
RECENT SIGNING STATEMENTS

SEPARATION OF POWERS — FOREIGN AFFAIRS — PRESIDENT TRUMP OBJECTS TO ACT IMPOSING SANCTIONS ON RUSSIA AND CONGRESSIONAL REVIEW OF PRESIDENTIAL WAIVERS. — STATEMENTS ON SIGNING THE COUNTERING AMERICA'S ADVERSARIES THROUGH SANCTIONS ACT, 2017 DAILY COMP. PRES. DOC. 558 & 559 (AUG. 2, 2017).

Careful observers of Congress have rendered their judgment: it is the “Broken Branch,”¹ the “Sapless Branch,”² and it just “lack[s] guts.”³ Congress is thought to be especially bumbling in foreign affairs.⁴ President Donald Trump echoed this view upon signing the Countering America’s Adversaries Through Sanctions Act⁵ (Sanctions Act), which codified sanctions and implemented congressional review of potential presidential waivers with respect to Iran, Russia, and North Korea.⁶ The President labeled portions of the bill “clearly unconstitutional,” including provisions that deny recognition of Russia’s annexation of Crimea.⁷ These provisions, the President argued, run afoul of *Zivotofsky ex rel. Zivotofsky v. Kerry*⁸ (*Zivotofsky II*), which held that only the President may recognize foreign governments and boundaries.⁹ President Trump also criticized the bill for “limiting the executive’s flexibility,” adding: “The Framers of our Constitution put foreign affairs in the hands of the President. . . . As President, I can make far better deals with foreign countries than Congress.”¹⁰

This assertion of presidential prowess in foreign affairs mirrors the pro-Executive logic of *Zivotofsky II*, which looked to “functional considerations” flowing from the Executive’s “unity.”¹¹ In dissent, Justice Scalia warned that “[f]unctionalism of th[is] sort . . . will *systematically*

¹ THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

² JOSEPH S. CLARK, *CONGRESS: THE SAPLESS BRANCH* (1964).

³ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 297 (1973).

⁴ *See, e.g., id.* at 296–97 (“Congress no doubt had manifest defects as an instrumentality for the making of foreign policy. It lacked continuity of purpose and interest[,] . . . information and expertise[, and] . . . the capacity to make clear and quick decisions. It lacked guts.”).

⁵ Pub. L. No. 115-44, 131 Stat. 886 (2017) (to be codified in scattered sections of the U.S. Code) [hereinafter Sanctions Act].

⁶ *Id.*

⁷ Statement on Signing the Countering America’s Adversaries Through Sanctions Act, 2017 DAILY COMP. PRES. DOC. 559, at 1 (Aug. 2, 2017) [hereinafter Statement I].

⁸ 135 S. Ct. 2076 (2015). An earlier decision had held that the case did not present a nonjusticiable political question. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 191 (2012).

⁹ *Zivotofsky II*, 135 S. Ct. at 2096.

¹⁰ Statement on Signing the Countering America’s Adversaries Through Sanctions Act, 2017 DAILY COMP. PRES. DOC. 558, at 1 (Aug. 2, 2017) [hereinafter Statement II].

¹¹ *Zivotofsky II*, 135 S. Ct. at 2086.

favor the unitary President over the plural Congress in disputes involving foreign affairs.”¹² And yet the Sanctions Act showcases Congress’s own functional bag of tricks in foreign policymaking, such as a special claim on legitimacy owing to its decentralized makeup and need for consensus. Because *Zivotofsky II* shortchanged these congressional advantages, the Court should take the next opportunity to balance its slanted analysis. Once it gives Congress its fair shake, the Court should balk at disabling Congress on functionalist grounds. The Court may even find that the functional inquiry ends in stalemate and abandon it wholesale. Either way, Congress may recapture a foothold in foreign policy.

On July 27, 2017, Congress passed the Sanctions Act establishing a regime of sanctions and congressional review of presidential efforts to undo them with respect to Iran, Russia, and North Korea.¹³ With unusual bipartisan support, approaching unanimity, the bill passed 419–3 in the House and 98–2 in the Senate.¹⁴ Titles I and III impose sanctions on Iran and North Korea, respectively.¹⁵ Title II of the Act,¹⁶ containing the measures against Russia, is the bologna in the sandwich served up after President Trump’s flirtations with a Russian rapprochement.¹⁷ President Barack Obama had previously imposed a series of sanctions on the Russian government, primarily because of “its purported annexation of Crimea”¹⁸ and its cyber interference in the 2016 U.S. presidential election.¹⁹ The Act enshrines these sanctions into law²⁰ but also significantly enhances them by attacking broad swaths of the Russian government and economy.²¹

¹² *Id.* at 2123 (Scalia, J., dissenting). See generally MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 42 (1990) (defining “[t]he functional approach” as “rel[ying] upon the institutional attributes of the branches as a standard for the allocation of power”).

¹³ Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) (to be codified in scattered sections of the U.S. Code).

¹⁴ 163 CONG. REC. H6278–79 (daily ed. July 25, 2017); *id.* at S4389 (daily ed. July 27, 2017).

¹⁵ Sanctions Act §§ 101–112 (Iran); *id.* §§ 301–334 (North Korea).

¹⁶ *Id.* §§ 201–292.

¹⁷ See, e.g., Julie Hirschfeld Davis, “Time to Move Forward” on Russia, Trump Says, as Criticism Intensifies, N.Y. TIMES (July 9, 2017), <https://nyti.ms/ztWxiag> [<https://perma.cc/F7X9-TXW7>] (“President Trump tried without success . . . to put the matter of Russia’s election meddling behind him, . . . declaring that it was ‘time to move forward.’”).

¹⁸ Exec. Order No. 13,662, 79 Fed. Reg. 16,169 (Mar. 20, 2014). These sanctions were later augmented by Exec. Order No. 13,685, 79 Fed. Reg. 77,357 (Dec. 19, 2014).

¹⁹ See Exec. Order No. 13,757, 82 Fed. Reg. 1 (Dec. 28, 2016). See generally OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (2017) (“Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the U.S. Presidential election . . . [and] developed a clear preference for President-elect Trump.”).

²⁰ Sanctions Act § 222.

²¹ The Act imposed mandatory sanctions on Russian activities “undermining cybersecurity,” *id.* § 224, Russian crude oil extraction projects, *id.* § 225, Russian financial institutions, *id.* § 226,

The President may waive these sanctions, but only by submitting “a written determination” to Congress that the waiver either “is in the vital national security interests of the United States” or “will further the enforcement of” the Sanctions Act and certifying that the sanctioned party has taken steps to ameliorate the wrong.²² The waiver may then be blocked by a congressional “joint resolution of disapproval” passed by both houses of Congress; the President may veto this resolution, but a second congressional joint resolution of disapproval will override the veto and bar the President’s action.²³

The Sanctions Act also contains provisions designed to help Ukraine fend off Russia. In a policy statement, the Act declares: “It is the policy of the United States . . . to never recognize the illegal annexation of Crimea.”²⁴ To back up this policy, the Act directs the State Department to spend \$30 million in the next two years to reduce Ukraine’s energy dependence on Russia,²⁵ in addition to \$250 million for the Countering Russian Influence Fund to protect NATO and EU countries “vulnerable to influence by the Russian Federation.”²⁶

The President, displeased, signed the Sanctions Act “for the sake of national unity” even as he declared it “seriously flawed” and protested that it “limit[s] the executive’s flexibility.”²⁷ President Trump voiced concern that the “sanctions could negatively affect American companies and those of our allies.”²⁸ He repeated Congress’s biting rhetoric on Iran and North Korea but, peculiarly, recast the measures against Russia in a conciliatory light; to bury the hatchet, he suggested “cooperation between our two countries on major global issues so that these sanctions will no longer be necessary.”²⁹ Touting his “company worth many billions of dollars” and deriding congressional gridlock, the President

Russians responsible for “significant corruption,” *id.* § 227, persons transacting with Russian “foreign sanctions evaders and serious human rights abusers,” *id.* § 228, persons transacting with Russian intelligence or defense officials, *id.* § 231, facilitators of privatization of Russian state-owned assets, *id.* § 233, and the transfer of arms to Syria, *id.* § 234.

²² *Id.* § 222(c); *see also id.* §§ 224(c), 227–230, 231(b), 233(b), 234(c), 236(b)–(c) (similar presidential-waiver provisions for various sanctions).

²³ *Id.* § 216(b)(4)–(6), (c). The statute has created confusion by alternately requiring “both Houses of Congress,” *id.* § 216(b)(4)–(5), and “either House of Congress,” *id.* § 216(c)(1). *See* Richard A. Epstein, *The Troubled Status of the Russian Sanctions Legislation — With the President’s Signing Statement Attached*, JUST SECURITY (Aug. 4, 2017, 8:01 AM), <https://www.justsecurity.org/43855/troubled-status-russian-sanctions-legislation-with-presidents-signing-statement-attached/> [<https://perma.cc/XUU9-ALUF>]. The description above follows Charlie Savage’s reading. *See id.*

²⁴ Sanctions Act § 257(a); *see also id.* § 253 (similar policy statement).

²⁵ *Id.* § 257(c)–(d).

²⁶ *Id.* § 254(b)(1)(a)(i); *id.* § 254(a)–(b).

²⁷ Statement II, *supra* note 10, at 1.

²⁸ *Id.*

²⁹ *Id.* The President said “the bill sends a clear message to Iran and North Korea that the American people will not tolerate their dangerous and destabilizing behavior,” but also that “[i]t represents the will of the American people to see Russia take steps to improve relations with the

concluded his statement by asserting his superior international dealmaking abilities.³⁰ The President issued a separate statement arguing that certain provisions of the Sanctions Act are “clearly unconstitutional,” including “sections 253 and 257,” which deny recognition of Russian sovereignty over Crimea and thus “purport to displace the President’s exclusive constitutional authority to recognize foreign governments” in violation of *Zivotofsky II*.³¹ The statement also objected to sections 254 and 257 for directing the Secretary of State “to undertake certain diplomatic initiatives, in contravention of the President’s exclusive constitutional authority” to conduct “international negotiations.”³²

President Trump’s signing statement is a natural outgrowth of *Zivotofsky II*’s holding and lopsided pro-Executive functionalism. But the Sanctions Act reveals Congress’s underappreciated functional advantages in crafting foreign policy and shows why the Court should perform either a balanced functional inquiry or none at all. This comment will first trace the path from *Zivotofsky II* to President Trump’s statement, then explore the functional virtues of Congress in foreign relations and how these advantages shaped the Sanctions Act.

Zivotofsky II held that Congress could not require the Secretary of State to issue a passport listing Israel as the birthplace of an American born in Jerusalem, because that “infringe[d] on the recognition power — a power the Court now holds is the sole prerogative of the President.”³³ In locating that exclusive presidential power to recognize foreign nations and territorial boundaries, Justice Kennedy, writing for the Court, relied partly on “functional considerations”: the President, unlike Congress, possesses “unity at all times,” can engage in “delicate and often secret diplomatic contacts[,] . . . [and] is also better positioned to take the decisive, unequivocal action necessary to recognize other states.”³⁴ In

United States.” *Id.*

³⁰ *Id.*

³¹ Statement I, *supra* note 7, at 1. President Trump clarified that he “share[s] the policy views” of those sections. *Id.* The President also contended that “[c]ertain provisions in section 216” pertaining to the congressional review period violate *INS v. Chadha*, 462 U.S. 919 (1983), because they allow Congress to unilaterally extend the period without the President’s signature. Statement I, *supra* note 7, at 1. Yet he “expect[s] to honor the bill’s extended waiting periods.” *Id.* See generally Epstein, *supra* note 23 (discussing President Trump’s *Chadha* objection). Finally, the President objected to sections banning individuals from the country since they did not take into account his constitutional authority to receive ambassadors. Statement I, *supra* note 7, at 1.

³² Statement I, *supra* note 7, at 1; see Sanctions Act § 254(a)–(e) (requiring the Secretary of State to coordinate with the European Union and NATO and to spend \$250 million over the next two years for the purpose, in part, of “protecting . . . from cyberattacks” countries “vulnerable to influence by the Russian Federation,” *id.* § 254(b)(1)); *id.* § 257(b)–(d) (requiring the Secretary of State to “work with the Government of Ukraine to develop a plan to . . . reduce Ukraine’s reliance on energy imports from the Russian Federation,” *id.* § 257(b)(1), and to spend many millions of dollars in furtherance of that plan).

³³ *Zivotofsky II*, 135 S. Ct. 2076, 2095 (2015).

³⁴ *Id.* at 2086.

dissent, Justice Scalia lamented that “the Court’s decision does not rest on text or history or precedent” but rather on “[f]unctionalism,” which he projected “will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs.”³⁵

Professor Jack Goldsmith notes that “the Court provided no principled limit” to these pro-Executive “functional arguments,”³⁶ thereby guaranteeing that executive branch lawyers will fashion them into new and creative weapons in future battles with Congress.³⁷ Two areas particularly susceptible to such functional arguments, Goldsmith explains, are disputes with Congress about the President’s exclusive powers of recognition (beyond the narrow passport issue) and of conducting diplomacy.³⁸ Coincidentally or not, President Trump’s signing statement objected to the Sanctions Act on both of these grounds.³⁹ The law on each of these points is unsettled: the boundaries of the President’s exclusive recognition power are unknown,⁴⁰ and the Executive’s long-claimed exclusive dominion over diplomacy has not been tested in the Court.⁴¹ If Justice Scalia spoke the truth, then the Court’s functionalism will favor the President in future clashes with Congress, perhaps even involving the Sanctions Act itself.

But this take misses half the enchilada. Congress too enjoys special gifts as a maker of foreign policy, and the Court should adopt a balanced functionalism that pays respect to Congress’s talents. Certainly, Congress lags behind the executive capacities for “[d]ecision, activity, secrecy, and dispatch.”⁴² These qualities are real, and it goes too far to

³⁵ *Id.* at 2123 (Scalia, J., dissenting); see also PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 44–45 (2002) (“Functionalism obviously favors the accretion of executive power . . .”).

³⁶ Jack Goldsmith, *The Supreme Court, 2014 Term — Comment: Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 130–31 (2015).

³⁷ *Id.* at 134.

³⁸ *Id.* at 136–42.

³⁹ Statement I, *supra* note 7, at 1.

⁴⁰ See Goldsmith, *supra* note 36, at 138 (“[T]he Court’s hazy line ultimately turns on the nebulous determination of whether Congress ‘infringes’ on or ‘aggrandizes’ [itself at the expense of] the Executive’s recognition power.”); Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 56 n.370 (2013) (“There does not appear to be any principled way in which courts could decide whether an executive policy related to recognition is at the core or periphery of the Executive’s recognition decision.”).

⁴¹ See *Zivotofsky II*, 135 S. Ct. 2067, 2115 (2015) (Roberts, C.J., dissenting) (“[O]ur precedents have never accepted such a sweeping understanding of executive power.”). See generally Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331 (2013) (discussing the history and constitutionality of congressional diplomatic communications). Goldsmith argues that *Zivotofsky II*’s functionalist arguments, along with dicta in the Court’s opinion, will allow executive branch lawyers “to strengthen and broaden the President’s claim to exclusive diplomatic powers and to muddy the extent to which Congress can regulate these powers.” Goldsmith, *supra* note 36, at 141.

⁴² *Zivotofsky II*, 135 S. Ct. at 2086 (quoting THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003)). But see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*,

say that *Zivotofsky II* “relied on stereotypes to define the power of the President.”⁴³ It is undeniable that “Congress is subject to . . . obvious limitations in setting foreign policy, of which thoughtful members are certainly aware,” notably a cavernous “information/expertise gap” separating it from the Executive.⁴⁴ But this hardly adds up to exclusive presidential power. Congress is smart enough to know its limits and has delegated, expressly or by acquiescence, broad foreign affairs powers to the President.⁴⁵ Delegation reflects institutional wisdom and responsibility, not dysfunction — and is not a reason to hamstring Congress.⁴⁶

And there are, of course, drawbacks to the Executive’s agility abroad. When it comes to initiating war, the Constitution counts on Congress’s relative disarray. This was the instinct of the Framers in lodging the power to declare war with Congress; the Constitution “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress”⁴⁷ Senator J. William Fulbright, who once counted Congress out of managing foreign policy for its “distressing tendency to adhere to the dictates of public opinion,”⁴⁸ was convinced by presidential misadventures that “[t]he collective judgment of the Congress, with all its faults, could be superior to that of one man who makes the final decision, in the executive.”⁴⁹ In a scorching critique of exclusive presidential power, Professor Michael Glennon highlighted “diversity of views” as exemplifying “the functional attributes that commend Congress as a foreign policy decision-maker.”⁵⁰ This diversity serves two

121 HARV. L. REV. 689, 796–99 (2008) (arguing that Hamilton’s comments, considered in context, do not suggest presidential power to disregard statutes).

⁴³ Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 207 (2016).

⁴⁴ Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 753 (1989).

⁴⁵ See *id.* at 754 (“Presidential influence [in foreign affairs] remains dominant because of congressional delegation, authorization and tolerance.”).

⁴⁶ See Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 57 (2016) (“Far from an abdication of power, delegation can be an effective tool of congressional power.”).

⁴⁷ James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 11, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (Merrill Jensen ed., 1976). But see DAVID J. BARRON, WAGING WAR 87 (2016) (discussing Thomas Jefferson’s letter to President James Madison “doubt[ing] whether, in case of a war, Congress would find it practicable to do their part” since “a body containing 100 lawyers” is prone to talking too much (quoting Letter from Thomas Jefferson to President James Madison (Feb. 19, 1812), in 4 THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 195 (J.C.A. Stagg et al. eds., 1999))).

⁴⁸ SCHLESINGER, *supra* note 3, at 297 (quoting J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q., Fall 1961, at 1, 6).

⁴⁹ *Id.* (quoting *War Powers Legislation: Hearings Before the S. Comm. on Foreign Relations on S. 731, S.J. Res. 18 & S.J. Res. 59*, 92d Cong. 530 (1972) (statement of Sen. J.W. Fulbright, Chair, S. Comm. on Foreign Relations)).

⁵⁰ Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT’L L. 5, 16 (1988). Ironically, this article found its way into the

principal functions: (1) it “is a mechanism for avoiding error and achieving consensus”; and (2) because “[d]iversity . . . gives members of the public a sense that their viewpoints have been heard and considered,” it is “crucial for purposes of *legitimacy*.”⁵¹ These qualities — unhurried deliberation, sensitivity to public opinion, collective judgment tested by open debate, and diversity of views — bump up Congress’s credibility in foreign affairs.

There is a final benefit of the decentralized Congress: its very incoherence inoculates it against corruption. Corruption via foreign intrigue worried the Founders with respect to the President.⁵² Yet Congress was thought more or less invulnerable to would-be puppeteers overseas. James Madison argued at the Constitutional Convention that the Impeachment Clause was necessary for the President since “[h]e might betray his trust to foreign powers,” being only “a single man” — in contrast to the multimember Congress where “the difficulty of acting in concert for purposes of corruption was a security to the public.”⁵³ Moreover, John Jay contended that Congress’s bicameral structure would frustrate a “foreign Prince” who sought to corrupt it: “You have a double security” with the House and Senate in that “the chance of corruption is . . . vastly diminished by the necessity of concurrence.”⁵⁴

Many or all of these inborn functional advantages were displayed by Congress in passing the Sanctions Act. The Act’s congressional review procedure ensures that “there can be transparency and a discussion and a debate,”⁵⁵ a phrase recalling Madison’s comment that legislators must be sufficiently numerous so as “to secure the benefits of free consultation and discussion”⁵⁶ and underscoring the congressional counterpoint to the President’s “delicate and often secret diplomatic contacts.”⁵⁷ Further-

Court’s opinion in *Zivotofsky II*. *Zivotofsky II*, 135 S. Ct. 2076, 2090 (2015).

⁵¹ Glennon, *supra* note 50, at 17. See generally GLENNON, *supra* note 12, at 30–33 (elaborating upon Congress’s functional attributes in the foreign policy realm).

⁵² See, e.g., THE FEDERALIST NO. 75, *supra* note 42, at 450 (Alexander Hamilton) (“An ambitious [President] might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents.”).

⁵³ Notes of James Madison (July 20, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., rev. ed. 1966) (statement of James Madison).

⁵⁴ John Jay, Speech at the New York Ratifying Convention (June 23, 1788), in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1824–25 (John P. Kaminski et al. eds., 2008). See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 354–56 (2009) (explaining the Founders’ views on size as a bulwark against corruption).

⁵⁵ 163 CONG. REC. S3443 (daily ed. June 13, 2017) (statement of Sen. Cardin).

⁵⁶ THE FEDERALIST NO. 55, *supra* note 42, at 340 (James Madison).

⁵⁷ *Zivotofsky II*, 135 S. Ct. 2076, 2086 (2015).

more, passing the bill required forging consensus among diverse viewpoints,⁵⁸ which shores up legitimacy. Aside from transparency and diversity, Congress's unique claim on legitimacy is starkest with respect to the fear of corruption — a fear that clearly animated Congress to pass the Sanctions Act. Senator Sherrod Brown, a drafter of the legislation, pointed to widespread concerns about “whether the Trump family or the Trump businesses or the Trump White House has had some kind of relationships — almost everybody here thinks — with the oilmen, with the oligarchs, with the Kremlin, maybe even Putin himself.”⁵⁹ Senator Lindsey Graham remarked that “[w]hen it comes to Russia, [President Trump]’s got a blind spot.”⁶⁰ Congress, with its many eyes, is designed to peer into this blind spot and prudently steer our foreign policy.

“The Framers of our Constitution,” President Trump claimed, “put foreign affairs in the hands of the President. This bill will prove the wisdom of that choice.”⁶¹ This criticism of the Sanctions Act draws strength from *Zivotofsky II*'s pro-Executive functionalism, but its logic owes less to the Framers than to Napoleon's “worldly wisdom” that “[t]he tools belong to the man who can use them.”⁶² The Court has assumed that the unitary President is just that person, an assumption underpinning Justice Scalia's warning that functionalism will systematically work against the plural Congress. Yet the Sanctions Act exposes the Court's analysis as, at best, incomplete. This approach forgets that Congress is handy with its own toolbox, wielding parliamentary instruments programmed to access public legitimacy in the country's foreign relations. The Court should take notice of Congress's functional advantages and apply a more balanced functionalist analysis — or, finding that the branches' opposing advantages cancel one another, perhaps return to the terra firma of “the Constitution's text and th[e] Court's precedent” alongside “historical evidence.”⁶³ The Sanctions Act represents a claim that, in foreign affairs, “Congress is involved; Congress has a say.”⁶⁴ The Court should fix its functionalism and let Congress speak.

⁵⁸ See 163 CONG. REC. H6264 (daily ed. July 25, 2017) (statement of Rep. Hoyer) (“This legislation is the product of very careful and sometimes difficult negotiations on a bipartisan basis.”).

⁵⁹ *Id.* at S3441 (daily ed. June 13, 2017) (statement of Sen. Brown); see also *id.* at H6265 (daily ed. July 25, 2017) (statement of Rep. Connolly) (“[T]his Congress does not trust the President of the United States to manage U.S.-Russia relations.”).

⁶⁰ Kailani Koenig, *Graham Slams “Disastrous Meeting” with Putin, Calls Russia Trump’s “Blind Spot,”* NBC NEWS (July 9, 2017), <http://www.nbcnews.com/politics/national-security/graham-slams-disastrous-meeting-putin-calls-russia-trump-s-blind-n781096> [<https://perma.cc/D9MD-5KUV>].

⁶¹ Statement II, *supra* note 10, at 1. For the contrary view of congressional primacy in foreign affairs, see Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 114–21 (2002).

⁶² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“If not good law, there was worldly wisdom in the maxim attributed to Napoleon”); see also Levinson, *supra* note 46, at 76 (arguing that, with *Zivotofsky II*, the “expansive de facto powers of the presidency have become de jure constitutionalized”).

⁶³ *Zivotofsky II*, 135 S. Ct. 2076, 2091 (2015).

⁶⁴ 163 CONG. REC. S4389 (daily ed. July 27, 2017) (statement of Sen. Corker).