

INTRODUCTION TO AGORA: REFLECTIONS ON *ZIVOTOFSKY V. KERRY*

*Curtis A. Bradley** and *Carlos M. Vázquez†*

AJIL Unbound is pleased to publish an Agora on the Supreme Court's recent decision in *Zivotofsky v. Kerry* (*Zivotofsky II*).¹ This highly anticipated separation-of-powers decision addresses the validity of congressional action alleged to intrude upon the President's exclusive power to recognize foreign sovereigns. The petitioner in *Zivotofsky* was born in Jerusalem and wished to have his birthplace designated on his passport as "Israel." Because the Executive branch does not recognize any country's sovereignty over Jerusalem, the birthplace of U.S. citizens born in Jerusalem has been designated on their passports as "Jerusalem." In 2002, Congress passed a statute entitling persons born in Jerusalem to have "Israel" designated in their passports as their place of birth. At issue in the case was the validity of this statute.

In an earlier decision, *Zivotofsky v. Clinton* (*Zivotofsky I*),² the Court held that the question of the validity of the statute did not present a nonjusticiable political question. This symposium focuses on the merits decision, *Zivotofsky II*, decided on June 8, 2015. The majority, in an opinion by Justice Kennedy, held that the President's power to recognize foreign sovereigns is exclusive and that Congress' statute unconstitutionally interfered with that power. Chief Justice Roberts and Justice Scalia wrote dissents, which Justice Alito joined. Both dissents expressed skepticism about the majority's conclusion that the President's recognition power is exclusive, but, in the end, both dissents rested on the conclusion that the statute Congress had enacted did not unconstitutionally interfere with that power. (Justice Thomas largely concurred with the majority, albeit on other grounds.)

The first set of essays in this Agora offer diverse insights into a variety of aspects of the opinions in the case. Our contributors from Philadelphia—Peter Spiro of Temple University Beasley School of Law and Jean Galbraith of the University of Pennsylvania School of Law—both note that the majority opinion departs from earlier decisions that had led some scholars to claim that the Roberts Court was "normalizing" Foreign Relations Law. Spiro frames this departure as a temporary retreat from normalization, while Galbraith sees value in the uncertainty produced by the departure. The contribution by Harlan Cohen of the University of Georgia School of Law examines the competing visions of foreign relations law reflected in the opinions of Justice Kennedy's and Chief Justice Roberts—the first highly functionalist and the second highly formalist—and the role those visions may be playing across the Court's foreign relations law jurisprudence. The contribution by Curtis Bradley of Duke Law School focuses on what the majority opinion in *Zivotofsky* tells us about the importance of historical practice in constitutional interpretation, particularly in the field of Foreign Relations Law, and also describes tensions between a custom-based approach to the separation of powers and the institution of judicial review.

A second set of essays will follow shortly after.

* *Van Alstyne Professor, Duke Law School.*

† *Professor of Law at Georgetown Law School.*

Originally published online 20 July 2015.

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

² *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).