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The Return of the King: How the Supreme Court Distorted the Jackson Concurrence and Expanded Executive Power in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)

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Note*

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I. INTRODUCTION

The City of Jerusalem holds a special place in world heritage. It is home to fundamentally sacred sites for three of the largest religions in the world[1] and has been center-stage for multiple religious crusades.[2]

* Michael Blackburn, J.D., University of Nebraska College of Law 2017. For my father.

1. COLUMBIA UNIV. PRESS, THE COLUMBIA ENCYCLOPEDIA 1407 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993) ("Jerusalem is a holy city for Jews, Christians, and Muslims."). Jerusalem is home to the Dome of the Rock, the second

From the Canaanites and Romans, to the Ottomans, to Hamas and the Israelis today, the battle for its possession has spanned millennia.[3] That struggle for control has also entangled U.S. foreign policy since the birth of modern Israel in 1948.[4] After almost seven decades, a solution continues to elude the country's policy makers.[5]

Under our Constitution, the Judicial Branch does not play a direct role in deciding U.S. foreign policy regarding Jerusalem, leaving that task to the Executive and Legislative Branches instead.[6] However, in 2015, *Zivotofsky ex rel. Zivotofsky v. Kerry*[7] presented the Court with a conflict between those branches over control of that policy. The dispute was the result of a long battle stemming from section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003.[8] This section allowed American citizens born in Jerusalem to choose to have their passport list Israel as their place of birth.[9]

Section 214(d) directly contradicted the Executive Branch's stance on the status of Jerusalem, which has consistently been a refusal to acknowledge any country's sovereignty over the city since the creation of Israel in 1948.[10] On the same day the President signed it into law, he also issued a statement clarifying the American diplomatic position on sovereignty over Jerusalem had not changed.[11] The statement also claimed if section 214(d) was interpreted as mandatory, it would unconstitutionally interfere with the Executive Branch's authority over foreign affairs.[12] The policy conflict caused by section 214(d) was aggravated by the Executive Branch's Foreign Affairs Manual (FAM),

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most holy site in Islam; the Wailing Wall, the only standing wall from Solomon's Temple and holy place for Jews; and the Church of the Holy Sepulcher, a Christian church built in 1086 AD. *Id.*

2. *Id.* at 1407–08.
3. *Id.*
4. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081 (2015).
5. *Id.* Notably, President Trump has projected a large change in U.S. foreign policy regarding Israel, proving once again this is by no means a settled issue. Nicole Gaouette & Elise Labott, *Trump Backs Off Two-State Framework for Israeli–Palestinian Deal*, CNN (Feb. 16, 2017), http://www.cnn.com/2017/02/15/politics/trump-netanyahu-two-state-solution-israel-palestinians [https://perma.unl.edu/2A9G-86ZK].
6. Zivotofsky, 135 S. Ct. at 2081 ("In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary.").
7. 135 S. Ct. 2076.
8. *Id.* at 2082 ("The subsection that lies at the heart of this case, § 214(d), addresses passports").
9. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).
10. *Zivotofsky*, 135 S. Ct. at 2082 ("[N]either President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem.").
11. Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002).
12. *Id.*

which defines the State Department's guidelines on listing place of birth on U.S. passports.[13] The FAM prohibits the issuance of passports that list a place of birth that contradicts "Executive Branch policy."[14] This policy clash set the stage in *Zivotofsky* for a rare foreign-affairs separation-of-powers dispute between the Legislative and Executive Branches.

This Note argues the *Zivotofsky* Court erred by applying a lower standard than it previously relied on when assessing the constitutional division of the Executive Branch's foreign-affairs powers relative to the Legislative Branch. The Court's error was exacerbated by the functionalist persuasion the Court relied on in order to reach its verdict. The result of this wayward step was to upend the established precedent, making predictions of future case outcomes useless, while simultaneously expanding the power of the Executive Branch.

Part II of this Note will provide an overview of the relevant case law on the separation of powers in foreign-affairs cases. It will also discuss the winding procedural path *Zivotofsky* took over the span of more than a decade before finally being decided on the merits by the Supreme Court. Part III compares the standards applied in the *Zivotofsky* ruling with the standards previously applied under the Jackson Concurrence in foreign-affairs separation-of-powers questions and the rejection of functionalism in those previous decisions. Finally, Part III forecasts some of the possible outcomes of the *Zivotofsky* decision, and Part IV concludes.

II. BACKGROUND

A. A Brief History of the Relevant Case Law

An analysis of the balance of power between the two political branches in foreign affairs relies heavily on case law. This is because the Constitution is largely silent or vague on many subjects dealing with foreign affairs.[15] Complicating this further is the wide berth the Court has traditionally given the political branches in dealing with such issues because of its exceptionalist approach to foreign affairs.[16] While a debate over the depth or merits of this approach is beyond the

13. *Zivotofsky*, 135 S. Ct. at 2082.

14. *Id.*

15. Stephen I. Vladeck, *Foreign Affairs Originalism in* Youngstown*'s Shadow*, 53 ST. LOUIS L.J. 29, 35 (2008).

16. *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1907–08 (2015) ("We therefore define foreign relations exceptionalism to mean that domestic and foreign affairs-related issues are analyzed in distinct ways as a matter of function, doctrine, or methodology."). Although foreign affairs exceptionalism was not always the doctrinal preference of the Court, it has been for the last century. *Id.* at 1911.

scope of this Note,[17] it is important to note the result of that approach is a void of rulings in this area of law.[18] This exceptionalist approach also separates foreign-affairs cases from other separation-of-powers cases because the Court has used a deferential standard to decide foreign-affairs questions in the few cases it has actually heard.[19] The cornerstone case in this area is *Youngstown Sheet & Tube Co. v. Sawyer*.[20] With *Youngstown* as its foundation, the Court has built a cannon of case law by adding decisions in *Dames & Moore v. Regan*,[21] *Hamdan v. Rumsfeld*,[22] and finally *Medellín v. Texas*.[23]

1. Youngstown Sheet & Tube Co. v. Sawyer

The *Youngstown* decision came during a shift in American history as the country was engaged in a new war in Korea.[24] Under the proliferating specter of the Cold War, President Truman was faced with a strike by the entire steel industry while he was trying to rearm the military for action in Korea.[25] President Truman, relying on his powers as Commander in Chief, moved to nationalize the steel industry after collective bargaining broke down in order to keep steel production going.[26] The executive action was objected to by the industry and wound up before the Court in 1952.[27]

Youngstown foreshadowed tangled decisions to come. It was a 6–3 decision with five concurring opinions holding President Truman's actions were not within the Executive Branch's powers and were therefore unconstitutional.[28] The most well-known part of the *Youngstown* decision is the now familiar concurrence written by Justice Jackson, known colloquially as the "Jackson Concurrence." In his concurrence,

17. The debate over foreign affairs exceptionalism and the debate over using formalist versus functionalist approaches to foreign-affairs cases are often intertwined, and therefore, arguments made in one debate are frequently applicable to the other. *See id.* at 1908. Several such arguments are identifiable in the myriad of opinions in the cases discussed *infra* in Part II. The merits of those arguments are argued sufficiently in the different opinions of those cases and are not necessary to the arguments made in this Note.
18. Sitaraman & Wuerth, *supra* note 16, at 1917–18 ("Courts applied the political question doctrine to limit the justiciability of foreign relations claims and thereby preserve the political branches' ability to shape foreign policy.").
19. *Id.* at 1900 ("[W]ithin the federal political branches, [exceptionalism] meant that the executive branch had expansive authority and received considerable deference.").
20. 343 U.S. 579 (1952).
21. 453 U.S. 654 (1981).
22. 548 U.S. 557 (2006).
23. 552 U.S. 491 (2008).
24. *Youngstown*, 343 U.S. at 668 (Vinson, C.J., dissenting).
25. *Id.* at 582–83 (majority opinion).
26. *Id.* at 583.
27. *Id.*
28. *Id.* at 589.

Justice Jackson formulated a tripartite analytical scheme to explain and evaluate the ebb and flow of powers between the two political branches.[29] The three parts of his scheme were:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . [Executive Action] pursuant to an Act of Congress [is] supported by the strongest of presumptions and the widest latitude of judicial interpretation . . . .
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .
> 3. When the President takes measures incompatible with the expressed 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. Courts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution . . . .[30]

This analytical scheme is the foundation for analysis of separation-of-powers questions in foreign-affairs cases.[31] It sets out the Executive Branch's sources of power and the judicial standard that should be used to evaluate the constitutionality of the Executive's actions. Using this framework, Justice Jackson concluded the President's actions fell into the third category and that the President did not have the power to nationalize the steel industry.[32]

2. Dames & Moore v. Regan

More than thirty years after *Youngstown*, the Court formally adopted the Jackson Concurrence for the first time in *Dames & Moore v. Regan*.[33] This time the Court was asked to decide the constitutionality of two Executive Orders issued by President Carter.[34] In response to the capture of the American embassy in Tehran—resulting in several Americans being held hostage—the President moved to freeze all of the assets of the Iranian government.[35] The petitioner, Dames & Moore, filed suit in the United States District Court for the Central District of California against the Government of Iran and a

29. *Id.* at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").
30. *Id.* at 635–38.
31. Sitaraman & Wuerth, *supra* note 16, at 1952.
32. *Youngstown*, 343 U.S. at 660 (Jackson, J., concurring).
33. Dames & Moore v. Regan, 453 U.S. 654 (1981).
34. *Id.* at 665.
35. *Id.*

third party whom it claimed owed over three million dollars in compensation under a contract for services already performed.[36]

The district court ruled in favor of Dames & Moore. However, the President issued an Executive Order implementing terms of an agreement between Iran and the United States to settle all disputes between any parties from the two countries before a specified tribunal.[37] The President subsequently issued another Executive Order referring any claims already in United States courts to the tribunal, and the district court suspended petitioner's claim accordingly.[38] The President relied on the Executive Branch's power to settle claims between the United States and foreign governments to issue the orders.[39] Dames & Moore moved for an injunction against both, claiming the Executive Orders were unconstitutional. Ultimately, the case was heard before the United States Supreme Court on appeal in 1981.[40]

The Court issued a unanimous decision[41] upholding the President's authority to issue both Executive Orders.[42] In its decision, the Court explicitly relied on the framework of the Jackson Concurrence to analyze the President's power.[43] It held the first Executive Order was authorized explicitly by Congress, falling into the first tier of the Jackson Concurrence framework, and was therefore within the President's power.[44] The Court found the second Executive Order was implicitly consented to by Congress, putting it into the second tier of the Jackson Concurrence, and thus, also within the President's power.[45]

3. Hamdan v. Rumsfeld

Following its decision in *Dames & Moore*, the Court next heard a foreign-affairs separation-of-powers case twenty-five years later in *Hamdan v. Rumsfeld*.[46] The *Hamdan* Court was faced with a challenge to an expansion of power by the Executive Branch during the course of the "War on Terror." The United States had detained and begun to try suspected terrorists captured in its collateral military action in Afghanistan.[47] The petitioner in *Hamdan* was one of these sus-

36. *Id.* at 663–64.
37. *Id.* at 664–65.
38. *Id.* at 666.
39. *See* United States v. Pink, 315 U.S. 203 (1942).
40. *Dames & Moore*, 453 U.S. at 667–68.
41. The ruling in *Dames & Moore* was unanimous, but there were two concurrences which both focused on a separate legal issue addressed at the end of the majority opinion unrelated to the Jackson Concurrence. *Id.* at 690 (Stevens & Powell, JJ., concurring).
42. *Id.* at 690 (majority opinion).
43. *Id.* at 668.
44. *Id.* at 674.
45. *Id.* at 688.
46. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
47. *Id.* at 566.

pected terrorists and was held at the U.S. naval base in Guantanamo Bay, Cuba.[48] The Executive Branch chose to try some of the detainees, including the petitioner, in military commissions instead of regular courts-martial. Relying on his power as Commander in Chief, the President established procedures for the commissions that varied significantly from courts-martial and other standard judicial actions, and began to carry them out.[49] The petitioner objected to those procedures on constitutional grounds, arguing they were illegal under both the Uniform Code of Military Justice and Geneva Convention.[50]

Like *Youngstown*, the ruling in *Hamdan* was fractured to the point of being chaotic, with two concurrences and two dissents joined by different combinations of Justices.[51] The majority decided the military commissions did not comply with procedures required by laws Congress passed to establish the Uniform Code of Military Justice and to implement the Geneva Convention and were therefore unconstitutional.[52] Unlike the other foreign-affairs cases, the majority in *Hamdan* did not engage in a thorough Jackson Concurrence analysis to answer the question, opting instead to rely on statutory interpretation.[53] However, the majority's decision had the implied effect of putting the analysis into the third tier of the Jackson Concurrence because the Court was deciding if the Executive Branch could conduct the military commissions where Congress had passed prohibiting legislation. This understanding is bolstered by the majority's citation to *Youngstown* in a footnote. It explained that any independent power the President may have to convene military commissions is still bound by Congress's exercise of its constitutionally granted powers in the same area.[54]

48. *Id.* at 568.
49. *Id.* at 591–93.
50. *Id.* at 567. The Court was also asked to answer a question about whether it had jurisdiction over the case, but that constitutional question is not relevant to the discussion in this Note. *Id.*
51. *Id.* at 564 ("STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI–D–iii, VI–D–v, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts V and VI–D–iv, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined . . . . KENNEDY, J., filed an opinion concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Parts I and II . . . . SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined . . . . THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to all but Parts I, II–C–1, and III–B–2 . . . . ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined as to Parts I through III . . . . ROBERTS, C. J., took no part in the consideration or decision of the case.").
52. *Id.* at 635.
53. *Id.* at 613.
54. *Id.* at 593 n.23.

Additionally, the majority's analysis is strengthened by Justice Kennedy's concurring opinion, which was joined by Justices Souter, Ginsberg, and Breyer from the majority. Justice Kennedy's analysis explicitly undertook the standard Jackson Concurrence analysis and put the Executive Branch's actions into the third tier.[55] This is juxtaposed with Justice Thomas's dissent, which placed the question squarely in the first tier of the Jackson Concurrence.[56] Thus, despite the different levels of reliance on the application of the Jackson Concurrence, an analysis of the opinions in *Hamdan* is valuable as part of the case law regarding foreign-affairs separation-of-powers questions because they both used the same analytical framework despite the different outcomes.

4. Medellín v. Texas

The final case in this canon is *Medellín v. Texas*.[57] In *Medellín*, the petitioner, José Medellín, was a Mexican national convicted of murder and sentenced to death in Texas.[58] He filed a habeas corpus petition on the grounds that he had not been advised of his right to consular assistance from the Mexican consulate after his arrest.[59] While the application was pending, the International Court of Justice (ICJ) issued a decision[60] concluding the United States had violated its treaty obligations by not informing several Mexican nationals, including Medellín, of their consular rights.[61] The ICJ ruling concluded the United States was accordingly obligated to review the conviction.[62]

The Fifth Circuit declined to follow the ICJ ruling and did not issue a writ of habeas corpus. The Supreme Court granted certiorari, but before it heard the case, President Bush issued a Memorandum attempting to enforce the ICJ ruling.[63] Medellín then filed a second habeas application in the Texas Court of Criminal Appeals, this time based on the President's Memorandum, to have the ICJ ruling enforced to review his death sentence.[64] The Supreme Court dismissed

55. *Id.* at 639 (Kennedy, J., concurring).
56. *Id.* at 680 (Thomas, J., concurring).
57. Medellín v. Texas, 552 U.S. 491 (2008).
58. *Id.* at 500–01.
59. *Id.* at 501.
60. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. Rep. 12 (Mar. 31).
61. *Id.*; *see* Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36(1)(b), Apr. 24, 1963, T.I.A.S. No. 6820, 596 U.N.T.S. 487 ("If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.").
62. *Medellín*, 552 U.S. at 502–03.
63. *Id.* at 503.
64. *Id.*

the first grant of certiorari to allow the Texas Court of Criminal Appeals hear the issue.[65] However, the Texas Court of Appeals refused to issue a writ of habeas corpus, so the Supreme Court again granted certiorari.[66]

The President maintained he could implement the ICJ ruling based on his Memorandum.[67] He argued it could enforce the treaty obligating the United States to enforce ICJ rulings as domestic law.[68] However, the Court found the treaty was nonself-executing and thus had to be implemented via legislation in order to take effect as domestic law.[69] It weighed the President's claim of unilateral power to implement the treaty against Congress's power to pass implementation laws and found them to be incongruent.[70] This conclusion put the case in the third tier of the Jackson Concurrence.[71] The Court then found that the Executive Branch did not have any exclusive power derived from the Constitution that would allow the President to unilaterally implement a treaty, and therefore his Memorandum could not do so.[72]

B. The Procedural History of *Zivotofsky*

The clash over section 214(d) arose in 2002—the same year it was adopted—with the birth of petitioner Menachem Binyamin Zivotofsky.[73] Zivotofsky was born to two American citizens in Jerusalem.[74] His mother visited the United States Embassy to request a passport and consular report of birth for him, and requested his place of birth on both read "Jerusalem, Israel."[75] The consulate refused based on FAM policy.[76] Zivotofsky's parents subsequently brought suit on his behalf in in the United States District Court for the District of Columbia for relief under section 214 against the Secretary of State in 2003.[77]

After the initial suit was filed, the subsequent legal battle spanned over a decade and involved multiple iterations. The district court initially dismissed the case because it did not believe Zivotofsky had

65. *Id.*
66. *Id.* at 504.
67. *Id.* at 525.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 527.
72. *Id.* at 530–32.
73. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015).
74. *Id.*
75. *Id.*
76. *Id.*
77. Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 2004 WL 5835212, at *2 (D.D.C. Sept. 7, 2004).

standing and because it was a nonjusticiable political question.[78] On appeal, the District of Columbia Circuit Court found there was standing and remanded the case for the district court to complete the record and reach a decision as to whether the case was justiciable or not.[79] During that appeal, both parties also agreed the proper question in the case was whether Zivotofsky could be issued a passport listing his place of birth as "Israel" instead of "Jerusalem, Israel," as the original complaint contended.

The district court again took up the case on remand in 2007. Both parties filed for summary judgment, and the Secretary of State also filed a motion to dismiss for lack of subject matter jurisdiction. The district court found they were faced with a nonjusticiable question under the standard in *Baker v. Carr*[80] and dismissed without ruling on the merits of either motion for summary judgment.[81] Zivotofsky again appealed, and the District of Columbia Circuit Court affirmed in 2009.[82] Zivotofsky then appealed the court of appeal's ruling, and the Supreme Court granted certiorari in 2011.[83]

The Supreme Court heard the case in 2012 and reversed the decision in an 8–1 ruling, with separate concurrences written by Justice Sotomayor and Justice Alito, and a dissent by Justice Breyer.[84] Chief Justice Robert's majority opinion responded that the question presented was the interpretation of a statute and its constitutionality,

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78. Zivotofsky *ex rel.* Ari Z. v. Sec'y of State, 444 F.3d 614, 615 (D.C. Cir. 2006).

79. *Id.* at 620.

80. 369 U.S. 186 (1962). *Baker* has six elements, any of which being met would create a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005). The district court found that the first, second, fourth, and sixth *Baker* elements were all met in the *Zivotofsky* case, and therefore, it was a political question that was not justiciable. Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 511 F. Supp. 2d 97, 102–06 (D.D.C. 2007).

81. Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 511 F. Supp. 2d 97, 107 (D.D.C. 2007).

82. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1233 (D.C. Cir. 2009) (holding the court did not have jurisdiction over the political question and therefore could not rule on the merits).

83. M.B.Z. *ex rel.* Zivotofsky v. Clinton, 563 U.S. 973 (2011).

84. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189 (2012).

and that question was within the scope of the courts' ability.[85] The case was remanded back down to the district court to be decided on the merits.[86]

The District of Columbia Circuit Court reviewed the case for a third time in 2013, a decade after section 214(d) was adopted and the original suit brought.[87] It ruled the President has sole recognition power and section 214(d) was an unconstitutional breach of that power.[88] Zivotofsky appealed this judgment and was again granted certiorari in 2014.[89]

The Court sustained the circuit court's ruling in another fragmented 6–3 ruling with two concurrences and two dissents.[90] The majority opinion focused on two questions. First, after deciding the executive action in question fell into the third category of the Jackson Concurrence,[91] it asked whether the Executive Branch's recognition power is "exclusive and conclusive."[92] Second, after determining whether the recognition power was exclusive and conclusive, it had to decide whether section 214(d) unconstitutionally encroached on the Executive's exclusive and conclusive recognition power.[93] Both of these questions were answered in the affirmative.[94]

Justice Breyer concurred, but wrote separately to reiterate his opinion that the case presented an issue which was a nonjusticiable political question.[95] Justice Thomas concurred in the judgment in part and dissented in part.[96] He found the Executive Branch has "residual foreign affairs powers" not set out explicitly in the Constitution.[97] He argued section 214(d) conflicts with those powers and Congress has no constitutional power in that area to interfere.[98] Justice Thomas concluded his concurrence by explicitly dissenting from the majority that the case at bar involved the recognition power,[99] but concurred in the judgment regardless, having already found section 214(d) to be unconstitutional for other reasons previously discussed.[100]

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85. *Id.* at 195–96.
86. *Id.* at 202.
87. Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013).
88. *Id.* at 225.
89. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 134 S. Ct. 1873 (2014).
90. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).
91. *Id.* at 2083. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
92. *Zivotofsky*, 135 S. Ct. at 2084.
93. *Id.* at 2094.
94. *Id.* at 2096.
95. *Id.* (Breyer, J., concurring).
96. *Id.* (Thomas, J., concurring).
97. *Id.* at 2099.
98. *Id.* at 2101.
99. *Id.* at 2112.
100. *Id.* at 2113.

Chief Justice Roberts, joined by Justice Alito, wrote the first dissent,[101] and both justices joined Justice Scalia's dissent as well. The Chief Justice wrote a separate opinion to highlight what he thought was an "unprecedented" error.[102] Like the majority, he framed the discussion using the Jackson Concurrence.[103] However, he found the Executive Branch did not have "exclusive and preclusive" recognition power[104] and fundamentally disagreed that section 214(d) conflicted with that recognition power at all.[105] Justice Scalia wrote the second dissent, which was much more in-depth and similarly concluded the Executive Branch did not have exclusive recognition power. Scalia further concluded that even if it did, section 214(d) did not conflict with the recognition power anyway.[106]

III. ANALYSIS

Zivotofsky is inconsistent with the previous foreign-affairs separation-of-power cases in two ways. The first is its reliance on an inconsistent, lower standard of constitutionally derived exclusive power in the third tier of the Jackson Concurrence than was used in previous decisions. The second is the Court's heavy reliance on functionalism to plug the gaps in its porous analysis. The sum of these two flaws is a substantial increase in the Executive Branch's power and a bewildering about-face in logic that makes predicting future cases futile.

A. The Third Tier of the Jackson Concurrence Standard Gets Lowered

To rule in favor of the Executive Branch, the *Zivotofsky* Court had to find the Executive's recognition power to be "exclusive and conclusive" because it fell into the third category of the Jackson Concurrence.[107] As mentioned *supra* Part II, Chief Justice Robert's dissent, Justice Scalia's dissent, and Justice Thomas's concurrence all disagreed whether the recognition power was even implicated. This Note assumes *arguendo* that the majority's contention that the recognition power was the correct issue to analyze was accurate. In making its decision, the Court needed to assess three sources: (1) the text of the Constitution, (2) its own precedent, and (3) the past practice of the

101. *Id.* (Roberts, J., dissenting).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 2114.
106. *Compare id.* at 2116–26 (Scalia, J., dissenting), *with id.* at 2113–16 (Roberts, J., dissenting).
107. *See supra* note 30 and accompanying text.

political branches.[108] While the Court discussed each of these sources, its analysis of the first source was notably discordant with its previous rulings in *Youngstown*, *Hamdan*, and *Medellín*.

To start its flawed analysis, the *Zivotofsky* Court identified the Executive Branch's power to receive ambassadors as the foundation for its recognition power.[109] The Court then built on that base by relying on the treaty power[110] and the power to nominate ambassadors.[111] It stated these powers add to the Executive's recognition power by giving him command over such decisions, which can be forms of recognition.[112] The Court attempted to justify this move by asserting that such power was "exclusive" to the Executive Branch because some of these powers were solely vested in it, while the Legislative Branch cannot initiate diplomacy with any foreign nation by itself.[113] This contention is particularly confusing because, by the Court's own admission, signing treaties or sending an ambassador may be an act of recognition, but neither of these things may be done solely by the Executive.[114] Therefore, two of the three examples the Court used to designate the recognition power as exclusive to the Executive Branch are explicitly shared powers, which is incompatible with the Court's assertion that somehow the President controls them.

The Court continued on to find that past precedent and political branch practice also supported the exclusivity of the Executive's recognition power.[115] However, had the Court accurately held the division of constitutional powers does not confer exclusive recognition power on the Executive Branch, its review of the past case law and practice by the two political branches would not have mattered.[116] Discussion of its analysis of those two sources is therefore unnecessary in the face of its error in deciding on the first.

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108. *Zivotofsy*, 135 S. Ct. at 2084. After assessing each of these three elements and ruling that recognition power was exclusive to the Executive Branch, the Court then assessed whether the statute in question abridged the Executive's recognition power. *Id*. at 2094.

109. *Id.* at 2085 ("It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.").

110. *Id. See generally* U.S. CONST. art. II, § 2, cl. 2.

111. *See generally* U.S. CONST. art. II, § 2, cl. 2.

112. *Zivotofsky*, 135 S. Ct. at 2085 ("In addition to receiving an ambassador, recognition may occur on 'the conclusion of a bilateral treaty,' or the 'formal initiation of diplomatic relations,' including the dispatch of an ambassador.") (citations omitted).

113. *Id.* at 2086.

114. *Id.* at 2087.

115. *Id.* at 2090.

116. Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power . . . .").

The standard to decide whether the Executive Branch has an exclusive constitutional power in *Zivotofsky* was by comparison much higher in *Youngstown*. In *Youngstown*, the Court dealt with the President's power as Commander in Chief and the Vesting Clause.[117] While *Youngstown* did not involve a statute that directly contradicted the Executive Branch's policy like *Zivotofsky*, Justice Black's majority opinion asserted the Executive Order issued by President Truman conflicted with the Legislative Branch's fundamental power to write laws.[118] The Court decided that where the Constitution was explicit about Congress's power to legislate, the Court would not give a liberal interpretation to the President as Commander in Chief to encroach on that power, let alone find that it was exclusive in the face of congressional action.[119]

In Justice Jackson's concurrence, he analyzed the two different sources of power the Executive Branch based its claim on. The first of these was the Vesting Clause, which he argued included any executive power available to the federal government under the law.[120] Justice Jackson characterized this blunt-force grab for power as antithetical to the separation of powers in general and dismissed it.[121] He then analyzed Congress's war powers in relation to the President's power as the Commander in Chief. Congress's war powers include the ability to raise and maintain a military force or call up the militia, whereas the commander-in-chief power pertains to the functional command of that military.[122] Finding Congress was explicitly granted distinct powers by the Constitution in this area, Justice Jackson would not give the Executive Branch a "monopoly" on war powers with which it could seize a steel plant.[123] This analysis is the reverse result of the recognition power carved out by the majority in *Zivotofsky*, which relied directly on multiple shared powers to find recognition was exclusive to the Executive Branch.[124]

The Court's analysis in *Hamdan* followed a standard similar to the one applied in *Youngstown*. As discussed *supra* Part II, the majority in *Hamdan* did not engage in a full Jackson Concurrence analysis, forgoing an analysis of whether the President had independent powers in an area Congress had legislated in multiple times.[125] The majority

117. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640–41 (1952) (Jackson, J., concurring).
118. *Id.* at 588–89 (majority opinion).
119. *Id.* at 587.
120. *Id.* at 640–41 (Jackson, J., concurring).
121. *Id.*
122. *Id.* at 644.
123. *Id.* at 642–43.
124. *See supra* note 110 and accompanying text.
125. Michael J. Turner, *Fade to Black: The Formalization of Jackson's* Youngstown *Taxonomy by* Hamdan *and* Medellín, 58 AM. U. L. REV. 665, 681 (2009).

simply decided Congress acted within its constitutional share of the war powers by enacting the legislation that created the UCMJ.[126] It further concluded the commission procedures also violated the Geneva Convention,[127] which was implemented by both the President and Congress as part of their shared treaty power.[128]

Thus, the *Hamdan* Court rejected the President's contrary actions in an area where Congress had acted within its constitutional powers. In fact, some scholars view this as the most important outcome of the *Hamdan* ruling.[129] Again, the *Zivotofsky* decision took the reverse approach by relying in part on the treaty power to find the Executive Branch's recognition power was exclusive. This is a diametrically opposite conclusion from *Hamdan*'s determination that Congress could trump presidential power by adopting legislation to implement the Geneva Convention under the *same* treaty power.

Finally, the Court also used the higher standard found in *Youngstown* and *Hamdan* in its decision in *Medellín*. In *Medellín*, the President argued the Executive Branch had the power to directly enforce an ICJ ruling because the United States was a party to treaties that created an obligation to comply with such rulings.[130] The Court found this was directly opposed to Congress's role in the treaty-ratification process laid out in Article II, Section 2 of the Constitution.[131] Once again, the Court discussed the necessity of action by both the Executive and Legislative Branches in order to implement a nonself-executing treaty and thereby give it domestic effect.[132] The Court spent little time dismissing the President's claim to a unilateral power to implement the treaty. It paused only to state that based on the Constitution's separation of powers, it should not be surprising that the President may not encroach on the Legislative Branch's role in the treaty-ratification process.[133] This analysis—like the analysis in *Hamdan*—is irreconcilable with the Court's finding in *Zivotofsky* that the recognition power is exclusive to the Executive Branch, as sup-

126. Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006); *see also* U.S. CONST. art. I, § 8, cl. 14 ("To make rules for the Government and Regulation of the land and naval forces").

127. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

128. *Hamdan*, 548 U.S. at 642 (Kennedy, J., concurring).

129. Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 418 (2015) ("It is against Congress's limited authorization, then, that the President's commissions must be assessed."); Turner, *supra* note 125, at 680 ("*Hamdan* reveals a new understanding of Jackson's third category by assuming that when Congress and the President disagree, Congress prevails.").

130. Medellín v. Texas, 552 U.S. 491, 525 (2008).

131. *Id.* at 526.

132. *Id.*

133. *Id.* 527–28.

ported by the President's purported control of the treaty and ambassador-nomination powers.

B. A Flawed Functionalist Approach

The second flaw in the Court's ruling in *Zivotofsky* is its heavy use of functionalism[134] to fill gaps in its porous arguments used to assess the recognition power. This approach occurred in the face of previous decisions explicitly rejecting a functionalist approach to foreign-affairs separation-of-powers questions. In its analysis of each of the three sources, in order to establish the Executive Branch's exclusive recognition power, the Court had to rely on such arguments to buttress otherwise indefensible positions in favor of the Executive Branch.

The most conspicuous functionalist argument occurs in the Court's discussion of the Constitution. Immediately following its confusing assertion that the recognition power is exclusive because some of the Executive Branch's recognition power is exclusive, the Court quickly followed by saying that "functional considerations" also suggest the recognition power *must* be exclusive to the Executive Branch.[135] This was because "the nation must speak with one voice" due to the dire consequences that come with the recognition of a foreign sovereign.[136] The Court concluded that the one voice had to be the Executive Branch's because the Legislative Branch does not have the capability to speak for the nation with a single voice like the Executive.[137]

The Court treated its analysis of the second source, relevant case law on recognition powers, in much the same way. The Court acknowledged up front that no case law directly determines the President holds the recognition power exclusively.[138] After a review of some case law that was not dispositive, the majority again sought to supplement a weak case in chief with functionalism. It concluded that regardless of the Court's unclear precedent, Congress could not force the Presi-

134. *See generally* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998) ("Functionalism . . . might be associated with standards or balancing tests that seek . . . greater flexibility . . . . [It] might be understood as induction from constitutional policy and practice, with practice typically being examined over time . . . . [It] emphasiz[es] pragmatic values like adaptability, efficacy, and justice in law.").

135. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015).

136. *Id.* (citation omitted).

137. *Id.* The Court further argued that the nation must speak with one voice because the foreign nations being negotiated with must have unequivocal assurances in their dealings with the United States. *Id. See generally* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1044 (2014) (discussing the merits and history of the "one voice" doctrine in foreign affairs).

138. *Zivotofsky*, 135 S. Ct. at 2088.

dent to contradict himself because of the significant legal consequences.[139]

Finally, the Court repeated this functionalist framework yet again in its assessment of the past practice of the political branches. It did not go into the same depth as the previous two sources but did explicitly conclude the sum of the Legislative Branch's past practice served "on balance" to acknowledge the importance of the Executive speaking with once voice.[140] This brief functionalist soliloquy in the analysis is the shortest of the three but shows the Court's functionalist approach permeated each of the three steps in deciding whether the recognition power was exclusive to the Executive Branch.

In contrast to *Zivotofsky*, the Court conspicuously rejected functionalist concerns in *Youngstown*, *Dames & Moore*, *Hamdan*, and *Medellín*, which were all cases involving similarly dire diplomatic consequences as in *Zivotofsky*. In *Youngstown*, the crux of the government's argument was that it had the "inherent power" to take action to avert a national catastrophe.[141] Justice Black chose not to even address those functional claims. Instead he preferred a purely formalist assessment of whether or not the Constitution or Congress had given the Executive Branch the power it was relying on.[142] Justice Jackson however, chose to address the functional arguments put forth by the government, not only as applied in the case at bar but more generally regarding such an expansion of executive power in the face of a national emergency.[143] He argued it is too easy to let contemporary circumstances in the form of emergencies overshadow the importance of the balance of power intentionally set out in the Constitution.[144] He concluded the Court should be the protector of the Constitution in such situations.[145]

Despite those arguments, some scholars argue Justice Jackson's concurring opinion supports a functionalist approach to assess foreign-affairs separation-of-powers cases.[146] That assessment fails for three reasons. The first, and arguably the strongest, is that Justice Jackson began his analysis by first looking to original intent.[147] It was

139. *Id.* at 2090.
140. *Id.* at 2094.
141. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).
142. *Id.* at 589.
143. *Id.* at 634 (Jackson, J., concurring).
144. *Id.* ("The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.").
145. *Id.* at 655 ("Such [separations of power] may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.").
146. Cohen, *supra* note 129, at 394 ("Functionalism, in contrast, is at the heart of Justice Jackson's influential concurrence in *Youngstown* . . . .").
147. *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring).

only after concluding original intent could not be discerned that Justice Jackson turned to a different construction.[148] If he believed a functionalist decision was the correct format to begin with, then he need not have even gone through that initial analysis.

The second reason is the nature of his tripartite scheme itself. In trying to solidify an analytical framework, Justice Jackson attempted to create a structure that could be used by the Court in lieu of the kind of multifactor balancing test usually associated with functionalist arguments.[149] Within each of the scheme's three tiers, the analysis relies solely on the question of the constitutionality of the actions taken by either branch. Nowhere in his analysis does he attempt to balance the needs of the branches.

The final factor in favor of a formalist interpretation of the Jackson Concurrence is the outcome of his opinion. Justice Jackson's rejection of the Government's functionalist arguments came in the face of a growing conflict with Korea and the Cold War.[150] So dire was the situation that President Truman believed the use of nuclear weapons was not only a possibility but may in fact have been demanded by a war-weary American public if the Soviet Union had sent troops into Korea.[151] Yet even with the threat of nuclear war, Justice Jackson still ruled against a dangerous increase in power for the Executive Branch. This conclusion was reached despite the protests by the dissent of the gravity of the situation.[152] These three reasons point to a rejection of functionalism and set the line for future decisions in foreign-affairs separation-of-powers cases even during times of national emergency.

The *Hamdan* Court similarly rejected functionalist arguments for an expansion of executive power. *Hamdan*, like *Youngstown*, was decided during a time of international conflict for the United States.[153] The September 11, 2001, terrorist attacks were the worst in U.S. history, and the resulting conflict in Afghanistan and the "War on Terror" were far from finished.[154] The petitioner was accused of providing weapons, ammunition, and security to Osama Bin Laden.[155] It was in this context that the government argued the danger presented by ter-

148. *Id.*

149. Cohen, *supra* note 129, at 392.

150. *Youngstown*, 343 U.S. at 668 (Vinson, J., dissenting).

151. Roger Dingman, *Atomic Diplomacy During the Korean War*, 13 INT'L SEC. 50, 53–54 (1989).

152. *Youngstown*, 343 U.S. at 668 (Vinson, J., dissenting) ("A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.").

153. Hamdan v. Rumsfeld, 548 U.S. 557, 567–68 (2006).

154. *Id.*

155. *Id.* at 646 (Kennedy, J., concurring).

rorism was so great it should not have to comply with the rules of normal courts-martial.[156]

The majority began its opinion by acknowledging the special place in American's minds occupied by the atrocities committed by Bin Laden and al Qaeda on September 11, 2001.[157] However, while it acknowledged the danger presented by terrorism, it refused to bow to fear and expand the Executive Branch's power in the face of contrary laws passed by Congress.[158] This rejection of functionalism in the face of the sizeable threat of international terrorism is also inconsistent with the Court's approach in *Zivotofsky*.

Finally, the *Medellín* Court also rejected the functionalist argument put forth by the Executive Branch to support its attempt to expand its powers. The President argued his role in the government made him specially qualified to make the foreign-affairs decision that compliance with the ICJ ruling demanded.[159] He claimed the need to vindicate the United States' interest in upholding international law and the Vienna Convention justified his ability to unilaterally implement a non-self-executing treaty.[160] As noted by Justice Thomas's concurrence and the dissent, the United States' international reputation was seriously threatened by the potential to put a Mexican national to death[161] in direct defiance of an ICJ ruling.[162]

The Court conceded that such an interest is compelling.[163] However, the Court succinctly dismissed it as a determining factor in deciding the balance of power between the two political branches in a single, short sentence.[164] The Court instead relied squarely on the Jackson Concurrence to decide the issue. This curt rejection of functionalism contrasts starkly with the *Zivotofsky* decision, which required a repeated functionalist buttress to support its shaky analysis of the exclusivity of the Executive's power at each step of its analysis.

The *Dames & Moore* decision dealt less directly with a functionalist versus formalist approach, but it is still instructive. A close reading shows the Court did not intend to endorse a functionalist justification for a large expansion of the Executive Branch's power as found in the

156. *Id.* at 622 (majority opinion).
157. *Id.* at 567–68.
158. *Id.* at 624.
159. Medellín v. Texas, 552 U.S. 491, 523–24 (2008).
160. *Id.* at 524.
161. José Medellín was in fact eventually executed for his crimes on August 5, 2008, five months after the Court's decision in *Medellín* to deny the application of the ICJ ruling. Allan Turner & Rosanna Ruiz, *Medellin Executed For Rape, Murder of Houston Teens*, HOUS. CHRON., Aug. 5, 2008, http://www.chron.com/news/houston-texas/article/Medellin-executed-for-rape-murder-of-Houston-1770696.php [https://perma.unl.edu/5B8Z-6ST7].
162. *Medellín*, 552 U.S. at 524.
163. *Id.*
164. *Id.* ("Such considerations, however, do not allow us to set aside first principles.").

Zivotofsky ruling. The most persuasive evidence for this reading of *Dames & Moore* is the bookended structure of its analysis that explicitly states the ruling was intended to apply only to the case it was deciding and was not creating a new rule to be applied in other situations.[165] This is considerably different from the broad scope of the Court's announcement in *Zivotofsky* that the recognition power is exclusively the domain of the Executive Branch.

The different categorization of the ruling in *Dames & Moore* also plainly distinguishes it from the other previously discussed cases. The *Dames & Moore* Court found Congress had explicitly approved the first Executive Order, putting it in the first tier of the Jackson Concurrence.[166] The second was supported by congressional intent and past practice, putting it in the second tier.[167] This is juxtaposed with *Youngstown*, *Hamdan,* and *Medellín*, which the Court analyzed in the third tier of the Jackson Concurrence, finding the Executive Branch was encroaching on the Legislative Branch's constitutional powers. *Zivotofsky* is even further separated from *Dames & Moore* than *Youngstown*, *Hamdan*, and *Medellín* because in *Zivotofsky*, Congress explicitly acted in opposition to the Executive Branch's actions by enacting Section 214(d).

It is clear from *Youngstown*, *Hamdan,* and *Medellín* the Court has continuously refused broad expansions of Executive Branch powers on the grounds of functionalist arguments in foreign-affairs separation-of-powers cases. Because the *Dames & Moore* Court explicitly stated it was not creating a broad executive power in the contested area, and because the case did not fall into the third tier of the Jackson Concurrence, it is easily discernable from *Zivotofsky*. Therefore, it lends no justification to the Court's functionalist approach in *Zivotofsky*. In short, the canon of foreign-affairs separation-of-powers cases is clearly inconsistent with the functionalist foundation the *Zivotofsky* Court relied on.

C. The Consequences of the Court's Errors in *Zivotofsky*

The decision in *Zivotofsky* had two main consequences. The first is a two-pronged increase in the Executive Branch's power. The first, most obvious increase in the Executive's power was the addition of the recognition power. *Zivotofsky* cemented the recognition power as exclusively the province of the Executive Branch instead of the shared

165. Dames & Moore v. Regan, 453 U.S. 654, 660–61 (1981) ("We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.").

166. *Id.* at 674.

167. *Id.* at 678.

status it had in past practice.[168] Chief Justice Roberts highlighted the gravity of this transition in his dissent when he noted it was the first time the Executive had ever been allowed to act in the face of explicit congressional opposition in the area.[169]

The second increase in Executive Branch power is the Court's application of a lower standard to find an executive power is exclusive, combined with the dependence on functionalist arguments to justify that standard.[170] Both make future Jackson Concurrence analysis favor the Executive Branch in the third tier. The question is now to what degree the "one voice" logic applied by the majority will become the standard the Court uses to assess separation-of-powers cases involving foreign affairs. Certainly the majority's analysis regarding the Executive's ability to act decisively and engage in sensitive or covert matters of state holds true in a myriad of situations in foreign affairs. Similarly, the unitary nature of the Executive Branch will also almost always make it a more practical or expedient operator to solve problems.[171] Given the number of enumerated powers the Legislative Branch has in the field of foreign affairs, there is an untold amount of power that may now be in reach of the Executive Branch if the Court finds its own logic persuasive in other situations.

The second major consequence of the *Zivotofsky* decision was to make the prediction of future foreign-affairs separation-of-powers decisions impractical. *Zivotofsky* raises the question of what standard will be used to assess whether a power is exclusive to the Executive Branch within the third tier of the Jackson Concurrence going forward. To find an exclusive executive power, will the Court apply the loosened standard found in *Zivotofsky*? Or will it rely on the standard it used in *Youngstown*, *Hamdan*, and *Medellín*? Will its choice of standard rely on the persuasiveness of functionalist arguments surrounding the power in question? The purpose of a functionalist justification is to make the law more practical. Instead, *Zivotofsky* has ironically made it less functional for future decisions by making it unclear exactly what the law is in different circumstances the Court may face in new cases.

The unpredictability of the Court in this area is particularly disturbing given the hazardous situations the Court usually faces in

168. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2088–90 (2015) ("[U]ntil today, the political branches have resolved their disputes over questions of recognition.").

169. *Id.* at 2113 (Roberts, J., dissenting) ("Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs.").

170. Cohen, *supra* note 129, at 395 ("[I]n the foreign affairs context, functionalism favors the executive branch.").

171. *Id.*

these cases.[172] In the five decisions the Court has ruled on in this area, the backdrops have involved the Korean War, the possibility of using nuclear weapons, and the collapse of diplomatic relations with Iran, including the capture of hostages in the American consulate in Tehran, the prosecution of terrorists during the "war on terror," the international credibility of the United States after the execution of a convicted criminal in Texas in the face of an ICJ ruling, and a dispute over U.S. foreign policy in Jerusalem—one of the most contentious issues in international politics. Making it unclear how the Court will assess the relationship of constitutionally founded foreign-affairs powers in future cases adds significant complexity to already-delicate scenarios. Such a convoluted outcome could have been avoided had the Court relied on the approach it had previously used in *Youngstown, Dames & Moore, Hamdan,* and *Medellín*.

IV. CONCLUSION

If history is any indication, the battle for control of the City of Jerusalem will continue on well into the future. Similarly, the tension between the President's attempt to respond to the challenges presented to the Executive Branch and the Constitution's separation of powers is likely to last as long as the Union itself. The *Zivotofsky* Court was presented with a rare opportunity to wade into this area to settle a dispute between the Executive and Legislative Branches in the third tier of the Jackson Concurrence.

Unfortunately, the Court's decision in *Zivotofsky* had two major inconsistencies with its past decisions in *Youngstown*, *Dames & Moore*, *Hamdan*, and *Medellín*. The first was the lower standard the Court relied on to assess whether a power is exclusive to the Executive Branch. The Court started with the power to receive ambassadors but then perplexingly relied on the treaty power and the power to nominate and appoint ambassadors—two explicitly shared powers—to find that the combination of the three gave the recognition power solely to the Executive Branch. The second was the functionalist gap filling the Court used to attempt to shore up its weakened standard for finding the recognition power is exclusive—an approach it had explicitly rejected in the previous cases.

The combination of these errors made the application of the Jackson Concurrence in this area of law even murkier. It is now unclear whether the Court will follow its approach from the previous cases or the divergent path it chose in *Zivotofsky*. Thus, more than sixty years

172. Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS L.J. 5, 20 (2008) ("In the area of foreign affairs . . . the interpretations we give the Constitution can implicate the survival of the Republic itself." (quoting H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1476 (1999))).

after Justice Jackson famously lamented the lack of "really useful and unambiguous authority applicable to concrete problems of executive power,"[173] the Court's most recent decision has only served to complicate the issue even further.[174]

The Court's analytical flaws in *Zivotofsky* also increased the Executive Branch's power. The Court concluded the Executive held the recognition power exclusively for the first time. The lowered standard for finding a power is exclusive to the Executive Branch, and the functionalist approach adopted to reach that result, may also increase Executive Branch power significantly if it is applied in future cases. The sum of these increases has moved the Executive Branch in the direction of the expansive executive power wielded by King George III, the example both feared and rejected by Justice Jackson in his famous *Youngstown* concurrence.[175]

173. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

174. For a discussion of the impact of the Court's erratic approach to foreign affairs cases in general, see Vladeck, *supra* note 15.

175. *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring).