Certainly, the existence of criminal defamation laws is increasingly challenged and condemned by human rights bodies. By asking for amendment, rather than repeal, of Burkina Faso's statute, the Court went only part of the way necessary to protect journalists on the continent who write about public figures, public institutions, and matters of public concern.

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Recognition of states—"Reception Clause" of the U.S. Constitution—presidential authority—status of Jerusalem—international law as part of U.S. foreign relations law

ZIVOTOFSKY *EX REL.* ZIVOTOFSKY v. KERRY. 135 S.Ct. 2076.
United States Supreme Court, June 8, 2015.

In *Zivotofsky v. Kerry,*[1] decided June 8, 2015, the United States Supreme Court (Court) held unconstitutional a federal statute that permitted U.S. citizens born in Jerusalem to designate "Israel" as their place of birth on their passports,[2] notwithstanding the secretary of state's decision that such passports should designate "Jerusalem" as the place of birth. The opinion resolved a relatively narrow question of law (the constitutionality of an unusual statute), but the justices' reasoning and language are of potentially broad significance and will provide 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 their statutory right, requested that the Department of State list Zivotofsky's place of birth as "Israel" on his passport. The State Department refused. In an effort to remain neutral in the sensitive political debates about sovereignty over Jerusalem, the department instead followed long-standing U.S. policy by listing the place of birth as "Jerusalem." Zivotofsky sued.

The first court to consider Zivotofsky's case held both that it presented a nonjusticiable political question and that Zivotofsky lacked standing.[3] These two closely related doctrines ensure that the federal courts hear only disputes well suited to judicial resolution. As to standing, the district court reasoned that Zivotofsky had alleged only a conjectural harm, not an actual or imminent injury, from having Jerusalem listed as the place of birth on his passport. The U.S. Court of Appeals for the District of Columbia 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] In its first consideration of the dispute, the Supreme Court did not address the standing issue[5] but held in an 8-1 decision that the political question doctrine did not bar Zivotofsky's claim (*Zivotofsky I*).[6] The case was therefore returned to the lower court for a determination on the merits. The D.C. Circuit then held the statute unconstitutional because it conflicted with a long-standing presidential

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

[2] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, §214(d), 116 Stat. 1350, 1366.

[3] Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, No. 03-1921, 2004 WL 5835212 (D.D.C. Sept. 7, 2004).

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

[5] Whether a statutory right itself is enough to confer standing is an issue currently before the Supreme Court in another case, *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), *cert. granted*, 135 S.Ct. 1892 (2015).

[6] Zivotofsky v. Clinton, 132 S.Ct. 1421, 1430 (2012).

policy of neutrality on the political status of Jerusalem.[7] The Supreme Court granted certiorari again and this time affirmed the appellate court's decision (*Zivotofsky II*).

Zivotofsky argued to the Supreme Court that the statute was a constitutional exercise of Congress's power to regulate passports, that the president has no exclusive power to recognize foreign countries and governments, and that in any event the birthplace designation of "Israel" on a passport did not itself imply that the United States recognized Jerusalem as part of Israel. The government argued that the president, acting through the secretary of state, has the exclusive power to recognize foreign sovereigns, citing in support constitutional text and founding-era history, long-standing practice of the president and Congress, and the functional attributes of the presidency. The government emphasized the foreign policy implications of the case, especially in support of the argument that the statute conflicted with the president's exclusive powers. It maintained, 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 the Palestinians.[8]

At oral argument, several justices voiced considerable skepticism about that last proposition. Justice Kennedy asked why the government did not simply issue a disclaimer stating that the passport designation was not a "formal recognition" of the status of Jerusalem.[9] The chief justice and Justices Scalia and Alito were also openly skeptical about the solicitor general's enumeration of the foreign policy consequences of a decision in Zivotofsky's favor. The chief justice maintained, for example, that the government itself had made a "big deal" out of the statute when President George H. Bush attached a signing statement noting that 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.[10] On the basis of 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.[11] Justice Kennedy wrote the majority opinion for himself and the four liberal justices. After reviewing the history of the case and noting that it falls within *Youngstown* category 3,[12] his opinion analyzed in turn (1) whether the president has the power to recognize foreign nations and governments, (2) whether that power is exclusive, and (3) whether the statute infringes on that power.

[7] Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 216–17 (D.C. Cir. 2013).

[8] Brief for the Respondent, Zivotofsky *ex rel.* Zivotofsky v. Kerry, No. 13-628, 2014 WL 4726506 at *5 (U.S. Sept. 22, 2014) (quoting Joint Appendix, *Zivotofsky*, 135 S.Ct. 2076 (No. 13-628), 2014 WL 3541505 at *52, *56).

[9] Transcript of Oral Argument, at 3–4, *Zivotofsky*, 135 S.Ct. 2076 (No. 13-628), *at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-628_fe9g.pdf, *available in* 2414 WL 5593534 at *3–*4.

[10] *Id.* at 29–31, 2414 WL 5593534 at *29–*31.

[11] *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).

[12] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (describing three categories of presidential conduct; in the third category the president acts contrary to the will of Congress, and to be upheld the asserted power must be both "exclusive" and "conclusive" on the issue).

All of the justices agreed on the first issue: the president has the constitutional power to recognize foreign governments and states. On the second issue, the majority held that the president's recognition power is exclusive, citing "functional considerations" (including the need for the nation to speak with "one voice") (p. 2086), as well as prior decisional law and the practice of Congress and the president. The majority acknowledged that "no single precedent resolves" the exclusivity question and that each category of evidence includes counter-examples (p. 2088).[13] The dissenters expressed doubt about the majority's exclusivity analysis but did not reach the issue because they concluded that the statute did not in any event infringe upon the recognition power.

The third issue was therefore the crux of the disagreement between the majority and the dissenting opinions. The majority acknowledged that the birthplace designation required by the statute is not itself a formal act of recognition. The majority also defined the exclusive recognition power narrowly to extend no further than the act of recognition itself. The conflict, the majority reasoned, arises because the passport designation "contradicts" the president's earlier recognition determination (p. 2095). If the passport is not a statement of recognition, what 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. The dissenting opinions found no conflict between the designation required by the statute and the power of recognition.

* * * *

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 was a constitutionally significant category for all nine justices, and modern international law helps determine the meaning and scope of this category, again for all nine justices. As Justice Thomas accurately noted 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."[14] The majority opinion defined 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.' "[15] The case did not involve a dispute about Israel's statehood or legitimate government but, instead, an underlying dispute over whether Jerusalem is part of Israel. Thus, the Court, relying only on a contemporary international law treatise, made this addition to the definition of recognition: "It may also involve the determination of a state's territorial bounds."[16] In addition, the majority opinion used

[13] Indeed, the contrary evidence has led the leading scholar on the topic to conclude that the recognition power is not exclusive. *See* Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 3–50 (2013).

[14] 135 S.Ct. at 2112 n.9 (Thomas, J., concurring in part and dissenting in part). Justice Thomas shared 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.*

[15] *Id.* at 2084 (majority opinion) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §203 cmt. a, at 84 (1986)).

[16] *Id.* (citing and quoting 2 Whiteman DIGEST §1, at 1).

eighteenth-century international law to interpret the ambassadorial Reception Clause in Article 2, section 3 of the Constitution as including the "recognition" of "other nations" (p. 2085).

The majority opinion also used modern international law in its analysis of the structure of the Constitution. The Court reasoned 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.[17] The various methods of implied recognition, in turn, are granted by the Constitution to the president through the powers to negotiate treaties, to nominate ambassadors, and to dispatch other diplomatic agents (pp. 2085–86). These textual grants of power to the president say nothing about recognition, of course. International law provides the link between these sections 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, relied on international law to conclude that the statute does not infringe upon the recognition power. "Recognition," Justice Scalia reasoned, "is a formal legal act with effects under international law."[18] To extend recognition, a "state must perform an act that unequivocally manifests that intention."[19] With this understanding in place, Justice Scalia argued, it is obvious that the statute has "nothing to do with recognition," because it requires no formal declaration about Israel's sovereignty over Jerusalem, nor does "international custom infer[ ] acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors."[20]

The majority opinion also used 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 reasoned that the president is better positioned than Congress to take "the decisive, unequivocal action necessary to recognize other states at international law" (p. 2086). These qualities, Justice Kennedy explained, are why the framers assigned to the president "the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors" (*id.*).

Functional reasoning was at the core of the Court's conclusion that the statute infringes on the president's exclusive recognition power and the Court relied 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" (pp. 2094–95).

[17] *Id.* at 2085–86 (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 93 (7th ed. 2008), and citing 1 Moore DIGEST §27, at 73 (1906)).

[18] *Id.* at 2118 (Scalia, J., dissenting) (citing Convention on Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19).

[19] *Id.* (citing Whiteman, *supra* note 16, §3, at 48–49).

[20] *Id.*

The Court's engagement with international law in *Zivotofsky II* is remarkable for several reasons. First, it spans several implicit and explicit methodologies used by the Court: originalism, textualism, constitutional structure, and functionalism.[21] Second, the opinions relied on contemporary international law as a tool of constitutional interpretation, a practice that has drawn controversy, but with the exception of Justice Thomas, the justices provided no methodological reason for doing so; nor did 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 eighteenth century.[22] Third, international law was unusually central to the Court's reasoning. The terms "Captures" and "Declare War" are (or were), like "recognition," important terms in international law, so that international law informs their interpretation;[23] but unlike "recognition," they are also part of the text of the Constitution. "Recognition" is not a constitutional term but a category of conduct defined by international law. As a category, recognition 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 boasts a strong historical pedigree,[24] in no contemporary case (and few historical ones) has international law played such a central role in interpreting the Constitution. All in all, the case offers a strong endorsement of 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 foreign relations in the same ways that it analyzes domestic issues.[25] By contrast, an "exceptionalist" approach to foreign relations cases, often associated with the Court's broad dicta in *Curtiss-Wright*,[26] 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. The Supreme Court's decision in *Zivotofsky I* rejecting the political question doctrine and forcing a resolution of the case on the merits took a significant step toward normalization.

The significance of *Zivotofsky II* for normalization is less clear. The Court held for the executive branch, and 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

[21] For a defense of using changing norms of international law in separation-of-powers cases as part of 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, 76–82 (2007). 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).

[22] *See, e.g.,* 135 S.Ct. at 2118 (Scalia, J., dissenting) (discussing the legal effects of recognition at international law and citing only twentieth-century sources in support).

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

[24] *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 6–7 (2006).

[25] 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); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002); Peter J. Spiro, *Normalizing Foreign Relations Law After* Zivotofsky II, 109 AJIL UNBOUND 22 (2015).

[26] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

relations cases and with *Curtiss-Wright*. In addition, the Court relied upon *United States v. Belmont* and *United States v. Pink*, [27] decisions that gave the president the power to make domestic law through executive claims settlement agreements, a power the president lacks in the domestic context. In these ways, Justice Kennedy's opinion for a five-justice majority does not support normalization.

In other ways, however, the decision does support the normalization of foreign relations law. For example, the Court decided the case on the narrow reasoning that the president has the exclusive power to recognize foreign states and foreign governments, 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.' "[28] The Court pointedly rejected the government's argument, but it did 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 enjoys exclusive power to conduct diplomatic relations, 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 decision also supports normalization because both the majority and the dissenting opinions disavowed exceptionalist language in *Curtiss-Wright*. The Court did 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.[29] But there is less tension between these parts of the opinion than some of the commentary suggests. The Court's functional reasoning in *Zivotofsky II* is more narrowly tailored to recognition and to the facts of this case than the Court's broad dicta in *Curtiss-Wright*. Thus, 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 (p. 2086). The Court uses functional reasoning in non-foreign relations cases, 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[30]—but whether they will be successful is an issue for another day and another case.

Finally, through its decision in *Zivotofsky 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 sit 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,[31] whether or not they involve foreign relations.

[27] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[28] 135 S.Ct. at 2089 (quoting Brief for the Respondent, *supra* note 8, at *18, *16).

[29] *See, e.g.,* Jean Galbraith, Zivotofsky v. Kerry *and the Balance of Power*, AJIL UNBOUND (July 20, 2015, 12:00 PM EDT), *at* http://www.asil.org/blogs/ajil-unbound.

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

[31] *See* NLRB v. Noel Canning, 134 S.Ct. 2550 (2014).

Taken together, the *Zivotofsky* opinions offer a bonanza of foreign relations issues and doctrine, covering, among others, the executive Vesting Clause, the president as "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 Genêt, the Spanish-American War, international law in constitutional interpretation, formalism and functionalism, historical practice—the list goes on and on! This decision bears all the hallmarks of a *Curtiss-Wright* or a *Sabbatino*[32] of our generation—even if its actual impact on the outcome of interbranch 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. Yet the *Zivotofsky* litigation writ large is immediately significant in one sense: the Supreme Court has put itself at the center of foreign relations disputes, just as the Court stands at the center of many other major political and ideological disputes in American life.

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[32] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).