
CONSTITUTIONAL LAW — SEPARATION OF POWERS — D.C. CIRCUIT HOLDS THAT RECOGNITION OF FOREIGN GOVERNMENTS IS AN EXCLUSIVE EXECUTIVE POWER. — *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013).

From civics classes to Supreme Court opinions, the executive branch is often called the “sole organ” of American foreign policy.¹ Over time, a view of “sole” or plenary executive control over foreign affairs has hardened.² And yet, because Congress rarely passes statutes directly countermanning the executive’s foreign policy judgment, the scope of much of the executive’s “exclusive” power in this field — power it can exercise even *against* congressional command — remains untested.

Recently, however, in *Zivotofsky v. Secretary of State*,³ the D.C. Circuit confronted a statute that, it found, sought directly to alter an executive foreign policy decision not to recognize Israeli sovereignty over Jerusalem. In striking the statute down, the court held that the recognition power lay *exclusively* within the President’s control and could not be contradicted by Congress.⁴ As a result, the statute, which gave Jerusalem-born American citizens the right to have “Israel” rather than “Jerusalem” marked as the place of birth on their U.S. passports, violated the separation of powers.⁵

In coming to this conclusion, the court relied primarily on Supreme Court dicta and historical practice following ratification of the Constitution. The evidence the court marshaled, however, arose outside the context of congressional-executive disagreement, the only context in which the “exclusivity” of executive power can be determined. For this and other reasons, while the court’s evidence supports a finding of *inherent* executive authority — the President’s ability to exercise the recognition power *absent* congressional action — it does not support a finding of *exclusive* authority that can withstand congressional contradiction. By importing inherent power evidence into the exclusive power context, the D.C. Circuit missed an opportunity to clarify the underpinnings and scope of exclusive presidential power and to engage fully with the lively and important debate about whether Congress or the President has the final say in foreign affairs.

¹ See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. John Marshall)). The phrase originated in a floor speech by then-Congressman John Marshall, in which he supported the President’s power to communicate and enforce — rather than create — foreign policy. Louis Fisher, *Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 140–41 (2007).

² Fisher, *supra* note 1, at 140–41 (describing the evolution of a theory of “plenary, exclusive, and inherent authority of the president in foreign relations,” *id.* at 140).

³ 725 F.3d 197 (D.C. Cir. 2013).

⁴ *Id.* at 214.

⁵ *Id.* at 200.

“The status of the city of Jerusalem is one of the most contentious issues in recorded history.”⁶ Currently, both Israelis and Palestinians claim Jerusalem as their capital and part of their state.⁷ As a result, although the United States has recognized Israel since its declaration of independence, “Presidents from Truman on have consistently declined to recognize Israel’s — or any country’s — sovereignty over Jerusalem.”⁸ Pursuant to this policy, the State Department has established its Israeli embassy in Tel Aviv rather than Jerusalem, and issues passports identifying Jerusalem-born citizens’ place of birth not as “Israel,” but only as “Jerusalem.”⁹

Congress has attempted to force the executive to alter its Jerusalem recognition policy. In 1995, Congress statutorily directed the President to relocate the U.S. embassy from Tel Aviv to Jerusalem.¹⁰ But the law included a waiver provision,¹¹ forestalling a direct conflict between the President and Congress over recognition.

Such a direct conflict arose in 2002, when President George W. Bush signed a foreign affairs omnibus bill that directed the State Department, upon request, to record a Jerusalem-born citizen’s place of birth as “Israel” on her U.S. passport.¹² No waiver provision was included. In keeping with his practice of signing broad, generally agreeable legislation and declining to enforce provisions that he believed trammelled his authority,¹³ President Bush issued a signing statement construing the Jerusalem passport section as merely advisory because he believed it would otherwise impermissibly interfere with the President’s foreign affairs powers.¹⁴

That same year, Menachem Zivotofsky was born in Jerusalem to two U.S. citizens.¹⁵ In 2003, his parents applied for his U.S. passport, listing Israel as the place of birth.¹⁶ When the State Department is-

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 200–01.

¹⁰ Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 3(a)–(b), 109 Stat. 398, 399 (1995).

¹¹ *Id.* § 7, 109 Stat. at 400 (allowing the President to waive the move with a finding that doing so is necessary to “protect the national security interests of the United States”).

¹² Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

¹³ See generally TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS (2012) (describing recent presidential practice), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

¹⁴ *Zivotofsky*, 725 F.3d at 202–03 (citing Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658, 1659 (Sept. 30, 2002)).

¹⁵ *Id.* at 203.

¹⁶ *Id.*

sued a passport identifying the location only as “Jerusalem,” Zivotofsky’s parents sued the Secretary of State to enforce the statute.¹⁷

“The litigation has been up and down the appellate ladder,”¹⁸ first on whether Zivotofsky had standing to bring the suit (he did¹⁹), and second on whether the suit presented a justiciable question.²⁰ In 2012, the Supreme Court found the case justiciable, explaining that the case asked only whether the statute impermissibly trammelled the separation of powers — a classic issue for the courts — without requiring the courts to settle political recognition or nonrecognition of Israeli sovereignty over Jerusalem.²¹ Although the Court also heard argument on the separation of powers question, it ultimately declined to reach it, vacating and remanding to the D.C. Circuit to rule based on “careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers.”²²

Writing for a D.C. Circuit panel on remand, Judge Henderson²³ held that the statute violated the separation of powers and that “exclusive Executive branch power authorizes the Secretary [of State] to decline to enforce [the Jerusalem passport section].”²⁴ Judge Henderson recited Justice Jackson’s seminal framework for separation of powers analysis articulated in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁵ with its three familiar categories of executive authority: First, when the President acts with the express or implied approval of Congress, he acts with maximum authority, including both his own authority and that delegated by Congress.²⁶ Second, when the President acts absent any congressional grant or denial of authority, he can rely only on his own inherent powers and powers in “the zone of twilight” of concurrent executive and legislative authority.²⁷ And third, when the President acts in contravention of the express or implied will of Congress, his power is “at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²⁸ In such a situation the President may only exercise,

¹⁷ *Id.*

¹⁸ *Zivotofsky*, 725 F.3d at 203.

¹⁹ See *Zivotofsky ex rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 617–19 (D.C. Cir. 2006) (finding standing because executive action deprived plaintiff of a statutory right).

²⁰ *Zivotofsky*, 725 F.3d at 203–04.

²¹ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

²² *Id.* at 1430.

²³ Judges Rogers and Tatel fully joined Judge Henderson’s opinion.

²⁴ *Zivotofsky*, 725 F.3d at 205; see *id.* at 200.

²⁵ 343 U.S. 579 (1952).

²⁶ *Zivotofsky*, 725 F.3d at 204 (citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

²⁷ *Id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

²⁸ *Id.* at 205 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)) (internal quotation mark omitted).

and Congress may not invade, the President's *exclusive* power.²⁹ Judge Henderson placed *Zivotofsky* in *Youngstown* Category Three, since the decision not to enforce the statute directly contravened congressional intent.³⁰

To determine the statute's constitutionality, she considered first the scope and nature of the President's "recognition power"; then the nature of Congress's "passport power"; and finally whether Congress or the President had invaded the other's power in the struggle.

She began her analysis by identifying the constitutional "recognition power" as the power to make policy regarding which governments the United States will acknowledge, establish diplomatic relations with, receive ambassadors from, and treat as equal sovereigns.³¹ Noting that the Constitution does not specifically enumerate the recognition power, she found that the text and originalist evidence failed to decisively resolve the separation of powers inquiry.³² She concluded, "the Framers apparently were not concerned with how their young country recognized other nations."³³

Moving on, however, she found that post-ratification practice supports an exclusively presidential recognition power.³⁴ Beginning with George Washington's belief that he could recognize foreign governments without Congress's approval, she traced a series of encounters between Presidents and Congresses over each branch's role in the recognition power.³⁵ Noting consistent presidential claims of exclusive control over recognition even in the face of congressional assertion of its recognition power, Judge Henderson concluded that the practice has been, in effect, one of exclusive executive authority.³⁶

Next, Judge Henderson considered Supreme Court precedent. Noting that the Supreme Court had stated repeatedly in dicta that the President has exclusive recognition power,³⁷ she concluded that the "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative" by lower courts,³⁸ "especially if the Supreme Court has repeated the dictum."³⁹ She also

²⁹ *Id.*

³⁰ *See id.*

³¹ *Id.* at 205–06.

³² *Id.* at 206–07.

³³ *Id.* at 207.

³⁴ *Id.*

³⁵ *Id.* at 207–10. The court also discussed the 1817 standoff over the recognition of Chile, the 1864 and 1919 disagreements over recognition of Mexican leadership, the 1896 showdown over the recognition of Cuban independence, and other incidents. *Id.*

³⁶ *Id.*

³⁷ *Id.* at 211; *see id.* at 211–14 (collecting and discussing cases).

³⁸ *Id.* at 212 (quoting *United States v. Dorcelly*, 454 F.3d 366, 375 (D.C. Cir. 2006)) (internal quotation marks omitted).

³⁹ *Id.* (citing *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010)).

noted that an interpretation of exclusive executive recognition authority accords with the “sole organ” theory of presumptive executive dominance in foreign affairs.⁴⁰

Having concluded that the recognition power is exclusively presidential, Judge Henderson analyzed the nature of the unenumerated “passport power,” including whether Congress exclusively controls that power.⁴¹ She held that Congress’s power to regulate passports historically has not been exclusive, and must therefore yield to the President’s exclusive recognition authority if they conflict.⁴²

Finally, to determine whether the two powers conflicted in this case, Judge Henderson analyzed the statute, holding that instructing the State Department to issue passports to Jerusalem-born citizens identifying their place of birth as “Israel” amounted to a usurpation of exclusive recognition power.⁴³ Rejecting Zivotofsky’s arguments that the statute neutrally regulates the content of passports and would not affect the legal nonrecognition of Jerusalem as part of Israel, she concluded that the statute “runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem”⁴⁴ — a conclusion supported by Congress’s description of the statute as seeking to alter policy.⁴⁵ She noted the Secretary’s claim that enforcing the statute might endanger U.S. interests in the Arab world, holding that exclusive executive power must extend over actions “that would recognize, or might be perceived as constituting recognition of, Jerusalem.”⁴⁶ Since the statute trammelled the recognition power, and that power is exclusively presidential, the court upheld the executive’s nonenforcement of the statute.

Although he concurred fully in the court’s opinion, Judge Tatel wrote separately as well. Observing that “neither party (nor any of the amici) points to any time in our history when the President and Congress have clashed over an issue of recognition,” Judge Tatel noted the failure of historical practice in this area to settle the question of the

⁴⁰ See *id.* at 211, 213.

⁴¹ *Id.* at 214–15.

⁴² See *id.* at 215–16.

⁴³ *Id.* at 219–20.

⁴⁴ *Id.* at 216.

⁴⁵ *Id.* at 217–18 (“The title of section 214 is ‘United States Policy with Respect to Jerusalem as the Capital of Israel.’” *Id.* at 218 (quoting Jerusalem Embassy Act of 1995, Pub. L. No. 107-228, § 214, 116 Stat. 1350, 1365 (2002) (emphasis added))). Judge Henderson also rejected as waived Zivotofsky’s argument that the policy discriminates against supporters of Israel, and rejected as irrelevant Zivotofsky’s claim that President Bush’s signing statement was illegal. *Id.* at 220.

⁴⁶ *Id.* at 217 (quoting Defendant’s Responses to Plaintiff’s Interrogatories at 8–9, *Zivotofsky ex. rel. Zivotofsky v. Sec’y of State*, 511 F. Supp 2d 97 (D.D.C. 2007) (No. 1:03-cv1921-(GK)) (D.D.C. June 5, 2006) (emphasis added)). The court was “not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d).” *Id.* at 219.

exclusivity of the recognition power.⁴⁷ Nevertheless, the weight of the Supreme Court's dicta and "largely consistent historical practice" required a finding of exclusive executive power.⁴⁸

The D.C. Circuit's core holding that the recognition power is exclusively executive seems unsurprising: judicial deference to the executive on foreign policy and references to the "sole organ" metaphor are de rigueur in foreign affairs power decisions.⁴⁹ And yet the scope of *exclusive* presidential power is dramatically undertheorized.⁵⁰ As Judge Tatel noted, before this case there had not been *any* examples of the President and Congress directly clashing over recognition.⁵¹ Therefore, as a matter of historical practice and judicial precedent, no recognition cases fell into *Youngstown* Category Three. Rather, in prior cases attention largely focused on the scope of the President's "inherent" powers — those powers available *absent* congressional action.⁵² *Inherent* powers are not necessarily *exclusive*, however, since exclusive powers must be both "within [the President's] domain *and* beyond control by Congress."⁵³ While some inherent powers, such as the power to nominate ambassadors, are clearly exclusive,⁵⁴ others, such as certain

⁴⁷ *Id.* at 221–22 (Tatel, J., concurring).

⁴⁸ *Id.* at 222; *see id.* at 221–22. Judge Tatel also responded to two of Zivotofsky's arguments. First, he responded to Zivotofsky's claim that the statute did not implicate the recognition power at all. He relied on the possible impact of the policies and Congress's own description of the statute to find that the statute did trench on the recognition power. *Id.* at 223–25. He also responded to Zivotofsky's claim that the executive's policy discriminated against supporters of Israel. Although Judge Tatel agreed with the panel that the argument had been waived, he noted that the policy applies equally to supporters of Israel and Palestine. *Id.* at 225–26.

⁴⁹ The Supreme Court first cited the "sole organ" metaphor in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). *Id.* at 319, 320. *Curtiss-Wright* and the "sole organ" metaphor "remain[] . . . frequent citation[s] used by the judiciary to support not only broad delegations of legislative power to the executive branch, but also the existence of independent, implied, inherent, and extraconstitutional powers for the president." Fisher, *supra* note 1, at 151.

⁵⁰ *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 946 (2008) [hereinafter Barron & Lederman, *Constitutional History*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 695–96 (2008) [hereinafter Barron & Lederman, *Framing the Problem*]. In their two-part article, Professors David Barron and Martin Lederman point out how little law has developed in Category Three for war powers, a similar situation to Category Three for foreign affairs powers.

⁵¹ *See Zivotofsky*, 725 F.3d at 221–22 (Tatel, J., concurring).

⁵² *Cf.* Barron & Lederman, *Framing the Problem*, *supra* note 50, at 693 (defining "inherent" executive power as power "to act in the absence of prior congressional authorization").

⁵³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (emphasis added).

⁵⁴ *See* U.S. CONST. art. II, § 2, cl. 2. While the Senate must confirm the President's nominees, the power to nominate lies with the President alone.

aspects of the President's management of the armed forces, may be superseded by statute.⁵⁵

The D.C. Circuit's analysis of historical practice and Supreme Court dicta often elided this distinction, however, using evidence of inherent power to support a claim of exclusive power.⁵⁶ This analysis obscured the degree to which exclusive foreign affairs power remains unsettled and in need of the careful examination it has eluded for two centuries,⁵⁷ and led the court to forego a rare opportunity to consider fully the untested scope of that power.

The court's inconsistent approach to the inherent-exclusive distinction is clear from both its historical analysis and its discussion of Supreme Court dicta. As Professor Robert Reinstein has shown, every post-ratification example cited by the court in *Zivotofsky* as evidence of exclusive power either proved only inherent power or pointed to subordinate executive power.⁵⁸ For instance, the court prominently analyzed the recognition crisis of 1792 to 1793, in which President Washington concluded that he could recognize the French Revolutionary government without waiting for congressional authorization.⁵⁹ This incident provides support for the President's inherent foreign affairs powers — his powers to operate amid congressional silence.⁶⁰ However, the D.C. Circuit cited the incident as evidence of the Washington Administration's belief that it had “the *exclusive* power to recognize foreign nations.”⁶¹ As Professor Reinstein shows, the incident — like each of the court's post-ratification historical examples — at most proves inherent power and may possibly indicate subordinate power.⁶²

Additionally, the D.C. Circuit relied on a questionable interpretation of Supreme Court dicta, beginning with the “sole organ” dictum

⁵⁵ Barron & Lederman, *Framing the Problem*, *supra* note 50, at 742 & n.167; *see also* *United States v. Symonds*, 120 U.S. 46, 49–50 (1887) (finding that the President's inherent authority may be superseded by Congress).

⁵⁶ As Barron and Lederman note in the related context of war powers, “[i]t is common for defenders of presidential prerogatives to conflate inherent . . . powers with preclusive ones, and to assume that any powers granted by Article II must also be immune from statutory limitation.” Barron & Lederman, *Framing the Problem*, *supra* note 50, at 741.

⁵⁷ In a different context, the D.C. Circuit in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013), considered questions regarding the recess appointments power that had not faced judicial scrutiny in more than two centuries of history.

⁵⁸ Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1 (2013).

⁵⁹ *See Zivotofsky*, 725 F.3d at 207–08.

⁶⁰ Reinstein, *supra* note 58, at 12. President Washington may have believed his authority came from the executive's duty and power to execute the laws, including the international law of recognition. *See id.* at 11.

⁶¹ *Zivotofsky*, 725 F.3d at 207 (emphasis added).

⁶² *See* Reinstein, *supra* note 58, at 12–13 (“Washington never claimed that any executive power to enforce the law of nations was superior to the legislative powers of Congress. Nor could he.” *Id.* at 12.); *id.* at 13–14, 13 n.66 (noting other instances in which President Washington demonstrated an understanding of foreign affairs powers as subservient to Congress).

that the court cited repeatedly as an indication of exclusive executive power.⁶³ Scholars have noted that the phrase's originator, then-Congressman and eventual Chief Justice Marshall, did not claim exclusive executive foreign affairs power when he used this phrase,⁶⁴ in fact, he believed in congressional ability to determine foreign policy and guide execution.⁶⁵ Marshall's speech, like Washington's actions, arose in the *inherent* power context, supporting the President's power to execute a treaty absent congressional instructions.⁶⁶ But Marshall explicitly stated that the power was *not* exclusive.⁶⁷ And as Justice Scalia pointed out in oral argument in this very case, "to be the sole instrument and to determine the foreign policy are two quite different things"; while the President is the instrument, "Congress can say . . . what the country's instrument is supposed to do."⁶⁸ The court's use of this famous but controversial and unclear dictum may have done more to obscure than to elucidate the exclusive powers debate.

But for the most part, the D.C. Circuit's precedential argument relied on Supreme Court dicta specifically concerning the recognition power. In its discussion the court cited several Supreme Court cases as supporting the exclusive power hypothesis.⁶⁹ While none of these cases involved a federal statute that countermanded executive policymaking, and therefore did not directly involve a claim of exclusive power, the court noted that well-considered and especially reiterated dicta are binding on lower courts.⁷⁰ The court then claimed that each of these decisions recognized the exclusive nature of the recognition power.⁷¹

Of the six cases the opinion of the court cited, however, five failed to state, even in dicta, that the President's power precludes congressional interference. Four cases focused on the claim that executive recognition of a government is "conclusive on the judicial department," without considering whether Congress could countermand the executive decision, or what effect congressional involvement would have on the court's ruling.⁷² A fifth noted that the President had the authority

⁶³ *Zivotofsky*, 725 F.3d at 211, 213, 215, 219.

⁶⁴ Fisher, *supra* note 1, at 140–43.

⁶⁵ Barron & Lederman, *Constitutional History*, *supra* note 50, at 970 n.88.

⁶⁶ *Id.*; see also Fisher, *supra* note 1, at 141–42.

⁶⁷ 10 ANNALS OF CONG. 614 (1800) ("Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution . . ."); see also Barron & Lederman, *Constitutional History*, *supra* note 50, at 970 n.88 (discussing the origin and meaning of the phrase).

⁶⁸ Transcript of Oral Argument at 39, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699).

⁶⁹ *Zivotofsky*, 725 F.3d at 211–12.

⁷⁰ *Id.* at 212.

⁷¹ *Id.* at 212–14.

⁷² *Id.* at 211 (quoting *Williams v. Suffolk Ins. Co.*, 38 U.S. (1 Pet.) 415, 420 (1839)) (internal quotation marks omitted); see also *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory . . ."); *United States v. Pink*, 315 U.S. 203, 229 (1942) (stating that objections to recognition policy should be directed "to

to recognize countries without the Senate's advice and consent, but in so doing described only the President's inherent power.⁷³

The final case the majority cited did state that “[p]olitical recognition is exclusively a function of the Executive,”⁷⁴ but again only in the context of limiting the judiciary's role,⁷⁵ and not in any way that directly implicated Congress. Rather, the Court “did not further explain this dict[um], simply making this statement in passing without any citation.”⁷⁶ Whatever the authority of the dictum in this final case, the D.C. Circuit did not sufficiently account for several cases in which the Supreme Court, also in dicta, explicitly said the opposite — that “Congress and the President share . . . [recognition] power.”⁷⁷ On balance, the dicta identified by the court, read in the context of those cases, do not clearly support an exclusive powers interpretation. Rather, the cases represent only recognition of *inherent* executive authority and of the judiciary's inability to overrule a political judgment.

The court's reasoning thus cited inherent power claims as controlling dicta for the exclusive power theory. Ultimately, the court imported a font of presidential authority — inherent power — into a context in which the President's power is supposed to be “at its lowest ebb.”⁷⁸ In so doing, the D.C. Circuit limited its important inquiry into the Constitution's true plan for the resolution of the rare interbranch disagreement that *Zivotofsky* brought to the fore: presidential resistance to a congressional attempt to directly control foreign policy. Although the court quickly dismissed the text of the Constitution and originalist

the political department and not to the courts”); *Guar. Trust Co. v. United States*, 304 U.S. 126, 137 (1938) (stating that recognition “is a political rather than a judicial question, and is to be determined by the political department of the government”). Of these cases, *Williams* comes closest to identifying an exclusive power, stating that the executive's determination is “obligatory on the people and government of the Union.” 38 U.S. at 420. However, in the context of a passage focusing tightly on the executive-judicial relationship, this phrase may be understood as a reference to the binding effect of the President's judgment on the people and government, as enforced by the courts.

⁷³ See *United States v. Belmont*, 301 U.S. 324, 330 (1937). The Court did use the “sole organ” metaphor in *Belmont*, but the facts of that case implicated only inherent executive power, not exclusive executive power. See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1018 (2013) (“*Belmont* did not mention any role for Congress in recognition, though it did not expressly reject such a role either.”).

⁷⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

⁷⁵ The next sentence discussed “judicial ‘recognition.’” *Id.*

⁷⁶ Galbraith, *supra* note 73, at 1018.

⁷⁷ *Zivotofsky*, 725 F.3d at 222 (Tatel, J., concurring) (“[T]he [Supreme] Court has also occasionally suggested that Congress and the President share . . . [recognition] power.”) (citing *Jones v. United States*, 137 U.S. 202, 212 (1890)); see also *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — ‘the political’ — Departments of the Government”); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 645 (1818) (“[T]he courts of the union must view such newly constituted [foreign] government as it is viewed by the legislative and executive departments of the government of the United States.”).

⁷⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

evidence as not providing “much help”⁷⁹ before resting on debatable post-ratification practice and dicta, scholars have engaged in a lively and productive debate encompassing constitutional text, original intentions, arguments from structure and function, and a deeper engagement with post-ratification practice that could have provided more extensive guidance for the court on this highly contested question.⁸⁰

While the outcome of the exclusive powers debate is uncertain, its importance is not. The impact of foreign affairs on domestic life continues to grow.⁸¹ The prospect of renewed congressional involvement suggests that the importance of understanding the scope of presidential power “at its lowest ebb” may grow, too.⁸² Those who support a President’s “[d]ecision, activity, secrecy, and dispatch”⁸³ in foreign affairs may find congressional countermanding of a presidential foreign policy decision repugnant. But in a system of checks and balances, the high bars of bicameralism and presentment may provide sufficient protections against incessant congressional interference in the President’s regular exercise of his inherent power, as they have since the Framing.⁸⁴ Such a foundational inquiry merits a fuller judicial discussion of the text, history, structure, function, and policy that the separation of *exclusive* foreign affairs powers has yet to receive.

⁷⁹ *Zivotofsky*, 725 F.3d at 206.

⁸⁰ See, e.g., David Gray Adler, *The President’s Recognition Power: Ministerial or Discretionary?*, 25 PRESIDENTIAL STUD. Q. 267 (1995); Galbraith, *supra* note 73, at 1009–19; H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1999); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 240–41, 240 n.25, 241 n.33 (2001) (surveying the debate and collecting sources); Reinstein, *supra* note 57; Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801 (2011); cf. generally Barron & Lederman, *Constitutional History*, *supra* note 50 (making an analogous argument that exclusive war powers are much more limited than the popular narrative suggests). Although the court cited some legal scholarship in its opinion, it relied on these pieces only to summarize historical events, *Zivotofsky*, 725 F.3d at 200, 205 n.6, 206 n.8, 208, and to dismiss other potential textual sources of the recognition power, *id.* at 206 n.7, and did not engage with the authors’ fuller arguments about the recognition authority.

⁸¹ See, e.g., Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1413 (1999) (“Increasing global interdependence . . . mean[s] that almost any issue with a foreign element can now be viewed to ‘affect’ foreign affairs.”); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 139 (1998) (noting the rise of international executive agreements and their role in regulating domestic law).

⁸² Cf. Barron & Lederman, *Framing the Problem*, *supra* note 50, at 698–720 (arguing that similar changes may foretell the rise of exclusive powers jurisprudence).

⁸³ THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁸⁴ Indeed, this case’s unique nature is instructive. As Judge Tatel noted, the parties failed to find other examples of Congress overriding a presidential recognition decision. See *Zivotofsky*, 725 F.3d at 221 (Tatel, J., concurring). Moreover, bicameralism and presentment make sustained congressional interference unlikely; the statute in this case became law only *because the President signed it*. This high barrier to congressional interference may protect the President’s ability to carry out normal functions while allowing a democratic safety valve for extraordinary cases.