Chief Justice's prior functionalist flourishes the price of Kennedy's vote? Whether the earlier patterns of compromise between Justice Kennedy and Chief Justice Roberts on such matters were conscious or unconscious, and whether or not they were attempted in drafts in this case, will only be known when archives are opened.

III. *Here be Dragons*

Justice Kennedy and Chief Justice Roberts both believe that foreign relations present existential dangers for the United States. The two justices disagree fundamentally though on that danger's primary source.

For Justice Kennedy, the primary source of danger is external. Foreign relations are complex, and perils for the United States abound abroad. He began his opinion in *Zivotofsky II* by noting the delicacy of questions about Jerusalem's status. “Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs.”⁴⁶ He later cited a letter from then-Secretary of State Warren Christopher observing that “[t]here is no issue related to the Arab-Israeli negotiations that is more sensitive than Jerusalem.”⁴⁷ Such sensitive issues, in turn, require the Court to take a pragmatic approach to foreign relations law and Presidential authority. In this sense, his majority opinion in *Zivotofsky II* reads much like his opinion in *Arizona*, which began by citing a former U.S. Secretary of State's views that immigration policy carried complex foreign relations implications that justified authority and discretion in the political branches.⁴⁸ And it reads like his *Kiobel* concurrence, pleading for flexibility in dealing with foreign relations cases.⁴⁹

Boumediene might seem at odds with this outlook, using functionalist reasoning to restrain Congress and the President. In fact though, it may be the flipside of the same coin as *Zivotofsky II*. If the Executive is constrained only by functional considerations, the Executive is, at least practically, empowered to find those limits. Justice Kennedy's *Verdugo-Urquidez* concurrence, using the same logic as *Boumediene* to approve the President's actions, demonstrates as much. And that is how lower courts have read it, finding few cases that meet *Boumediene's* standard for heightened scrutiny.

⁴³ See Cohen, *supra* note 13, at 422-23.

⁴⁴ *Id.* at 418.

⁴⁵ *Zivotofsky II*, 138 S.Ct. at 2113 (Roberts, C.J., dissenting).

⁴⁶ *Zivotofsky II*, 132 S.Ct. at 2085.

⁴⁷ *Id.* (quoting 141 Cong. Rec. 28967 (1995) (letter to Robert Dole, Majority Leader, (June 20, 1995))).

⁴⁸ *Arizona*, 132 S.Ct. at 2498 (relying on brief from former Secretary of State Madeleine K. Albright).

⁴⁹ *Kiobel*, 133 S.Ct. at 1659 (Kennedy, J. concurring).

For Justice Kennedy, there are dangers abroad, and the President must be authorized to defend the nation. Justice Scalia describes Justice Thomas' approach in concurrence as an endorsement of a presidency more reminiscent of George III than George Washington.⁵⁰ Justice Kennedy's President is more St. George, tasked with defending the realm from foreign dragons.

For Chief Justice Roberts, while external threats can pose grave dangers, the real risk is not foreign dragons but a Leviathan: a federal government, and in particular an Executive, that uses foreign danger as an excuse to engorge its power at home and to engage in reckless adventurism abroad. Federal foreign relations power must be restrained. A stricter *Youngstown* test that leaves less room for Executive branch aggrandizement and congressional silence, a stricter political question doctrine that leaves fewer acts beyond judicial scrutiny, stricter rules of statutory interpretation that require greater precision from Congress and leave less room for prosecutorial discretion and judicial foreign policy—these are the key moves in Chief Justice Roberts' foreign relations law jurisprudence.

IV. A Return to Foreign Affairs Functionalism and Exceptionalism?

Assuming the Court has been moving away from functionalist approaches to foreign relations law that had long made the area “exceptional,”⁵¹ embracing formalist tools to rein in the broad discretion long-wielded by the political branches, does *Zivotofsky II*, Justice Kennedy's break with the Chief Justice, and Justice Kennedy's ability to gather a majority around his functionalist opinion auger a change in the Court's direction? The last two Justice Kennedy functionalist interventions, *Boumediene* and *Arizona* did little to stop the rushing path towards formalism and constraint in foreign relations law.

Moreover, *Zivotofsky II* is not without formalist flourishes. Justice Kennedy tried to narrow the decision “solely to exclusive power of the President to control recognition determinations” and congressional attempts to force the President to contradict his own statements.⁵² More notably, the majority distinguished their holding from the Government's argument that “the President has ‘exclusive authority to conduct diplomatic relations,’ along with ‘the bulk of foreign-affairs,’”⁵³ and formally disavowed the common use of *Curtiss-Wright's* dicta recognizing the President as “the sole organ of the federal government in the field of international relations,” as a source of “broad, undefined [Presidential] powers over foreign affairs.”⁵⁴ Together, the narrowing of the opinion and the disavowal of *Curtiss-Wright* might suggest that the rest of the majority has not entirely lost its appetite for formalism and constraint. Those caveats may have been the price of their votes.

Zivotofsky II also presents a somewhat unique case for the Roberts Court, one in which the President and Congress were truly at odds. This Court seems as interested in reining in Congress as the Executive,⁵⁵ and it is clear that for the majority, Congress's attempt to make policy with regard to Jerusalem was an “improper act” to “aggrandiz[e] its power at the expense of another branch.”⁵⁶ And the substantive outcome of this case also likely mattered. Justice Kennedy and the four justices who joined his opinion likely believe that Jerusalem's status *is* a sensitive foreign policy question best left to the President. If they did not, they could have joined

⁵⁰ *Zivotofsky II*, 132 S.Ct. at 2109 (Scalia, J., dissenting).

⁵¹ Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

⁵² *Zivotofsky II*, 132 S.Ct. at 2099.

⁵³ *Id.* at 2089 (quoting Brief for Respondent at 18, 16).

⁵⁴ *Id.*

⁵⁵ Cohen, *supra* note 13, at 441 n.426 and *passim*.

⁵⁶ *Zivotofsky II*, 132 S.Ct. at 2096 (internal citation omitted). One might wonder whether Congressional conflicts with the Executive then in the news, like Speaker of the House John Boehner's invitation to Israel Prime Minister Binyamin Netanyahu to address Congress or Senator Tom Cotton's letter to Iran, were on the majority's mind when they considered whether Congress needed to be reined in.

Justice Scalia's dissent, which laid out a narrow route to deciding the case—a narrow route to a loss for the President. *Zivotofsky II* might not tell us very much about cases not about Jerusalem.⁵⁷

Nonetheless, the logic of *Zivotofsky II* is certainly at odds with trends toward formalism, constraint, or normalization. The majority in *Zivotofsky II* largely undoes Justice Stevens' and Chief Justice Roberts' efforts to narrow and formalize Justice Jackson's three *Youngstown* categories, reopening the possibility that even when Congress speaks, the President may disregard it. Moreover, the logic of the opinion, including its invocation of the need for "one voice" in foreign relations, is extraordinarily broad. Regardless of what the majority believes, the boundaries of that logic are hard to discern. For example, the same functional arguments made by Justice Kennedy in favor of an exclusive recognition power could be made in favor of an exclusive Commander-in-Chief power: regardless of the range of congressional powers with regard to the military and war-making, the President is necessary to bring them into effect. Can congressional attempts to regulate war-fighting, perhaps by imposing time-limits, bans on tactics or weapons, or prohibitions on ground-troops simply be ignored by Presidents?⁵⁸

The majority may think it knows the answer and that its decision in *Zivotofsky II* truly is narrow. But policing that unspoken boundary depends on the Court reviewing these cases, something it is unlikely to do. As Jack Goldsmith suggests,⁵⁹ the real concern might be how the Government itself will read this opinion, and while the Office of Legal Counsel may mourn the death of *Curtis-Wright*, the mourning period will be short, and the Executive Branch may move on quickly to *Zivotofsky II* and arguments about exclusive powers and one voice.

The other question *Zivotofsky II* raises for prevailing trends regards future grants of certiorari. For those who voted to grant certiorari in cases like *Bond* and *Zivotofsky* on the hopes that the time was right to reconsider broad functionalist doctrines with regard to treaties or the recognition power, those efforts may now appear to have been turned back twice (maybe three times if one counts the doors left open in *Kiobel*). If a Justice is worried that other cases will turn out like *Bond* and *Zivotofsky*, the appetite for revisiting such cases may disappear. Without grants of certiorari, *Zivotofsky II*'s legacy will be left to lower courts. It is easy to imagine lower courts invoking *Zivotofsky II* as an all-purpose justification for functionalist foreign relations deference to the Executive much as they invoked the political question doctrine before *Zivotofsky I*.

⁵⁷ Commitment to a substantive outcome, in that case, granting Guantanamo detainees access to habeas review, might explain the majority's decision to join Justice Kennedy's opinion in *Boumediene*.

⁵⁸ Notably, Chief Justice Roberts in dissent cites *Little v. Barreme*, 6 U.S. 170 (1804), a case suggesting that the President is required to abide by congressional limits on war-making.

⁵⁹ Jack Goldsmith, *Why Zivotofsky Is a Significant Victory for the Executive Branch*, LAWFARE, (June 8, 2015, 3:44 PM).