AGORA: REFLECTIONS ON *ZIVOTOFKSY V. KERRY*
PRESIDENTIAL SIGNING STATEMENTS AND DIALOGIC CONSTITUTIONALISM

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When the Supreme Court held that the executive branch has exclusive authority to recognize foreign sovereigns in the Jerusalem passport case, *Zivotofsky v. Kerry (Zivotofsky II)*,[1] Jack Goldsmith hailed the decision as a "vindication" of presidential signing statements and executive power.[2] Indeed, in the context of the debate over the treatment of the terror suspects, the New York Times had called such signing statements the "constitutionally ludicrous" work of an overreaching, "imperial presidency."[3]

Others in this Symposium[4] and elsewhere have covered what a "bonanza"[5] *Zivotofsky II* is for foreign relations law, the competing visions[6] of foreign relations at the case's center, the justices' reliance on historical practice[7] in constitutional interpretation, and the ways in which the opinion departs from[8] or reinforces[9] the Roberts Court trend toward "normalizing"[10] foreign relations law.

Building on these themes, the focus of this essay is on how *Zivotofsky II* demonstrates the role that presidential signing statements can play in facilitating inter-branch dialogue,[11] as a means of promoting clarity, cooperation, and compromise in constitutional interpretation.[12] Notwithstanding my earlier criticism of specific signing statements in the context of the treatment of terror suspects[13]—a position I maintain today based on my disagreement with the substance of those statements—I am not against signing statements per se.

In fact, I agree with Goldsmith that "[s]igning statements are not in themselves cause for concern . . . . Poor interpretations of Article II articulated in a signing statement can be a cause for concern—especially in the rare

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Originally published online 21 August 2015.

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

2 Jack Goldsmith, *Zivotofsky's Vindication (and the New York Times' approval) of Signing Statements*, LAWFARE (June 9, 2015, 9:16 AM).

3 Editorial, *The Imperial Presidency at Work*, N.Y. TIMES, Jan. 15, 2006.

4 Curtis A. Bradley & Carlos M. Vázquez, *Introduction to Agora: Reflections on* Zivotofsky v. Kerry, 109 AJIL Unbound 1 (2015).

5 Ingrid Wuerth, Zivotofsky v. Kerry: *A Foreign Relations Law Bonanza*, LAWFARE (July 12, 2015, 2:30 PM).

6 Harlan Grant Cohen, Zivotofsky II's *Two Visions for Foreign Relations Law*, 109 AJIL Unbound 10 (2015).

7 Curtis A. Bradley, *Historical Gloss, the Recognition Power, and Judicial Review*, 109 AJIL Unbound 2 (2015).

8 Jean Galbraith, Zivotofsky v. Kerry *and the Balance of Power*, 109 AJIL Unbound 16 (2015).

9 Peter J. Spiro, *Normalizing Foreign Relations Law after* Zivotofsky II, 109 AJIL Unbound 22 (2015).

10 Ganesh Sitaraman & Ingried Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

11 *Cf.*, Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001) (discussing the value of a dialogic approach between federal and state governments in domestic incorporation of human rights law).

12 See *id.*; Galbraith, *supra* note 8.

13 Catherine Powell, *Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. INT'L L. & POL. 723 (2008).

signing statement that leads to non-compliance."[14] Criticism of signing statements are often really debates about the proper reach of presidential power. *Zivotofsky II* provides an opportunity to assess the value of signing statements in a different light and to build on my earlier work on dialogic approaches to the Constitution.[15]

I. Who is in Dialogue, with Whom, and on What Terms?

The signing statement implicated in *Zivotofsky II* is one President George W. Bush issued when he signed into law the statute at question—the Foreign Relations Authorization Act, Fiscal Year 2003.[16] Most presidential signing statements perform an expressive function, and the one at issue in *Zivotofsky II* articulated the executive branch's long-held position of neutrality in the dispute between the Israelis and Palestinians regarding sovereignty over Jerusalem. While American presidents have maintained a consistent policy of formal recognition of Israel since President Truman in 1948, neither Truman nor any subsequent U.S. president has recognized *any* country's sovereignty over Jerusalem specifically—insisting instead that the matter be addressed through negotiations.

By contrast, the U.S. Congress has expressed its support for Israeli sovereignty over the city. In 2002, Congress adopted the appropriations bill at issue in *Zivotofsky II*, Section 214(d) of which provides that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] *shall*, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[17] In placing this provision in a section of the statute with the heading "United States Policy with Respect to Jerusalem as the Capital of Israel," Congress's intended signal on the question of recognition was unmistakable.

In signing the Act into law, President George W. Bush issued a signing statement, indicating his view that "if construed as mandatory rather than advisory, [section 214(d) would] impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states."[18] President Bush underscored that "U.S. policy regarding Jerusalem has not changed."[19]

In issuing the signing statement, President Bush opened up a dialogue on several fronts with regard to who has constitutional authority *to make* particular types of diplomatic statements and who has authority *to determine the content* of such communications. While President Obama maintained Bush's position on neutrality over Jerusalem—and thus there was consensus on this point across party and across administrations, dialogic constitutionalism involves the President and Congress developing an intra-*branch* consensus in interpreting a particular constitutional principle, which the Court later adopts. In *Zivotofsky II*, the Court stepped in to ultimately resolve the disagreement. Nonetheless, we can examine *Zivotofsky II* for its potential as a case of dialogic constitutionalism, even though it ultimately falls short.

The model of dialogue *Zivotofsky II* presents runs both horizontally and vertically. Along the horizontal axis, the President and Congress are in dialogue with each other—and ultimately the courts—over the boundaries

[14] Goldsmith, *supra* note 2.

[15] Powell, *supra* note 11. While not personally invested in the outcome of the case, by coincidence, my son was born in Jerusalem in March 2003, shortly after the statute at issue went into effect and Zivotofsky's parent sought to have "Israel" put on their son's U.S. passport. We lived in Jerusalem that year because my son's father was the chief of staff to the UN Special Envoy to the Middle East Peace Process at the time.

[16] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002).

[17] *Id.* (emphasis added).

[18] Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sep. 30, 2002).

[19] *Id.*

of their respective authority over diplomatic communications. As in many debates over constitutional interpretation, the disagreement between the President and Congress (and ultimately between the majority and dissent) can be framed as a dispute over the level of generality or specificity for defining the scope of the constitutional authority. While Justice Kennedy resolves the case on the narrow issue of who has authority to recognize foreign sovereigns, in dissent, Chief Justice Roberts and Justice Scalia frame the issue more broadly on the President's powers, respectively, to engage in foreign relations and in a range of foreign affairs-related activities, such as naturalization. With the signing statement, the President, in effect, warned Congress that it has overstepped its bounds and declined to enforce section 214(d).

Along the vertical axis, the President and Congress are speaking to the People, who can elevate representatives up into high office, but just as easily vote them down if they do not agree with them. Beyond the ordinary public in the United States, the President and Congress were also speaking to the various publics abroad, both "up" to the United Nations and international community more broadly and "across" to the various parties and constituencies in the Middle East. The courts and these various publics are able to use both Congressional and Presidential statements as inputs in making determinations about who wins the constitutional battles at stake.

The fact that the signing statement had an expressive function aimed at the Israeli and Palestinian factions in the Middle East—and the fact that the Supreme Court recognized this expressive function—is apparent from the way Kennedy discusses it. In holding that section 214(d) unconstitutionally infringed on the President's exclusive power to recognize foreign sovereigns, Justice Kennedy's majority opinion discusses how the signing statement was part and parcel of the executive branch's efforts to send a signal to the parties in the region that U.S. policy toward Jerusalem had, in fact, not changed.[20] The President's view of his exclusive authority to recognize foreign sovereign authority over Jerusalem—as is illustrated in the signing statement—is nicely aligned with Kennedy's analysis of constitutional text, structure, precedent, and historical practice. While Kennedy does not appear to give the signing statement much independent weight in his ultimate conclusion, the discussion of the signing statement over three paragraphs in the majority opinion suggests that the statement provided information to the Court about the President's view as well as evidence of the strength and persistence of the President's position.

The expressive work the signing statement performs is in laying down a marker—even before the emergence of litigation—that the executive branch would continue its policy of neutrality on Jerusalem as a matter of foreign policy. Maintaining neutrality on Jerusalem has helped the United States project an image as an honest broker in peace negotiation.[21] This was important in the context of the Middle East peace process in 2002 and 2003, particularly in the context of a war against Iraq that, at least in 2003, was popular with the Israeli government but not among many Arabs. A variety of foreign policy considerations (related to both the Israeli-Palestinian conflict as well as the region) were at play. In holding that the executive branch has exclusive power over recognition of foreign sovereigns, Justice Kennedy's functionalist approach prioritized the value of having the President as the single decision-maker in balancing such delicate foreign policy concerns.

While President Bush might have considered other vehicles for expressing his view on Jerusalem, these other options seemed less desirable. A press release would have carried less weight; an executive order would have only applied to the executive branch; and an executive memorandum would have had even less legal weight

[20] Zivotofsky II, 135 S.Ct. at 2082 (noting that when Palestinian leaders protested this new U.S. statute—despite the signing statement—the Secretary of State was forced to respond by "advis[ing] diplomats to express their understanding of 'Jerusalem's importance to both sides and to many others around the world.'" *Id.* (internal citation omitted)).

[21] The status of Jerusalem is one of the most difficult issues to resolve in Israeli-Palestinian conflict and diplomats involved in the peace negotiations have therefore preserved it as a final status issue to be resolved as part of a comprehensive peace plan.

than a signing statement.[22] Bush also could have vetoed this Authorization Act,[23] but by issuing a signing statement instead, he was able to reap the benefits of other aspects of legislation that he liked, while sending signals on the status of Jerusalem and his own authority over recognition.

II. Dialogic Approach to Constitutional Interpretation in Foreign Affairs

In *Zivotofsky II*, the Court stepped in to resolve the conflict. But in other conflicts—signaled by presidential signing statements—the political branches and public have engaged in forms of dialogic constitutionalism to mediate and eventually come to consensus, followed by the Court adopting the constitutional principle. As I have elaborated more fully elsewhere,[24] President Bush's signing statement on the McCain Amendment (concerning humane treatment of terror suspects detained abroad) was the subject of tremendous controversy and debate. In response to criticism of this signing statement and other assertions of executive power concerning detainees, the Bush Administration eventually conceded that it would apply the Geneva Convention standards of humane treatment to, for example, Guantanamo, as a matter of policy, though not as matter of law. The iterative process that followed among Congress, the executive branch, and courts represented a dialogic process that, at least with respect to the use of enhanced interrogation techniques, was resolved with the election of President Obama and his Executive Orders on point.

While presidential signing statements can be used in problematic ways to assert controversial substantive positions, they can promote dialogue with coordinate branches as well as a degree of executive branch transparency, unlike—for example—the Office of Legal Counsel memos prepared during the presidency of George W. Bush, which were not regularly made public. Elsewhere, I have discussed the value of dialogic approaches to constitutional interpretation in the context of cooperative federalism.[25] In this essay, I extend that analysis to the way presidential signing statements shape and influence the struggle for constitutional meaning among the President, Congress, and the federal courts.

Curtis Bradley and Eric Posner point out that presidential signing statements emerged around two hundred years ago and have been routinely used from the New Deal onward.[26] Signing statements have played a variety of expressive roles: to explain or praise a bill; to illuminate how executive branch officials will implement the bill; to assert a particular interpretation of a specific provision of a bill; to describe how the bill will interact with other statutes; to criticize Congress on policy grounds; and to criticize, question, or clarify Congressional action on constitutional grounds (including where presidential power is implicated) as in *Zivotofsky II*.[27]

In fact, presidents have claimed authority to disregard statutes that they argued were unconstitutional at least as far back as Jefferson, who decided not to continue prosecutions under the Sedition Act because of his concerns that this infringed on the First Amendment.[28] Across party lines, several administrations have taken the position that the president may decline enforcement of statutes believed to be unconstitutional.[29]

[22] *Cf.*, Medellín v. Texas, 552 U.S. 491 (2008).

[23] In fact, Bush did not exercise the veto power for his first five and a half years in office, and yet he issued more signing statements based on constitutional objections than any other president. Jamie E. Kay, *Eight Years, Twelve Vetoes: Why President Bush Chose to Ignore his Veto Power*, 2 STUDENT PULSE, No. 05, 2010. *See also* Charlie Savage, *Bush Challenges Hundreds of Laws*, N.Y. TIMES, Apr. 30, 2006.

[24] Powell, *supra* note 13.

[25] *Cf.*, Powell, *supra* note 11.

[26] Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006).

[27] *Id.*

[28] *Id.* at 335.

[29] *Id.* at 336 (citing, among others, the well-known Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to the Honorable Abner J. Mikva, Counsel to the President para. 3 (Nov. 2, 1994)).

In envisioning a model of dialogue that runs both horizontally and vertically, *Zivotofsky II* fits most closely—though ultimately not perfectly—within the standard political science model of dialogic constitutionalism.[30] On this view, dialogue among the three branches of the federal government occurs over a fairly long period, until the Supreme Court is eventually "brought into line with the constitutional views held by a political coalition that sustains itself in power for a suitably long period[,]" such that, through the appointments process, new justices whose views mirror the views of the political coalition are elevated to the Supreme Court.[31] In *Zivotofsky II*, there was ultimately no political consensus between the executive and legislative branches (though, as mentioned above, there *was* consensus across party-lines and across administrations with*in* the White House, with both Presidents Bush and Obama maintaining the same position on Jerusalem's neutrality).

The model of dialogue at work in *Zivotofsky II* is also different from the account of dialogic constitutionalism emphasized by social movement theorists, such as Robert Post and Reva Siegel (who envision constitutional law shaped more directly by the People, who organize "social movements that offer distinctive constitutional visions").[32] *Zivotofsky II* also does not quite fit the dialogic model implied by Bruce Ackerman's constitutional moments, in which the courts face "a mobilized public, and its political leadership [and thus] abandon their previous interpretation of the Constitution and adopt the one offered by their conversational partners" through an interaction producing a "switch in time."[33]

Finally, as a descriptive matter, the outcome in *Zivotofsky II*—and the dialogic model sketched here to explain the outcome—is dissimilar from popular constitutionalism. "In popular constitutionalism, everyone—the mobilized people, their political representatives, and the courts—offers up constitutional interpretations all at once," but unlike the dialogic approaches just discussed, "the courts have no normative priority in the conversation."[34] Putting *Zivotofsky I and II* together, the Court *did* have priority and the final say, in reaching and deciding the merits (in contrast to the popular constitutionalism approach).

Even so, Peter Spiro is right to note that the Court is not the only relevant branch engaged in interpreting the scope and division of authority in foreign affairs under the Constitution.[35] Presidential signing statements are one channel through which the executive branch can promote its understanding of presidential foreign affairs (and other constitutional) authority. And as Jean Galbraith reminds us, Edward Corwin described the Constitution as "an invitation to struggle for the privilege of directing American foreign policy[.]"[36] Yet, *Zivotofsky* stands for the proposition that the Court has supremacy over constitutional interpretation, and that this supremacy—common in the domestic affairs realm—extends to (at least some) matters of interpretation in foreign affairs.

Of course, a presidential signing statement that asserts a particular constitutional interpretation may outline a view at odds with Congress's view or merely clarify a potentially shared view. The "substantive uncertainty

[30] The approaches to dialogic constitutionalism outlined here are drawn from Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006). The political science view originated with Robert Dahl and was updated by Barry Friedman. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

[31] Tushnet, *supra* note 30, at 998 (citing Dahl and Friedman).

[32] *Id.* (citing Post and Siegel and describing how these social movements "offer constitutional visions, typically oppositional to the vision dominant in the courts [and perhaps other branches] when the movements begin[,]" but who overtime influence the Court, though not through the standard political process and appointments process).

[33] *Id.* at 999 (citing Ackerman and explaining that "[u]nlike the social movements model, here the mechanism of change is not persuasion but submission").

[34] *Id.* at 999. *See also* Mark V. Tushnet, *The Constitution Outside of the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437 (1992).

[35] Spiro, *supra* note 9.

[36] Galbraith, *supra* note 8. (citing EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 200 (1940)).

concerning where the boundary between Congress and the President lies . . . may spur cooperation, compromise, and reflection, as well as allow[] for shifting resolutions that fit shifting times."[37] In fact, the tripartite framework Justice Jackson outlines in his well-known concurring opinion in *Youngstown* envisions concurrent, shared authority in some areas.

On the one hand, the *Youngstown* framework is quite malleable as applied—for example—to the *Zivotofsky II* case itself (where the executive branch wins under Justice Jackson's Youngstown category 3 analysis, even though the President's authority is at his lowest ebb, where his action directly contradict the will of Congress). On the other hand, the *Youngstown* framework reminds us that the Constitution does not "partake of the prolixity of a legal code," and that "only its great outlines [are] marked, its important objects designated, and the minor ingredients which compose those objects [left to] be deduced from the nature of the objects themselves."[38] Presidential signing statements can offer one view, among several, that can help guide the process of constitutional interpretation.

Conclusion

While the signing statement for the statute at issue in *Zivotofsky II* was not decisive in the Court's holding, it illustrates how the executive branch can use such statements as tools to promote U.S. foreign policies objective abroad and to advance its views of the Constitution at home. Signing statements can promote transparency, dialogue, and provide a window into the executive branch's view of the Constitution outside the context of litigation.

As Goldsmith notes, "[t]he vast majority of signing statements that contain constitutional objections (or potential constitutional objections) to a statute are never operationalized with actual non-compliance on the ground."[39] The signing statement in the Jerusalem passports case was "a rare creature," [40] in that President Bush—and subsequently President Obama—did, in fact, disregard a law the White House believed to be unconstitutional. In *Zivotofsky II*, the Court held that this was the correct constitutional position for both presidents to take. In disregarding an unconstitutional law—and in issuing a signing statement to signal its unconstitutionality—Presidents Bush and Obama advanced our understanding and appreciation of the Constitution, as part of an ongoing dialogue on the proper role of each branch in the U.S. foreign policy project.

[37] *Id.*

[38] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

[39] Goldsmith, *supra* note 2.

[40] *Id.*